# NORTH CAROLINA REPORTS

## VOLUME 288

SUPREME COURT OF NORTH CAROLINA

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# NORTH CAROLINA

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| | COY E. BREWER[1] | Fayetteville |
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| 14 | CLARENCE W. HALL | Durham |
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[1] Deceased 12 December 1975. Succeeded by D. B. Herring, Jr., Fayetteville, 19 December 1975.

[2] Resigned 15 January 1976.

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[1] Appointed 5 January 1976 to succeed Darius B. Herring, Jr.
[2] Appointed 2 February 1976 to succeed Robert K. Leonard who resigned 31 January 1976.
[3] Appointed 1 December 1975 to succeed William G. Robinson who resigned 30 November 1975.

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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 additional named person below duly passed the examinations of the Board of Law Examiners, and by Resolution of the Board dated October 16, 1975 said person has been issued a license certificate by the board.

JOHN ARLINGTON NORTHEN .................................................. Carrboro

Given under my hand and the Seal of the Board of Law Examiners, this the 4th day of December, 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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IN THE MATTER OF: ALBERT LEE WILLIS

No. 108

(Filed 26 June 1975)

1. **Attorney and Client § 2— admission to bar — standards — good moral character**

While a State cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment, a State can require high standards for admission to the bar, including good moral character and proficiency in its laws, so long as the qualifying standards have a rational connection with the applicant's fitness or capacity to practice law.

2. **Attorney and Client § 2; Administrative Law § 1— admission to bar — qualifications determined by Legislature — delegation of authority to Board of Law Examiners**

It is well established that the constitutional power to establish the qualifications for admission to the Bar of this State rests in the Legislature, and it is equally well settled that the Legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority.

3. **Attorney and Client § 2; Constitutional Law § 12— character requirements for admission to bar — constitutionality**

The "character and general fitness" requirement of G.S. 84-24 and the "good moral character" requirement of Rule VIII of the

Rules Governing Admission to the Practice of Law in the State of N. C. are constitutionally permissible standards for admission to the Bar.

4. **Attorney and Client § 2— admission to bar — good moral character — burden on applicant**

Facts relevant to the proof of the good moral character of an applicant for admission to the N. C. Bar are largely within the knowledge of the applicant and are more accessible to him than to an investigative board; accordingly, the burden of proving his good moral character traditionally has been placed upon the applicant in this State and in other jurisdictions.

5. **Attorney and Client § 2; Constitutional Law § 12— burden of proof of moral character — authority of Board of Law Examiners to make rule**

Since the burden of proof provision of Rule VIII of the Rules Governing Admission to the Practice of Law in the State of N. C. provides for the orderly determination of an applicant's moral character, that provision is within the legitimate rule-making power constitutionally delegated to the Board of Law Examiners in G.S. 84-24.

6. **Attorney and Client § 2— Board of Law Examiners — determination of character and general fitness requirements**

The General Assembly has entrusted to the Board of Law Examiners the duty of examining applicants and providing rules and regulations for admission to the Bar; in this regard the Board of Law Examiners must determine whether applicants for admission to the Bar possess the qualifications of character and general fitness for an attorney, and if the proof offered by an applicant fails to satisfy the Board that the applicant has the requisite moral character required by G.S. 84-24 and Rule VIII, it is the Board's duty to deny his application.

7. **Administrative Law § 5— Board of Law Examiners — review of findings on appeal**

G.S. 84-24 establishes the Board of Law Examiners as an administrative agency of the State, and its findings of fact are conclusive on appeal if properly supported by the evidence.

8. **Attorney and Client § 2— moral character of bar applicant — sufficiency of findings**

Findings by the Board of Law Examiners were sufficient to support the Board's conclusion that applicant had not carried his burden of showing his good moral character where the Board found that applicant enlisted in the Air Force, was twice punished under the U. S. Code of Military Justice, and was given a general discharge under honorable conditions, applicant was arrested and investigated on a charge of burglary, was later charged with trespass, failed to appeal at trial and was found guilty, applicant was convicted of driving under the influence and was granted limited driving privileges by the court, applicant subsequently drove a vehicle in violation of the terms of his driving privileges, and applicant's answers to the Board's questions were incomplete and misleading.

ON REHEARING.

ON petition of the Board of Law Examiners to rehear our per curiam decision filed 26 November 1974, reported in 286 N.C. 207, 209 S.E. 2d 457 (1974). The case was redocketed and reargued in the Supreme Court as No. 108 at Spring Term 1975.

In January 1972 Albert Lee Willis applied for registration before the Board of Law Examiners. He had begun the study of law in September 1970 and anticipated taking the written portion of the Bar examination in 1973 after graduation from law school. The applicant's answers to questions 22 and 23 of that application read:

> "22. Are there any unsatisfied judgments against you? Yes. Balance of less than $200.00. If so, give facts. Owed on a wrecked automobile.
>
> 23.a. Have you ever been a party to any legal proceedings, either criminal, civil or military? Yes.
>
> If so, give facts in detail, name of action, date, court, results, etc. (Need not list acting as counsel in military proceedings.) In 1965 I was acquitted in Baltimore City Court for driving under the influence. In 1970 I was found guilty of driving under the influence in the District Court of Orange County, N. C. In 1970 I was fined in Durham County District Court for driving on a restricted license.
>
> b. Have you ever been arrested, held for investigation or as a material witness? Yes. In Catonsville, Maryland around 1963 I was arrested as a suspect and released after about 12 hours."

On 10 January 1973 the applicant filed application, including required certificates of moral character, with the Board of Law Examiners for admission to the 1973 Bar examination administered by said Board. Pertinent questions and answers appear in the application as follows:

> "26. Have you ever been a party to any legal proceedings either criminal, civil or military? If so, give facts in detail, name of action, date, court, results, etc. (Need not list acting as counsel in military proceedings): Yes. 1969 I was found guilty of driving under the influence of alcohol in Orange County District Court at Hillsboro, N. C. My license was suspended for 1 year and I was fined.
>
> 27. Have you ever been a witness in any legal proceedings? If so, give facts and details. Yes. About 1959 I ap-

peared as a witness for the defense in the case of the *State of N. C. v. Claude Green.*

28. Have you ever been charged with or questioned regarding any crime, either felony or misdemeanor? If so, give facts and details. I was questioned on suspicion in Catonsville, Maryland and released without any charges around 1962.

29. Have you ever been arrested? If so, give facts and details. Only as stated in answer to question #26.

30. Have you ever been held for investigation or as a material witness? If so, give facts and details. No.

* * * *

35. Are there any unsatisfied judgments against you? Yes. About $190.00 due on payment of an automobile with First Union Bank of Durham, N. C. If so, give facts.

* * * *

37. Have you served in the armed forces of the United States? Yes.

If so, give branch of service, dates of service, place and type of discharge. U. S. Air Force 6-54 to 8-56. Discharged under honorable conditions at Bryan Air Force Base, Texas."

Pursuant to Section 4 of Rule VIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina, the applicant appeared before the Bar Candidate Committee for the Eighth Judicial District on 7 April 1973 for examination in regard to his moral fitness to be licensed to practice law. Based upon matters discussed at the examination and certain "evasive" answers by petitioner to questions concerning an incident in Maryland, mentioned in his answer to question 28 above, that committee recommended further review of the applicant's moral character by the Board of Law Examiners.

The applicant was advised by letter that he was to appear before the Board of Law Examiners at its 24 May 1973 meeting in Raleigh for consideration of his application and "in particular" his moral character. The incidents disclosed by applicant's answers to questions 26, 28 and 35 on his application and his discharge from the Air Force were enumerated topics of inquiry. The Board requested that the applicant furnish a certi-

fied copy of his discharge and military 201 file which would explain the facts surrounding his discharge from the Air Force. It appears the applicant received a general discharge under honorable conditions as opposed to an honorable discharge.

The applicant appeared before the Board of Law Examiners at the assigned time and chose to proceed without counsel. He neglected to produce his 201 file at that meeting, stating "I understand that the Air Force doesn't give out a 201 File." His testimony before the Board was transcribed and appears in the record before us. At the conclusion of the proceeding the Board of Law Examiners deferred action on petitioner's application until further facts were obtained.

The Board obtained a copy of the applicant's Air Force 201 file and considered his application at its 22 June 1973 meeting. Based upon evidence received in the foregoing proceedings, the Board made the following findings of fact and conclusions of law:

> "1. That the applicant enlisted in the regular Air Force in July, 1954. The applicant was administered punishment under Article 15 of the United States Code of Military Justice in October, 1955, for dereliction in the performance of his duties in the 3530th Air Base Group Unit Mail Room and reduced to the grade of Airman Basic. He was further administered punishment under Article 15 of the United States Code of Military Justice in May, 1956, for disobeying a lawful order issued by his First Sergeant and reduced to the grade of Airman Basic. The record shows that the applicant was issued a general discharge from the Air Force in August, 1956, on account of continuous poor performance, indifferent attitude, lack of responsibility, immaturity and low order of intellect and potential.
>
> 2. The applicant indicated on his Application filed with the Board on January 10, 1973, in response to the question:
>
> > '28. Have you ever been charged with or questioned regarding any crime, either felony or misdemeanor? If so, give facts and details.'
>
> that 'I was questioned on suspicion in Catonsville, Maryland and released without any charges around 1962.'
>
> 3. In May 1964, while the applicant was living in Catonsville, Maryland, he was arrested and investigated

on a charge of burglary. Later he was charged with trespass. The record reflects that the incident giving rise to this occurrence happened on or about May 6, 1964, when the applicant went to the home of Mrs. Carey Elizabeth Smith about 1:30 a.m., climbed on her porch and began knocking on the second floor bedroom window. Shortly thereafter, he was arrested by the police. He was released on bond posted by his wife. The record shows that the applicant failed to appear at the trial at Catonsville on May 8, 1964, and his bond was forfeited, a verdict of guilty of trespassing was entered and applicant was assessed a fine in the amount of $28.00.

4. In December, 1969, applicant was tried and convicted in Orange County, North Carolina, of driving under the influence of intoxicating beverages and was granted limited driving privileges by the court.

5. During the period of time applicant had limited driving privileges, he drove an automobile at a time when he was in violation of the restrictive provisions of his license and was involved in an accident in Durham County, North Carolina. Applicant was fined in Durham County District Court for driving in violation of the terms of his driving privileges.

From the foregoing Findings of Fact, the Board CONCLUDES:

That the applicant, Albert Lee Willis, has not satisfied the Board that he is possessed of good moral character and entitled to the high regard and confidence of the public."

As a result of the applicant's failure to satisfy the Board of his good moral character, the Board denied him the opportunity to take the 1973 North Carolina Bar Examination. The applicant was so notified by a letter dated 27 June 1973 and signed by Fred P. Parker III, Executive Secretary of the Board of Law Examiners.

Thereafter, the applicant, through counsel, sought a rehearing before the full Board on grounds that he had further evidence of his good moral character. The Board refused to reconsider the applicant's character and advised him to pursue normal appeal procedures provided under the Rules Governing Admission to the Practice of Law in the State of North Carolina. The

applicant gave notice of appeal and made another request for reconsideration of his character. The Board denied the second request stating it was "without jurisdiction."

The applicant appealed to Wake Superior Court pursuant to Rule XIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina, 279 N.C. 733, 740 (1971). His exceptions to the order and decision of the Board were that (1) Section 1 of Rule VIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina is violative of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Constitution of North Carolina because the rule contains no ascertainable standards by which good moral character can be determined, (2) G.S. 84-24 is an unlawful delegation of legislative authority and violates Article II, Section 1 of the Constitution of North Carolina, (3) the Board's order constitutes an abuse of discretion because there was insufficient evidence before the Board to support a finding of fact and conclusion that the applicant "is of insufficient moral character to stand the Bar examination," and (4) the Board, "motivated by racial prejudice," acted arbitrarily and capriciously in violation of the Federal and State Constitutions.

The matter came before Judge Henry A. McKinnon, Jr., at the January 1974 Civil Session of Wake Superior Court. Judge McKinnon entered judgment, filed 18 March 1974, sustaining the decision of the Board of Law Examiners.

The applicant appealed to this Court. The members of the Court being equally divided on the questions presented, the judgment of the superior court was thereby affirmed without becoming a precedent. We subsequently allowed the petition of the Board of Law Examiners to rehear for the purpose of considering the constitutionality of G.S. 84-24.

*Rufus L. Edmisten, Attorney General; Andrew A. Vanore, Jr., Deputy Attorney General; Fred P. Parker III, attorney, for the Board of Law Examiners, petitioner appellant.*

*Pearson, Malone, Johnson, DeJarmon & Spaulding, by W. G. Pearson II, and C. C. Malone, Jr., for Albert Lee Willis, respondent appellee.*

HUSKINS, Justice.

The sole question presented on this rehearing is whether G.S. 84-24 is a lawful delegation of legislative authority and is constitutional on its face and as applied to the applicant in this case.

G.S. 84-24, enacted in 1933 and entitled "Admission to practice," established the Board of Law Examiners "for the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor." The statute authorizes the Board of Law Examiners, subject to the approval of the Council of the North Carolina State Bar, to make such rules and regulations for admission to the Bar as in its judgment will promote the welfare of the State and the legal profession. Provisions of that statute pertinent to this appeal read:

> "The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess *the qualifications of character and general fitness requisite for an attorney and counselor at law* and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly." (Emphasis added.)

Rule VIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina, promulgated in accordance with G.S. 84-24 and in effect at the time of the applicant's application, provides that every applicant shall have the burden of proving his good moral character and that he is entitled to the high regard and confidence of the public. 279 N.C. 733, 737 (1971). The rule requires every applicant to appear before a Bar Candidate Committee to be examined about any matter pertaining to his moral character, and states that an applicant may be required to appear before the Board. In this regard each applicant must furnish the Committee with such information as may be required on forms provided by the Board and

with such other information and documents as the Committee may reasonably require. The rule further provides that technical rules of evidence, such as the hearsay rule, need not be observed in investigations of moral character. Section (3) of Rule VIII in pertinent part reads:

> "No one shall be certified (licensed) to practice law in this State by examination or comity:
>
> * * * *
>
> (2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions." 279 N.C. at 737.

Applicant alleges that G.S. 84-24 and Rule VIII of the Rules Governing Admission to the Practice of Law in the State of North Carolina do not contain adequate standards for the Board to follow in determining whether an applicant possesses the qualifications of character and general fitness requisite for an attorney and, therefore, the provisions are unconstitutional on their face in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 and Article II, Section 1 of the Constitution of North Carolina. In this regard, he contends that "good moral character," as a guideline or standard of itself, will not suffice to satisfy constitutional requirements. We find this contention unsound.

The applicant relies upon *Konigsberg v. State Bar of California,* 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 (1957), one of several cases reaching the United States Supreme Court in which states have refused to permit applicants to practice law because bar examiners have been suspicious about applicants' loyalties and about their views on Communism and revolution. In *Konigsberg* the State Committee of Bar Examiners of California refused to certify the applicant to practice law on grounds that he had failed to prove (1) he was of good moral character and (2) he did not advocate overthrow of the Government of the United States or California by unconstitutional means. There, the United States Supreme Court held that the applicant's exclusion from the practice of law violated due process

because the evidence did not rationally support the State's finding. In reference to the use of "good moral character" as a qualification for the California Bar, the Supreme Court said:

> "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this repect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal view and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 353 U.S. at 262-63, 1 L.Ed. 2d at 819, 77 S.Ct. at 728.

Because of the vagueness of the term "good moral character," that Court turned to California case law for a definition, but found none. The Court finally accepted, for the purpose of its decision, the definition proposed by counsel for the State of California that "good moral character" is "honesty, fairness and respect for the rights of others and for the laws of the state and nation." Although the Court considered the definition too broad, it nevertheless concluded that the State's action could not be sustained on the facts.

A similar approach was taken by the United States Supreme Court in the more recent case of *Law Students Research Council v. Wadmond,* 401 U.S. 154, 27 L.Ed. 2d 749, 91 S.Ct. 720 (1971), in which the appellants, purporting to represent a class of law students and law graduates, attacked New York's system for screening applicants for admission to the New York Bar primarily on First Amendment vagueness and overbreadth grounds. In reference to arguments alleging the unconstitutionality of New York's requirement that the Appellate Division of the State Supreme Court in the judicial department where an applicant resides must "be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law," the Supreme Court held:

> "The three-judge District Court, although divided on other questions, was unanimous in finding no constitutional infirmity in New York's statutory requirement that applicants for admission to its Bar must possess 'the character and general fitness requisite for an attorney and counsellor-

> at-law.' We have no difficulty in affirming this holding. [Citations omitted.] Long usage in New York and elsewhere has given well-defined contours to this requirement, which the appellees have construed narrowly as encompassing no more than 'dishonorable conduct relevant to the legal profession,' . . . [Citations omitted.] The few reported cases in which bar admission has been denied on character grounds in New York all appear to have involved instances of misconduct clearly inconsistent with the standards of a lawyer's calling." 401 U.S. at 159, 27 L.Ed. 2d at 756, 91 S.Ct. at 724-25.

The Supreme Court went on to note that every state, the District of Columbia, Puerto Rico, Virgin Islands, and even the Supreme Court itself requires some similar qualification.

We note that both *Konigsberg* and *Law Student Research Council* involved questions of whether action by the Bar examiners of California and the entire applicant screening process of New York violated First Amendment freedoms of expression and association, and could be distinguished on that ground from the present case, which does not involve such First Amendment ramifications. Even so, those decisions of the United States Supreme Court do not support the suggestion that "good moral character" is an unconstitutional standard. To the contrary, the quoted language from those cases seems to say that the term "good moral character," although broad, has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard.

Such has been the case in North Carolina. As early as 1760 every applicant to the Bar in this State was required by law to be of "good character." 25 State Records of North Carolina at 448 1906); Coates, Standards of the Bar, 6 N.C.L. Rev. 34 (1927). After this Court was organized in 1818, it was authorized to determine an applicant's character. In the first reported decision of this Court considering a bar application, Ex parte Thompson, 10 N.C. 354 (1824), the Court denied the applications of two applicants because of their alien status. Although not directly faced with the question of the applicants' moral character, the Court said: "Whatever discretion resides in the judges relative to the admission of attorneys ought to be exercised with a view to the advantage and security of the suitors in the several courts; for to them the license is a guarantee that

in the opinion of the magistrates signing it the licentiate is politically, not less than legally and *morally*, qualified to transact their business." (Emphasis added.) Indeed, it has been said that the possession of "good moral character" is "the cardinal condition of the attorney's admission to the bar." *In re Ebbs*, 150 N.C. 44, 63 S.E. 190 (1908), quoting from *Penobscot Bar v. Kimball*, 64 Me. 140 (1875). The importance of "good moral character" was described by Justice Brown, dissenting in *In re Applicants for License*, 143 N.C. 1, 21, 55 S.E. 635, 642 (1906), as follows:

> "The public policy of our State has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice than legal learning. Legal learning may be acquired in after years, but if the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling—a curse instead of a benefit to his community—a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin." *Accord, In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926).

There have been few decisions in this State squarely facing the issue of an applicant's moral character. Even so, a review of existing decisions illustrates the contours given to the requirement of "good moral character" by its long usage in this State.

In the case of *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924), the Court denied the applicant's application to practice law in this State because protestants filed a number of affidavits and certifications of court records which disclosed conduct by the applicant during 1919, 1920 and 1921 "amounting in many instances to violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion and others, all of them involving moral turpitude. . . ." The applicant made no substantial denial of the charges. Instead, he claimed "he [had] turned from his evil practices and has since demeaned himself as a good citizen" and offered a certificate of several prominent citizens certifying to his good conduct for approximately two years prior to his application. In denying the application, the Court said: "[N]either the certificate presented, nor the closing statement of respond-

ent's purpose, commendable as it is, suffice as an assurance to us that he has the upright character required for lawful issuance of this license." The Court further noted that when one seeks to establish restoration of a character which has been deservedly forfeited, the question becomes essentially one "of time and growth."

In the case of *In re Applicants for License,* 191 N.C. 235, 131 S.E. 661 (1926), which is the last decision of this Court on the question of an applicant's moral character, the Court denied the applications of two applicants. Protestants attacked the character of the first applicant on grounds that "in his office as a justice of the peace of Wilson County, he has not only failed to make due returns and account for moneys and things intrusted to him, but in some instances, he has converted them to his own use; and that he has generally engaged in unethical practices." In response thereto, the applicant offered a large number of affidavits from citizens of Wilson County attesting to his general good character. In denying his application, the Court concluded the evidence showed "such a lack of moral perception, or careless indifference to the rights of others" that they were unable to say the applicant possessed the requisite upright character. Attempting to delineate the contours of "upright character," Chief Justice Stacy said:

> " . . . It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. 'Character,' said Mr. Erskine in the trial of Thomas Hardy for high treason, 'is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion.' Even more is this true when the restoration of character, as here, is the subject of consideration. It is then a matter of time and growth." 191 N.C. at 238, 131 S.E. at 663.

The character of the second applicant in *In re Applicants for License* was challenged by protestants in affidavits showing, without contradiction, that in August 1922 the applicant, a former deputy sheriff of Guilford County, attended a ball game, became intoxicated, engaged in a fight, used a deadly weapon, and as a result was indicted in six cases. He pleaded guilty to nuisance (using profane and indecent language on highway), assault and carrying a concealed weapon, and was fined by the court. Judgment was continued in the other three indictments on payment of costs. Consequently, the applicant was discharged as a deputy sheriff. The affidavits further showed that a judgment had been recovered against the applicant in a civil action for wrongful assault and that the applicant's wife had obtained a divorce from him on grounds of adultery. In the divorce proceeding the applicant was found not to be a fit and suitable person to have custody of his daughter. The applicant expressed regret at the incident giving rise to the criminal charges against him and stated he had changed his manner of living since that time. He also filed a large number of character certificates in support of his good character. The Court concluded the record was insufficient to support the applicant's upright character.

**[1]** While a State cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment, a State can require high standards for admission to the bar, including good moral character and proficiency in its laws, so long as the qualifying standards have a rational connection with the applicant's fitness or capacity to practice law. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L.Ed. 2d 796, 77 S.Ct. 752 (1957).

**[2]** It is well established that the constitutional power to establish the qualifications for admission to the Bar of this State rests in the Legislature. *In re Applicants for License,* 143 N.C. 1, 55 S.E. 635 (1906) ; *accord, Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90 (1954) ; *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949) ; *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854 (1940) ; *Seawell, Attorney-General v. Motor Club,* 209 N.C. 624, 184 S.E. 540 (1936) ; *State v. Lockey,* 198 N.C. 551, 152 S.E. 693 (1930). It is equally well settled that the Legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. *Turnpike Authority v.*

*Pine Island,* 265 N.C. 109, 143 S.E. 2d 319 (1965). "In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance." *State v. Harris, supra* at 754, 6 S.E. 2d at 860.

**[3]** When applicant's first contention—that G.S. 84-24 and Rule VIII are unconstitutional on their face—is viewed in light of the foregoing decisions, we hold that the "character and general fitness" requirement of G.S. 84-24 and the "good moral character" requirement of Rule VIII are constitutionally permissible standards. While we are cognizant of the broad dimensions of such standards, it is our view that one would be hard put to enunciate a better standard for admission to the Bar. There is no better test for the purpose known to us, but the Board of Law Examiners and this Court must nevertheless apply the standard judiciously. *See In re Heller,* ___ F. 2d ___ (D.C. Cir. decided February 26, 1975).

**[4, 5]** Section 1 of Rule VIII, promulgated by the Board of Law Examiners under authority of G.S. 84-24, provides: "Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public." 279 N.C. 733, 737 (1971). The applicant argues that this provision had its inception in, and flows from, an unlawful delegation of legislative authority in violation of the Fourteenth Amendment to the Constitution of the United States and Article II, Section 1 of the Constitution of North Carolina. In support of this argument he cites *Law Students Research Council v. Wadmond, supra,* and *Speiser v. Randall,* 357 U.S. 513, 2 L.Ed. 2d 1460, 78 S.Ct. 1332 (1958). It suffices to say that the cases cited involved restrictions on freedom of speech under the First Amendment and are not apposite to the present case. *See Konigsberg v. State Bar of California,* 366 U.S. 36, 6 L.Ed. 2d 105, 81 S.Ct. 997 (1961). Facts relevant to the proof of his good moral character are largely within the knowledge of the applicant and are more accessible to him than to an investigative board. Accordingly, the burden of proving his good moral character traditionally has been placed upon the applicant in this State and in other jurisdictions. *Baker v. Varser, supra; In re Applicants for License,* 191 N.C. 235, 131

S.E. 661 (1926); Annot., Admission to Bar—Moral Character, 64 A.L.R. 2d 301, 311 (1959). Since the burden of proof provision of Rule VIII provides for the orderly determination of an applicant's moral character, we find that provision to be within the legitimate rule-making power constitutionally delegated to the Board of Law Examiners in G.S. 84-24. *See Utilities Com. v. R. R.*, 224 N.C. 283, 29 S.E. 2d 912 (1944).

We now turn to the applicant's final contention that G.S. 84-24 was unconstitutionally applied to him by the Board of Law Examiners.

**[6]** The General Assembly has entrusted to the Board of Law Examiners the duty of examining applicants and providing rules and regulations for admission to the Bar. G.S. 84-24. In this regard the Board of Law Examiners must determine whether applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor at law. If the proof offered by an applicant fails to satisfy the Board that the applicant has the requisite moral character required by G.S. 84-24 and Rule VIII, it is the Board's duty to deny his application. *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954).

**[7]** G.S. 84-24 establishes the Board of Law Examiners as an administrative agency of the State, and its findings of fact are conclusive on appeal if properly supported by the evidence. *In re Berman*, 245 N.C. 612, 97 S.E. 2d 232 (1957); *Baker v. Varser, supra; Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954). As long as there is evidence in the record which rationally justifies a finding that the applicant has failed to establish his moral fitness to practice law, this Court cannot substitute its judgment for that of the Board of Law Examiners. *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S.Ct. 752 (1957).

**[8]** The applicant does not contend the evidence was insufficient to support the Board's findings of fact. Instead, he argues that the findings are insufficient to sustain the Board's conclusion that he had not carried his burden of showing his good moral character.

The applicant contends that under our previous decisions only conduct evincing moral turpitude, dishonesty, a turbulent or intemperate nature, baseness, vileness or depravity is relevant

to one's moral character for admission to the Bar. In this regard he argues that his military record is removed in time by more than fifteen years and contains nothing suggesting dishonorable conduct relevant to the legal profession; that the Maryland incident, contained in findings of fact two and three by the Board, was disclosed to the extent that he recalled what happened and that the resulting conviction of trespass does not involve moral turpitude; and that driving under the influence of intoxicating beverages and driving in violation of a limited driving permit do not involve moral turpitude. While we are inclined to agree that the above conduct of the applicant does not involve the moral turpitude evinced by the applicants in *In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926), and *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924), we are not persuaded that the Board's conclusion is not rationally justified by the evidence.

The traits of character and conduct evinced by the applicant's military record as an enlisted man in the Air Force cannot be regarded as irrelevant to the determination of his moral character for admission to the Bar. Dereliction of duty and an indifferent attitude toward one's obligations, if carried into the legal profession, are certainly character traits undeserving of public confidence. The legal profession is "neither a place of refuge nor a reformatory for those who have stumbled in other fields." *In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926). Furthermore, applicant's characterization of the type of discharge he received, in response to question 37 on his application, as "[d]ischarged under honorable conditions," when he now admits he received a general discharge under honorable conditions, was misleading and gives rise to the inference that he was trying to conceal the fact that he did not receive an honorable discharge. He also did not disclose, in responding to question 26 on his application, that while he was in the Air Force he was punished twice under Article 15 of the United States Code of Military Justice. How the character traits indicated by his military record were affected by the lapse of time, by his change in fields of endeavor, and by his answers to questions 26 and 37 was for the Board of Law Examiners to determine from all the testimony and evidence before it.

Similarly, the incident in Maryland, disclosed in the Board's findings of fact two and three, cannot be dismissed out of hand as a gross indiscretion on the part of the applicant. The circum-

stances surrounding the initial charge of burglary and his subsequent conviction of trespass are some evidence of the applicant's character at the time of the incident. While our decisions are clear that criminal conduct is inconsistent with the moral character required of an applicant to the Bar, the applicant's explanation of this incident, if accepted as true, would seem to rebut any suggestion that this one incident alone would be a sufficient indication of bad moral character to exclude him from the practice of law. However, it is apparent, when findings of fact two and three are read together, that the Board of Law Examiners was as concerned, if not more so, with the applicant's failure to fully disclose the incident in his application. Misrepresentations and evasive or misleading responses, which could obstruct full investigation into the moral character of a Bar applicant, are inconsistent with the truthfulness and candor required of a practicing attorney. *Carver v. Clephane*, 137 F. 2d 685 (D.C. Cir. 1943); *In re Meyerson*, 190 Md. 671, 59 A. 2d 489 (1948); *In re Greenblatt*, 253 App. Div. 391, 2 N.Y.S. 2d 569 (1938); *see* Annot., Admission to Bar—Moral Character, 64 A.L.R. 2d 301, 318 (1959).

Finding of fact four represents applicant's conviction and restriction to limited driving privileges in 1969 for driving under the influence of intoxicating beverages. While this offense of itself does not evince such a lack of good moral character as to deprive the applicant of a license to practice law, it does indicate a willful disregard for the very laws which he seeks to advocate on behalf of the public. Moreover, any character impugning implications which do arise from such conduct are compounded by his subsequent driving in violation of the restrictions placed on his driving privileges by the court for that offense as found by the Board in finding of fact number five. Although the last offense appears on the applicant's application for registration, he neglected to include it on his application for admission to the Bar examination.

Rule VIII places on the applicant the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public. It also requires the applicant to make full disclosure of any civil and criminal proceedings involving him. 279 N.C. 733, 737 (1971). Nothing in the Fourteenth Amendment's protection against arbitrary State action forbids a State from denying admission to a Bar applicant on grounds that he refuses to provide unprivileged

answers to questions having a substantial relevance to his qualifications. *Konigsberg v. State Bar of California,* 366 U.S. 36, 6 L.Ed. 2d 105, 81 S.Ct. 997 (1961).

When the Board's findings of fact and conclusions of law are viewed in the context of the entire record as submitted, we conclude that they are rationally justified by the evidence. "[S]atisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said, as it was of 'many honest and sensible judgments' in a different context, that it expresses 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.' " *Schware v. Board of Bar Examiners,* 353 U.S. 232, 248, 1 L.Ed. 2d 796, 807, 77 S.Ct. 752, 761 (1957) (Frankfurter, J., concurring).

We find nothing in this record which indicates arbitrary, discriminatory or capricious application of the good moral character standard by the Board of Law Examiners. The decision of the Board and the judgment of Wake Superior Court affirming that decision are therefore

Affirmed.

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STATE OF NORTH CAROLINA v. FREDERICK STANLEY

No. 113

(Filed 26 June 1975)

1. **Criminal Law § 161— failure to bring forward assignments of error — review by Court**

   The Supreme Court may exercise its rarely used general supervisory authority and elect to consider whether the evidence in the case disclosed entrapment as a matter of law, even though there were no assignments of error properly before the Court where defendant did not raise the question of entrapment in the Court of Appeals and where defendant failed to argue, cite authority, or bring forward any of the matters upon which he based his petition for *certiorari.*

2. **Criminal Law § 7— entrapment defined**

   Entrapment is the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.

**3. Criminal Law § 7; Narcotics § 4— inducement to buy narcotics — entrapment as a matter of law**

In a prosecution for felonious possession of a controlled substance with intent to distribute and felonious distribution, the trial court erred in failing to allow defendant's motion to dismiss on the ground that the evidence disclosed entrapment as a matter of law where such evidence tended to show that a 28 year old police officer posing as an army sergeant ingratiated himself into the confidence and affection of the 16 or 17 year old defendant for the purpose of using him to find and buy drugs, the officer accomplished his purpose by seeking defendant's companionship, continually calling defendant's home, and allowing defendant to drive his automobile, during this time he assured defendant's troubled parents that he would "look after their son," and after establishing the relationship of a "big brother" with defendant, the police officer "got him to make more than one drug buy for me."

ON *certiorari* to review the decision of the Court of Appeals, 24 N.C. App. 323, 210 S.E. 2d 496, which found no error in the trial before *Tillery, J.*, 11 February 1974 Session of NEW HANOVER County Superior Court.

Defendant was tried upon separate bills of indictment charging him with felonious possession of a controlled substance with the intent to distribute and felonious distribution of a controlled substance. The bills of indictment were consolidated for trial without objection, and defendant entered pleas of not guilty to both charges.

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

W. A. Lee, a member of the New Hanover Sheriff's Department assigned to the Inter-Agency Drug Squad, testified that on the evening of 4 April 1973 about 8:00 to 8:15 p.m., he picked up defendant and Charles Shelton in the vicinity of the New Hanover High School. Defendant requested that he take them to a concert at the college and stated that he had a friend there from whom he could obtain "acid." When they arrived at the college, defendant and Shelton left for a few minutes and, when they returned, told him that they could get two "hits" of LSD for him for six dollars. He thereupon gave defendant six dollars, and defendant returned with two purple tablets. The witness Lee stated that he took defendant and Shelton to Wrightsville Beach and thereafter delivered the drugs to the Sheriff's Department. It was stipulated that subsequent tests revealed the substance delivered to the witness to be lysergic acid diethylamide (LSD).

On cross-examination Lee testified that he was twenty-eight years old and that on 4 April 1973, the date of the offense, defendant, a student at New Hanover High School, was sixteen or seventeen years old. He had known defendant since March, 1973, and had associated with him for approximately three or four weeks prior to the commission of the offenses charged. He told defendant that he was a sergeant in the army and was attached to the Coast Guard station on Carolina Beach Road. He actually was a narcotics undercover agent who solicited and gained the confidence of people who might have drugs or be able to lead him to drugs. He had at his disposal a blue Pinto automobile and a Volkswagen van. He further testified that he and defendant became friends, and the witness went to defendant's home on "perhaps three occasions, picked him up after school, and let him ride around with me, and carried him places. I wanted him to help me find drugs. I wanted him to help me find any group at the high school or related groups that had anything to do with drugs." He met a number of defendant's friends, associated with them, and transported them to various places "over a fairly lengthy period of time." During this same period of time, the witness was "close enough" with defendant to allow defendant to drive his automobile or bus. With regard to his associations with defendant, the witness further testified:

> I visited his home and his brother's home. I would take him home after we had kicked around at night, and would pick him up from school, his home, and his brother's home. I recall making two calls to him at his father's home, and I helped him move from his father's home to his brother's home.
>
> On numerous occasions when he was living at his brother's home, I would carry him home at night; it may have been as late as two, three, or four o'clock in the morning, but I don't recall. Often, I would ask him where I could find drugs and buy drugs.
>
> He looked at me as a big brother as I was over ten years older than he was, and he believed I was a Sergeant in the Army. On occasion when I picked him up from his brother's house, I would talk to his brother and sister-in-law for hours. I knew his brother, his sister-in-law, his mother, and his father. His father told me that he was worried about the boy and asked me to look after him, and I told him that I would look after Frederick Stanley.

> I got him to make more than one drug buy for me. He would go in and buy the stuff from people as I was well-known. I would never get out of the van to make a purchase because I had been in the Uniformed Division for two years. I did not know who [*sic*] he purchased drugs from, but I supplied the money for the purchases.
>
> Two occasions that he purchased for me it turned out that they were not real drugs, but imitations. Stanley didn't know whether the stuff was drugs or not.

Officer Lee was the only State's witness, and at the close of his testimony defendant moved to dismiss both charges. The motion to dismiss was denied.

Defendant's evidence, in substance, was as follows:

Lewis Stanley, defendant's father, testified that on the day of the alleged crime, defendant was living with him and that Lee had previously visited in the witness's home approximately three times. Lee made telephone calls to his home and talked with defendant's mother. Lee would take his son places and bring him back home. The witness had conversations with Lee, and Lee told him that he was a sergeant in the army attached to the Coast Guard station. The last time Lee was in his home was on the occasion when he helped defendant move. On this occasion the witness told Lee that he was worried about his son and asked Lee to look out for him. Mr. Stanley further testified that "it was my opinion that he was a bit old for my son to be going around with, and I asked my son to stop going around with him, and my son told me that Mr. Lee was the best friend he had. Mr. Lee had a lot more influence over my son than I did."

Mabel Stanley, defendant's mother, testified that she received "perhaps eight or nine" telephone calls from Mr. Lee concerning his associations with her son. She stated that she asked Lee "to look out for my son on several occasions, and he told me that he would look after him." She further testified that since her son stopped associating with Lee, "his behavior has improved, and he has moved back home. Further, he is working full time, and takes a lot of interest in his home life." She stated that after Lee became friends with her son, he became "more rebellious and harder to manage, and he went from job to job and dropped out of school."

On cross-examination, the witness testified that defendant left home and stayed with his brother for approximately three weeks. She further stated that although during this general period of time her son occasionally left home, he had been staying at home and doing well for a long time prior to his arrest for this charge.

On redirect examination she said that although the offense charged was alleged to have happened on 4 April 1973, her son was not arrested until 6 July 1973.

Roger Stanley, a brother of defendant, testified that during the spring of 1973 his brother moved into his home and while there had frequent associations with Lee. He further stated that Lee came to his home one to three times weekly while his brother was staying there. On occasion, Lee would keep his seventeen-year-old brother out almost all night. He testified that Lee spent a great deal of time with, and took much interest in, his brother, "and I knew that my brother admired him and thought an awful lot of him."

Edith Stanley, a sister-in-law of defendant, stated that she and her husband had a conversation with Lee concerning how late defendant was staying out at night and informed Lee that defendant had told them that he and Lee had been out drinking beer, and further that on occasion defendant had come home in a drunken condition. It was her impression that Lee "was one of the few people who could really talk to my brother-in-law."

Defendant, testifying in his own behalf, stated that on 4 April 1973 he was seventeen years of age. He further related that when they first met, Lee asked him whether he knew anybody from whom Lee could obtain narcotics. That evening, when they went to Southport, defendant smoked some marijuna furnished by Lee. During the succeeding weeks he and Lee were became frequent companions, and during some weeks Lee would pick him up from school almost every day. With regard to this relationship, defendant stated:

> During our conversations, he constantly talked about the subject of drugs, and kept asking me where I could get drugs for him, and on several occasions we went looking for drugs, but were unable to find them.
>
> I introduced Mr. Lee to many of my friends, including four boys and two girls, whom he tried to get to help him obtain drugs. These friends were ages 15 to 18 years of age.

> During this period I was with him almost constantly, and almost every place that I went was with Mr. Lee. During this time, I was having difficulty with my parents, and it seemed that I just could not talk with them.
>
> I looked at Mr. Lee like a brother, in fact, closer than my brother. The reason that I thought that a man of that age who was an Army sergeant would take up with a kid like myself was because he was new in town and he didn't have any friends, and was looking for friends. We became very friendly and very good friends, and I started thinking of him as a big brother, and he treated me like a brother.

On the night of 4 April 1973 Lee picked up defendant and Shelton, and during their conversation he asked them, "Do you know where we can cop any drugs at?" Defendant informed him that he did not know of any place at this time, but Shelton stated that there was "someone out at the college that might have them."

They proceeded to the college, where they located the person who Shelton thought might have some drugs. This person informed them that LSD would be $2.50 per "hit." They obtained $5.00 from Lee, bought the LSD, and delivered it to him. Lee put the drugs in his shirt pocket and shortly thereafter let him and Shelton out.

Defendant further testified:

> If Mr. Lee hadn't carried me out there, and hadn't wanted the drugs, I would not have had any interest in going there and in getting them. I have smoked some marijuana, but I have never been on hard drugs. The only reason that I was trying to get these drugs was as a favor for Mr. Lee.

On cross-examination defendant stated that prior to meeting Lee, he had used marijuana perhaps once every two weeks but that he had not used LSD and had never used a needle. He said that at the time he knew Lee he dressed like a hippie and that the last time he used marijuana was before he moved back with his parents. He was on probation for a conviction of possession of marijuana. On redirect examination he said that "most of the kids at school know something about drugs, and most of them know something about where you can obtain them."

Gene Wright, aged nineteen, testified that he had seen defendant and Lee together on many occasions and had ridden with them about a dozen times. On one occasion Lee allowed him and defendant to smoke marijuana cigarettes which they found in the ashtray of Lee's automobile.

Edcil Wright, aged fifteen, testified that he had seen Lee on many occasions, and on one occasion he allowed him, defendant, and his brothter Gene to smoke marijuana cigarettes found in the ashtray of his vehicle.

Lee, recalled, testified that he never gave any of the young people marijuana.

The jury returned a verdict of guilty as to the charge of felonious possession with intent to distribute and not guilty as to the charge of distribution of a controlled substance. Defendant appealed. The Court of Appeals found no error in the trial, and we allowed defendant's petition for writ of *certiorari* on 4 March 1975.

*Attorney General Rufus L. Edmisten, by Assistant Attorneys General William F. O'Connell and William Woodward Webb, for the State.*

*Harold P. Laing for defendant appellant.*

BRANCH, Justice.

[1] At the threshold of this appeal we are confronted with the question of whether any assignments of error are properly before us for review. Justice Lake clearly stated one of the rules which governs decision of this question in *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353:

> When this Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of that Court is before us for review. We inquire into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Our inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in this Court, except in those instances in which

we elect to exercise our general power of supervision of courts inferior to this Court. Our review of a decision by the Court of Appeals upon an appeal from it to us as a matter of right, pursuant to G.S. 7A-30, which means of review might have been pursued by the defendant in this action, is similarly limited.

Further, it is well recognized that assignments of error not set out in an appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned. *State v. Bumgarner*, 283 N.C. 388, 196 S.E. 2d 210; *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239; *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735; *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22; *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59; *Branch v. State*, 269 N.C. 642, 153 S.E. 2d 343; *State v. Spears*, 268 N.C. 303, 150 S.E. 2d 499. In the case *sub judice* appellant did not raise the question of entrapment in the Court of Appeals.

By his petition for *certiorari*, appellant sought review of the rulings of the Court of Appeals relating to the impropriety of the solicitor's cross-examination, to the validity and constitutionality of the narcotics statutes, and to the question of whether possession of a controlled substance is a lesser included offense of the crime of possession of a controlled substance with intent to distribute. Nevertheless, in his brief filed with this Court, appellant failed to argue, cite authority, or bring forward, even by reference, any of the matters upon which he based his petition for *certiorari*. Thus, applying the above-stated rules, we conclude that nothing is properly before us for review unless we elect to exercise our general supervisory powers.

This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. N. C. Const. Art. IV, § 12(1); *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439; *Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584. Under unusual and exceptional circumstances we will exercise this power to consider questions which are not properly presented according to our rules. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476. Because of the exceptionally unusual facts of this case relating to entrapment, we do not believe that defendant should be deprived of our consideration of this defense because of noncompliance with our rules. We therefore elect to

consider the question of whether the evidence in this case discloses entrapment as a matter of law.

**[2]** Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." 21 Am. Jur. 2d. *Criminal Law* § 143; *State v. Campbell,* 110 N.H. 238, 265 A. 2d 11. *See* R. Perkins, Criminal Law 1031 *et seq.* (2d ed.). *See generally* Annot., 62 A.L.R. 3d 110; Annot., 22 A.L.R. Fed. 731. In the case before us, the trial judge submitted the question of entrapment to the jury; nevertheless, there remains the question of whether the trial judge erred in failing to allow defendant's motion to dismiss on the ground that the uncontradicted evidence disclosed entrapment as a matter of law.

We note that the question here presented is an evidentiary question, not one of constitutional dimensions. *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366; *Smith v. State,* 258 Ind. 415, 281 N.E. 2d 803.

Apparently, the first case in this State to consider a defense of entrapment, although not specifically calling the defense by that name, is *State v. Smith,* 152 N.C. 798, 67 S.E. 508. In that case a law enforcement officer furnished to a third person money with which to buy liquor and also paid the third person for his services. Under orders from the law enforcement officer, the police agent and a city policeman went to the defendant and purchased intoxicating liquor from him "with the view of having him indicted and punished." Upon his conviction, defendant appealed and presented the sole question of whether the conduct on the part of the law enforcement officer was a bar to his prosecution. In rejecting that contention, this Court stated: " . . . [A]s to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller which is to be considered." To similar effect, *see State v. Hopkins,* 154 N.C. 622, 70 S.E. 394.

The defense of entrapment was first recognized as such in *State v. Love* and *State v. West,* 229 N.C. 99, 47 S.E. 2d 712. There the Court, rejecting defendants' contentions that the evidence disclosed entrapment and that the trial judge should have granted motion as of nonsuit, held that in order for the

defense of entrapment to exist, there must be more than trickery, fraud, or deception on the part of the law enforcement officers. There must be trickery, fraud, or deception *"practiced upon one who entertained no prior criminal intent."* (Emphasis supplied.) However, in a dictum statement, the Court noted its concern for overreaching police activities:

> Considerations of the purity and fairness of the Courts and the agencies created for the administration of justice gravely challenge the propriety of a procedure wherein the officers of the State envisage, plan and instigate the commission of a crime and proceed to punish it on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice,—for which the defendant is in reality punished.

In *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191, the State's evidence tended to show that after receiving from the defendant several telephone calls in which he obscenely stated that "he wanted her," the prosecuting witness reluctantly consented to the police officers' request that she allow one of them to conceal himself in her automobile and meet the defendant at a place designated by him. Upon going to this place, she unlocked the door of her automobile, and the defendant entered the car, lunged across the seat, grabbed her, and started to put his hands around her throat. The defendant was then taken into custody by the police officers and charged with assault with intent to commit rape. The evidence showed that there were several other abortive attempts to trap the defendant in the same manner before he was finally apprehended. At trial and upon appeal, the defendant contended that the case against him should have been nonsuited because the State's evidence revealed that he was a victim of entrapment. This Court rejected the defense of entrapment and speaking through Justice Parker (later Chief Justice), in part, stated:

> It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense. *S. v. Marquardt,* 139 Conn. 1, 89 A. 2d 219, 31 A.L.R. 2d 1206 and Anno. p. 1212; *Butts v. U. S.,* 273

> Fed. 35, 18 A.L.R. 143 and Anno. p. 149; *Robinson v. U. S.*, 32 Fed. 2d 505, 66 A.L.R. 468 and Anno. p. 482; *Sorrells v. U. S.*, 287 U.S. 435, 77 L.Ed. 413, 86 A.L.R. 249 and Anno. 265; *People v. Finkelstin*, 98 Cal. App. 2d 545, 553, 220 P. 2d 934; *Falden v. Commonwealth*, 167 Va. 549, 555, 189 S.E. 329; *S. v. Jarvis*, 105 W.Va. 499, 500, 143 S.E. 235; 22 C.J.S., Criminal Law, pp. 99-100; 15 Am. Jur., Criminal Law, Sec. 336. See also *S. v. Love; S. v. West*, 229 N.C. 99, 47 S.E. 2d 712; *S. v. Godwin*, 227 N.C. 449, 42 S.E. 2d 617.
>
> In the leading case of *Butts v. U. S., supra, Sanborn, C. J.*, said for the Court: "The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."
>
> A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. *S. v. Jarvis, supra; S. v. Mantis*, 32 Idaho 724, 187 P. 268; 15 Am. Jur., Criminal Law, p. 24; 22 C.J.S., Crim. Law, pp. 100-101.

*Accord: State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485; *State v. Caldwell*, 249 N.C. 56, 105 S.E. 2d 189; *State v. Kilgore*, 246 N.C. 455, 98 S.E. 2d 346; *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476. *See* 21 Am. Jur. 2d *Criminal Law* § 144.

*Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848, provides guidance for our decision in instant case. In *Sherman* the evidence tended to show that a government informer first met the defendant at a doctor's office where both were being treated as narcotic addicts. After several meetings, during which the defendant and the informer discussed mutual problems, the informer asked the defendant whether he knew of a good source of narcotics. He explained that the treatment was not working with him and that he needed a source of supply so that he could return to the use of drugs. Initially, the defendant tried to avoid this question, but after a number of requests predicated upon the informer's suffering, the defendant finally acquiesced. The defendant thereafter obtained narcotics which he shared with the informer. He also shared the expense of obtaining the narcotics. After several such transactions the informer advised agents of the Bureau of Narcotics

that he had another seller, the defendant. After government agents observed the defendant give narcotics to the informer in return for money supplied by the government, the defendant was arrested.

The factual issue of entrapment was raised at the trial and submitted to the jury, apparently under adequate instructions. A conviction resulted, and the defendant was sentenced to a term of imprisonment of ten years. The Court of Appeals for the Second Circuit affirmed. 240 F. 2d 949.

On *certiorari*, the Supreme Court of the United States reversed and held that the evidence established entrapment as a matter of law. The Court emphasized that it was not choosing between conflicting testimony but was reaching its conclusion from "the undisputed testimony of the prosecution's witnesses." Reaffirming its prior decision in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, the Court stated the problem which ensues whenever entrapment is raised in a criminal case:

> . . . The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.
>
> However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. (Emphasis supplied.) See 287 U.S., at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap

for the unwary criminal. The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an "appropriate and searching inquiry into his own conduct and predisposition" as bearing on his claim of innocence. See 287 U.S., at 451.

Focusing on the government's contention that the petitioner evinced a "ready complaisance" to accede to the informer's request, the Court emphasized the lack of evidence that the defendant himself was in the trade. The Court noted that no narcotics were found in the defendant's apartment when it was searched after his arrest and that there was no significant evidence that the defendant made a profit on any sale to the informer. The Court also stated, rather significantly, that "[t]he Government's characterization of petitioner's hesitancy to [the informant's] request as a natural wariness of the criminal cannot fill the evidentiary void." The Court further stated that the fact that petitioner had two previous convictions, one a nine-year-old sales conviction and the other a five-year-old possession conviction, were insufficient to prove that petitioner "had a readiness to sell narcotics at the time [the informant] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."

The Court emphasized its concern with the undesirable aspects of this sort of procedure by a police agent:

> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The setup is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.

For other cases in which the Courts have found entrapment as a matter of law, *see United States v. Bueno*, 447 F. 2d 903

(5th Cir.), *cert. denied,* 411 U.S. 949, 93 S.Ct. 1931, 36 L.Ed. 2d 411; *State v. McKinney,* 108 Ariz. 436, 501 P. 2d 378; *Rogers v. State,* 277 So. 2d 838 (Fla. App.); *People v. Dollen,* 53 Ill. 2d 280, 290 N.E. 2d 879; *Jones v. State,* 285 So. 2d 152 (Miss.).

The rule governing the application of the defense of entrapment as a matter of law is clearly and concisely stated by the New Hampshire Supreme Court in *State v. Campbell, supra.* We quote from that case:

> Ordinarily, if the evidence presents an issue of entrapment it is a question of fact for the jury to determine. 1 Whartons Criminal Law and Procedure, s. 132 (supp.); *United States v. Baker,* 373 F. 2d 28; *Rush v. United States,* 370 F. 2d 520; *United States v. Landry,* 257 F. 2d 425. The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take. *Cline v. United States,* 20 F. 2d 494; *Morei v. United States,* 127 F. 2d 827; *Sherman v. United States,* 356 U.S. 369, 2 L.Ed. 2d 848, 78 S.Ct. 819. . . .

**[3]** The uncontradicted State's evidence in instant case discloses that a twenty-eight-year-old police officer posing as an army sergeant ingratiated himself into the confidence and affection of the sixteen- or seventeen-year-old defendant for the purpose of using him to find and buy drugs. He accomplished his purpose by seeking defendant's companionship, continually calling defendant's home, and allowing defendant to drive his automobile. During this time he assured defendant's troubled parents that he would "look after their son." After establishing the relationship of a "big brother" with defendant, the police officer "got him to make more than one drug buy for me." Clearly the acts described in the bills of indictment in this case were committed by this young defendant at the instance of, and as a result of the persuasion of, Officer Lee. We find nothing in this record which tends to show that the crime of which defendant stands convicted was conceived in defendant's mind. To the contrary, the State's uncontradicted evidence shows that the criminal design and intent to commit this offense originated in the mind of Officer Lee and that he, by fraud and persuasion, induced defendant to commit the criminal act. It is true that defendant had at the time of the trial been convicted of possession of marijuana. However, the record fails to indicate

whether this offense took place before or after his association with Officer Lee. In any event, a conviction of possession of marijuana would not indicate a predisposition to commit the crime of which he stands convicted. *Sherman v. United States, supra; Rogers v. State, supra.*

Our conclusion in this case is buttressed by G.S. 90-113.1(c), which provides that no liability for violation of the Controlled Substances Act shall be imposed upon any duly authorized officer engaged in the lawful enforcement of its provisions. It would violate every precept of fair play and fundamental justice to allow a law enforcement officer to benefit from this statutory protection and at the same time prosecute his youthful agent, who at his instance violated the provisions of the act.

We do not wish to leave any impression that we oppose the necessary undercover activities of law enforcement officers. We are too well aware of the destructive effect of the drug traffic upon the health and moral fiber of this country to place an unnecessary limitation upon those who seek to enforce our drug laws. The methods of the drug trafficker are so clandestine and insidious that it becomes necessary for the State to use undercover agents, who may rightfully furnish to the plyers of this trade opportunity to commit the crime in order that they may be apprehended. It is only when a person is induced by the officer to commit a crime which he did not contemplate that we must draw the line. Here the State's uncontradicted evidence and all the legitimate inferences arising therefrom compel a finding as a matter of law that defendant was fraudulently persuaded and induced to commit the criminal act charged. There was not a scintilla of evidence to show any predisposition on the part of defendant feloniously to possess a controlled substance with intent to distribute.

We therefore hold that this defendant was a victim of entrapment and that the trial judge erred by denying his motion to dismiss.

The judgment of the Court of Appeals is reversed, and the case is remanded to that Court with direction that it remand the case to the Superior Court of New Hanover County with order to vacate the judgment in case No. 73CR10676 (felonious possession of a controlled substance with intent to distribute) and to dismiss the indictment against defendant in that case.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLES AUSTIN PEARSON

No. 115

(Filed 26 June 1975)

**Homicide § 28— self-defense — instructions — deadly force to quell simple assault**

In a homicide prosecution wherein defendant contended he shot decedent while attempting to repel an assault on him by decedent and two others, the trial court did not err in instructing the jury that a person may not "normally" avail himself of self-defense when he has used deadly force to quell an assault by someone who has no deadly weapon but that the jury could find defendant acted in self-defense if it was "satisfied that because of the number of attackers or their size or the fierceness of the attack or all three . . . defendant believed from the circumstances that he was in danger of death or suffering great bodily harm and that the belief was reasonable under the circumstances as they appeared to him at that time."

ON *certiorari* to review the decision of the Court of Appeals reported in 24 N.C. App. 410, 210 S.E. 2d 887 (1975) (opinion by Martin, J., Britt and Hedrick, J.J., concurring), which found no error in defendant's trial before *Winner, S.J.*, at the 1 April 1974 Session of CALDWELL County Superior Court.

Defendant was tried upon a bill of indictment charging him with the first-degree murder of William G. Morgan on 29 September 1973. Defendant entered a plea of not guilty. Following the presentation of all the evidence, the court instructed the jury that they could find defendant guilty of either first-degree murder, second-degree murder, voluntary manslaughter or involuntary manslaughter, or not guilty. The jury found defendant guilty of voluntary manslaughter and Judge Winner entered judgment sentencing defendant to a term in prison of "Not less than sixteen (16) nor more than twenty (20) years."

The uncontroverted facts are as follows:

On the evening of 28 September 1973 defendant, his wife, and his sister attended a dance at the Cedar Rock Country Club, Lenoir, North Carolina. Decedent (hereinafter referred to as Morgan) along with his wife and two other couples also attended the dance. About 1:00 a.m. the dance terminated and all of these parties walked out to the parking lot and got in their respective cars. Defendant's wife, who had apparently been the life of the party, was not ready to leave at this particular time. Accord-

ingly, as defendant's vehicle approached the parking lot exit, his wife jumped out of the car and headed back towards the clubhouse. Defendant immediately stopped the car (in the vicinity of the exit), jumped out, ran after his wife, and grabbed her by the hair and by the arm. A struggle ensued as defendant attempted to get his wife back into the car. During the course of this struggle, Morgan's vehicle approached the exit area. Morgan had two male passengers with him (Charles Miller and Leo King). Their wives had previously left in another car. From this point forward, the evidence is highly contradictory.

The State's evidence, summarized except where quoted, tended to show the following:

Defendant's vehicle completely blocked the exit and Morgan was forced to bring his car to a complete stop. Defendant looked at the Morgan vehicle and yelled, "Get the damn headlights out of my eyes." Shortly thereafter, defendant approached the driver's door and Morgan asked him what was the trouble. Defendant told Morgan it was none of his "damn business." At this juncture, Morgan got out of his car and he and defendant began to fight. Defendant subsequently knocked Morgan to the ground and began kicking him. Charles Miller, one of the passengers in Morgan's car, intervened. Miller apparently got the best of defendant. At this point, both Morgan and Miller got back into the Morgan vehicle. Defendant then came up to the car window, pistol in hand, and told Morgan: "I'm going to shoot you." Defendant then forced Morgan to get out of the car, stalked him around the parking lot for several minutes, and eventually shot him in the head.

Defendant's evidence, summarized except where quoted, tended to show the following:

Defendant was trying to get his wife back into the passenger's side of his car when three men, without provocation, stopped their vehicle and commenced to "beat the hell out of him." One of them said: "Let's just stomp the son of a bitch's guts out." During the course of this altercation, defendant was able to get to his car where he had a .45 caliber automatic pistol between the two back rests of the front seat (defendant stated that he had previously given the pistol to his sister). As defendant left the car, he stuck the pistol up in the air and fired a single warning shot. Thereafter, he said: "You son of a bitches, get off of me." Morgan and the others did not heed

this warning and defendant started using the pistol as a "club," trying to hit anything that was near him. While attempting to hit Morgan with the pistol, it somehow went off. Morgan hit the ground. Defendant immediately got back in his car, threw the pistol on the seat, and drove directly to the Lenoir police station. Defendant was an assistant to the Lenoir City Manager. Defendant called Captain Dewey Triplett of the Lenoir Police Department and made a statement substantially similar to the facts above summarized.

*Attorney General Rufus L. Edmisten, by Associate Attorney Archie W. Anders, for the State.*

*Bailey, Brackett & Brackett, by Allen A. Bailey and Kermit D. McGinnis, for defendant appellant.*

COPELAND, Justice.

In his supplemental brief, defendant addresses himself primarily to the trial court's charge as it related to self-defense.

After charging the jury correctly as to the grounds of self-defense, Judge Winner gave the following instruction:

> *"Now, members of the jury, under the law of this State a person may not normally avail himself of self-defense when he has used deadly force to quell an assault or attack by someone who does not have a deadly weapon.*
>
> "However, if you are satisfied that because of the number of attackers or their size or the fierceness of the attack or all three of those things put together the defendant believed from the circumstances that he was in danger of death or suffering great bodily harm and that the belief was reasonable under the circumstances as they appeared to him at that time and that the force was not excessive and that the defendant was not the aggressor, then the defendant would have satisfied you of self defense." (Emphasis supplied.)

At approximately 8:25 p.m. (Saturday night) the jury returned to the courtroom and asked the court to restate the elements of first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter, and self-defense.

During the course of this subsequent charge, Judge Winner instructed the jurors as follows:

> "To excuse the killing entirely on the grounds of self defense the defendant must satisfy you of four things. First, that it appeared to the defendant and he believed it to be necessary to shoot W. G. Morgan in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief as in the first part, the first element, in the minds of a person of ordinary firmness.
>
> "It is for you, the jury, to determine the reasonableness of the defendant's belief in the circumstances as they appeared to him at that time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including size, age, strength of the defendant as compared to W. G. Morgan; the fierceness of the assault, if any, upon the defendant; whether or not W. G. Morgan had a weapon in his possession. And also although I did not include this in this part of the charge the first time, you may consider in determining this the number of assailants, if you find there were any, who attacked the defendant.
>
> "Third, that the defendant was not the aggressor. If he voluntarily and without provocation entered the fight he was the aggressor, unless he thereafter attempted to abandon the fight and gave notice to W. G. Morgan that he was doing so either by word or act. One enters the fight voluntarily if he uses toward his opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight. And, fourth, that the defendant did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant and under all the circumstances as they appeared to him at that time.
>
> *"If you will remember at this point I charged you that normally a person cannot use deadly force and avail himself of self-defense if the other side did not have a deadly weapon.* You want me to go over that?" (Emphasis supplied.)

As a result of the question propounded by the court, the following transpired:

"FOREMAN: I think that is sufficient, Your Honor.

"MR. BAILEY: May I approach the bench?

"THE COURT: Yes, sir.

"(Conference at the bench)

"THE COURT: I think I'd better go over it all."

Following the "bench conference" between the court and defendant's attorney, the court instructed the jury, in pertinent part, as follows:

> *"A person under the law may not normally avail himself of self defense when he has used deadly force to quell an assault by someone who has no deadly weapon. In other words, a simple assault within the law.* However, if you are satisfied that because of the number of attackers or their size or the fierceness of the attack the defendant believed from the circumstances that he was in danger of death or suffering great bodily harm and that the belief was reasonable under the circumstances as they appeared to him at that time and that the force was not excessive and that the defendant was not the aggressor and that the defendant would have still satisfied you of self defense. If you find the defendant acted in self defense he would not be guilty." (Emphasis supplied.)

After receiving all of the above instructions, the jury retired and shortly thereafter returned with a verdict finding defendant guilty of voluntary manslaughter.

Defendant strongly contends that the trial court committed prejudicial error when it instructed the jury on three separate occasions that "a person under the law may not normally avail himself of self defense when he has used deadly force to quell an assault by someone who has no deadly weapon." We find no merit in this contention.

In *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974), this Court, in an opinion by Justice Branch, stated the general rules applicable to the defense of self-defense as follows:

> "The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as

is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. *State v. Gladden,* 279 N.C. 566, 184 S.E. 2d 249; *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24." *Id.* at 214-15, 203 S.E. 2d at 834. *See generally* 4 Strong, N. C. Index 2d, Homicide § 28 (1968).

In considering these general rules it is particularly important to keep in mind the distinction between deadly force (force intended or likely to cause death or great bodily harm) and nondeadly force (force neither intended nor likely to do so). It is also important to distinguish force which is reasonable from that which is unreasonable. One commentator has differentiated between the two as follows:

> ". . . Deadly force and reasonable force are neither mutually exclusive nor collectively exhaustive. Deadily force is unreasonable if nondeadly force is obviously sufficient to avert the threatened harm, but may be entirely reasonable under other circumstances. And even nondeadly force is unreasonable if it is obviously and substantially in excess of what is needed for the particular defense." R. Perkins, Criminal Law 993 (2d ed. 1969) (hereinafter cited as *Perkins).*

Another distinction applicable to the deadly force-nondeadly force dichotomy is made between assaults with felonious intent (use of deadly force) and assaults made without felonious intent (use of nondeadly force). In the latter the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow. *See, e.g., State v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895 (1949); *State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519 (1944); *State v. Bryant,* 213 N.C. 752, 197 S.E. 530 (1938); *State v. Johnson,* 184 N.C. 637, 113 S.E. 617 (1922). In the former, however, where the attack is made with murderous intent (i.e., deadly force), the person attacked is under no obligation to retreat, but may stand his

ground and kill his adversary, if need be. *See, e.g.,* cases above cited. These retreat rules ordinarily have no application, however, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, home, place of business, or on his own premises. In this type situation the law imposes no duty to retreat as a condition to exercising the right of self-defense—regardless of the character of the assault. *See, e.g., State v. Pennell,* 231 N.C. 651, 58 S.E. 2d 341 (1950). A person assaulted in his home or place of business is said to already be "at the wall" and therefore need not retreat. *See, e.g., State v. Miller,* 221 N.C. 356, 20 S.E. 2d 274 (1942).

A corollary of the above rules is the general principle, heretofore recognized by this Court, that deadly force is not privileged against nondeadly force. *See, e.g., State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Ellerbe, supra; State v. Dills,* 196 N.C. 457, 146 S.E. 1 (1929); *State v. Gaddy,* 166 N.C. 341, 81 S.E. 608 (1914); *State v. Hill,* 141 N.C. 769, 53 S.E. 311 (1906). *See also State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971) (negative inference). But, even this rule is qualified where there is a great disparity in strength between the defendant and his assailant, or where the defendant is attacked by more than one assailant. Under these circumstances, death or great bodily harm is possible without the use of any weapons by the assailant or the assailants, and the defendant therefore may be justified in employing deadly force to repel such an attack. *See, e.g., State v. Gaddy, supra; State v. Hill, supra. See generally* Perkins, *supra,* at 993-1018.

In *State v. Hill, supra,* the above rule was well stated by Justice Hoke as follows:

> "It is true, as a general rule, or under ordinary conditions, that the law does not justify or excuse the use of a deadly weapon to repel a simple assault. This principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm—such person having been in no default in bringing on or unlawfully entering into the difficulty. . . .
>
> "In such case a defendant's right of self-defense is usually a question for the jury; and it is not always necessary to the existence of this right that the first assault

should be with a deadly weapon. It may, in exceptional instances, arise when the fierceness of this assault, the position of the parties and the great difference in their relative sizes or strength show that the danger of great bodily harm is imminent. . . . " 141 N.C. at 771, 53 S.E. at 311.

In *State v. Gaddy, supra,* this Court, in an opinion by Justice Allen, found no error in the following charge (taken from the *Hill* case, *supra*):

" 'It [right of self-defense] may, in exceptional instances, arise when the fierceness of this assault, the position of the parties, and the great difference in their relative sizes or strength show that the danger of great bodily harm is imminent, although under ordinary conditions the law does not excuse the use of a deadly weapon to repel a simple assault, this principle does not apply where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm, such person having been in no default in bringing on or unlawfully entering into the fight. In such case the defendant's right of self-defense is a question for the jury. It is not necessary to the existence of this right that the defendant should have been assailed with a deadly weapon. The jury may consider the fierceness of the assault upon him, the position of the parties, and the difference in their relative size and strength, with a view of determining whether, under all the circumstances, the defendant was reasonably led to believe and did believe that he was in danger of being killed or of receiving serious bodily harm at the hands of the deceased.' " 166 N.C. at 348, 81 S.E. at 611.

Suffice it to say, the charge complained of by defendant in the instant case is in accord with the rule of law applicable under these facts and is virtually identical to the language used by and approved by this Court in *Hill* and *Gaddy*. Defendant strongly contends, however, that the instant charge is erroneous under authority of *State v. Francis*, 252 N.C. 57, 112 S.E. 2d 756 (1960). In *Francis* the defendant was charged in a bill of indictment with felonious assault (now G.S. 14-32(a)). The alleged assault occurred in the defendant's place of business. In

charging the jury on the law of self-defense, Judge Pless gave the following instruction:

> " . . . 'Now, in determining the degree of force a person may use you will have to take into consideration all the surrounding circumstances. *Generally speaking, gentlemen of the jury, a person can't fight somebody with a pistol who is making what is called a simple assault on him, that is an assault in which no weapon is being used, such as a deadly weapon or a knife or a pistol. That would render human life too cheap. It is better for a man to be the loser in a fist fight than to cut or shoot somebody.* So, in determining the degree of force one may use, the law permits a person to use such force as is reasonably necessary to protect himself, and he can even go to the extent of taking human life where it is necessary to save himself from death or great bodily harm, but if he uses more force than is reasonably necessary he is answerable to the law.' " *Id.* at 58-59, 112 S.E. 2d at 757. (Emphasis supplied.)

In awarding the defendant in *Francis* a new trial, this Court, in an opinion by Justice Denny (later Chief Justice) stated:

> "We think the above portion of the charge is erroneous in two respects. (1) The instruction virtually eliminates the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault. This Court said in *State v. Pennell,* 231 N.C. 651, 58 S.E. 2d 341: 'Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense—*regardless of the character of the assault.*' (Emphasis added.) (2) It is erroneous in that the court failed to charge the jury with respect to the use of such force as was necessary or *apparently necessary* to protect the defendant from death or great bodily harm. The plea of self-defense rests upon necessity, real or apparent. [Citations omitted.] Or, to put it another way, one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. The reasonableness of such belief or apprehension must be judged by the facts

and circumstances as they appear to the party charged at the time of the assault." *Id.* at 59, 112 S.E. 2d at 758.

We agree with defendant that the italicized portion of the charge in *Francis* was error *under the facts of that case.* However, under the facts of the instant case such charge was a correct statement of the law. The distinguishing factors involve the relationship of the various retreat rules to the type of force employed by the assailant. For example, if a person is attacked in his own dwelling, home, place of business, or on his own premises, and is also free from fault in bringing on the difficulty, he is under no duty to retreat, whether the assailant is employing deadly force or nondeadly force. Of course, in order to justify the use of deadly force under these circumstances the person attacked must believe it to be necessary and must have a reasonable ground for such belief. On the other hand, where the person attacked is not in his own dwelling, home, place of business, or on his own premises, then the degree of force he may employ in self-defense is conditioned by the type of force used by his assailant. If the assailant uses nondeadly force, then generally deadly force cannot be used by the person attacked; provided there is no great disparity in strength, size, numbers, etc., between the person attacked and his assailant. However, if the assailant uses deadly force, then the person attacked may stand his ground and kill his attacker if he believes it to be necessary and he has a reasonable ground for such belief.

Applying the above rules to the *Francis* case and to our case, the following distinguishing factors become apparent. (1) The defendant in *Francis* was in his own place of business. Hence, he was under no duty to retreat as a condition to exercising the right of self-defense—regardless of the character of the assault (i.e., deadly or nondeadly). It was therefore error to charge the jury that generally speaking he could not employ deadly force to repel the attack. (2) On the other hand, defendant in our case was not attacked in his own dwelling, home, place of business, or on his own premises. He was attacked in the parking lot of the Cedar Rock Country Club. Also, there was no evidence that any of his assailants assaulted him with deadly force. Hence, he was not privileged to use deadly force to repel the attack, unless, due to the great disparity in strength, size, numbers, etc., between him and his assailants he believed, and had a reasonable basis for such belief, that he would be subjected to death or great bodily harm if he did not defend him-

self with deadly force. It was therefore not error to charge the jury that "normally" he could not use deadly force unless the jury was "satisfied that because of the number of attackers or their size or the fierceness of the attack on all three . . . defendant believed from the circumstances that he was in danger of death or suffering great bodily harm and that the belief was reasonable under the circumstances as they appeared to him at that time. . . . "

Accordingly, for the reasons above stated, we hold that the portion of the judge's charge complained of was not error but constituted a clear, accurate, and full statement of the law of this State. Defendant's contention is therefore rejected.

Defendant brought forward numerous assignments of error in his brief to the Court of Appeals. However, in his supplemental brief to and oral arguments before this Court he only pursued the assignment and exceptions related to the instructions on self-defense. We have answered this issue in favor of the State. We have closely examined all the other assignments and approve of the action taken by the North Carolina Court of Appeals in connection therewith.

In the final analysis the evidence in this case was in sharp conflict. The verdict rested with the credibility of the witnesses in the eyes of the jurors. The jury, after receiving a proper charge from Judge Winner on the law of self-defense as applied to these particular facts, has spoken. The decision of the North Carolina Court of Appeals is therefore affirmed.

Affirmed.

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STATE OF NORTH CAROLINA v. JOE LEWIS WHITE

No. 24

(Filed 26 June 1975)

1. **Criminal Law § 117— testifying accomplice — written, timely request for instruction — denial error**

In a prosecution for first degree murder and common law arson where the evidence tended to show that defendant's girl friend at least aided and abetted him in the commission of those crimes and therefore was an accomplice, the trial court erred in denying defendant's request, made in writing and before argument to the jury, for an instruction on accomplice testimony.

2. **Criminal Law § 9— *accomplice defined***

An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact, and the generally accepted test as to whether a witness is an accomplice is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony.

3. **Arson § 1— common law arson — statutory felony — distinction**

Common law arson is the wilful and malicious burning of the dwelling house of another person, while the statutory felony defined in G.S. 14-65 is committed when the occupant of a building used as, or the owner of a building designed or intended as, a dwelling house wantonly or wilfully or for a fraudulent purpose burns or causes it to be burned.

4. **Arson § 5— common law arson — instruction on burning for fraudulent purpose**

The gravamen of the offense of common law arson is the danger that results to persons who are or might be in the dwelling, whereas the main import of G.S. 14-65 is protection of the property itself; therefore, the better practice is for the trial court to maintain a clear distinction between the wilful and malicious burning of common law arson and burning for a fraudulent purpose as defined by G.S. 14-65.

5. **Criminal Law § 75— in-custody statement — admission proper**

The trial court did not err in allowing into evidence a statement made by defendant in the presence of two officers in response to interrogation while they were transporting him by car from N. J. to N. C., since the officers gave defendant the *Miranda* warnings, no promises or threats were made to defendant, and defendant stated that he understood his rights and would proceed without an attorney.

6. **Constitutional Law § 37; Criminal Law § 75— two confessions — one waiver of rights — second confession inadmissible**

The trial court erred in allowing into evidence testimony by an officer that defendant was given full *Miranda* warnings, he was then placed in the same room with his accomplice, the accomplice made a statement as to the circumstances preceding and during the crime, the officer asked defendant if he had heard and understood the statement, if he disagreed with it, and if the accomplice told the truth, and the officer testified that defendant stated he did not disagree with the statement and what the accomplice said was true, since there was neither evidence nor finding by the trial judge that defendant waived his right to remain silent or his right to have counsel present during this particular in-custody interrogation; moreover, this interrogation was not part of the same transaction which produced a prior confession and the State was not entitled to rely on defendant's earlier waiver of his rights.

DEFENDANT appeals from two judgments of *Clark, J.*, entered at the August 12, 1974 Session of SCOTLAND Superior Court.

Defendant was duly indicted in separate bills for first degree murder of one Mose Watson and for wilfully and maliciously burning Watson's dwelling house, i.e., common law arson. The indictments, returned at the June 24, 1974 Criminal Session of Scotland Superior Court, alleged that both offenses occurred on May 19, 1973, and were consolidated for trial. The jury returned verdicts of guilty as charged and judgments imposing the death penalty were entered in both cases.

Evidence for the State was, briefly summarized, as follows: Mose Watson was the prosecuting witness in a case pending in Scotland County in which defendant's brother, Bunny White, was charged with burglary and robbery. Defendant and his girl friend, Delores Austin, attended the preliminary hearing of the charges against Bunny White after which defendant asked Delores Austin to help him kill Watson. He discussed the killing of Watson in the presence of Delores Austin thereafter "dozens of times" and stated on occasion that only he "had nerve enough to do it." During the evening of May 19, 1973, defendant poured gasoline on and set fire to Watson's home knowing Watson was inside. Watson was burned to death.

Defendant testified in his own behalf and denied the burning.

*Rufus L. Edmisten, Attorney General, and William F. O'Connell, Assistant Attorney General, for the State.*

*J. Robert Gordon for defendant appellant.*

EXUM, Justice.

Defendant must be given a new trial on both indictments because of prejudicial error committed in the trial judge's instructions to the jury.

The principal State's witness was Delores Austin. Her testimony was essentially this: She was defendant's girl friend. Defendant asked her after Bunny White's preliminary hearing to help him kill Watson. She overheard defendant discuss killing Watson "dozens of times," many times with other members of defendant's family. On the night of May 19, 1973, defendant sent her twice to Watson's home to determine whether Watson

was there. After her second trip she reported to defendant that Watson was at home. He asked her to help him saying that it "was something he must do and that he couldn't let that old man testify against his brother." After defendant siphoned two cans of gasoline out of his father's truck he carried one can and Delores Austin carried the other to the vicinity of Watson's home. Delores Austin then testified:

> "Joe left me about two houses from Mose's house because I couldn't run, but I could see Joe Lewis go up to Mose's house and pour gas on it around the back steps. I saw Joe Lewis get up on a stone and look in the window. All of a sudden I saw an explosion of fire. Joe Lewis was running towards me and when he reached me he said, 'I got him.' "

She further testified that on the following Monday she and defendant went to McColl, South Carolina, then to Sanford, North Carolina, and finally to Tabor City where they lived for a year and a half. After they "found out the law was behind" them they were taken by defendant's father to some woods near Laurinburg where they were picked up by defendant's brothers and mother who took Delores Austin to the bus station in Fayetteville. She took a bus to New Haven, Connecticut, where she surrendered to law enforcement officials. Although there is testimony in the record by Detective L. E. Smith of the Laurinburg Police Department that Delores Austin had at one time been charged with the murder of Mose Watson she admitted having pled guilty only to accessory after the fact to murder.

**[1]** After the State and defendant had rested their cases and before argument to the jury, defendant requested in writing the following jury instruction:

> "The witness, Delores Austin, has previously entered a plea of guilty to the crime of accessory after the fact of murder in the first degree. Therefore, Delores Austin, is considered by the law to have an interest in the outcome of this case. Consequently, Ladies and Gentlemen of the Jury, I instruct you to examine every part of her testimony with the greatest care and caution. If, after doing so, you believe her testimony in whole or in part, you should treat what you believe the same as any other believable evidence."

The trial judge's only instruction bearing upon the testimony of an interested witness was:

> "The defendant in this case testified in his own behalf. In this connection, I do instruct you that the defendant has an interest in the outcome of this case and that you should, therefore, carefully scrutinize his testimony in the light of such interest; and you may also find that any other witness has an interest in the outcome of this case; and in deciding whether to believe such a witness, you may take his interest into account. If, after doing so, you believe the testimony of the defendant, or the testimony of any other interested witness in whole or in part, then you should treat what you believe the same as any other believable evidence."

This instruction fell far short of complying with defendant's request. Failure to instruct the jury in substance that Delores Austin was an accomplice, therefore an interested witness, and that her testimony should be carefully scrutinized was, in view of defendant's request, and the facts supporting it, prejudicial error. *State v. Spicer,* 285 N.C. 274, 204 S.E. 2d 641 (1974); *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165 (1961); *State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690 (1956).

Defendant's request was, it is true, in part erroneous. The fact that Delores Austin had previously pled guilty to accessory after the fact to murder of Mose Watson would not, *ipso facto,* make her an accomplice of defendant. "The more generally accepted view is that an accessory after the fact is not an accomplice." *State v. Bailey, supra,* 254 N.C. at 387, 119 S.E. 2d at 171. The trial judge was not, however, relieved of his duty to give a correct accomplice testimony instruction, there being evidence to support it, merely because defendant's request was not altogether correct. *State v. Bailey, supra.* In *Bailey* the requested instruction on accomplice testimony was legally insufficient in two respects. First, the request called for a charge that as a matter of law certain witnesses were accomplices when there was evidence from which the jury could find that they were not. Second, the request gave the defendant, in substance, a more favorable instruction than he was entitled to as a matter of law. We held, nevertheless, that the trial judge, "while not required to parrot the instructions 'or to become a mere judicial phonograph for recording the exact and identical words of counsel,' must charge the jury in substantial conformity to the prayer;" and we set out what would have been proper in-

structions. *Id.* at 386, 119 S.E. 2d at 170; *accord, State v. Hooker, supra.*

**[2]** "[A]n 'accomplice' is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact. The generally accepted test as to whether a witness is an 'accomplice' is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony." *State v. Bailey, supra,* 254 N.C. at 387, 119 S.E. 2d at 171. It is not necessary for a witness to be charged with the same crime or crimes as the defendant in order to be an accomplice. *State v. Spicer, supra.*

The testimony of Delores Austin herself, uncontradicted except by defendant, was enough to convict her of the same crimes charged against defendant on the theory that she at least aided and abetted him in the commission of those crimes.

On this evidence defendant's request for an accomplice instruction with regard to the testimony of Delores Austin was, except for the first sentence, a good statement of the law. The trial court should have in substance so charged the jury. There are compelling reasons, demonstrated in legal history and policy, for instructing juries to scrutinize the testimony of accomplices. *See State v. Bailey, supra,* for a good discussion of them. "A skeptical approach to accomplice testimony is a mark of the fair administration of justice." *Id.* at 388, 119 S.E. 2d at 171.

There is another aspect to the trial judge's instructions to the jury which deserves noting. He charged that the State must prove beyond a reasonable doubt "that the defendant, in burning the house, acted maliciously. Now, that is, intentionally, wilfully, or wantonly, without lawful excuse or justification *or with a fraudulent purpose.*" (Emphasis supplied.) Thereafter he charged that the "State must prove that it was done maliciously *or with a fraudulent purpose.* I instruct you that the burning of a dwelling by the defendant . . . for the purpose of putting Mose Watson in fear or terror to prevent him from testifying . . . would constitute *a fraudulent purpose* on his part." (Emphasis supplied.) In his final mandate to the jury in the arson case the trial judge charged that the State must

prove, among other things, that "the defendant, in burning the house, acted maliciously, *with a fraudulent purpose* . . . ." (Emphasis supplied.)

**[3]** In these instructions the trial judge seems to have confused the common law crime of arson, for which defendant was indicted and which before the enactment of Chapter 1201, 1973 Session Laws, was a capital crime, with the general felony defined by G.S. 14-65. Common law arson is the wilful and malicious burning of the dwelling house of another person. *State v. Arnold,* 285 N.C. 751, 208 S.E. 2d 646 (1974); *State v. Porter,* 90 N.C. 719 (1884); 2 Wharton's Criminal Law and Procedure § 388 (1957); Curtis, The Law of Arson § 1 (1936). The statutory felony defined in G.S. 14-65 is committed when the occupant of a building used as, or the owner of a building designed or intended as, a dwelling house wantonly and wilfully "or for a fraudulent purpose" burns or causes it to be burned. The trial judge equated burning "for a fraudulent purpose" with a "wilful and malicious" burning. In effect, he charged the jury that they could convict the defendant if it found that he burned Mose Watson's dwelling either wilfully and maliciously or with a fraudulent purpose.

**[4]** The mental state denoted by the term "wilful and malicious," is not the same as that denoted by the term "fraudulent purpose." For a burning to be "wilful and malicious" in the law of arson it must simply be done "voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense" of common law arson. 2 Wharton's Criminal Law and Procedure § 390; *accord,* Curtis, The Law of Arson §§ 68-69; *See also* North Carolina Pattern Jury Instructions, Criminal, 215.10. Burning "for a fraudulent purpose," on the other hand, describes a mental state having to do with the desire for illegal pecuniary gain usually at the expense of the property's insurer. The gravamen of the offense of common law arson is the danger that results to persons who are or might be in the dwelling, whereas the main import of G.S. 14-65 is protection of the property itself. While burning the dwelling of Mose Watson for the purpose of frightening Watson and keeping him from testifying for the State would clearly be a wilful and malicious burning, we doubt that it would be a burning "for a fraudulent purpose."

We do not decide whether the precise use of the term made here by the able trial judge constituted legal error. It might be argued that he defined "fraudulent purpose" to be in this case burning of the dwelling for the purpose of intimidating its occupant, a State's witness. This act would also be a wilful and malicious burning. Since, the argument goes, two or more things equal to the same thing are equal to each other the charge is saved from error. Be that as it may, and without considering all the factual circumstances which may be embraced by the term "fraudulent purpose," we believe that the concept has no place in a common law arson case. The better practice is to maintain a clear distinction between this ancient crime and burning for a fraudulent purpose as defined by G.S. 14-65.

**[5]** Because the questions will probably arise at defendant's second trial we discuss assignments of error relating to the introduction of two confessions of the defendant, made at different times. According to the State's evidence the first one was made on May 4, 1974, in the presence of Detective L. E. Smith and SBI agents William Dowdy and Hugh Currin, Jr., in response to interrogation while they were transporting defendant by car from Patterson, New Jersey, where he had been extradited to North Carolina. This interrogation and confession occurred in the automobile shortly after 12:00 Noon before the car left Patterson. Evidence for the State on the question of the admissibility of this confession was that before making it defendant was fully advised of both his right to have counsel, either privately employed or court appointed, during questioning and his right to remain silent in accordance with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and that no promises or threats were made to defendant. Defendant replied that he understood his rights and "would proceed without an attorney." Defendant, on *voir dire,* admitted being given the *Miranda* warnings and that no coercion was used, but claimed that he asked for a lawyer. The trial court found facts in accordance with the State's evidence, found that defendant waived his right to counsel during this interrogation, that the confession was voluntary and concluded that it was admissible. There was ample evidence to support these findings, including the implied finding that defendant also waived his right to remain silent. Consequently, there was no error in admitting this confession.

**[6]** The State also offered evidence that Delores Austin who had been brought to the Laurinburg Police Station on April 29,

1974, had on that date, after waiving her constitutional rights, made a statement essentially in accordance with her testimony at the trial. On May 4, 1974, while defendant was in custody at the Laurinburg Police Station he was again given full *Miranda* warnings after which he and Delores Austin were placed together in the same room. On a second *voir dire* hearing Detective Smith testified that Delores Austin repeated her statement in defendant's presence. He then asked the defendant:

> "[I]f he heard and understood the statement that Delores had made and he said that he did. I asked him if he disagreed with anything—any part of the statement and he said that he did not, that she had told the truth and that this was the way it happened. The whole interview with Delores and the defendant took less than half an hour."

After finding that this second statement of defendant was made "after he had been fully advised of his rights . . . and that it was freely and understandingly and voluntarily . . . made, without compulsion or duress or promise of leniency and is admissible" the trial court permitted Detective Smith to testify before the jury that upon being confronted with the statement of Delores Austin defendant stated he did not disagree with it and what she said was true.

On this record this was prejudicial error.

With regard to defendant's second incriminating statement amounting, in effect, to another confession, there was neither evidence nor finding by the trial judge that defendant waived his right to remain silent or his right to have counsel present during this particular in-custody interrogation. "Waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona, supra; accord, State v. Turner,* 281 N.C. 118, 187 S.E. 2d 750 (1972); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971). This second interrogation, moreover, was not part of the same transaction which produced defendant's first confession. It occurred a number of hours later (at least the number required to drive from Patterson, New Jersey, to Laurinburg) and was at a different place and under different circumstances. The State was not, therefore, entitled to rely on defendant's earlier waiver which had occurred in Patterson, New Jersey. His confession after waiver at that time "exhausted the procedure" to which

the waiver applied. *State v. Wright,* 274 N.C. 84, 94, 161 S.E. 2d 581, 589 (1968).

The prejudice to defendant from erroneously admitting his second confession into evidence notwithstanding that an earlier confession was properly admitted is shown by what transpired at the trial after the jury had begun its deliberations. The jury returned into court to inquire whether it could hear again what defendant said to officers in New Jersey, Delores Austin's statement, and defendants' answers to Detective Smith's inquiries as to whether he agreed with her statement. During this episode one juror said, "Did he agree with her statement or did he disagree. That's the hang-up. Did he disagree with her? Did he say that he didn't do it at the time or did he say that she was telling the truth?" The trial court then summarized again for the jury his recollection of that portion of the State's evidence which was that defendant agreed Delores Austin was telling the truth. Defendant's statement made on the trip from New Jersey was not at this time reviewed.

For errors committed defendant is given a

New trial.

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RICHARD CLIFTON ROSE v. EPLEY MOTOR SALES AND JEROME EPLEY

No. 98

(Filed 26 June 1975)

**1. Sales § 16; Uniform Commercial Code § 15— breach of warranty of merchantability — sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim for relief for rescission of the sale of an automobile for breach of warranty of merchantability where it alleged a sale of an automobile by one engaged in that business, the making of an implied warranty that the automobile was "suitable for everyday use and transportation" (i.e., the normal use of such article) and that after only three hours of normal operation it was destroyed by a fire originating in the engine compartment, for which reason the plaintiff, with reasonable promptness, asserted to the defendant his right to rescind the sale.

**2. Uniform Commercial Code § 15— warranty of merchantability — car catching fire — sufficiency of evidence for jury**

In an action to rescind the sale of an automobile on the ground of breach of implied warranty of merchantability, the trial court did

not err in the denial of defendant's motion for directed verdict where plaintiff's evidence tended to show that plaintiff purchased a used automobile from defendant dealer in such commodities, nothing whatever was said about a warranty of the condition of the car, nothing was done to the automobile after the sale which altered its condition, at all times following the sale plaintiff operated it in a normal and proper manner, three hours after the sale, while it was being so operated, it was totally destroyed by a fire originating in its motor compartment and on the following day plaintiff demanded rescission of the contract of sale, which demand the defendant refused, since it may reasonably be inferred from plaintiff's evidence that the vehicle was not in condition suitable for ordinary driving at the time of the sale; however, the trial court erred in granting plaintiff's motion for directed verdict since the evidence does not compel a finding that the defect which caused the fire existed at the time of the sale. G.S. 25-2-607(4).

3. **Uniform Commercial Code § 12— used car dealer as "merchant" — automobile as "goods"**

A used car dealer is a "merchant" as that term is defined in the Uniform Commercial Code, G.S. 25-2-104, and the term "goods" includes an automobile within the meaning of the Code. G.S. 25-2-105.

4. **Uniform Commercial Code § 20— revocation of acceptance**

The buyer who has accepted goods as performance of the seller's contract may revoke his acceptance when there is a nonconformity of the goods to the contract which substantially impairs their value to him, provided his failure to discover such nonconformity prior to the acceptance of the goods was reasonably induced by the difficulty of such discovery and he notifies the seller of such revocation within a reasonable time after he discovers, or should have discovered, the ground therefor and before any substantial change in the condition of the goods not caused by their own defects, G.S. 25-2-608; when the buyer justifiably revokes his acceptance of the goods, he may cancel the sale and recover the purchase price together with such other damages as may be justified. G.S. 25-2-608(3); G.S. 25-2-711.

5. **Rules of Civil Procedure § 50— directed verdict — party having burden of proof**

The trial judge may not direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, even though the evidence is uncontradicted, the defendant's denial of an alleged fact, necessary to plaintiff's right of recovery, being sufficient to raise an issue as to the existence of that fact, even though he offers no evidence tending to contradict that offered by the plaintiff.

ON *certiorari* to the Court of Appeals to review its decision reversing judgment for the plaintiff by *Dale, J.*, in the District Court of BURKE, the decision of the Court of Appeals being reported in 23 N.C. App. 494, 209 S.E. 2d 330.

The complaint alleges: Epley Motor Sales is a used car company and Jerome Epley is its salesman. On 6 November 1973, the plaintiff purchased a used Volkswagen from Epley Motor Sales which, through its agent, Jerome Epley, impliedly warranted the automobile to be "suitable for everyday use and transportation." The plaintiff operated the automobile in a lawful, reasonable and prudent manner for three hours, driving it approximately 100 miles. While he was so operating it, three hours after the purchase, the automobile was completely destroyed by fire which started in the engine compartment. On 8 November 1973, the plaintiff attempted to rescind the sale, offering to return the damaged automobile to the defendants and demanding return of the purchase price. The defendants rejected the demand for rescission. By virtue of the Uniform Commercial Code, implied warranties of merchantability and of fitness for purpose arose upon the sale of the vehicle to the plaintiff. The plaintiff prays for a rescission of the contract and return of the purchase price ($820.00 in cash plus a 1964 Pontiac automobile traded to Epley Motor Sales as part payment for the Volkswagen) or, in the alternative, for damages for breach of implied warranty in the sum of $1,020 with interest from the date of the plaintiff's offer to rescind the sale.

The defendant moved to dismiss for failure of the complaint to state a claim for relief upon which a judgment could be rendered. Simultaneously, the defendant filed an answer admitting the sale of the Volkswagen but denying the making of any implied warranty. The answer alleges that the plaintiff drove the automobile, to try it, for approximately three hours, returned to the place of business of Epley Motor Sales and purchased the vehicle after pointing out certain defects by reason of which the seller reduced the purchase price originally demanded. The answer alleges that the vehicle was sold to the plaintiff as a used automobile "as is." The answer further admits that the vehicle was substantially destroyed by fire approximately four hours after the sale while in the exclusive custody and control of the plaintiff and that the plaintiff attempted to rescind the contract of sale but the defendant refused to do so.

The defendant's motion to dismiss the action for failure of the complaint to state a claim for relief on which relief can be granted was overruled. The matter then came on for hearing before Judge Dale and a jury.

The plaintiff's evidence consisted entirely of his own testimony to the following effect:

The plaintiff is not a duly licensed mechanic. On 6 November 1973, he negotiated with Epley Motor Sales, through Jerome Epley, for the purchase of the Volkswagen. He was permitted to take the vehicle and try it, which he did for approximately three hours. Jerome Epley told him that the engine had been "gone through" and "had been checked" and that Epley had had some work done on it at "a Volkswagen repair shop at a cost of about $120.00." Following his trial of the car, the plaintiff informed Jerome Epley of certain defects in the brakes and horn. He then purchased the automobile and, with his wife and children, started on a trip from Morganton to Marion. En route, "the car made a funny racket and blue smoke came out of the back end of it." It sounded as if a piston had broken. The plaintiff brought the car to a stop and his family got out. The entire back end was then engulfed in flames which could not be extinguished until the car was a total loss. Prior to the outbreak of the fire the plaintiff was driving 65 to 70 miles per hour and was "real pleased" with the way the automobile operated. While he was trying the car out prior to the purchase, he did not drive it faster than 55 miles per hour. He did no work whatever on the car after purchasing it, and had none done. Following the purchase, he drove to a service station and purchased gasoline. The service station attendant showed him how to check the oil. The attendant "twisted a little cap and pulled it out and it had the dip stick in it." On 7 November 1973, the day after the fire, the plaintiff went back to Jerome Epley and asked him to rescind the sale, which Epley refused to do. The purchase price of the car was $1,000, plus a tax of $20.00. In the plaintiff's opinion, the car was well worth $1,000 "before it burned up." He looked the car over carefully before he purchased it. He could not tell anything was wrong with it. He does not know what caused the car to catch on fire.

At the conclusion of the plaintiff's evidence, the defendants moved for a directed verdict in their favor, which motion was denied.

The defendants' evidence consisted entirely of the testimony of Jerome Epley to the effect that he had purchased this vehicle slightly more than one month prior to selling it to the plaintiff. Prior to the sale to the plaintiff, Epley took the automobile to the Volkswagen "service place" and had the car checked over

and had work done on it. He did everything "that was needed to be done." In the sale to the plaintiff he did not make any warranty whatsoever except that he had had the motor worked on. Nothing whatsoever was said about any kind of warranty by either the plaintiff or Epley.

At the end of all the evidence the defendants renewed their motion for a directed verdict, which was again denied. The plaintiff then moved for a directed verdict, which motion was allowed. The defendants then moved to set aside the order of the court, again renewed their motion for a directed verdict in their favor, moved for judgment notwithstanding the verdict and moved for a new trial. All of these motions by the defendants were denied.

Judge Dale made findings of fact in accord with the evidence of the plaintiff. He concluded as matters of law that the sale was governed by Article II of the Uniform Commercial Code; the defendants are "merchants" as defined therein; implied warranties of merchantability and of fitness for particular purpose arose upon the sale; these were broken when the Volkswagen was totally destroyed; the plaintiff did not have knowledge necessary to inspect the engine and to determine, prior to the purchase, the cause of the fire; the plaintiff lawfully rejected the automobile after the breach of the implied warranty and within a reasonable time thereafter notified the defendants of his desire to rescind the contract; and, therefore, the plaintiff is entitled to recover the full purchase price plus tax. Judgment was entered accordingly.

On appeal the Court of Appeals reversed the judgment of the District Court on the ground that the plaintiff had offered absolutely no evidence of a defect in the Volkswagen or of the cause of the fire, these being left completely to conjecture. For this reason the Court of Appeals held the District Court erred in denying the defendants' motion for a directed verdict in their favor.

*Robert E. Hodges for plaintiff.*

*Byrd, Byrd, Ervin & Blanton, P.A., by Robert B. Byrd and Joe K. Byrd, Jr., for defendants.*

LAKE, Justice.

There was no error in the denial by the District Court of the defendants' motion to dismiss for failure to state in the com-

plaint a claim upon which relief can be granted. The basis of this motion is that the complaint does not state wherein the alleged implied warranties were broken or otherwise allege any act or omission of the defendants or any condition of the automobile at the time of the sale which caused the fire.

**[1]** The complaint would clearly have been insufficient to state a cause of action under the provisions of the old Code of Civil Procedure. Under the present Rules of Civil Procedure, G.S. Ch. 1A, it falls far short of being a model pleading but, in our opinion, it does meet the minimum requirements of notice pleading there prescribed. It alleges a sale of an automobile by one engaged in that business, the making of an implied warranty that the automobile was "suitable for everyday use and transportation" (i.e., the normal use of such article) and that after only three hours of normal operation it was destroyed by a fire originating in the engine compartment, for which reason the plaintiff, with reasonable promptness, asserted to the defendants his right to rescind the sale. The prayer is for rescission and recovery of the purchase price. These allegations are sufficient to notify the defendants and advise the court that the plaintiff demands rescission for breach of the alleged warranty.

The requirement for a sufficient statement of a claim for relief is thus stated in Rule 8(a): "(1) A short and plain statement of a claim sufficiently particular to give the Court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled * * * ."

In Moore, Federal Practice, § 12.08, it is said that the defendant's remedy for mere vagueness or lack of detail in a complaint is a motion for a more definite statement. No such motion was made in the present case. In *Sutton v. Duke,* 277 N.C. 94, 104, 176 S.E. 2d 161, speaking through Justice Sharp, now Chief Justice, we said, "A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." See also: *Redevelopment Commission v. Grimes,* 277 N.C. 634, 645, 178 S.E. 2d 345.

Even under the old Code of Civil Procedure distinction was drawn between a complaint which disclosed "a defective cause of action" and one which made "a defective statement of a good cause of action," the latter situation being present when the complaint failed to allege a necessary fact which presumably could be supplied by an amendment. See: *Sutton v. Duke, supra,* at p. 106. Thus, even under the old Code of Civil Procedure, the plaintiff could have been permitted to amend his complaint to supply the missing, then essential, allegation that the vehicle was not as warranted, which defect caused the fire, and dismissal of the action would not have been proper.

There was likewise no error in the denial of the defendants' motion for a directed verdict. Such motion is similar to the motion for judgment of nonsuit under the former practice and, in consideration of it, the evidence must be interpreted in the light most favorable to the plaintiff, must be considered as true and all reasonable inferences to be drawn therefrom must be made in his favor. *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396.

**[2]** So considered, the evidence is sufficient to show the plaintiff purchased a used automobile from the defendant dealer in such commodities, that nothing whatever was said about a warranty of the condition of the car, that nothing was done to the automobile after the sale which altered its condition, that at all times following the sale the plaintiff operated it in a normal and proper manner, that three hours after the sale, while it was being so operated, it was totally destroyed by a fire originating in its motor compartment and that on the following day the plaintiff demanded rescission of the contract of sale, which demand the defendant refused. From the facts shown by the plaintiff's evidence, taken to be true, it may reasonably be inferred that the vehicle sold to him by the defendants was not in condition suitable for ordinary driving at the time of the sale, three hours before the fire.

G.S. 25-2-314 (part of the Uniform Commercial Code) provides:

> *"Implied warranty: Merchantability; usage of trade.*— (1) Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * *

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and * * *

(c) are fit for the ordinary purposes for which such goods are used; * * * "

[3] Epley Motor Sales is a "merchant" as that term is defined in the Uniform Commercial Code. G.S. 25-2-104. The term "goods" includes an automobile within the meaning of the Code. G.S. 25-2-105.

Official Comments upon G.S. 25-2-314 state that the warranty of merchantability applies to sales for use as well as to sales for resale; a contract for the sale of secondhand goods involves only such obligation as is appropriate to such goods for that is their contract description; fitness for the ordinary purposes for which goods of the type are used in a fundamental concept of this section of the Uniform Commercial Code; and in an action for breach of warranty it is necessary to show not only the existence of the warranty but the fact of its breach and that the breach was the proximate cause of the loss sustained.

G.S. 25-2-316 provides that to exclude such implied warranty of merchantability the language used for that purpose must mention merchantability, except that, unless the circumstances otherwise indicate, all implied warranties are excluded by expressions like "as is" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. This section of the Code also provides that when the buyer, before entering into the contract, has examined the goods as fully as he desired there is no implied warranty with regard to defects which such examination ought, in the circumstances, to have revealed to him.

The defendants' testimony is that nothing whatever was said about any warranty. There is no evidence in the record indicating any exclusion of the implied warranty of fitness for purpose as provided in G.S. 25-2-316. Although the evidence shows that the plaintiff test drove the automobile and looked it over before making the purchase, nothing in the evidence would compel, or even support, a finding that the defect, if any, which caused the fire should have been discovered by him through such

test driving and inspection, he not being a mechanic. See: *Motors, Inc. v. Allen,* 280 N.C. 385, 395, 186 S.E. 2d 161.

**[4]** The Uniform Commercial Code provides that if the goods fail in any respect to conform to the contract, the buyer may reject them within a reasonable time after their delivery, provided he seasonably so notifies the seller. G.S. 25-2-601, G.S. 25-2-602. The buyer who has accepted goods as performance of the seller's contract may revoke his acceptance when there is a nonconformity of the goods to the contract which substantially impairs their value to him, provided his failure to discover such nonconformity prior to his acceptance of the goods was reasonably induced by the difficulty of such discovery and he notifies the seller of such revocation within a reasonable time after he discovers, or should have discovered, the ground therefor and before any substantial change in the condition of the goods not caused by their own defects. G.S. 25-2-608. When the buyer justifiably revokes his acceptance of the goods, he may cancel the sale and recover the purchase price together with such other damages as may be justified. G.S. 25-2-608(3); G.S. 25-2-711; *Motors, Inc. v. Allen, supra,* at p. 395 et seq.

Consequently, the evidence, interpreted in the light most favorable to the plaintiff, is sufficient to support a verdict in his favor and there was no error in the denial of the motions by the defendants for a directed verdict in their favor.

There was, likewise, no error in the denial of the defendants' motions for judgment notwithstanding the verdict.

**[2, 5]** There was, however, error by the District Court in granting the motion of the plaintiff for a directed verdict. The burden is upon the buyer to establish a breach by the seller of the warranty of merchantability; that is, to show that the defect which caused the fire existed at the time of the sale. G.S. 25-2-607(4). The evidence in the record is sufficient to permit an inference to this effect, but it does not compel such a finding even if true and the credibility of the plaintiff's evidence is for the jury. The trial judge may not direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, even though the evidence is uncontradicted, the defendants' denial of an alleged fact, necessary to the plaintiff's right of recovery, being sufficient to raise an issue as to the existence of that fact, even though he offers no evidence tending to contradict that offered

by the plaintiff. *Cutts v. Casey*, 278 N.C. 390, 417-422, 180 S.E. 2d 297.

Consequently, the judgment of the Court of Appeals must be, and is hereby, reversed. The matter must be, and is hereby, remanded to that Court with direction to enter judgment vacating the judgment of the District Court and remanding the matter to the District Court for a new trial.

Reversed and remanded.

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VINCENT S. MEYER, ANNE K. MEYER AND ELIZABETH S. MEYER v. McCARLEY AND COMPANY, INC., BLEECKER MORSE, AND WHEAT, FIRST SECURITIES, INC.

No. 106

(Filed 26 June 1975)

1. **Rules of Civil Procedure § 56— summary judgment — when appropriate**

Summary judgment is appropriate, upon motion therefor duly made, when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

2. **Negligence § 29— recovery based on negligence — prerequisites**

The prerequisites for recovery of damages for injury by negligence are (1) the existence of a legal duty, owed by the defendant to the plaintiff, to use due care, (2) a breach of that duty, and (3) the alleged negligent act or omission by the defendant must be the proximate cause of the injury of which the plaintiff complains.

3. **Brokers and Factors § 4; Negligence § 10— failure of broker to follow instructions — subsequent wrong by second broker — intervening negligence**

In an action to recover for losses allegedly sustained by plaintiffs when defendant McCarley failed promptly to execute an alleged order by plaintiffs to sell shares of stock owned by plaintiffs and held by McCarley, the evidence tended to show that the male plaintiff bought 200 shares of stock for himself and 200 for each of the other plaintiffs, the female plaintiffs paid for their stock, the male plaintiff paid the balance of what he owed for his stock with a check drawn on a bank in which defendant Wheat was instructed to deposit the cash balance of plaintiff's account with Wheat, Wheat deposited only a portion of the balance in the bank and sent the remainder to male plaintiff's residence, male plaintiff's check to McCarley was dishonored by the bank because of insufficient funds, and McCarley refused to carry out male plaintiff's sell order on the 600 shares of stock held by it on the

ground that the stock had not been paid for; therefore, female plaintiffs could not recover against Wheat on the ground of negligence since McCarley's failure to comply with the male plaintiff's sell order was not reasonably foreseeable by Wheat at the time it allegedly failed to carry out male plaintiff's instructions concerning payment of its indebtedness to him but was instead an intervening wrongful act of a third party (if plaintiffs' allegations be true) which insulated the negligence of Wheat.

4. **Contracts § 14— third party beneficiaries — insufficiency of evidence — no recovery on contract**

Even if defendant Wheat was under a contractual duty to male plaintiff to pay its indebtedness to him by transmission of its check to his bank and Wheat failed to perform this duty, the female plaintiffs were not parties to that contract nor were they third party beneficiaries thereof where there was no evidence that the parties to such contract intended it to be for the benefit of the female plaintiffs, the female plaintiffs' accounts with Wheat were separate and distinct from that of the male plaintiff, and the balances due them upon such accounts were paid to them by Wheat in accordance with instruction of their agent; consequently, the female plaintiffs had no standing to sue for breach of the contract, if any, between the male plaintiff and Wheat.

5. **Contracts § 14— incidental beneficiary — no rights against promisor or promisee**

It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance, but such incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

APPEAL by defendant Wheat, First Securities, Inc., from the decision of the Court of Appeals, reported in 24 N.C. App. 418, 210 S.E. 2d 893, reversing summary judgment by *Brewer, J.*, at the 10 June 1974 Civil Session of DURHAM, Hedrick, J., dissenting in part.

The plaintiffs sued McCarley and Company, Inc. (hereinafter called McCarley), Morse, its employee, and Wheat, First Securities, Inc. (hereinafter called Wheat), for losses allegedly sustained by them when McCarley failed promptly to execute an alleged order by the plaintiffs to sell shares of stock owned by the plaintiffs. The plaintiffs contend that a failure by Wheat to comply with instructions given it by Vincent S. Meyer, father of the other two plaintiffs, caused the delay by McCarley in executing the order to sell the stock and the resulting loss to the plaintiffs.

All of the defendants moved for summary judgment against all of the plaintiffs. These motions were heard upon the plead-

ings, affidavits of Vincent S. Meyer and Morse and lengthy depositions of Vincent S. Meyer, Morse and officers and employees of McCarley and of Wheat. Brewer, J., granted all of these motions and gave summary judgment in favor of each defendant against each plaintiff, except that the motions of McCarley and Morse for summary judgment against Vincent S. Meyer were denied. All three plaintiffs appealed to the Court of Appeals from such judgments against them. McCarley and Morse did not appeal from the denial of their motion for summary judgment against Vincent S. Meyer. The Court of Appeals reversed the summary judgments in favor of Wheat and the summary judgments in favor of McCarley and Morse. Hedrick, J., dissented from the reversal of the summary judgments in favor of Wheat against Anne K. Meyer and Elizabeth S. Meyer, concurring in the reversals of the other summary judgments.

By reason of the dissent of Hedrick, J., Wheat appealed to the Supreme Court from the reversal of the judgments in its favor against Anne K. Meyer and Elizabeth S. Meyer. Appellate review of the decision of the Court of Appeals was not sought by McCarley or Morse or by Wheat with reference to the reversal of its judgment against Vincent S. Meyer. Consequently, the present appeal relates solely to whether summary judgment was properly entered by Brewer, J., in favor of Wheat against Anne K. Meyer and Elizabeth S. Meyer. Only so much of the allegations and of the supporting documents on motion for summary judgment as relates to the action of these plaintiffs against Wheat is here set forth.

The material facts alleged in the complaint are:

On 6 September 1972, the three plaintiffs purchased through McCarley 200 shares each of the common stock of Levitz Furniture Corporation. McCarley opened a separate account for each plaintiff. Third-party trading agreements were entered into whereby Vincent S. Meyer was authorized to sell shares owned by Anne and Elizabeth. In due time Anne and Elizabeth each paid for her 200 shares of the Levitz stock, giving her personal check therefor.

To pay for his 200 shares, Vincent S. Meyer, through McCarley, arranged for the transfor to McCarley, for sale by it and retention of the proceeds in his account with McCarley, certain stock then held for his account by Wheat and gave McCarley his check for the balance. On 15 September 1972, this

check was dishonored by the drawee bank because of insufficient funds. Such insufficiency of funds was due to the failure of Wheat to carry out Vincent S. Meyer's instruction to transfer to his credit in the drawee bank the full cash balance in Vincent S. Meyer's account with Wheat. Vincent S. Meyer had advised Wheat that the funds so to be transferred would be required to cover a check which he was drawing upon the drawee bank. By negligence Wheat so deposited in the drawee bank to the credit of Vincent S. Meyer only a portion of the balance then in his account with Wheat and mailed to Vincent S. Meyer's home a check for the remainder.

On 28 September 1972, Vincent S. Meyer directed McCarley to sell the entire 600 shares of the Levitz stock at a price between $46.00 and $47.00 per share. McCarley refused to carry out the "sell order" on the ground that the stock had not been paid for. On that date the closing price of the Levitz stock on the market was $47.00 per share. On the following day the market price of Levitz stock dropped sharply. Vincent S. Meyer acted promptly to make the necessary funds available to cover his check to McCarley so that McCarley would sell the Levitz stock. The stock was sold on 10 October 1972 for prices ranging from $28.625 to $28.125.

The plaintiffs sue for the difference between the prices so obtained and $47.00 per share. They allege that their loss was caused by the negligence of Wheat and, alternatively, that the instruction by Vincent S. Meyer, acquiesced in by Wheat, constituted a contract whereby Wheat promised to deposit the said funds in the drawee bank to the account of Vincent S. Meyer and, through the breach of such contract by Wheat, the plaintiffs sustained the said loss through the delay of the sale of their stock by McCarley.

In its answer Wheat alleges the plaintiffs have failed to state a claim against it on which relief can be granted. Wheat admits:

Vincent S. Meyer had a cash balance in his account with Wheat in the amount of $6,244.77 and was so advised by Wheat in response to his inquiry. Wheat caused to be transferred to the credit of Vincent S. Meyer in the drawee bank $5,281.64 and mailed its check for the remainder ($953.13) to Vincent S. Meyer at his home. The closing price of Levitz stock on 28 September 1972 was $47.00.

The deposition of John N. McCarley, Jr., officer and controlling stockholder of McCarley, is to the effect that he is aware of no regulation of the Securities Exchange Commission prohibiting a broker from carrying out a customer's order for the sale of stock which has not been paid for and McCarley has no such policy. Thus, its employees can sell stock for which the customer has not paid. The deposition of Raymond E. Quinn, an employee of McCarley, is to the same effect. The deposition of Paul J. Strauss, an employee of Wheat, is to the effect that he knows of no New York Stock Exchange regulation or any other rule or regulation which prevents a broker from executing a sell order for stock for which the customer has not fully paid. The deposition of James W. Marshall, Jr., an employee of McCarley, is to the effect that he knows of no policy of the McCarley firm to that effect but he, himself, followed that policy, and Morse, the employee of McCarley who handled the plaintiffs' accounts, told Vincent S. Meyer that the stock could not be sold because payment therefor had not been made. According to the deposition of Marshall, the daughters were not involved in that.

The deposition of Doris Corby, an employee of Wheat, is to the effect that Vincent S. Meyer, Anne and Elizabeth had separate accounts with Wheat. In response to a telephone inquiry from Vincent S. Meyer, Mrs. Corby informed him as to the amount of the balances in each account. She had no idea as to why he wanted to withdraw the balances and had no reason to ask him. He requested her to send his money and that of Anne to the Second National Bank in Richmond, Virginia, and to send Elizabeth's money to her at her address in California.

The deposition of Vincent S. Meyer is to the effect that he and his two daughters had separate accounts with Wheat and with McCarley. He purchased 200 shares of Levitz stock for himself, 200 shares for Anne and 200 shares for Elizabeth, three separate purchase orders being written up by McCarley. When informed by Mrs. Corby of the amounts of the cash balances in each of the accounts with Wheat, he told her, "I had bought some stock and I need to pay for it," and asked her to send checks for the balances in the three accounts to him at his home address. Later he telephoned her and requested her to send his and Anne's balances to the bank in Richmond and to send Elizabeth's balance to her in California.

The deposition of Morse, the employee of McCarley who handled the Meyer accounts, was to the effect that Meyer and each of his daughters had separate accounts with McCarley and 200 shares of Levitz stock was purchased for each account. Morse told Meyer the stock could not be sold until it was paid for. He knows of no such regulation of the New York Stock Exchange. The Levitz shares purchased by Anne and Elizabeth were paid for in full by them. All 600 shares were sold in October 1972.

*Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by E. C. Bryson, Jr., for defendant appellants.*

*Powe, Porter, Alphin & Whichard, P.A., by J. G. Billings, for plaintiff appellees.*

LAKE, Justice.

The record reveals no material issue of fact between Wheat on the one hand and Anne Meyer and Elizabeth Meyer on the other. It is not controverted that each of them fully paid the purchase price of the 200 shares of Levitz stock held in her account by McCarley. The plaintiffs allege McCarley was given an order to sell such stock at a price, which could have been obtained on the day the order was given, while McCarley denies that it received an order to sell the stock owned by Anne Meyer and Elizabeth Meyer, but that is not a matter at issue as between these plaintiffs and Wheat. It is further not controverted that prior to the opening of their accounts with McCarley, these plaintiffs and Vincent S. Meyer each had an account with Wheat in each of which there was a cash balance due the customer; Vincent S. Meyer ordered these accounts closed as he was authorized to do; he instructed Wheat to deposit the amount so due him in the bank in Richmond upon which he was about to draw a check and Wheat told him it would do so; by its error, Wheat failed so to deposit all of the balance due Vincent S. Meyer and, as a result, the check given by him to McCarley in payment of his 200 shares of Levitz stock was dishonored by the drawee bank.

**[1]** Summary judgment is appropriate, upon motion therefor duly made, when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter

of law." Rule 56 of the Rules of Civil Procedure, G.S. 1A-1; *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457; *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35; *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823.

The plaintiffs contend that they sustained a loss by reason of Wheat's negligence in failing to follow the instructions given it by Vincent S. Meyer in making payment of the money which Wheat owed him. They also contend that such failure by Wheat was a breach of its contractual obligation.

[2] The first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care. *McNair v. Boyette, supra; Moody v. Kersey,* 270 N.C. 614, 155 S.E. 2d 215; *Luttrell v. Mineral Co.,* 220 N.C. 782, 18 S.E. 2d 412; 86 C.J.S., Torts, § 6; 74 Am. Jur. 2d, Torts, § 8. The second prerequisite is a breach of that duty. The plaintiffs, Anne and Elizabeth Meyer, have not alleged or shown any interest in, or right to, the balance owed by Wheat to Vincent S. Meyer, their father. Their accounts with Wheat were separate and distinct from his. They could not have maintained an action against Wheat to collect the balance due him. They do not contend that Wheat failed to pay to them, or either of them, the full amount owed by Wheat in accordance with the instructions given Wheat by their agent, Vincent S. Meyer. Whatever negligent failure there may have been by Wheat in carrying out the instructions of Vincent S. Meyer, concerning the payment of the balance due him, was not a violation of a duty owed to his daughters, or either of them.

The third prerequisite to a right of action for damages for negligence is that the alleged negligent act or omission by the defendant was the proximate cause of the injury of which the plaintiff complains. *McNair v. Boyette, supra; Moody v. Kersey, supra.* Assuming, for the moment, that Wheat owed a legal duty to Anne and Elizabeth Meyer to use due care to send to the designated bank in Richmond the full amount owed by Wheat to Vincent S. Meyer and that Wheat defaulted in the performance of that duty, Wheat would be liable for no loss sustained by Anne and Elizabeth Meyer if a wrongful act by another person, not reasonably foreseeable by Wheat, intervened between Wheat's default and the injury of which these plaintiffs complain and if the injury would not have occurred but for such intervening wrong. *Butner v. Spease,* and *Spease v. Butner,* 217 N.C. 82, 6 S.E. 2d 808. See also: *McNair v. Boyette, supra;*

*Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894; *Potter v. Frosty Morn Meats, Inc.,* 242 N.C. 67, 86 S.E. 2d 780; *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919; *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, 74 S.E. 2d 36; Strong, N. C. Index 2d, Negligence, § 10.

The plaintiffs, Anne and Elizabeth Meyer, allege in their complaint that, through their agent, Vincent S. Meyer, they ordered McCarley to sell their Levitz stock, held by McCarley, and that the sale price specified by them in such instruction could have been obtained at the time the instruction was given. They allege that McCarley refused to carry out this instruction for the reason that Vincent S. Meyer had not paid for his own shares of the Levitz stock. If, as McCarley contends, no such "sell order" was given, the alleged default by Wheat in its procedure for paying its indebtedness to Vincent S. Meyer had no causal relation to any loss sustained by Anne and Elizabeth Meyer through the decline of the Levitz stock on the market. If such "sell order" was given, the failure of McCarley to sell the stock of Anne and Elizabeth Meyer was an intervening wrong by McCarley which could not reasonably have been foreseen by Wheat as a probable result of Wheat's own negligence in disregarding Vincent S. Meyer's instruction to it concerning the payment of its indebtedness to him.

**[3]** As between Wheat and the plaintiffs, the giving and failure to follow the "sell order" are not in controversy. It is likewise uncontroverted, between them, that Anne and Elizabeth Meyer had paid in full for the Levitz shares held by McCarley for their account. Furthermore, it is conceded by the deposition of the president of McCarley that even had the stock held for these plaintiffs not been paid for, that circumstance would not prevent the execution of a "sell order." Our attention has been called to no rule, regulation or custom of any stock exchange or of any regulatory agency which would require, or even justify, the rejection by a broker of his customer's "sell order" for the reason that the customer had not paid for the purchase of such stock. We are aware of no rule of law which would have that effect. The alleged failure of McCarley to comply with the "sell order" given it by Vincent S. Meyer with reference to the stock held by McCarley for the accounts of Anne and Elizabeth Meyer was, therefore, not reasonably foreseeable by Wheat at the time it allegedly failed to carry out the instructions given it by Vincent S. Meyer with reference to the payment of its indebtedness

to him. It was an intervening wrongful act of a third party (if the plaintiffs' allegations be true) which insulated the alleged negligence of Wheat. Wheat, therefore, cannot be held liable for the resulting loss sustained by the plaintiffs Anne and Elizabeth Meyer on the theory of negligence.

**[4]** Assuming that Wheat was under a contractual duty to Vincent S. Meyer to pay its indebtedness to him by transmission of its check to his bank and that Wheat failed to perform this duty, the plaintiffs, Anne and Elizabeth Meyer, were not parties to that contract nor were they third-party beneficiaries thereof. Consequently, they have no standing to sue for its breach. *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.,* 277 N.C. 119, 177 S.E. 2d 273; *Trust Co. v. Processing Co.,* 242 N.C. 370, 88 S.E. 2d 233; *Land Co. v. Realty Co.,* 207 N.C. 453, 177 S.E. 335. Nothing whatever in the pleadings, or in the depositions and affidavits filed for consideration of the court at the hearing on the motion for summary judgment, indicates that the parties to such contract intended it to be for the benefit of Anne or Elizabeth Meyer. Their accounts with Wheat were separate and distinct from that of Vincent S. Meyer. The balances due them upon such accounts were paid to them by Wheat in accordance with instruction of their agent.

**[5]** In Williston on Contracts, 3rd Ed., § 402, it is said: "It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance. Such a person is neither a donee beneficiary nor a creditor beneficiary, but belongs to the third type—the incidental beneficiary. An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." In *Kelly v. Richards,* 95 Utah 560, 83 P. 2d 731, 129 A.L.R. 164, the Court said, "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof." In 17A C.J.S., Contracts, § 518, it is said: "As a general rule, one who is not a party to a contract, but who has been injured by a breach thereof, cannot maintain an action for such breach or derive any benefit therefrom." In 17 Am. Jur. 2d, Contracts, § 297, it is said:

> "Ordinarily, the obligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in

privity with it, except under a real party in interest statute, or under certain circumstances, by a third-party beneficiary. As a general rule, whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, and none but a party to a contract has the right to recover damages for its breach against any of the parties thereto. It has been said that he alone to whom a promise is made or in whom its legal interest is vested can enforce performance or complain of its breach."

Nothing in the pleadings or in the depositions or affidavits contained in the record suggests any intent by Vincent S. Meyer or Wheat that the alleged contract, whereby Wheat was to pay its indebtedness to Vincent S. Meyer by sending the amount of the balance in his account with Wheat to the bank designated by him for deposit therein to his credit, was intended to benefit in any way either Anne or Elizabeth Meyer. Neither his statement to Wheat that he wanted to buy other stock nor his statement that he needed his money to cover a check he was about to issue indicates any intent to benefit them by such transfer of the balance due him.

It follows that no cause of action in favor of either Anne or Elizabeth Meyer against Wheat has been alleged in their complaint and, the facts being uncontroverted as between these parties, the Superior Court properly granted Wheat's motion for summary judgment against the plaintiffs Anne K. Meyer and Elizabeth S. Meyer and dismissed their action against Wheat. The Court of Appeals erred in reversing that portion of the judgment of the Superior Court. That portion of the judgment of the Court of Appeals is, therefore, reversed.

Reversed.

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MARCIE GAYNELL EUDY v. VAN PATRICK EUDY

No. 124

(Filed 26 June 1975)

**1. Divorce and Alimony § 2— divorce action — required allegations**

The allegations required by G.S. 50-8 are indispensable constituent elements of a divorce action and must be established either by the ver-

dict of a jury or by a judge, as the pertinent statute may permit. G.S. 50-10.

2. **Rules of Civil Procedure § 15— amendment of pleadings to conform to proof**

In order for pleadings to be amended to conform to the proof pursuant to Rule 15(b), there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded.

3. **Divorce and Alimony § 2; Rules of Civil Procedure § 15— failure to allege residence — divorce from bed and board — no amendment of pleadings to conform to proof**

In an action for alimony without divorce wherein plaintiff failed to allege that plaintiff or defendant had been a resident of North Carolina for at least six months next preceding the institution of the action as required in a divorce action, the pleadings were not deemed amended to conform to evidence of residence, and the court was therefore without jurisdiction to grant plaintiff a divorce from bed and board, where evidence as to residence of the parties was admitted to introduce the witnesses or was casually intertwined with the proof of other material facts clearly embraced by the pleadings, and there is nothing to indicate that the evidence was such that defendant understood or reasonably should have understood that any issue other than those embraced in the pleadings was being tried.

4. **Divorce and Alimony § 16— amount of alimony — appellate review**

While the trial judge's determination of the amount of alimony is not absolute and unreviewable, it will not be disturbed absent a clear abuse of discretion.

5. **Divorce and Alimony § 16— amount of alimony — findings not required**

Findings of fact are not required to support the trial judge's finding of the *amount* of alimony in actions for divorce from bed and board or in actions for alimony *pendente lite*. G.S. 50-16.8.

6. **Divorce and Alimony § 16— no jurisdiction to grant divorce — remand for grant of alimony without divorce**

Where the trial court was without jurisdiction to grant a divorce from bed and board, and the pleadings, evidence and issues submitted to and answered by the jury support a judgment for alimony without divorce, the cause is remanded for entry of such judgment.

ON *certiorari* to review the decision of the Court of Appeals, 24 N.C. App. 516, 211 S.E. 2d 536, which vacated the judgment of *Webb, District Court Judge,* entered at the February, 1974, Session of UNION County District Court, and remanded for a new trial.

Plaintiff-wife filed this action seeking *alimony without divorce,* requesting that certain real and personal property be

secured to her, seeking assessment of attorney's fees for her counsel, and generally praying for such other and further relief to which she might be entitled. She supported her prayers for relief with allegations of abandonment, cruelty, adultery, and other indignities to her person by defendant-husband. Her complaint did not allege that plaintiff or defendant had been a resident of the State of North Carolina for at least six months next preceding the institution of the action.

Defendant answered and denied the material allegations of the complaint except for the allegation of separation. He alleged that plaintiff's nagging and abusive treatment toward him were the causes of the separation.

Both plaintiff and defendant offered evidence in support of their respective contentions, and at the conclusion of the evidence issues were submitted to, and answered by, the jury as follows:

1. Were the plaintiff and the defendant lawfully married as alleged in the complaint?

ANSWER: Yes.

2. Did the defendant abandon his wife without adequate provocation as alleged in the complaint?

ANSWER: Yes.

3. Did the defendant by cruel or barbarous treatment endanger the life of the plaintiff without adequate provocation as alleged in the complaint?

ANSWER: Yes.

4. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome without adequate provocation as alleged in the complaint?

ANSWER: Yes.

The parties agreed that Judge Webb should determine whether plaintiff was a dependant spouse and whether defendant was a supporting spouse. After conducting a hearing, the judge determined plaintiff to be a dependent spouse, defendant to be a supporting spouse, and upon making additional findings as to plaintiff's needs and the financial circumstances of the

parties, entered judgment granting plaintiff *a divorce from bed and board,* alimony, and attorney's fees. Defendant appealed, and the Court of Appeals vacated Judge Webb's judgment and ordered a new trial. We allowed *certiorari* on 2 April 1975.

*Henry T. Drake, attorney for plaintiff appellant.*

*Clark and Griffin, by Richard S. Clark and Lewis R. Fisher, and Coble Funderburk, for defendant appellee.*

BRANCH, Justice.

Plaintiff contends that the Court of Appeals erred in granting a new trial because her complaint failed to allege that either she or defendant were residents of the State of North Carolina for six months next preceding the filing of her complaint.

**[1]** G.S. 50-8, in part, provides that in all actions for divorce plaintiff shall set forth in his or her complaint that complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding filing of the complaint. Prior to the enactment of Chapter 590 of the 1951 Session Laws, the Court acquired no jurisdiction in an action for absolute divorce or in an action for divorce from bed and board unless plaintiff filed with his complaint an affidavit containing the required statutory averments, one of which was the above-quoted residency requirement. The filing of this affidavit was mandatory. Absent all required averments, the Court had no jurisdiction, and the action was subject to dismissal by the Court, either *ex mero motu* or upon motion duly made. *Carpenter v. Carpenter,* 244 N.C. 286, 93 S.E. 2d 617; *Hodges v. Hodges,* 226 N.C. 570, 39 S.E. 2d 596; *Nichols v. Nichols,* 128 N.C. 108, 38 S.E. 296. On the other hand, when the proper affidavit was filed, the Court acquired jurisdiction in divorce actions. *Kinney v. Kinney,* 149 N.C. 321, 63 S.E. 97. The 1951 Act eliminated the necessity for the affidavit, but the Act now codified as G.S. 50-8 requires plaintiff, *inter alia,* to set forth in his or her complaint an allegation that complainant or defendant has been a resident of North Carolina for at least six months next preceding the filing of the complaint. Thus, the allegations required by G.S. 50-8 are indispensable, constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge, as the pertinent statute may permit. G.S. 50-10; *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296.

The statutory changes eliminating the necessity for the filing of the affidavit and allowing a judge in some cases to become the trier of facts in divorce actions do not change the fundamental precepts that jurisdiction over the subject matter of divorce is statutory and that all averments required by the statute must be both alleged in the complaint and found by the finder of fact to be true before a divorce judgment may be entered. G.S. 50-10; *Wicker v. Wicker,* 255 N.C. 723, 122 S.E. 2d 703; *Israel v. Israel,* 255 N.C. 391, 121 S.E. 2d 713; *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29; *Pruett v. Pruett, supra; Carpenter v. Carpenter, supra; Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7.

Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. *Burtnett v. King,* 33 Cal. 2d 805, 205 P. 2d 657; 20 Am. Jur. 2d *Courts* § 151 at 497. In instant case plaintiff failed to allege the residential requirements expressly required by G.S. 50-8, and the Court therefore was without jurisdiction to grant plaintiff a divorce from bed and board unless, as plaintiff contends, the pleadings were amended by the rule of "litigation by consent" pursuant to G.S. 1A-1, Rule 15(b) (hereafter cited as Rule 15(b)). We turn to consideration of the effect of this rule upon the facts of this case.

Rule 15(b) reads as follows:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense

upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

We discussed the rationale of this rule in *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721. We quote from that case:

> The thrust of this rule seems to destroy the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings and, in some cases, by the evidence. Under 15(b) the rule of "litigation by consent" is applied when *no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings.* In such case the statutory rule, in effect, amends the pleadings to conform to the evidence and allows any issue raised by the evidence to go to the jury. *Even when the evidence is objected to on the ground that it is not within the issues raised by the pleadings,* the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. The far-reaching effect of this statutory rule is emphasized by the burden placed on the objecting party to specify the grounds of objection and to satisfy the court that he will be prejudiced by the admission of the evidence or by litigation of the issues raised by the evidence. The objecting party must meet these requirements in order to avoid "litigation by consent" or allowance of motion to amend. [Original emphasis.]

Despite the broad remedial purpose of this provision, however, Rule 15(b) does not permit judgment by ambush. One respected authority on federal practice has succinctly stated the limits of its application, as follows:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent

> to try an issue where the parties do not squarely recognize it as an issue in the trial. . . .

3 J. Moore, Moore's Federal Practice ¶ 15.13[2] at 991-992 (2d ed.). *See also* 6 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 1493 at 466-467; Note, 9 Wake Forest L. Rev. 247.

Federal cases amply support the general statement of law given above. In *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F. 2d 709 (6th Cir.), the Court well stated the rule which governs resolution of an amendment-by-consent situation:

> We think it clear that if a theory of recovery is tried fully by the parties, the court may base its decision on that theory and may deem the pleadings amended accordingly, even though the theory was not set forth in the pleadings or in the pretrial order. *See Wallin v. Fuller*, 476 F. 2d 1204 (5th Cir. 1973); *Monod v. Futura, Inc.*, 415 F. 2d 1170 (10th Cir. 1969); *Dering v. Williams*, 378 F. 2d 417 (9th Cir. 1967); Fed. R. Civ. P. 15(b). However, the implication of Rule 15(b) and of our decision in *Jackson v. Crockarell*, [475 F. 2d 746 (6th Cir.)], is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue. *See Bettes v. Stonewall Ins. Co.*, 480 F. 2d 92 (5th Cir. 1973); *Standard Title Ins. Co. v. Roberts*, 349 F. 2d 613, 620 (8th Cir. 1965); *Niedland v. United States*, 338 F. 2d 254, 258 (3d Cir. 1964).

*Accord: Bettes v. Stonewall Ins. Co.*, 480 F. 2d 92 (5th Cir.); *Cole v. Layrite Products Co.*, 439 F. 2d 958 (9th Cir.); *Wasik v. Borg*, 423 F. 2d 44 (2d Cir.); *Armstrong Cork Co. v. Lyons*, 366 F. 2d 206 (8th Cir.); *Systems, Inc. v. Bridge Electronics Co.*, 335 F. 2d 465 (3d Cir.); *United States v. 47 Bottles, More or Less*, 320 F. 2d 564 (3d Cir.), *cert. denied sub nom. Schere v. United States*, 375 U.S. 953, 84 S.Ct. 444, 11 L.Ed. 2d 313; *Wickahoney Sheep Co. v. Sewell*, 273 F. 2d 767 (9th Cir.); *Freitag v. The Strand of Atlantic City, Inc.*, 205 F. 2d 778 (3d Cir.); *Otness v. United States*, 23 F.R.D. 279 (D. Alaska).

The cases also fully support the proposition that where evidence claimed to support trial by consent is relevant to an

issue explicitly embraced by the pleadings, and there is no indication at the trial that the party introducing the evidence sought to raise a new issue, the pleadings will not be deemed amended by consent under Rule 15(b). *See, e.g., Cox v. Fremont County Public Building Authority,* 415 F. 2d 882 (10th Cir.); *Standard Title Ins. Co. v. Roberts,* 349 F. 2d 613 (8th Cir.); *Gallon v. Lloyd-Thomas Co.,* 264 F. 2d 821 (8th Cir.); *Macris v. Sociedad Maritima San Nicolas, S.A.,* 245 F. 2d 708 (2d Cir.), *cert. denied,* 355 U.S. 922, 78 S.Ct. 364, 2 L.Ed. 2d 353; *United States v. City of Brookhaven,* 134 F. 2d 442 (5th Cir.); *Simms v. Andrews,* 118 F. 2d 803 (10th Cir.); *Wirtz v. F. M. Sloan, Inc.,* 285 F. Supp. 669 (W. D. Pa.), *aff'd,* 411 F. 2d 56 (3d Cir.).

We note that the Court of Appeals, *ex mero motu,* properly took note of the question of want of jurisdiction in this case. *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715.

We need reach the question of the effectiveness of Rule 15(b) to cure a failure to allege this jurisdictional fact if, and only if, (1) sufficient evidence was introduced without objection to show, directly or by legitimate inference, that the parties had been residents of North Carolina for the six months next preceding the commencement of this action and (2) the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings.

Prior to the 1951 Act, now codified as G.S. 50-8, the question of whether the required affidavit complied with the statute so as to confer jurisdiction upon the Court in a divorce action was a matter to be determined by the trial judge. Upon the effective date of present G.S. 50-8, the statutory requirements for obtaining a divorce became material facts which must be alleged in the complaint and passed upon by the jury or, in proper cases, by a judge sitting as a jury. *Carpenter v. Carpenter, supra; Pruett v. Pruett, supra.* Thus, since the material facts must be found from the evidence offered, the *opportunity* to amend by consent does exist. However, the facts of instant case do not present the question of whether *required jurisdictional averments* may be supplied by the application of the provisions of Rule 15(b).

**[2, 3]** The evidence in this case would have supported a jury verdict and judgment for alimony without divorce. The same

evidence, properly pleaded, would also have supported a verdict and judgment for divorce from bed and board. Although there was evidence from which the jury could reasonably infer that both plaintiff and defendant had been residents of Union County, North Carolina, for six months next preceding the filing of the complaint in this cause, this evidence was admitted to introduce the witnesses or was casually intertwined with the proof of other material facts clearly embraced by the pleadings. In order for pleadings to be amended to conform to the proof pursuant to Rule 15(b), there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded. Here, the evidence supports issues embraced by the pleadings without indicating in any manner that the parties introducing the evidence sought to raise a new issue. There is nothing to indicate that the evidence was such that defendant understood or reasonably should have understood that any issue other than those embraced in the pleadings was being tried. Under these circumstances the provisions of Rule 15(b) do not apply so as to amend the pleadings to conform to the evidence. The essential issue of residence simply was not pleaded or tried in this case as is required to support a judgment for divorce from bed and board. We therefore hold that the Court of Appeals correctly vacated the judgment entered in Union County District Court.

Appellant assigns as error the holding of the Court of Appeals that the trial judge erred in awarding alimony. In this regard the Court found that the trial judge failed to make sufficient findings as to the estate, income, earnings, and expenses of defendant. This conclusion points to error on the part of the trial judge in fixing the *amount* of alimony.

G.S. 50-16.5(a) 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.

**[4]** The trial judge must follow the requirements of this statute in determining the amount of alimony to be awarded, but the determination of such amount lies within his sound discretion. The trial judge's determination of the amount of alimony is not absolute and unreviewable, but it will not be disturbed

absent a clear abuse of discretion. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5; *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218.

We note that the Court of Appeals relied on *Briggs v. Briggs,* 21 N.C. App. 674, 205 S.E. 2d 547, to support its conclusion. The Court in that case considered a contention that the trial judge erred in failing to make sufficient findings to support an order of alimony *pendente lite* as required by G.S. 50-16.8. It is true that this statute specifically requires the judge to find facts from the evidence presented upon a hearing on application for alimony *pendente lite.* In our opinion this requirement does not refer to the amount of alimony, but refers to the ultimate facts which must be found pursuant to G.S. 50-16.3. We think it pertinent that subsection (b) of that section provides that "the determination of the amount . . . of alimony *pendente lite* shall be in the same manner as alimony. . . ." The language of *Briggs* itself is consistent with our conclusion. We quote a pertinent passage from that case:

> The trial judge in this case found from competent evidence that a marital relationship existed between the parties; that the plaintiff is substantially dependent upon the defendant for her maintenance and support; and that the defendant is capable of making support payments. These findings are sufficient to show that plaintiff is the dependent spouse, and that defendant is the supporting spouse.

**[5]** Our examination of the relevant statutes and this Court's interpretation of these statutes leads us to conclude that findings of fact are not required to support the trial judge's finding of the *amount* of alimony in action for divorce from bed and board or in action for alimony *pendente lite.*

**[6]** The District Court was without jurisdiction to grant a divorce from bed and board. However, the residency requirement of G.S. 50-8 is not applicable in an action for alimony without divorce. Here the pleadings, the evidence, and the issues submitted to, and answered by, the jury support a judgment for alimony without divorce. Therefore, the cause is remanded to the Court of Appeals with direction that it remand to the District Court of Union County for entry of judgment consistent with the jury verdict.

Modified and affirmed.

MAMIE PAULINE PEGRAM TUCKER v. MELVIN CLARENCE TUCKER, JR.

No. 118

(Filed 26 June 1975)

1. **Divorce and Alimony § 24— custody of child — discretion of trial court**

   The trial judge who has the opportunity to see and hear the parties and the witnesses is vested with broad discretion in cases involving the custody of children, and the welfare of the child is the paramount consideration that must guide the court in exercising this discretion.

2. **Divorce and Alimony § 24— custody of child — modification upon substantial change of circumstances**

   An order pertaining to the custody of the child does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the court may modify prior custody decrees; however, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances affecting the welfare of the child, and the party moving for such modification has the burden of showing such change of circumstances. G.S. 50-13.7.

3. **Parent and Child § 6— custody of child — right of parent not absolute**

   As a general rule in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and this right may not lightly be denied or interfered with by action of the courts; however, this right is not absolute, and it may be interfered with or denied for substantial and sufficient reasons, and is subject to judicial control when the interest and welfare of the children clearly require it.

4. **Divorce and Alimony § 24— mother divested of custody of minor — changed circumstances — insufficiency of evidence**

   Evidence was insufficient to support the trial court's finding that there had been a substantial change of circumstances affecting the welfare of a minor from 7 June 1974, the date of the last order granting the mother custody, to 7 August 1974, the date of the order depriving her of that custody, or that there was convincing proof that plaintiff was an unfit person to have the custody of her son; therefore, the trial court erred in awarding custody of the minor to his older brother and his wife.

APPEAL pursuant to G.S. 7A-30(2) to review the decision of the Court of Appeals, reported in 24 N.C. App. 649, 211 S.E. 2d 825 (1975), which affirmed the order of *Alexander, J.*, at the 29 July 1974 Session of GUILFORD District Court.

This action was instituted 9 March 1973 when plaintiff-wife filed complaint seeking alimony without divorce, child cus-

tody and support, and counsel fees. The parties were married 21 November 1943, and five children were born of the marriage. They have been living separate and apart since 9 March 1973. Of the five children born of the marriage, only Timothy Joe Tucker (Timmy), born 8 December 1961, is subject to the custody jurisdiction of district court.

After a hearing on 27 April 1973, Judge Clark, in an order dated 20 August 1973, found that defendant had constructively abandoned plaintiff through his indignities toward her; that plaintiff had been a good mother to Timmy since the separation of the parties and had taken good care of him; that she is the fit and proper person to have custody and control of Timmy; and that she is entitled to child support. Judge Clark then ordered that custody of Timmy be vested exclusively in plaintiff subject to visitation privileges in defendant and that defendant make support payments and tender certain property to plaintiff.

On 5 October 1973, plaintiff filed with the court a motion and affidavit alleging that defendant, in willful contempt of the 20 August order, was keeping Timmy continuously in his custody. After hearing before Judge Haworth on 23 October 1973, that judge found that notwithstanding the terms and conditions of Judge Clark's order of 20 August 1973, defendant had willfully and without lawful excuse permitted Timmy to remain with him at all times since 27 April 1973. Judge Haworth further found that it was still in the best interest of Timmy that his primary custody be placed in the plaintiff, and ordered that defendant forthwith deliver the child to her. Defendant was adjudged in contempt and ordered confined to jail for twenty days, defendant to be relieved of such confinement however so long as he specifically complied with each provision set forth in the order.

On 7 March 1974, plaintiff filed a motion seeking an order directing defendant to show cause why he should not be sentenced to jail for willful contempt of the orders of 20 August 1973 and 23 October 1973, alleging that defendant had failed and refused to transfer certain property and to deliver custody of Timmy to plaintiff. Judge Clark heard the motion on 25 March 1974 and entered an order on 10 May 1974 finding as facts that the defendant was too irresponsible to have custody of Timmy and that his actions showed that he had no intention of complying with past orders. Judge Clark then ordered that

defendant be confined to jail for willful contempt for thirty days, the order not to take effect, however, provided defendant complied with the conditions of that and previous orders.

On 24 May 1974, plaintiff moved for another show-cause order against defendant, alleging the willful noncompliance by defendant with prior court orders. Such motion was granted 28 May 1974 by Judge Alexander. At the hearing on 7 June 1974, Judge Alexander adopted the findings of facts contained in the three previous orders, modified property and visitation rights, ordered that plaintiff have custody of Timmy, and that defendant be confined to jail if he failed to comply with this and previous orders.

On 18 June 1974, plaintiff again moved for an order directing defendant to appear and show cause why he should not be sentenced to jail for his willful contempt in failing to comply with the prior orders regarding property disposition and custody of Timmy, and why he should not be denied visitation rights. On 8 July 1974, Judge Alexander directed that the matter be set for hearing on 29 July 1974 and directed further that the Departments of Social Services of Guilford and Rockingham Counties investigate the homes of both parents and all married children of the parties.

On 30 July 1974, Judge Alexander heard testimony of several witnesses and considered reports from the Departments of Social Services. The two daughters of the marriage testified that Timmy is happy living with his mother; that Timmy's mother could control him if he were left alone by his father; that they hate their father because of the way he has treated them and their mother; and that defendant has said no one is going to tell him what to do regarding Timmy. Plaintiff testified that Timmy had spent only six or seven nights at her home since the 7 June order because "his daddy told him he didn't have to listen to [her] and that he could do as he pleased." Three friends of plaintiff testified that she is a good Christian person and a fit and proper person to have custody of Timmy.

Clarence Michael Tucker, a son of the parties, testified that he has a six-year-old son, steady employment and a comfortable home, and that he and his wife are willing and able to properly supervise Timmy if given custody of him. Hilton Tucker, another son, testified that recently his mother became very angry at him when he sought to use some of the farm equipment in her

possession and that she told him to "forget that [he] was her son." He denied that her remarks were in response to comments by him that "she was crazy and . . . had no authority under the court [order] to use the farming equipment."

Investigations by social workers revealed that the mobile home of defendant was extremely cluttered but basically clean; that Mr. Tucker told a worker that plaintiff does not adequately supervise Timmy or provide him with food or clothing; that Timmy and his father share interests in athletics, raising dogs, and farming; that Timmy stated he wanted to live with his father because no one is ever at home at his mother's; and that the worker believes that defendant sometimes leaves Timmy inadequately supervised. A visit to the home of plaintiff revealed that it was neat and clean. Plaintiff stated that defendant has shown little interest in Timmy and has failed to give him adequate supervision. Defendant expressed his belief to social workers that plaintiff wants custody of Timmy as a way of hurting him. Plaintiff, to the contrary, stated that her husband was trying to get Timmy as a way of hurting her.

Visits to the homes of Hilton and Michael Tucker—sons of the parties—revealed that both sons are concerned about Timmy and that both have the means and inclination to take custody of him.

By order dated 7 August 1974, Judge Alexander found that the situation had deteriorated and that both plaintiff and defendant were totally unfit because of jealousy, vindictiveness, and emotional instability to have care and custody of Timmy, and that Clarence Michael Tucker, older brother of Timmy, and his wife are the most fit and proper persons to have custody of him. The court then ordered that Clarence Tucker and his wife be given custody of Timmy; that certain property of his parents be made available to provide support for him; and that the disposition of the contempt proceeding against defendant be reserved for further order of the court.

The Court of Appeals affirmed, with one member of the hearing panel dissenting. Plaintiff appealed.

*Younce, Wall and Suggs, by Adam Younce and Peter F. Chastain for plaintiff appellant.*

*No counsel contra.*

MOORE, Justice.

Following the hearing on 30 July 1974, Judge Alexander found facts, in part, as follows:

> "That the Court finds further that each [parent] has engaged in a course of conduct to consciously attempt to destroy the other and that the boy has been used by both as a tool to accomplish this result. . . . [T]hat neither of the parents are [sic] fit to have custody; that both the parties hereto are honorable people, and enjoy a good reputation, but custody in either of the parents under the present circumstances would be detrimental to the minor child and his emotional well-being."

Based upon her findings, Judge Alexander concluded as a matter of law:

> "That neither Mamie Pauline Pegram Tucker nor Melvin Clarence Tucker, Jr. are [sic] fit and proper persons to have the care and custody of the minor child, Timmy Joe Tucker; that Clarence Michael Tucker and wife and Hilton Wayne Tucker are both fit and proper persons to have the care and custody of Timmy Joe Tucker, but that Clarence Michael Tucker and wife are the most fit and capable persons to have the care and custody of Timmy Joe Tucker; that it is for the best interest of said minor to grant custody to Clarence Michael Tucker and wife; that the Defendant, Melvin Clarence Tucker, Jr., is in contempt of Court as a matter of law."

Judge Alexander then ordered:

> "1. The Court reserves the disposition of the Defendant for being in contempt of Court for further orders of the Court.
>
> "2. That Clarence Michael Tucker and wife are given exclusive care and custody of Timmy Joe Tucker.
>
> "3. That Clarence Michael Tucker and wife shall allow visitation by either of the parents at their pleasure, and at their convenience; that neither the Plaintiff nor the Defendant shall interfere with, harass or otherwise upset or bother Clarence Michael Tucker and wife in their exclusive custody of Timmy Joe Tucker.

"4. That the one-acre [sic] of tobacco and the proceeds therefrom shall be for the support of Timmy Joe Tucker.

"5. That this matter is retained for further Orders of this Court. This order is signed out of term by agreement of the parties."

The question presented by this appeal is whether there was sufficient evidence of change in circumstances affecting the welfare of Timmy to justify modification of the order of 7 June 1974 and other orders prior thereto, all of which placed him in custody of his mother, and to justify the order of 7 August 1974 which removed him from the custody of his mother and granted exclusive custody to Clarence Michael Tucker and his wife.

At the outset it should be noted that this matter was heard on 30 July 1974 on an order of the court, issued on motion of plaintiff, directing defendant to show cause why he should not be held in contempt for disobedience of former orders of the court granting plaintiff custody of her son. After this hearing, the court for the fourth time found defendant in contempt and in addition entered an order granting Clarence Michael Tucker and his wife custody of Timmy. Neither Clarence nor his wife was a party to this action. This order was based to a large extent upon two brief, written reports of social workers in Guilford and Rockingham Counties, neither of which contained statements of these workers that plaintiff was not a fit and proper person to have custody of her child. At the hearing several witnesses testified that plaintiff is a fine Christian woman and is a fit and proper person to have the custody of Timmy. Two other district court judges and Judge Alexander at a former hearing on this matter found this to be true. As late as 7 June 1974, Judge Alexander found: "The plaintiff is a fit, suitable and proper person to have the care, custody and control of Timmy and it would be in the best interest of and to the best interest of Timmy that he be in the exclusive care, custody and control of the plaintiff."

**[1]** Our Court has consistently held that the trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of children. *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967); *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966). The welfare of the child is the paramount

consideration that must guide the court in exercising this discretion. *Blackley v. Blackley, supra; Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332 (1965); *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871 (1963).

**[2]** An order pertaining to the custody of the child does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the court may modify prior custody decrees. G.S. 50-13.7. *Blackley v. Blackley, supra; Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967); *In re Herring,* 268 N.C. 434, 150 S.E. 2d 775 (1966). However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances affecting the welfare of the child, and the party moving for such modification has the burden of showing such change of circumstances. *Blackley v. Blackley, supra; Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357 (1968); *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967). As stated by Justice Branch in *Shepherd v. Shepherd, supra,* at 75, 159 S.E. 2d at 361:

> "A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.
>
> "We hold that there must be a finding of fact of changed conditions before an order may be entered modifying a decree of custody. . . . "

**[3]** As a general rule in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and this right may not lightly be denied or interfered with by action of the courts. This right is not absolute, however, and it may be interfered with or denied for substantial and sufficient reasons, and is subject to judicial control when the interest and welfare of the children clearly require it. *Brake v. Mills,* 270 N.C. 441, 154 S.E. 2d

526 (1967); *Shackleford v. Casey,* 268 N.C. 349, 150 S.E. 2d 513 (1966); *Spitzer v. Lewark,* 259 N.C. 50, 129 S.E. 2d 620 (1963); *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759 (1955). *See generally* 3 Lee, N. C. Family Law § 224 (3rd ed. 1963); Annot., 31 A.L.R. 3d 1187.

**[4]** There is no evidence in this record of any substantial change in conditions affecting the welfare of Timmy between 7 June 1974 and 7 August 1974. The friction between the parents had existed from the date of the first custody order in 1973. In fact, all of the evidence as to this friction and its effect on Timmy indicates that the court, not plaintiff, should probably bear the major responsibility. Four times defendant was cited to show cause why he should not be held in contempt for disobedience of the court's orders granting plaintiff custody of Timmy. Four times and by three different district court judges defendant was found to be in contempt and four times the court did nothing to enforce compliance. It is no wonder that Timmy failed to obey his mother. The court encouraged that disobedience by its failure to enforce its own orders. Even in the final order removing Timmy from the custody of his mother, the court again found that defendant had violated previous orders and was in contempt, but again failed to take action to enforce compliance.

One of the social workers who made an investigation at Judge Alexander's request recognized that the failure of the court to enforce its orders had aggravated the matter when she reported to the court:

> "It is worker's impression that Timmy is indeed caught in the middle of his parents' marital problems. Since Mr. and Mrs. Tucker live so close to one another and *since previous court orders seem to have been ineffective,* Timmy's placement in a brother's home or that of some other relative seems a viable avenue to consider at this point." (Emphasis added.)

We agree that in view of the court's failure to act to enforce its orders, Timmy's placement in his brother's home or that of some other relative was a viable solution to consider. However, we believe that a more viable solution would be for the court to enforce its several orders finding defendant in contempt by sentencing him to jail if necessary to assure compliance with former orders and to prevent him from interfering with plaintiff's custody of her child.

Surely, a mother who on four occasions goes into court to ask that it enforce its orders granting her custody of her minor son deserves more consideration than to have an order entered by that court depriving her of the custody of that child. In *Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973), Justice Sharp, now Chief Justice, quoted with approval from 2 Nelson, Divorce and Annulment § 15.09 (2d ed. 1961), as follows:

> "It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. . . . "

We do not think that there was sufficient evidence to support a finding that there had been a substantial change of circumstances affecting the welfare of Timmy from 7 June 1974, the date of the last order granting the mother custody, to 7 August 1974, the date of the order depriving her of that custody, *see Blackley v. Blackley, supra;* or that there was convincing proof that plaintiff is an unfit person to have the custody of her son. *See James v. Pretlow, supra.*

For the reasons stated, the decision of the Court of Appeals is reversed and the case is remanded to that court with direction to remand to the District Court of Guilford County for entry of judgment reversing the order of that court granting Clarence Michael Tucker and his wife custody of Timmy Joe Tucker, and directing that court to enter an order returning the custody of Timmy Joe Tucker to his mother, the plaintiff herein, in accordance with the order entered by Judge Alexander on 7 June 1974, and with the further direction that the District Court of Guilford County proceed to dispose of the contempt proceedings against defendant in accordance with law.

Reversed and remanded.

ROBERT L. YOUNT AND WILLIAM E. BUTNER, INDIVIDUALLY, AND ROBERT L. YOUNT AND WILLIAM E. BUTNER, T/D/B/A WILKES INDUSTRIAL PARK, A PARTNERSHIP v. ELMER LOWE

No. 58

(Filed 26 June 1975)

1. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

The party moving for summary judgment under Rule 56 has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court, and his papers are carefully scrutinized while those of the opposing party are on the whole indulgently regarded.

2. **Rules of Civil Procedure § 56— summary judgment — requirements**

G.S. 1A-1, Rule 56, conditions rendition of summary judgment on a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to judgment as a matter of law.

3. **Deeds § 14; Easements § 9; Registration § 3— easement granted in consent judgment — exemption of easement from deed — judgment and deed recorded**

Where plaintiffs brought an action to enjoin defendant from using a passageway over plaintiffs' property for any purpose other than those purposes specifically set out in G.S. 136-69 and when defendant answered claiming an easement in perpetuity with the unlimited right of egress, ingress, and regress over the lands of the plaintiffs by virtue of a consent judgment entered in a cartway proceeding brought by defendant against Paul Rhodes, plaintiffs' predecessor in title, the trial court properly granted defendant's motion for summary judgment since the consent judgment under which defendant claimed was recorded, the deed from Paul Rhodes, from whom defendant acquired the easement, to J. H. Pearson, plaintiffs' immediate predecessor, specifically exempted the easement granted to defendant, and that deed was recorded, both the consent judgment and the deed were in plaintiffs' chain of title, and plaintiffs took title to the land with notice of the perpetual right and easement owned by defendant.

4. **Easements § 9— purchaser of land — taking subject to prior easements**

The purchaser of lands upon which the owner has imposed an easement of any kind takes the title subject to all easements, however created, of which he has notice.

5. **Easements § 9; Highways and Cartways § 14; Judgments § 8— consent judgment — no limitation to issues in pleadings — cartway proceeding — easement given in consent judgment**

In rendering an adversary judgment, the jurisdiction of the court is restricted to the matters presented in the pleadings, but a consent judgment may extend to any matters agreed upon by the parties which are within the general jurisdiction of the court; therefore, the fact that a consent judgment granting defendant an easement in perpetuity

with the unlimited right of egress, ingress and regress over the lands of plaintiffs was rendered in a cartway proceeding did not limit the scope or affect the validity of the easement granted.

6. **Judgments § 10— consent judgment — rules for contract interpretation applicable**

Since a consent judgment is a contract, the rules which courts have evolved for the interpretation of contracts are applicable to consent judgments.

7. **Easements § 9— appurtenant easement defined**

An appurtenant easement is an incorporeal right attached to the land and incapable of existence separate and apart from the particular land to which it is annexed.

8. **Easements § 9— appurtenant easement — taking of servient estate**

By a consent judgment entered between defendant and plaintiffs' predecessor in title, the predecessor in title intended to pass and did pass to defendant an easement in perpetuity appurtenant to and running with the dominant estate to which it was annexed, and plaintiffs had notice thereof and took title to the servient estate burdened therewith; therefore, there was no genuine issue as to any material fact remaining, and defendant was entitled to judgment as a matter of law.

APPEAL by plaintiffs from decision of the Court of Appeals, 24 N.C. App. 48, 209 S.E. 2d 867 (1974), affirming judgment of *Collier, J.*, 18 March 1974 Session, WILKES Superior Court.

Plaintiffs commenced this action on 2 January 1974 to enjoin defendant from using a passageway over plaintiffs' property for any purpose other than those purposes specifically set out in G.S. 136-69, the statute prescribing the procedure for obtaining and laying out a cartway.

Defendant answered claiming an easement in perpetuity with the unlimited right of egress, ingress and regress over the lands of the plaintiffs by virtue of a consent judgment entered in a cartway proceeding brought by defendant against Paul Rhodes, plaintiffs' predecessor in title.

The consent judgment relied on by defendant, entered in the Superior Court of Wilkes County in a proceeding entitled *"Elmer Lowe, Petitioner v. Paul Rhodes, Defendant,"* dated 11 November 1970, duly docketed and recorded, reads in pertinent part as follows:

"1. The petitioner, Elmer Lowe, is hereby granted a cartway across the lands of the defendant and extending from the eastern boundary of the tract of land deeded to the

petitioner by Joe O. Brewer, T. R. Bryan, Sr. and Ralph Davis, Commissioners, said deed being recorded in book 496 page 63 Office of the Wilkes County Registry across the lands of the defendant to the western boundary of secondary road #1001, more commonly known as the Oakwoods or Brushy Mountain Road. By the granting of this cartway, the petitioner and his successors in title forever are given a perpetual right and easement of egress, ingress and regress over and upon the said cartway, as hereinafter described, and the said cartway or easement herein granted is appurtenant to and runs with the petitioner's land as above described. The cartway herein granted is described as follows: Lying and being in Wilkesboro Township, Wilkes County, North Carolina and more particularly described as follows:

> BEGINNING On a Stake in the west margin of the right-of-way of the Oakwood Road, said stake being 15.6 feet; south of a right-of-way marker and running thence S. 54° 30′ E 25 feet to a stake; thence N 67° 30′ W 379 feet to a stake; thence N 63° 30′ W 391 feet to a stake in Elmer Lowe's line at a Poplar thence S. 87° E 48 feet to a stake; thence S 63° 30′ E 345 feet to a stake; thence S 67° 30′ E 362 feet to the beginning, containing 14,760 square feet.

2. In full and complete consideration for the granting of the cartway herein given to the petitioner, the defendant shall have and recover of the petitioner the sum of Two Thousand ($2,000.00) Dollars in full and final settlement of all matters in controversy arising out of this action, and in full and final settlement for the conveyance of the cartway herein granted to the petitioner."

Plaintiffs allege that defendant is using the "cartway" granted in the consent judgment for the construction of a private residence on defendant's property and not for any purpose for which a cartway may be obtained under G.S. 136-69. Therefore, plaintiffs assert that the value of their lands across which the "cartway" runs will be substantially and irreparably decreased unless defendant is permanently enjoined from using the roadway for any purpose other than those specified in G.S. 136-69.

After the complaint and answer were filed, defendant moved for summary judgment under Rule 56(b) of the Rules of

Civil Procedure. In support of his motion he submitted the following documents:

1. Consent judgment entered in the proceeding entitled "*Elmer Lowe, Petitioner v. Paul Rhodes, Defendant*" on 11 November 1970, recorded in the Office of the Clerk of Superior Court of Wilkes County and in the office of the Register of Deeds of Wilkes County in Book 512, Page 1648.

2. Certified copy of deed from Paul Rhodes to J. H. Pearson and others, covering the lands on which the easement was claimed, dated 4 April 1972, recorded in Deed Book 517, Page 310, in the office of the Wilkes County Registry. This deed provided that the property conveyed was subject to certain exceptions which included: "Right-of-easement in favor of Elmer Lowe, dated November 11, 1970, and recorded in Book 512, at page 1648, Wilkes County Public Registry, together with any and all other rights-of-way or easements recorded or unrecorded."

3. Certified copy of deed from J. H. Pearson and others to Wilkes Industrial Park, a partnership, dated 27 June 1973, recorded in Book 527, Page 26, in the office of the Wilkes County Registry.

4. Affidavit of Elmer L. Lowe showing the construction of a home on his property at a contract price of over $60,000.00 upon which $55,000.00 had already been paid, the construction of a road, farm pond stocked with fish, the planting of an orchard, and extensive cultivation of land.

Plaintiffs answered the motion for summary judgment and asserted there were issues of fact for determination by the jury. Plaintiffs supported their answer by affidavits which disputed defendant's assertions that he was using his property for one or more of the purposes for which a cartway may be obtained under G.S. 136-69 and prayed that defendant's motion for summary judgment be denied for that, in fact, genuine issues of material facts do exist.

The trial court found facts and concluded as a matter of law that no genuine issue as to any material fact existed and that defendant was entitled to judgment as a matter of law. Summary judgment was accordingly entered, and plaintiffs' action was dismissed. On appeal, the Court of Appeals affirmed

with Morris, J., dissenting. Plaintiffs thereupon appealed to this Court as of right pursuant to G.S. 7A-30(2).

*Butner and Gaither by J. Richardson Rudisill, Jr., Attorneys for plaintiff appellants.*

*E. James Moore; J. Gary Vannoy of the firm Vannoy, Moore & Colvard, Attorneys for defendant appellee.*

HUSKINS, Justice.

The sole question before us is whether the Court of Appeals erred in upholding summary judgment for the defendant.

Principles applicable to summary judgment under Rule 56 are detailed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and have been applied in numerous cases by this Court, including *Harrison Associates, Inc. v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

**[1, 2]** The party moving for summary judgment under Rule 56 has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice § 56.15[8], at 2439-40 (1974). The rule itself conditions rendition of summary judgment on a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c) (1969); *Kessing v. Mortgage Corp., supra.*

Defendant's evidence, oral and documentary, tends to show that his tract of land was completely surrounded by the lands of others at the time he purchased it. On 8 July 1969 he instituted a cartway proceeding under G.S. 136-68 et seq. to establish a cartway across the lands of Paul Rhodes, plaintiffs' predecessor in title. That cartway proceeding was settled by a consent judgment, dated 11 November 1970, containing the following language: "By the granting of this cartway, the petitioner and his successors in title forever are given a perpetual right and easement of egress, ingress and regress over and upon the said

cartway, as hereinafter described, and the said cartway or easement herein granted is appurtenant to and runs with the petitioner's land as above described." Elmer Lowe paid Paul Rhodes $2,000.00 for the "perpetual right and easement."

By deed dated 4 April 1972, duly recorded in the Wilkes County Registry, Paul Rhodes conveyed the lands, burdened with the easement described in the consent judgment, to J. H. Pearson, et al., plaintiffs' immediate predecessors in title. This deed provided, among other things, that the property was conveyed subject to: "Right-of-easement in favor of Elmer Lowe, dated November 11, 1970, and recorded in Book 512 at page 1648, Wilkes County Public Registry, together with any and all other rights-of-way or easements recorded or unrecorded." Then, by deed dated 27 June 1973, J. H. Pearson, et al., conveyed said property to the plaintiffs in this action by a deed which fails to mention the easement in favor of Elmer Lowe.

The supporting affidavit of Elmer Lowe asserts that after obtaining the right-of-way easement over the Paul Rhodes lands, he constructed a road thereon leading from defendant's lands to secondary road #1001, commonly known as the Oakwoods or Brushy Mountain Road. Defendant has used said road for ingress, egress and regress since that time.

**[3, 4]** Due consideration of the foregoing evidence, supporting documents, and materials presented by defendant in support of his motion impels the conclusion that the granting of summary judgment by the trial court was correct. We hold that defendant has carried the movant's burden of proof. The purchaser of lands upon which the owner has imposed an easement of any kind takes the title subject to all easements, however created, of which he has notice. *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517 (1944); *accord, Dulin v. Williams,* 239 N.C. 33, 79 S.E. 2d 213 (1953); *Trust Co. v. Braznell,* 227 N.C. 211, 41 S.E. 2d 744 (1947). The consent judgment entered in the action between defendant and Paul Rhodes was recorded in the office of the Register of Deeds of Wilkes County on 12 November 1970. Furthermore, in the deed from Paul Rhodes to J. H. Pearson, et al., the easement theretofore granted across the Rhodes land was specifically exempted, and the grantees took the title subject to the easement. J. H. Pearson, et al., could not convey to plaintiffs more than they owned. Both the consent judgment creating the "right-of-easement in favor of Elmer

Lowe" and the deed from Paul Rhodes to J. H. Pearson, et al., were duly recorded, were in plaintiffs' chain of title, and plaintiffs took title to the land with notice of the perpetual right and easement owned by Elmer Lowe. *Hensley v. Ramsey,* 283 N.C. 714, 199 S.E. 2d 1 (1973); *Gas Co. v. Day,* 249 N.C. 482, 106 S.E. 2d 678 (1959); *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541 (1953); *Bender v. Tel. Co.,* 201 N.C. 355, 160 S.E. 352 (1931).

**[5]** In rendering an adversary judgment, the jurisdiction of the court is restricted to the matters presented in the pleadings, but a consent judgment may extend to any matters agreed upon by the parties which are within the general jurisdiction of the court. *Holloway v. Durham,* 176 N.C. 550, 97 S.E. 486 (1918). "The decisions of this State have gone very far in approval of the principle that a judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the Court and would seem to uphold the position that such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction, and this with or without regard to the pleadings." *Holloway v. Durham, supra; accord, Horner v. R. R.,* 184 N.C. 270, 114 S.E. 296 (1922); *Bank v. McEwen,* 160 N.C. 414, 76 S.E. 222 (1912); *Bunn v. Braswell,* 139 N.C. 135, 51 S.E. 927 (1905). Therefore, the fact that the consent judgment under discussion was rendered in a cartway proceeding does not limit the scope or affect the validity of the easement granted.

**[6]** Since a consent judgment is a contract, *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971), "[t]he rules which courts have evolved for the interpretation of contracts are applicable to consent judgments. [Citations omitted.] A contract results when there is a meeting of the minds for the settlement or adjustment of asserted or disputed rights and obligations. The words chosen by the draftsman selected to reduce the agreement to writing are merely vehicles to make visible the mutual intention of the parties. Interpretation is, therefore, the ascertainment of that intent. To do so, the entire agreement must be examined with an understanding of the result to be accomplished and the situation of the parties at the moment the contract is made." *In re Will of Stimpson,* 248 N.C. 262, 103 S.E. 2d 352 (1958).

The *contract* between Elmer Lowe and Paul Rhodes provided, *inter alia,* that Elmer Lowe "and his successors in title

forever are given a perpetual right and easement of egress, ingress and regress over and upon the said cartway, as hereinafter described, and the said cartway or easement herein granted is appurtenant to and runs with the petitioner's land as above described."

**[7]** An appurtenant easement is an incorporeal right attached to the land and incapable of existence separate and apart from the particular land to which it is annexed. 25 Am. Jur. 2d, Easements and Licenses, § 11 (1966). "An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance thereof; it is owned in connection with other real estate and as an incident to such ownership. . . . An easement appurtenant is incapable of existence apart from the particular land to which it is annexed, it exists only if the same person has title to the easement and the dominant estate; it must bear some relation to the use of the dominant estate, and it must agree in nature and quality to the thing to which it is claimed to be appurtenant. An easement appurtenant is incident to an estate, and inheres in the land, concerns the premises, pertains to its enjoyment, and passes with the transfer of the title to the land, including transfer by descent." *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183 (1963).

**[8]** Applying these rules to the consent judgment on which the rights of the parties depend, it is clear that Paul Rhodes intended to pass, and did pass, to Elmer Lowe an easement in perpetuity appurtenant to and running with the dominant estate to which it was annexed. Plaintiffs had notice thereof and took title to the servient estate burdened therewith. *Hensley v. Ramsey, supra.* In light of that truth, there is no genuine issue as to any material fact remaining and Elmer Lowe is entitled to judgment as a matter of law. Thus, summary judgment for defendant was appropriately entered by the trial court and correctly upheld by the Court of Appeals.

The provisions of G.S. 136-69, limiting the purposes for which a cartway may be laid out, and cases construing and applying cartway statutes, relied on by plaintiffs, are inapposite in the factual setting revealed by the record in this case. The limitations which plaintiffs seek to place on the terms "cartway" and "easement," as used in the consent judgment, through the application of those statutes and cases are inconsistent with the dignity of an easement in perpetuity appurtenant to and running with the dominant estate. "[A]n easement granted or reserved

in general terms, without any limitations as to its use, is one of unlimited reasonable use." 25 Am. Jur. 2d, Easements and Licenses § 74 (1966); *see Shingleton v. State, supra.*

For the reasons stated, the decision of the Court of Appeals affirming summary judgment for defendant is

Affirmed.

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PIEDMONT AVIATION, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., UNITED AIR LINES, INC., PETITIONERS v. RALEIGH-DURHAM AIRPORT AUTHORITY, RESPONDENT

No. 21

(Filed 26 June 1975)

1. **Municipal Corporations § 5— airport — proprietary function**

A municipality operating an airport acts in a proprietary capacity.

2. **Aviation § 1; Municipal Corporations § 5— airport authority — determination of fees — proprietary function**

In determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, a municipal airport authority acts as the proprietor of the property, not as a regulatory agency.

3. **Municipal Corporations § 5— determination of water rates — proprietary function — prior decision no longer authoritative**

The statement in *Candler v. Asheville,* 247 N.C. 398, to the effect that a municipality in establishing rates it will charge for water is exercising a governmental function is no longer authoritative.

4. **Aviation § 1— airport authority — managing board — determination of landing fees and rentals**

The managing board of a municipal airport authority, in determining landing fees and rentals it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility, subject only to limitations imposed on it by statute or by contractual obligations assumed by it.

5. **Aviation § 1— airport authority — determination of landing fees and rentals — hearing and notice not required**

The Raleigh-Durham Airport Authority is not required by statute to conduct a hearing, receive evidence and make findings of fact or to follow any other procedural course in determining the landing fees or rentals to be charged by it, nor is the Authority required to give notice to present or prospective users of its properties that it is contemplating a change in such fees and rental charges.

**6. Administrative Law § 5; Aviation § 1— airport authority — fixing of fees — no administrative decision — judicial review**

The fixing by the Raleigh-Durham Airport Authority of the fees it will charge for the use of its properties is not an "administrative decision" within the meaning of G.S. Ch. 143, Art. 33, and the procedure provided by that Article for obtaining judicial review of "administrative decisions" is not applicable thereto.

APPEAL by respondent, Raleigh-Durham Airport Authority, from *Bailey, J.*, at the 14 October 1974 Session of WAKE, heard prior to determination by the Court of Appeals.

The petitioning airlines, each a common carrier operating regularly scheduled flights in which it uses the facilities of the Raleigh-Durham Airport for landings and departures, complain of the action of the Airport Authority (hereinafter called the Authority) increasing landing fees and space rental charges previously in effect at the airport. By their joint petition to the Superior Court of Wake County, they pray the court to stay the effectiveness of the new rates pending the outcome of this proceeding and to set "a reasonable and adequate landing fee and space rental charge" or, alternatively, to declare the rates so fixed by the Authority "null and void." In summary, the petition alleges:

The Authority is an agency within the meaning of G.S. 143-306(1) and is subject to the provisions of G.S. Ch. 143, Art. 33, entitled "Judicial Review of Decisions of Certain Administrative Agencies." On 21 June 1973, the petitioners were notified by the Authority of an increase in the landing fees and in the space rental charges, effective 1 October 1973. The increased landing fee, applicable to the petitioners, is 262 per cent of that previously charged. No data purporting to justify such increase in the landing fee were submitted by the Authority to the petitioners until after the Authority acted. The Authority has never made a computation supporting the increase in the space rental charge. The increases, both in the landing fees and in the space rental charges, are unlawful because:

(1) They exceed the "reasonable and adequate" fees and charges which the Authority is permitted by statute to charge; (2) they exceed the amount which the "petitioners are contractually obligated to pay pursuant to a tenancy from year to year arising upon the expiration of the Airport-Airline Lease and Use Agreement, dated August 1, 1967"; (3) they were determined upon "without a meeting of the Authority and without

providing the petitioners a fair opportunity to be heard; (4) they are unsupported by competent, material and substantial evidence, are arbitrary and capricious, and constitute a denial of due process of law and equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, § 19, of the North Carolina Constitution"; and (5) the "statutory power of the Authority to set landing fees, and space rental charges contained in Chapter 168, § 7, of the 1939 Session Laws of North Carolina, as amended, is unconstitutional for the reasons that (i) it represents an unlawful delegation of legislative authority under Article II, § 1, of the North Carolina Constitution; and (ii) it is a local or special act regulating trade and is, therefore, violative of Article II, § 24, of the North Carolina Constitution."

The petitioners further allege they have exhausted all administrative remedies available to them by statute or agency rule and "are entitled to judicial review of such decision under the provisions of Article 33 of Chapter 143 of the General Statutes of North Carolina."

The respondent Authority moved to dismiss the petition for review on the ground that its action in establishing the fees and charges in question is not subject to the provisions of G.S. Ch. 143, Art. 33, for the reasons that: (a) The Authority is not "a State administrative agency," (b) its action in fixing the fees and charges in question is not an "administrative decision," and (c) there is no "statute, regulation, rule or other provision" requiring the Authority to follow any established administrative procedure in fixing such fees and charges.

The Superior Court concluded that it had jurisdiction; that the respondent is an "administrative agency" as defined in G.S. 143-306(1); that the determination of the Authority with respect to the establishment of the landing fees in dispute was an "administrative decision" as defined in G.S. 143-306(2) and the petitioners' legal rights, duties and privileges were required by constitutional right to be determined after an opportunity for an agency hearing; and that the petitioners are entitled to a judicial review of such determination pursuant to G.S. Ch. 143, Art. 33. The court, therefore, denied the motion to dismiss the petition. From this denial the respondent Authority appealed.

At the hearing in the Superior Court, the following facts (summarized except as otherwise indicated) were stipulated:

The Authority "owns and operates the Raleigh-Durham Airport." Its facilities are used by scheduled air carriers, nonscheduled air carriers, military aircraft and general aviation aircraft. The four petitioners are the only "scheduled air carriers" using the airport. The nonscheduled air carriers are "essentially 'charter' flights by commercial airlines." "General aviation aircraft" are privately owned. Two flying service companies, located at the airport, transport passengers for hire on short trips. A consulting firm employed by the Authority projected that, "during calendar year 1974," 93,577 landings would occur at the airport, of which 20.1 per cent by number and 77.6 per cent by weight would be by scheduled air carriers, 0.8 per cent by number and 3 per cent by weight would be by nonscheduled air carriers, 7.5 per cent by number and 1.8 per cent by weight would be by military aircraft and 71.6 per cent by number and 17.6 per cent by weight would be by "general aviation" aircraft. "The rates charged users of the Raleigh-Durham Airport facilities other than the scheduled air carriers were different in amount and determined in a manner different from the rates charged the scheduled airliners." The increases in the fees and charges were agreed upon by members of the Authority in telephone conversations without a formal meeting, following which agreement there was concurrence therein at a meeting of the Authority. "The petitioners were not given prior notice of the Authority's intention to set such rates * * * and the airliners have never been given a hearing, nor the opportunity for a hearing, before the Airport Authority concerning said rates."

In their brief on appeal, the petitioner-appellees state that after 1 October 1973 they were billed by the Authortiy on the basis of the new fees and charges but refused to pay the same and in January 1974 the petitioners began to pay, and the respondent Authority began to accept payments computed on the basis of the "old" rates without prejudice to the rights of either party. The petitioners further state in their brief that a suit instituted by the respondent Authority against the petitioners Delta, Eastern and United is now pending in the United States District Court for the Eastern District of North Carolina and a similar action against the petitioner Piedmont is now pending in the Superior Court of Wake County, each such action being

for the recovery of the difference between the fees and charges computed in accordance with the increased rates and the fees and charges computed in accordance with the old rates.

*Purrington, Hatch & Purrington by A. L. Purrington, Jr., and Edwin B. Hatch for respondent appellants.*

*Womble, Carlyle, Sandridge & Rice by E. Lawrence Davis and Jimmy H. Barnhill; Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty for petitioner appellees.*

LAKE, Justice.

The Authority was created by Chapter 168 of the Public-Local Laws of 1939. By that Act, as amended by Ch. 577 of the Session Laws of 1959, the Authority is authorized to own and operate the Raleigh-Durham Airport, to contract for the operation of "airline scheduled" flights, nonscheduled flights and other airplane activities and to charge and collect "reasonable and adequate" fees and rents for the use of its property and for services rendered in the operation thereof.

G.S. 63-1(14) provides that such an authority is a "municipality" within the meaning of Ch. 63 of the General Statutes. G.S. 63-53(5) authorizes a "municipality" to "determine the charges or rental for the use of any property [of the Authority] * * * and the charges for any services or accommodations [supplied by it]." G.S. 63-53(5) further provides that such charges "shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality."

**[1]** A municipality operating an airport acts in a proprietary capacity. *Airport Authority v. Stewart,* 278 N.C. 227, 179 S.E. 2d 424; *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371, rehear. den., 230 N.C. 759, 53 S.E. 2d 313. Upon the rehearing of *Rhodes v. Asheville, supra,* this Court said that the legislative declaration that such operation should be deemed a "governmental function [see G.S. 63-50] did not make it so, for that is a judicial and not a legislative question."

**[2, 3]** Thus, in determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, the Authority is acting as the proprietor of the property, not as a regulatory agency. The statement in *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d

470, to the effect that a municipality in establishing rates it will charge for water is exercising a governmental function was not necessary to the decision in that case, is not supported by the authorities cited therefor and may no longer be deemed authoritative. That statement overlooks the distinction to be drawn between municipal action fixing rates to be charged by a public utility to its customers and municipal action fixing rates which the municipality, itself, will charge for its service. The former function is a governmental function. See: *Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557, 90 A.L.R. 688; *City of Seymour v. Texas Electric Service Co.*, 66 F. 2d 814, cert. den., 290 U.S. 685, 54 S.Ct. 121, 78 L.Ed. 590. The latter is a proprietary function.

**[4, 5]** Thus, the managing board of the Authority, in determining landing fees and rentals which it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility, subject only to limitations imposed upon it by statute or by contractual obligations assumed by it. Our attention has been directed to no statutory limitation imposed upon the Authority in the matter of fixing landing fees and rentals except the provision in Ch. 755 of the Session Laws of 1959 authorizing the Authority to charge "reasonable and adequate" fees and rents, and the provision of G.S. 63-53(5) stating that the charges for the use of its properties "shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality." No provision in these statutes requires that the Authority conduct a hearing, receive evidence and make findings of fact or that it follow any other procedural course in determining the landing fees or rentals to be charged by it. Nothing in these statutes requires the Authority to give notice to present or prospective users of its properties that the Authority is contemplating a change in such fees and rental charges. The petitioners were notified of the increases more than three months before they were to become effective.

G.S. Ch. 143, Art. 33, provides a procedure by which a person aggrieved by a final "administrative decision" may obtain a judicial review of such decision. This article was repealed and a substitute therefor provided by Ch. 1331 of the Session Laws of 1973, but the repeal is not effective until 1 July 1975, and the repealing act provides that it shall not affect any pending

administrative hearing. Thus, if, by its terms, G.S. Ch. 143, Art. 33, applies to the present matter, the petitioners' right to proceed thereunder is not affected by the repeal.

The judicial review for which G.S. Ch. 143, Art. 33, provides is limited to the review of an "administrative decision" as that term is therein defined. G.S. 143-306(2) defines "administrative decision," for the purposes of this article, to mean "any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing."

As Justice Rodman, speaking for this Court in *Duke v. Shaw, Commissioner of Revenue*, 247 N.C. 236, 100 S.E. 2d 506, said, "Manifestly this statute [G.S. Ch. 143, Art. 33] contemplated a quasi-judicial hearing." See also, Hanft, 49 N. C. L. Rev. 635, where it is said: "The application of the Act * * * is plainly to adjudications and not to the process of making general regulations. * * * It has been noted that the * * * Act relates to administrative adjudication, not administrative legislation."

The decisions relied upon by the petitioners are distinguishable from the present matter. In *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, the administrative decision in question was an order of the Secretary of Agriculture under the Packers and Stockyards Act fixing commission rates to be charged by market agencies for the buying and selling of cattle in the Kansas City stockyard. The Act specifically required the Secretary to make certain findings as a condition precedent to the entry of an order fixing such commission rates. Thus, the administrative action in question was not the fixing of a charge to be made by an administrative board for the use of its own property or services but was the fixing of the fee which another legal entity might charge his or its customers. Clearly, this was the exercise of a governmental power determining the legal rights of specific parties and the Act empowering the Secretary to do so required him to make findings which, in turn, necessitated the holding of a quasi-judicial hearing. See also, *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (second appeal in the same matter).

In *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E. 2d 879, this Court said the Act here in question sets the stand-

ard to be met in determining the adequacy of the judicial review of an action of a municipal zoning board of adjustment denying the right of the petitioner to continue a nonconforming use claimed by him as a legal right. Such action is clearly an exercise of the city's governmental power and a determination of the right of a property owner to make a certain use of his property. Likewise, in *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129, the administrative action held reviewable, under this Act, was the denial to a landowner of a special use permit which the landowner claimed as a matter of legal right. *In re Carter,* 262 N.C. 360, 137 S.E. 2d 350, involved judicial review of an administrative decision expelling a student from the University of North Carolina. All of these cases involved a hearing by an administrative agency to find facts upon which the agency determined the legal right of another person. An administrative determination of the charge to be made by the administrative agency itself for the use of the agency's own property is of an entirely different nature.

**[6]** We, therefore, hold that the fixing by the Authority of the fees it will charge for the use of its property is not an "administrative decision" within the meaning of G.S. Ch. 143, Art. 33, and the procedure provided by that article for the obtaining of judicial review of "administrative decisions" is not applicable thereto. Consequently, it was error for the Superior Court to deny the motion of the Authority to dismiss this proceeding.

We do not have before us upon this appeal the merits of the contention of the petitioners that the proposed landing fees and rental charges are unreasonable or discriminatory and, therefore, in excess of the limitation imposed by G.S. 63-53(5) upon the right of the Authority to fix charges for such use of its properties. Our decision herein does not deprive the petitioners of a judicial determination of these contentions by appropriate procedures. See G.S. 143-307. According to their brief, there are now pending in the Federal and State trial courts actions instituted against them by the Authority for the recovery of the charges here in question. Nothing in our present decision relates to the right of the petitioners to assert, in those proceedings, the illegality of the fees and charges sought to be collected therein.

Reversed.

STATE OF NORTH CAROLINA v. IVEY LEE WHITLEY

No. 82

(Filed 26 June 1975)

1. **Criminal Law § 75— admission of confession — absence of express finding of voluntariness**

Defendant's confession was properly admitted in evidence where the trial court made findings supported by the evidence on *voir dire* that defendant was given the Miranda warnings, that he was not intoxicated at the time of the confession, that he understood his rights and that he waived his rights in writing before making the statement; failure of the court to make an express finding that the confession was voluntary was not error where the evidence was not conflicting and tended to show the confession was voluntary.

2. **Criminal Law § 23— guilty pleas — withdrawal by defendant — court's refusal to accept**

In a prosecution for arson, felonious breaking and entering, larceny from the person, and assault with a deadly weapon with intent to kill, the trial court did not err in refusing to accept defendant's tender during trial of guilty pleas to the felonies of breaking or entering, larceny from the person and burning an unoccupied building where defendant stated during questioning by the court, "I believe I will go on and let the jury decide it."

3. **Arson § 4; Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence for jury**

The State's evidence, including testimony of the victim and defendant's confession, was sufficient for the jury in a prosecution for arson, breaking and entering and larceny from the person.

4. **Arson § 6— life imprisonment — act making change in punishment retroactive**

A defendant sentenced to death for a crime of arson committed prior to 8 April 1974, the effective date of the statute changing the punishment for arson from death to life imprisonment, is entitled to have his case remanded for imposition of a sentence of life imprisonment pursuant to the 1975 Act which made the change in punishment retroactive. Chapter 703, 1975 Session Laws.

APPEAL by defendant from two judgments of *Winner, J.*, entered at the November 1974 Special Session of WILKES Superior Court.

Defendant was duly indicted in separate bills for arson (No. 74-CR-2112), kidnapping (No. 74-CR-2113), assault with a deadly weapon with intent to kill (No. 74-CR-2114), felonious breaking and entering (No. 74-CR-2178), and larceny from the person (No. 74-CR-2179), all of which charges arose from one

criminal episode against one victim. The indictments, which were returned at the June 24, 1974 Criminal Session of Wilkes Superior Court, were consolidated for trial on motion of the State without objection. Defendant's motion for nonsuit was allowed at the close of the State's evidence as to the charge of assault with a deadly weapon with intent to kill (No. 74-CR-2114). The jury returned a verdict of guilty as charged in all the other cases. In the arson case Judge Winner imposed the then mandatory death sentence. The other cases were consolidated for judgment and defendant was sentenced to life imprisonment.

Evidence for the State, including the testimony of the victim of these crimes, Lester Roark, tended to show that at or about 10:30 p.m. on 6 April 1974, defendant and a companion, Robert Pruitt, forcibly broke into and entered a small cinder-block house in Wilkes County. Their purpose was to rob the owner and sole occupant of the house, an 83-year-old recluse named Lester Roark. Robert Pruitt was under the mistaken belief that Roark kept large sums of money hidden in his dwelling.

When Roark attempted to defend his home by brandishing a hammer, Pruitt overpowered him and then beat him about the head, back, face and arms with the hammer. Defendant and Pruitt then tied up Roark and attempted to force him to reveal where his money was hidden. Defendant and Pruitt took what money Roark had on his person, broke into a vending machine he kept on the premises, and took groceries he had on hand. They then forced Roark into his basement, placed newspapers next to his bound body, ignited the papers, and left. After "the place had started to burn pretty good" defendant returned to the basement, untied Roark's feet and took him outside. Defendant and Pruitt placed Roark in their automobile and drove away while discussing how to kill him and dispose of the body. During the entire episode one of Roark's assailants several times addressed the other as "Whitley."

Ultimately, Roark was released on a deserted road some eight to ten miles from his home. A passing truck driver picked him up and returned him to his house which had burned to the ground.

Defendant and Pruitt left the State but both of them were subsequently arrested and returned to North Carolina. Upon his

return defendant admitted to authorities his part in the crimes. His confession was offered in evidence at his trial.

Defendant offered no evidence.

*Rufus L. Edmisten, Attorney General, and Lester V. Chalmers, Jr., and Sidney S. Eagles, Jr., Assistant Attorneys General, for the State.*

*Max F. Ferree for defendant appellant.*

EXUM, Justice.

Defendant brings forward five assignments of error but concedes in his brief that the first four are "not well taken." The fifth relates to the constitutionality of the death penalty as imposed in this case. Defendant has asked us to carefully scrutinize the entire record, including the instructions to the jury to which no exception was taken "in an effort to find that prejudicial error that counsel was unable to uncover. This we have done. "[I]t is the uniform practice in this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*, 270 N.C. 468, 469, 155 S.E. 2d 83, 84 (1967). Unanimously we find no error in the conduct of the trial and hold that the verdicts of guilty must stand.

Defendant's first assignment of error challenges the admission into evidence of his confession. A *voir dire* hearing was conducted at trial to determine its admissibility. We have looked, however, not only to evidence presented on *voir dire* but to the entire record in our consideration of this assignment. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975). The State's evidence was, essentially, as follows: Wilkes County Deputy Sheriff Franklin Earp took custody of defendant at 11:00 a.m. on April 15, 1974, at Virginia Beach, Virginia, where defendant had been arrested for being publicly drunk. He had been in jail there for several days and had no odor of alcohol on his breath at the time Earp took him into custody. During the trip to Wilkes County defendant asked several times to be given beer and liquor but none was given him. Defendant arrived in Wilkes County between 4:00 and 5:00 p.m. on April 15. He was interrogated by Captain Melvin Roberts of the Wilkes County Sheriff's Department in the presence of Special Agent Steve

Cabe of the State Bureau of Investigation and Deputy Earp. The interrogation began at 5:05 p.m. and ended at 6:30 p.m. At the time of the interrogation defendant was "very nervous, he was more or less wringing his hands, he couldn't be still, he would attempt to light a cigarette." Defendant "did from time to time call for liquor. No liquor was given to him in order to booster him" and "no liquor was given to him after the interrogation." Defendant told Captain Roberts that "he was very nervous and shook up, he told me he had been on a drunk for a few days, he was getting off of it, pretty upset, I asked him how he had been sleeping, he told me he had been sleeping pretty good, he was feeling a lot better than he did." Before being questioned, defendant was advised of his right to remain silent and to have a lawyer present before and during questioning. He was told that if he could not afford to employ a lawyer one would be appointed by the court before any questions were asked and that if he decided to answer questions without a lawyer he could stop answering them at any time. When asked, defendant replied that he understood these rights. Defendant signed a written waiver of rights form. The written waiver, although offered in evidence at trial as State's Exhibit No. 1, was not brought forward on appeal. No promises, threats, or inducements of any kind were offered defendant. Defendant "was coherent" and his answers responsive.

Although defendant himself did not testify either on *voir dire* or before the jury he offered, on *voir dire*, the testimony of his physician, sister, mother, and two fellow inmates at the Wilkes County Jail. Their testimony was essentially to the effect that defendant was an alcoholic and when observed by some of the witnesses on April 16 he appeared to be nervous, shaky, as if he had "been on a drunk."

**[1]** Judge Winner, after the *voir dire* hearing, made this ruling:

> "The Court finds as a fact that on the occasion that the statement was taken that the Defendant was informed of all of the rights required by the case of MIRANDA v. ARIZONA, that he was not intoxicated at that time, and that he understood the rights given to him and that he affirmatively in writing waived the rights under the Miranda decision before he made his statement. The Court concludes from his findings of fact that statement made at that time on April

15, 1974, is admissible in the trial of this case and the objection is overruled."

Although the uncontradicted evidence adduced on *voir dire* and before the jury shows that defendant's confession was freely and voluntarily made after he had been duly advised of his constitutional rights, which he knowingly and understandingly waived, Judge Winner did not find expressly that the confession was voluntary. While the better practice is to make full findings of fact upon which the court's conclusions are based where, as here, there is no conflicting evidence with regard to voluntariness and all the evidence adduced tends to show the confession was voluntary, failure of the court to make an express finding of voluntariness is not error. *State v. Simmons*, 286 N.C. 681, 692, 213 S.E. 2d 280, 288 (1975). Such finding is implied when the court admits the confession into evidence. This assignment of error is overruled.

**[2]** Defendant's second assignment of error is that the court below erred in refusing to accept certain guilty pleas tendered by defendant during trial. At the conclusion of the *voir dire* hearing to determine admissibility of his confession defendant, through counsel, tendered pleas of guilty to the felonies of breaking or entering, larceny from the person, and burning of an unoccupied building. These pleas were acceptable to the State and would have resulted in the dismissal of all other charges against defendant. Through similar plea bargaining Robert Pruitt had previously been allowed to plead guilty to a non-capital felony.

As required after tender of the pleas, Judge Winner examined defendant personally to determine whether the pleas were "voluntarily, understandingly and intelligently tendered." *State v. McClure*, 280 N.C. 288, 294, 185 S.E. 2d 693, 697 (1972). The following exchange occurred (questions are by the court):

"Q. Do you understand that your lawyer has tendered pleas of guilty on your behalf to the offenses of breaking or entering, larceny from the person, and burning an unoccupied building, do you understand that he has tendered those pleas of guilty?

"A. Yes.

"Q. Do you understand that?

"A. Yes, I think so. I don't know nothing about law. I can't read. Nobody never read any law to me.

"BY THE COURT: Did your lawyer come to you and ask you whether you wanted to plead guilty to those offenses, if the State would drop all the other charges?

"A. You can ask him how he said it, he said it and I said: 'All right.'

"Q. Did you say you would plead guilty?

"A. Yes.

"Q. Do you understand you could go on and continue to try this case out and have the jury decide it, do you understand that?

"A. *I believe I will go on and let the jury decide it.*

"BY THE COURT: Is that what you want to do. All right, we will go on and let the jury decide it. The Court will not accept the pleas of guilty tendered by the Defendant in the absence of the jury. You may go down there and sit next to your lawyer." (Emphasis supplied.)

From this colloquy it is clear that acceptance of defendant's guilty pleas would have been improper because defendant himself withdrew them. Further urging or prodding by court or counsel might well have deprived pleas subsequently accepted of their requisite voluntariness and encouraged a later post-conviction proceeding to set them aside. Defendant, moreover, concedes that he "cannot in good conscience argue that the court's action constitutes reversible error." We agree.

**[3]** Defendant's third and fourth assignments of error raise the question of the sufficiency of the evidence to overcome his motions for judgment of nonsuit in all cases at the conclusion of the evidence. Testimony of the victim himself tended to establish every element of each crime for which defendant had been convicted and identified defendant as one of the perpetrators. This testimony alone provided plenary evidence to overcome defendant's motions for nonsuit. These assignments deserve no further discussion and are overruled.

**[4]** Defendant's fifth assignment of error challenges the imposition of the death penalty in the arson case. Defendant contends that in this case exacting the supreme penalty violates the Equal Protection Clause of the Fourteenth Amendment and

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States, the latter made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), and Article I, §§ 19 and 27 of the Constitution of North Carolina—particularly since on April 8, 1974, less than two days after defendant committed the arson, the North Carolina General Assembly ratified Chapter 1201 of the 1973 Session Laws, which, *inter alia,* changed the penalty for this crime from death to life imprisonment effective upon ratification. A majority of this Court rejected this very argument in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975) and *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975). The reason for rejection was expressly stated in *Williams.* It was based on Section 8 of Chapter 1201, 1973 Session Laws which provided "This act shall become effective upon ratification *and applicable to all offenses hereafter committed.*" (Emphasis supplied.) The majority in *Williams* reasoned that Chapter 1201 was, consequently, prospective only in application and did not apply to any offenses committed before April 8, 1974.

On June 23, 1975, however, the North Carolina General Assembly ratified House Bill 954, Chapter 703, 1975 Session Laws, Section 1 of which provides that Sections 3 and 4 of Chapter 1201, 1973 Session Laws (making life imprisonment the punishment for first degree burglary and arson), "shall apply to all [such] crimes . . . committed prior to April 8, 1974 . . . as well as to those thereafter committed." House Bill 954 has by implication repealed Section 8 of Chapter 1201, 1973 Session Laws, insofar as this section made Sections 3 and 4 of Chapter 1201 prospective only in application. We construe Section 2 of House Bill 954 setting out the procedure for effectuating Section 1 to apply only to capital cases which have been finally determined by this Court such as, for example, *State v. Boyd, supra.* Since defendant's case had not been finally determined upon ratification of House Bill 954, he is entitled now to the benefits of Section 1. The arson case must therefore be remanded for the imposition of a sentence of life imprisonment.

In defendant's trial and various convictions we unanimously find no error. For the reasons stated, the arson case (74-CR-2112) is remanded to the Superior Court of Wilkes

County which is instructed to impose a sentence of life imprisonment.

No error in the trial.

Case No. 74-CR-2112 remanded for the imposition of a sentence of life imprisonment.

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STATE OF NORTH CAROLINA v. JIMMY McKINNEY

No. 104

(Filed 26 June 1975)

1. **Criminal Law § 104— motion for nonsuit — failure to renew — sufficiency of evidence reviewed on appeal**

G.S. 15-173 provides that the failure of the defendant to renew his motion for nonsuit at the close of all the evidence constitutes a waiver of his motion for nonsuit made prior to the introduction of his evidence, and numerous decisions of the Supreme Court hold that a motion for judgment as of nonsuit upon the evidence will not be considered on appeal when it is not renewed at the conclusion of all the evidence; however, since the effective date of the enactment of G.S. 15-173.1, the sufficiency of the State's evidence in a criminal case, if challenged by assignment of error and argued in the briefs, is reviewable upon appeal regardless of whether a motion for judgment of nonsuit was made by defendant in the trial court.

2. **Criminal Law § 106— motion for nonsuit — evidence favorable for State considered**

A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion.

3. **Narcotics § 4— distribution of tetrahydrocannabinols charged — evidence of distribution of THC — nonsuit proper**

In a prosecution for feloniously selling and distributing tetrahydrocannabinols, evidence was insufficient to be submitted to the jury where it consisted of testimony by two schoolboys that they purchased from defendant a substance which he represented to be THC, a doctor who examined one of the boys after he took some of the substance testified that the boy's condition was most likely caused by "a hallucination drug," tetrahydrocannabinols "can be a hallucinogenic drug," the doctor was familiar with THC and stated that "it's a substance similar to marijuana like drugs," but the doctor did not know what

the boy took or that he took anything, and no witness testified that THC was an abbreviation for tetrahydrocannabinols.

ON *certiorari* to the Court of Appeals to review its decision, 24 N.C. App. 259, 210 S.E. 2d 450 (1974), finding no error in the trial before *Martin (Harry C.), J.*, April 1974 Session, MCDOWELL Superior Court.

Defendant, a sixteen-year-old schoolboy, was charged in separate indictments with (1) feloniously selling and distributing to Benjamin Franklin on 9 December 1973 a controlled substance, to wit: Tetrahydrocannabinols, and (2) feloniously selling and distributing the same drug on 10 December 1973 to John Peppers. The cases were consolidated for trial without objection.

Benjamin Franklin testified that he was fifteen years of age on 9 December 1973. He attended school during the day and worked at Hardee's in Marion from 4 p.m. until closing time. On that date he had a conversation with defendant Jimmy McKinney in the dining room at Hardee's and paid him $10.00 for a white substance in a small plastic bag which defendant represented to be "THC." "It was white and looked like sugar. It was more of a crystal form than solid." This witness stated he had never seen, taken or purchased THC before. He further stated that he showed the substance to his co-worker John Peppers and turned it over to Peppers "right after the purchase. I did not observe him do anything with it and he returned it to me 10 or 15 minutes later in the same package as when I gave it to him."

Benjamin Franklin further testified that he placed a pinch of the substance, about one-fourth of a thimbleful, in his mouth and swallowed it. It tasted bitter. He threw the remainder in a trash can because he was scared to have it with him. Fifteen or twenty minutes later he became so dizzy he did not know what he was doing. He blacked out but would awaken occasionally and black out again. He remembered going to the office of Dr. George Ellis in Old Fort but had no recollection of being hospitalized in Morganton. He suffered hallucinations "in which everything was dark and there were candles held up to faces that were melting, and I heard organ music. The hallucinations lasted about one day and I was in the hospital in Morganton two weeks. . . . I had never seen THC before and did not know that the substance was THC. I have not taken other drugs."

John Peppers, a fifteen-year-old schoolboy who also worked at Hardee's, testified that he tasted the substance sold to Benjamin Franklin; that the substance was white, like sugar crystals, and had a bitter taste. In thirty to forty-five minutes after tasting it he started getting dizzy and sick but continued working at Hardee's and then went home and to bed. The next night, December 10, 1973, he purchased from defendant Jimmy McKinney for $10.00 a substance which McKinney stated was THC. Peppers said he made the purchase at the request of two of his friends, took it to school the next day, and gave it to other boys there.

On cross-examination, Peppers stated: "I have not taken THC before nor since. I have never seen any THC. I have not taken other drugs. As to whether I know what THC looks like, I would recognize it now, by seeing it at Hardee's. That was the only time I have ever seen any substance called THC. . . . [A]nd except for that one occasion, I still don't know what it looks like."

Dr. George Ellis, stipulated to be a medical expert, testified that he examined Ben Franklin on 10 December 1973 at his office in Old Fort; that Franklin was acutely psychotic and completely incoherent, a condition which Dr. Ellis attributed to medication or drugs of some type—"most likely a hallucination drug." Dr. Ellis stated that tetrahydrocannabinols could have caused Franklin's symptoms. "I did not measure nor try to detect the drug. . . . Mr. Franklin did not tell me that he had taken any substance, but his sister told me that he had taken a substance." Dr. Ellis said he was familiar with the abbreviation THC and that "it's a substance similar to marijuana like drugs."

On cross-examination Dr. Ellis said: "It is true that other drugs can cause hallucinations such as described in Mr. Franklin. It is also true that people have hallucinations that have never taken drugs. I do not know what Mr. Franklin took or that he took anything."

Defendant's motion for nonsuit at the close of the State's evidence was denied.

Defendant, testifying as a witness in his own behalf, stated that he was sixteen years of age and was at Hardee's Restaurant on the nights of 9 and 10 December 1973. He further testified that he saw Ben Franklin working behind the counter but had

no conversation with him, did not tell Franklin he had THC and did not sell him anything. To the contrary, defendant said: "I have never had any THC in my possession. I do not know what it looks like. I have never sold Ben Franklin anything. I saw John Peppers on December 10 at Hardee's. . . . I did not sell him any THC. I did not sell him anything at all, nor have I ever sold him anything."

The jury returned a verdict of guilty on each charge. The cases were consolidated for judgment and defendant was sentenced to prison for a term of not less than one nor more than three years as a youthful offender pursuant to G.S. 148-49.2. The Court of Appeals found no error in the trial and judgment, and we allowed certiorari to review that decision.

*Story, Hunter & Goldsmith, P.A., by C. Frank Goldsmith, Jr., for defendant appellant.*

*Rufus L. Edmisten, Attorney General, and Raymond L. Yasser, Associate Attorney, for the State of North Carolina.*

HUSKINS, Justice.

The record discloses that defendant's motion for nonsuit at the close of the State's evidence was denied. Defendant thereupon offered evidence in his own behalf, and the State examined a witness in rebuttal. Both the State and the defendant then rested, but defendant's motion for dismissal or judgment as of nonsuit was not renewed. Nevertheless, failure to nonsuit is assigned as error and argued in the briefs filed in the Court of Appeals and in this Court.

**[1]** G.S. 15-173 provides that the failure of the defendant to renew his motion for nonsuit at the close of all the evidence constitutes a waiver of his motion for nonsuit made prior to the introduction of his evidence. Numerous decisions of this Court applying G.S. 15-173 hold that a motion for judgment as of nonsuit upon the evidence will not be considered on appeal when it is not renewed at the conclusion of all the evidence. *State v. Howell,* 261 N.C. 657, 135 S.E. 2d 625 (1964); *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250 (1942); *State v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474 (1940); *State v. Helms,* 181 N.C. 566, 107 S.E. 228 (1921).

Chapter 762 of the 1967 Session Laws, codified as G.S. 15-173.1, reads as follows: "The sufficiency of the evidence of

the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." Since the effective date of this enactment, 13 June 1967, the sufficiency of the State's evidence in a criminal case, if challenged by assignment of error and argued in the briefs, is reviewable upon appeal regardless of whether a motion for judgment of nonsuit was made by defendant in the trial court. We must therefore determine whether the evidence was sufficient to carry the case to the jury. We proceed as if the proper motion had been made under G.S. 15-173 and denied by the trial judge. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973).

**[2]** A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *State v. Cutler, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1966). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533 (1939).

Applying these governing principles to the evidence offered in this case, we hold the evidence was insufficient to carry the case to the jury for the reasons which follow.

**[3]** Each bill of indictment charged defendant with the felonious sale and distribution of tetrahydrocannabinols, a controlled substance included in Schedule VI of the North Carolina Controlled Substances Act. *See* G.S. 90-94 (1974 Cum. Supp.). The fact in issue between the State and the defendant is whether defendant violated the North Carolina Controlled Substances Act by distributing the drug tetrahydrocannabinols.

There must be legal evidence of the fact in issue, and evidence which only raises a suspicion or conjecture is insufficient.

*State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772 (1960). Evidence which merely shows that defendant might have distributed tetrahydrocannabinols, or raises a suspicion that he did, is insufficient to support a verdict and should not be left to the jury. *State v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734 (1960); *State v. Glenn,* 251 N.C. 156, 110 S.E. 2d 791 (1959).

To prove that defendant distributed tetrahydrocannabinols, the State offered the testimony of two schoolboys, Benjamin Franklin and John Peppers, and Dr. George Ellis. Franklin testified that he paid defendant $10.00 for a white substance in a small plastic bag which defendant represented to be "THC." The substance was white and looked like sugar. He swallowed "a pinch" of the substance and threw the remainder in a trash can. He became dizzy, suffered blackouts and hallucinations, and was treated by Dr. Ellis. Franklin testified he had never seen, taken or purchased THC before and did not, in fact, know that the substance was THC.

John Peppers testified that he tasted the substance sold to Benjamin Franklin; that the substance was white, like sugar crystals, and had a bitter taste. The next night Peppers paid defendant $10.00 for a substance represented by defendant to be "THC" and gave it to two of his friends at school. Peppers stated that he had not taken THC before or since and that he still doesn't know what it looks like "except for that one occasion."

Dr. George Ellis, a medical expert, testified that he examined Ben Franklin on 10 December 1973 at his office; that Franklin was acutely psychotic and completely incoherent, a condition caused most likely by "a hallucination drug." Dr. Ellis stated that tetrahydrocannabinols "can be a hallucinogenic drug" and that a sufficient quantity of that drug could have caused Franklin's symptoms. Dr. Ellis said he was familiar with the abbreviation THC. He was then asked: "What chemical substance does those abbreviations represent?" Dr. Ellis replied: "It's a substance similar to marijuana like drugs." He stated on cross-examination that other drugs can cause hallucinations as described in Franklin's case and that people have hallucinations who have never taken drugs. He said he did not know what Franklin took or that he took anything.

When the foregoing evidence is considered in the light most favorable to the State, giving the State every reasonable in-

tendment and every reasonable inference to be drawn therefrom, it fails to show that defendant distributed tetrahydrocannabinols as charged in the bills of indictment. Defendant represented to Franklin and Peppers that the substance was THC —whatever that is. No witness testified that THC was an abbreviation for tetrahydrocannabinols. The testimony of Dr. Ellis that THC is "a substance similar to marijuana like drugs" leaves unanswered the basic question whether THC is the abbreviation for tetrahydrocannabinols. This is so because there may be many substances "similar to marijuana like drugs," and tetrahydrocannabinols may or may not be one of them. Did defendant sell tetrahydrocannabinols to Franklin and Peppers? The witnesses do not say. Before there can be a lawful conviction the State must prove (1) that the crime charged has been committed and (2) that it was committed by the person charged. *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Edwards,* 224 N.C. 577, 31 S.E. 2d 762 (1944); *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533 (1939). The State's evidence fails to meet these requirements.

To withstand a motion for judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged. Whether the State has offered such substantial evidence is a question of law for the trial court. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971). The evidence here is insufficient to support a verdict and should not have been left to the jury.

Since the insufficiency of the State's evidence requires dismissal, it becomes unnecessary to discuss other errors assigned.

The decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court of McDowell County for entry of judgment in that court dismissing the charges as of nonsuit in accordance with this opinion.

Reversed and remanded.

VIVIAN LAMB THOMPSON v. FREDDIE W. THOMPSON

No. 121

(Filed 26 June 1975)

1. **Contempt of Court § 6; Constitutional Law § 29— criminal contempt proceeding — jury trial**

A defendant is not entitled to a jury trial in a criminal contempt proceeding.

2. **Appeal and Error § 3— appeal from Court of Appeals — substantial constitutional question — burden on appellant**

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 existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal.

APPEAL by defendant, pursuant to G.S. 7A-30(1), from the decision of the Court of Appeals, 25 N.C. App. 79, 212 S.E. 2d 243, which affirmed the judgment entered by *Winborne, District Judge,* 16 August 1974 Session of WAKE County District Court.

On 2 July 1971 plaintiff instituted an action seeking alimony *pendente lite,* custody of the children born to the marriage of plaintiff and defendant, and support for said children. On 21 September 1971 Judge Henry V. Barnette, Jr., entered an order awarding custody of the children to plaintiff, requiring defendant to pay the sum of $150 a month for each of his three minor children, and requiring defendant to pay $500 for accrued child support and $250 in attorney's fees to plaintiff's attorney. Judge Barnette also found that plaintiff was not entitled to alimony *pendente lite.*

In August, 1974, a hearing was held before Judge Winborne pursuant to plaintiff's motion that defendant be held in contempt for willful failure to make support payments as ordered. After finding, *inter alia,* that defendant was in arrears in child support payments in the amount of $11,080 and that his failure to make said payments was willful and without lawful excuse, Judge Winborne held defendant in contempt of Court, found that he was at that time unable to pay the full amount of arrearage, and thereupon ordered that defendant be confined in the Wake County Jail for a period of thirty days.

Defendant appealed, and the Court of Appeals affirmed. Defendant appealed to this Court on the ground that the case involved "a substantial question arising under the Constitution of the United States [and] of this State." G.S. 7A-30(1). On 29 April 1975 plaintiff filed with this Court a motion to dismiss the appeal on the ground that it presented no substantial constitutional question.

*Carl E. Gaddy, Jr., for defendant appellant.*

*George M. Anderson for plaintiff appellee.*

PER CURIAM.

**[1]** The sole question presented by this appeal is whether defendant is entitled to a jury trial in a criminal contempt proceeding.

The identical question was considered and answered in the negative in *Blue Jeans Corporation v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867. We reaffirm that well reasoned and scholarly opinion by Justice Huskins. *See also Codispoti v. Pennsylvania,* 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed. 2d 912; *Taylor v. Hayes,* 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed. 2d 897.

**[2]** G.S. 7A-30(1) provides that there may be an appeal of right to this Court from decisions of the Court of Appeals which directly involve a substantial question arising under the Constitution of the United States or the Constitution of this State. However, our decisions interpreting this statute require that an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, *cert. denied,* 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780.

We hold that appellant has failed to show the existence of a substantial constitutional question which has not already been the subject of conclusive judicial determination, and therefore plaintiff's motion to dismiss is allowed.

Appeal dismissed.

MARRIOTT FINANCIAL SERVICES, INC. v. CAPITOL FUNDS, INC. AND LAWYERS TITLE INSURANCE CORPORATION

No. 97

(Filed 27 August 1975)

1. **Contracts § 6— statutory penalty — contract in derogation of statute**

The statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself; in such cases the courts may examine the language and purposes of the statute, as well as the effects of avoiding contracts in violation thereof, and restrict the penalty for violation solely to that expressed within the statute itself.

2. **Deeds § 7; Municipal Corporations § 30; Vendor and Purchaser § 3— subdivision control ordinance — reference to unapproved plat — misdemeanor — validity of deed**

Enabling statute and city ordinance making it a misdemeanor to describe land in a deed by reference to a subdivision plat which has not been properly approved and recorded does not render a conveyance of land illegal and subject to rescission on the ground that the seller did not obtain city council approval of a subdivision plat as required by the ordinance.

3. **Cancellation and Rescission of Instruments § 4— rescission for mutual mistake**

In order for the remedy of rescission to be operable because of mistake of fact, there must be mutual mistake of fact; a unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances is not sufficient to avoid a contract or conveyance.

4. **Cancellation and Rescission of Instruments § 4— unilateral mistake — validity of land sale**

A sale of land was not subject to rescission on the ground of mutual mistake of fact for the reason that the purchaser acted under the mistaken assumption that an effective driveway permit for the land had been obtained by its assignor of an option to purchase the land where there was no evidence tending to show that this mistaken assumption was induced by any misrepresentation, deceitful action or misleading silence on the part of the seller, that the seller knew of the specific purpose for which the purchaser intended to use the property, or that the seller knew or should have known that the purchaser mistakenly believed that a driveway permit had been obtained, and where the means of information were equally open to all parties to the transaction and the purchaser made no investigation or inquiry concerning access to the land but chose to proceed on its limited knowledge or to assume the sole risk of error.

5. **Cancellation and Rescission of Instruments § 2— cancellation for fraud — absence of representations**

A sale of land was not subject to rescission on the ground of fraud where there was no evidence tending to show that the seller, with fraudulent intent, made a false representation of a material fact which the purchaser relied upon to its injury.

6. **Contracts § 16— sale of land — driveway permit not condition precedent**

In an action to rescind a sale of land, the trial court properly concluded that the issuance of a valid driveway permit by a city was not a condition precedent of the contract of sale.

7. **Insurance § 6— construction of policy language**

The test in construing the language of an insurance contract is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.

8. **Insurance § 148— title insurance — lack of access — character of property**

When an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is reasonable access under the circumstances; and where the subject property lies adjacent to a heavily traveled street in a city and is located in a commercial area heavily populated with restaurants, stores and automobile dealerships, mere pedestrian access cannot be deemed reasonable access, and the policy will be construed to protect against lack of vehicular access.

9. **Insurance § 148— title insurance — exclusion for exercise of police power — lack of access**

A title insurance policy did not insure against lack of vehicular access to the subject property where a policy provision excluded from coverage any loss or damage by reason of exercise of governmental police power unless notice of the exercise of the police power appears in the public records on the effective date of the policy, and a city council resolution rejecting the purchaser's application for subdivision approval after the policy date makes it clear that the city council would exercise its police power to deny any application for a driveway permit to the property, or any other property within 200 feet of a bridge located at one corner of the property.

ON *certiorari* to review the decision of the Court of Appeals, 23 N.C. App. 377, 209 S.E. 2d 423, which affirmed in part and reversed in part the judgment of *McLelland, J.*, 28 January 1974 Session of WAKE County Superior Court.

This civil action was instituted by plaintiff Marriott Financial Services, Inc., (Marriott) to rescind a sale of land from Capitol Funds, Inc., (Capitol) or, in the alternative, to recover

on a title insurance policy issued by defendant Lawyers Title Insurance Corporation (Lawyers Title). By agreement of the parties, the case was heard without a jury.

The subject property is a tract of land fronting approximately two hundred forty feet on the west side of Old Wake Forest Road in Raleigh. The property has a depth of one hundred fifty feet, and its southern boundary is the center line of Crabtree Creek, which flows under a bridge carrying Old Wake Forest Road over the creek at the southeast corner of the property. This property is a portion of a larger tract formerly owned by Capitol. In 1967 Capitol conveyed to Al Smith Buick, Inc., (Al Smith) a portion of this larger tract fronting on Old Wake Forest Road and adjoining the subject property on the north and west. In connection with this conveyance, Capitol made no application to obtain the approval of the Raleigh Planning Commission or the Raleigh City Council under the provisions of the Subdivision Standards Ordinance of the City of Raleigh. However, subsequent to the conveyance, Al Smith did apply for and obtain such approvals. In connection with this application, a plat entitled "Property of Al Smith Buick, Inc.," was submitted to and approved by the City Council and recorded in the Office of the Register of Deeds of Wake County. This plat showed the boundary of the lot which Capitol conveyed to Al Smith as well as the adjoining lot, title to which still remained in Capitol. Before Raleigh officials approved this plat for recording, a notation was placed thereon opposite an arrow which pointed to the subject property and bore the following notation: "Not an Approved Lot." This notation was on the plat when it was signed by the corporate secretary of Capitol.

A. C. Hall, Jr., Director of City Planning for the City of Raleigh, testified that he was familiar with the subject property. He further testified that the Raleigh City Council, because of the heavy traffic on Old Wake Forest Road, had adopted a policy, not specifically embodied in any ordinance, of denying any driveway connections into Old Wake Forest Road within one hundred fifty or two hundred feet from the abutments on the bridge over Crabtree Creek. The City Council did not approve the lot shown on the Al Smith plat because "they suspected that had they done so they would have been a party to having to allow a driveway, which they didn't want to do."

In 1968 Walter L. Pippin, a real estate broker from Greensboro who dealt primarily in commercial and industrial properties, became interested in the subject property. Pippin had made it his practice to search for locations which he thought were suitable for businesses and then "either list them or take an option on them and try to find a buyer." From the tax records Pippin determined that the subject property was owned by Capitol and that D. W. Royster, Sr., of Shelby, President of Capitol, was the person to contact with regard to the property. Pippin went to Shelby and obtained from Capitol, in consideration of $1,000, a written option agreement dated 25 October 1968, by which option Capitol gave Pippin the right until 1 March 1969 to purchase the subject property for $75,000 cash, less the sum paid for the option, the deed to be made to Pippin or "designated owners."

By letter dated 27 February 1969, Pippin notified Capitol that he exercised the option, the letter stating, *inter alia:*

> The exercise of the option is subject to our obtaining driveway permits, which should be completed next week.

On 28 February 1969 Capitol responded in a letter addressed to Pippin, which letter contained the following language:

> We understand that the exercise of this option is subject to obtaining driveway permit and that you expect to complete same within the next week.

Pippin testified that at the time he exercised the option, he had obtained a purchaser, the KIK Corporation, which planned to place a Roy Rogers Drive-In Restaurant on the property. Later it was decided that Marriott was to be the purchaser and that KIK would lease from Marriott. A few days after notice of the exercise of the option, Pippin's son came to Raleigh and obtained on a plat of the subject property a handwritten notation as follows: "O.K. one 45′ Dr. to Wake For. Rd at north parking isle." This notation, dated 2 March 1969, was signed by Don Blackburn, Traffic Engineer for the City of Raleigh, who concededly lacked authority to bind the City of Raleigh to give a driveway permit.

On 21 March 1969 the sale was closed by Marriott's payment of $90,000, of which Capitol received $75,000 and Pippin, $15,000. Subsequent to the closing of the sale, Marriott applied to the Raleigh Planning Commission and to the Raleigh City

Council *for approval of the subdivision* with regard to the lot which Capitol had conveyed to Marriott. On 18 August 1969 the City Council adopted a resolution denying the application. That resolution, *inter alia,* stated as follows:

> It would be contrary to the public peace, safety, and welfare of the inhabitants of the City of Raleigh to approve any subdivision allowing access to Wake Forest Road within 200 feet of the Crabtree Creek Bridge in that said access would create a visual traffic and safety hazard and would in fact violate an established policy of the City. . . .

Thereafter Marriott demanded and received a refund of $15,000 paid to Pippin and tendered a reconveyance to Capitol on condition that Capitol would refund to Marriott the purchase price of $75,000 and the amount of the 1970 ad valorem taxes which Marriott had paid. Capitol refused this tender of reconveyance.

At the conclusion of the evidence, the Court allowed the motion of Lawyers Title under Rule 41(b) to dismiss, denied Capitol's similar motion, and made findings of fact upon which the Court concluded that both parties to the conveyance mistakenly believed when the sale was closed that the City of Raleigh had granted the buyer a driveway permit and "[t]hat by reason of mutual mistake a contract legally valid was not formed between the parties." The Court thereupon entered judgment that Marriott be allowed to rescind the contract, that it recover from Capitol $75,000 plus the amount paid as taxes, and that it reconvey the property to Capitol.

From this judgment Capitol appealed, including among its assignments of error the denial of its Rule 41(b) motion to dismiss and the Court's conclusion that because of mutual mistake no legal and valid contract had been formed. Marriott, although seeking to uphold the judgment, filed a cross-appeal, assigning as error the Court's failure to conclude that Marriott had a right to rescind on certain additional grounds alleged in its complaint. In the alternative and in case its judgment against Capitol should be reversed, Marriott appealed from the portion of the judgment which granted the motion of Lawyers Title to dismiss Marriott's claim as to that defendant.

On appeal, the Court of Appeals reversed the determination of the trial court that Marriott was entitled to rescission of the contract by reason of mutual mistake of fact. That Court

also held that Marriott was not entitled to rescind on the ground of illegality of the contract for failure to comply with the Subdivision ordinance of the City of Raleigh, on the ground that Capitol was guilty of actionable fraud, on the ground that the obtaining of a driveway permit was a condition precedent to the exercise of the option and conveyance of the property, or on the final ground that there was a breach of the covenant against encumbrances in Capitol's deed to Marriott.

The Court of Appeals also found no error in the Court's granting of Lawyers Title's motion to dismiss under Rule 41(b), holding that upon the facts and the law Marriott had shown no right to relief under the policy of title insurance issued by Lawyers Title.

We allowed *certiorari* on 4 February 1975.

*Manning, Fulton & Skinner, by Howard E. Manning and John B. McMillan, for plaintiff appellant Marriott Financial Services, Inc.*

*Maupin, Taylor & Ellis by Armistead J. Maupin and Thomas W. H. Alexander, for defendant appellee Capitol Funds, Inc.*

*Poyner, Geraghty, Hartsfield & Townsend, by John L. Shaw and Cecil W. Harrison, Jr., for defendant appellee Lawyers Title Insurance Corporation.*

BRANCH, Justice.

Marriott assigns as error the holding of the Court of Appeals that the trial judge correctly refused to conclude that rescission should be allowed on grounds that the conveyance was illegal because Capitol had not complied with Section 20-5(a) of the Subdivision Standards Ordinance of the City of Raleigh, which provides:

> Before any real property located within the city or located outside the city within two (2) miles in any direction of the corporate limits shall be subdivided and offered for sale, and before any plat thereof shall be recorded in the registry of Wake County, the subdivision plat thereof shall be approved by the city council, and such approval entered in writing on the plat by the city clerk and treasurer, after first having been submitted to the city planning commission in accordance with the provisions of this chapter.

Section 20-11 provides that the Register of Deeds shall not file or record a plat of a subdivision of land within the territorial jurisdiction of the City without the approval of the city council and makes the *filing or recording* of a non-approved plat void. Chapter 921 of the 1955 Session Laws is the enabling act pursuant to which the City Ordinance was adopted. Section 4 of that Act provides:

> Any person who, being the owner or agent of the owner of any land located within the platting jurisdiction granted to the municipality, thereafter transfers or sells such land by reference to a plat which was not recorded in the Office of the Register of Deeds of Wake County, showing a subdivision of such land before such plat has been approved by said legislative body, *shall upon conviction be guilty of a misdemeanor.* [Emphasis supplied.]

[1] The general rule is that an agreement which violates a constitutional statute or municipal ordinance is illegal and void. *Cauble v. Trexler,* 227 N.C. 307, 42 S.E. 2d 77; *Phosphate Co. v. Johnson,* 188 N.C. 419, 124 S.E. 859; 17 Am. Jur. 2d *Contracts* § 165 at 521; Restatement of Contracts § 580(1). However, there is also ample authority that the statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself. In such cases the Courts may examine the language and purposes of the statute, as well as the effects of avoiding contracts in violation thereof, and restrict the penalty for violation solely to that expressed within the statute itself. *Price v. Edwards,* 178 N.C. 493, 101 S.E. 33; *Hines v. Norcott,* 176 N.C. 123, 96 S.E. 899; *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324; *Ober v. Katzenstein,* 160 N.C. 439, 76 S.E. 476; 17 Am. Jur. 2d *Contracts* § 166 at 523. *See generally* Annot., 55 A.L.R. 2d 481, for cases applying these principles.

The holdings of this Court demonstrate a remarkable divergence in results in cases presenting the question of illegality of contracts because of violation of statutory provisions. The cases generally follow the rule that where certain acts are expressly made illegal, contracts based on such acts are void. *See, e.g., Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (limited partnership agreement formed as a part of a usurious loan transaction declared void); *Glover v. Insurance Co.,* 228 N.C. 195, 45 S.E. 2d 45 (insurance company not allowed

to vary the statutory requirements for a standard fire insurance policy); *Courtney v. Parker, supra* (One who violates a statute prohibiting the conduct of business under an assumed name may not enforce against a third party a contract made in the course of such business.); *Sharp, Administrator v. Farmer,* 20 N.C. 255 (No action can be based upon an agreement among heirs to pay debts of the decedent and distribute the shares of personal property without taking out letters of administration as required by statute.)

On the other hand, the Court has refused to extend the terms of a penal statute to avoid a contract unless such a result is within the intent of the legislative body. *See, e.g., Price v. Edwards, supra,* (A statutory provision requiring filing of a certificate with the Clerk of Superior Court showing names and addresses of all partners of a partnership operated under an assumed name does not apply between parties who are presumed to possess this information, the purpose of the statute being to prevent fraud upon those who ignorantly deal with the partnership.); *Hines v. Norcott, supra; Annuity Co. v. Costner,* 149 N.C. 293, 63 S.E. 304 (The plaintiff executed notes for payment of premiums for life insurance policies and defended his refusal to pay the notes upon a contemporaneous execution of a rebate contract which was made illegal by statute. The Court allowed recovery.).

*Hines v. Norcott, supra,* is analogous to instant case. There plaintiff sued for rent under a lease executed on 13 November 1913 for certain commercial buildings. Defendant denied liability on the ground that the lease was rendered illegal by the adoption in April, 1914, of the following city ordinance:

> . . . Whereas the maintenance and use of surface and dry privies in the town of Greenville is or may become a menace to the public health of the town: Now, therefore, be it ordained by the Board of Aldermen of the Town of Greenville in regular meeting assembled on 2 April, it shall be unlawful for any person, firm, or corporation to erect, maintain, or use any surface or dry privies upon any lot or premises in said town, abutting on any street wherein a sewer-pipe has been laid; and that all owners of said property shall connect with said sewer on or before 1 June, 1914. Any person violating the provisions of this ordinance shall be fined $5 for each offense, and each day said violation shall continue shall constitute a separate offense.

At trial the judge instructed the jury that the question of the plaintiff's violation of the ordinance was "a question between him and the town authorities" and had no bearing upon the lawsuit between the plaintiff and the defendant. This Court also rejected the defendant's contention that there could be no recovery because the lease was rendered illegal by failure to comply with the ordinance. The Court treated the question as one depending upon determination of legislative intent, *i.e.*, "whether it was the purpose to avoid the contract alleged to be contrary to its provisions, or whether it was intended that the penalty alone should be a sufficient punishment." We quote a portion of that opinion:

> . . . The imposition of a penalty for not doing an act which is required to be done may of itself render the doing of the same illegal; but still, if upon a fair construction of the statute it appears to have been the intention of the legislative body to confine the punishment or forfeiture to the penalty prescribed for a violation of it, that intention will be enforced. And the same may be said as to the prohibition of an act, but it does not follow in either case that the illegal act will vitiate a contract which is connected with it only incidentally because it relates to property affected, in some degree, by the statute or ordinance prohibiting or enjoining the act and annexing a penalty for its violation. This ordinance was intended to forbid the "erection, maintenance, or use of surface or dry privies" in the town, and required, in order to prevent any injury to the public health, that they should be connected with sewer-pipes laid in a street adjoining the premises. The lease in this case did not refer at all to the subject-matter of the ordinance, and especially did not stipulate that no such connection should be made, or that such privies should or might be used on the premises. *The town council, in passing the ordinance, surely did not have in mind the prohibition of a lease or sale of the premises, but only the punishment by way of penalty for the violation of its ordinance. . . . It cannot be supposed, upon a proper reading of this evidence, that the council intended to invalidate leases and sales of property merely because the owner of the premises had failed to make the sewer connections. . . .* [Emphasis supplied.]

In reaching its decision, the Court relied heavily on the landmark case of *Harris v. Runnels*, 53 U.S. (12 How.) 79, 13

L.Ed. 901. There, the action was based on a promissory note given for slaves brought into Mississippi and there sold in violation of a statute regulating the importation of slaves into the state and prescribing a one-hundred dollar penalty for each violation thereof. The Supreme Court of the United States, rejecting the defendant's defense of illegality, noted that prior decisions on point had been "fluctuating and counteracting," observed that the purpose of the statute was to exclude from Mississippi all slaves who were tainted with crime, and, *inter alia,* stated:

> . . . [W]e have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the Legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. . . .

We think that the well reasoned opinion of *Price v. Edwards, supra,* also correctly states the law pertinent to our decision of the question presented. There the administrator of the estate of S. J. Edwards instituted a proceeding seeking final settlement of the estate. His brother, J. H. Edwards, claimed to be a partner in the business and to own a one-third interest therein. The defendants, who, with J. H. Edwards, were the distributees of the estate of S. J. Edwards, filed answers in which they denied that J. H. Edwards was a partner in the business. They also pleaded in bar of J. H. Edwards's right to recover as a partner the assumed name statute, which required that the names and addresses of all partners be filed with the Clerk of Superior Court. The trial judge entered an order which declared that J. H. Edwards was a partner and entitled to a one-third interest in the business conducted by S. J. Edwards at the time of his death and that he had one-third of the proceeds of the partnership business before final distribution. The defendants appealed.

On appeal, the defendants contended that J. H. Edwards could not recover his interest as a member of the partnership because the business was transacted under an assumed name and there had been no compliance with the provisions of the assumed name act. The Court declined to apply the statute to deny recovery in this action wherein the rights of third parties were not affected and declared:

> " . . . [E]xcept in those jurisdictions where the rule had been changed by express enactment, all statutes in derogation of the common law are to be construed strictly. Where the statute not only effects a change in the common law, but is also in derogation of common right, it must be construed with especial strictness. . . . The rule to be applied in the construction of all such statutes is that they must not be deemed to extinguish or restrain private rights, unless it appears by express words or plain implication that it was the intention of the Legislature to do so." The statute now under our consideration is clearly penal, as it makes a violation of its provisions indictable and punishable by fine or imprisonment. . . .

Cases from other jurisdictions have considered questions virtually identical to the question presented in instant case. In *Pangborn v. Westlake,* 36 Iowa 546, the plaintiff brought an action to foreclose a mortgage given by the defendant and his wife to the plaintiff. The note which was the basis for the mortgage was given on 13 March 1871, and the mortgage was duly recorded on 20 March 1871. The note was given as payment for six lots in the plaintiff's contemplated addition to the City of Maquoketa, Iowa, which addition was not at the time of the note and mortgage as yet recorded. The plat of the subdivision was duly recorded on 7 October 1871. The defendant admitted the due execution of the note and mortgage but contended that the sale and conveyance of the real estate made by the plaintiff to him was illegal and contrary to an Iowa statute which provided as follows:

> . . . [A]ny person or persons who shall dispose of, or offer for sale or lease, for any time, any out or in lots, in any town, or addition to any town or city, or any part thereof, which has been or shall hereafter be laid out, until the plat thereof has been duly acknowledged and recorded, as provided for in chapter 41 of the Code of Iowa, shall forfeit and

pay $50 for each and every lot or part of lot sold or disposed of, leased or offered for sale.

The trial court sustained a demurrer to the defense of illegality, and the defendant appealed. In upholding the action of the trial court and rejecting the defendant's contention that the contract was void, the Court adopted the reasoning of *Harris v. Runnels, supra,* and squarely held that the statute did not avoid the note sued upon.

Likewise, in *De Mers v. Daniels,* 39 Minn. 158, 39 N.W. 98, the plaintiffs brought suit to recover on two promissory notes executed by the defendant to them, and the defendant set up as a defense illegality of the contract for failure to comply with the requirement that the plats be recorded prior to conveyance of the property. In rejecting the defense of illegality, the Court set forth a particularly helpful analysis:

> . . . The only provision in this statute from which it can be inferred that contracts for the sale or leasing of platted lands were intended to be prohibited, and avoided if made, is that which subjects the vendor or lessor, who has not first complied with the requirements of the law, to a pecuniary penalty. If the purpose of this section was also to prevent such sales and contracts by making them illegal, a purchaser, having such knowledge of the facts as any reasonably prudent purchaser would acquire, violates the law, and is as much in the wrong as the vendor. The fact that no penalty, forfeiture, or disability is declared with respect to purchasers, under any circumstances, is worthy of being considered in this connection. The act is wholly consistent with the theory that, as a means of securing the observance of the prescribed requirements as to platting and recording, only the specified penalty should be enforced as a consequence of a disregard of the law. It is in the power of the proprietor, platting his lands, to comply with the requirements of this law. Another person, a purchaser of a portion of the land, cannot do this. A specific penalty is declared for the omission of the former; the statute is silent as to the consequences to the latter.

*Accord: Watrous & Anouffer v. Blair,* 32 Iowa 58; *Bemis v. Becker,* 1 Kan. 226; *Strong v. Darling & Walcott,* 9 Ohio 201; *Kern v. Feller,* 70 Or. 140, 140 P. 735; but *cf. Bronson v. Moo-*

*nen*, ...... Or. ......, 528 P. 2d 82. *See also State ex rel. Craven v. Tacoma*, 63 Wash. 2d 23, 385 P. 2d 372.

We have discovered cases in two States which appear to take somewhat different positions. An early Missouri case declared void a note given for the purchase of land sold in violation of a platting ordinance and denied recovery by the vendor's assignee. *Downing v. Ringer*, 7 Mo. 585. However, later cases, noting that such statutes impose no penalty upon the purchaser, have held that the violation of the platting requirement does not render the deed void and prevent the passing of title. *Sharp v. Richardson*, 353 Mo. 138, 182 S.W. 2d 151; *Rollins v. McIntire*, 87 Mo. 496; *Mason v. Pitt*, 21 Mo. 391. Similarly, the California cases have held such contracts void. *See, e.g., Hartzell v. Doolittle*, 205 Cal. 17, 269 P. 527; *Smith v. Bach*, 183 Cal. 259, 191 P. 14. At least some later cases, however, have indicated that the contract may not be absolutely void, but merely voidable at the election of the purchaser. *See City of Tiburon v. Northwestern Pacific R. R.*, 4 Cal. App. 3rd 160, 84 Cal. Rptr. 469; *Munns v. Stenman*, 152 Cal. App. 2d 543, 314 P. 2d 67. We do not think it profitable to enter into a detailed discussion of these cases. We merely note that, insofar as they hold that such contracts are void, we decline to follow them.

**[2]** We look to the language of the enabling act and the city ordinance to ascertain the intent of the legislative bodies. The preamble to Chapter 921 of the 1955 Session Laws indicates that the purposes of the legislation are to prevent urban blight; to discourage the inefficient and inappropriate uses of lands; to deter the creation of conditions which require excessive expenditures for municipal facilities, services, and maintenance; to promote the efficient and wise use of land and the orderly growth of cites and towns by requiring that new subdivisions "be designed in accordance with reasonable standards and comprehensive plans for the growth of the urban areas"; and to provide an adequate means by which the City of Raleigh may effectuate these aims. Such protective legislation must be construed "so that it does not become just another hazard for the unwary." *In re Estate of Peterson*, 230 Minn. 478, 42 N.W. 2d 59. Pursuant to the ordinance, anyone who describes any land in a deed by reference to a subdivision plat which has not been properly approved and recorded is guilty of a crime, punishable as a misdemeanor. The offense is expressly designated, and punishment for its violation clearly stated. The Gen-

eral Assembly has carefully designated the offense, the offender, and the penalty and has made specific provisions to insure enforcement. The inference is "that the Legislature has dealt with the subject completely and did not intend, in addition thereto, that the drastic consequences of invalidity should be visited upon the victim of the offender by mere implication." To hold that the enactment, either expressly or by plain implication, indicates a legislative intent to invalidate the sale of property absent compliance with the subdivision ordinance would visit upon the unfortunate purchasers "a penalty far greater than, and out of all proportion to, the penalty imposed upon the wrongdoer himself." *In re Estate of Peterson, supra.*

In our opinion, and we so hold, the legislative bodies dealt with the matter completely and did not intend to invalidate conveyances of real property because of failure to follow the provisions of this penal legislation. The Court of Appeals correctly decided that the trial judge properly ruled that the sale was not illegal because of statutory provisions of the Raleigh City Code.

Marriott contends that the Court of Appeals erred in reversing the determination of the trial court that it was entitled to rescission on grounds of mutual mistake.

All parties to this appeal apparently concede, and we think correctly so, that plaintiff succeeded to all the rights and obligations formerly held by its assignor, Walter L. Pippin, so as to establish privity of contract between plaintiff and defendant. *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636; *Moore v. Moore,* 151 N.C. 555, 66 S.E. 598.

It is a well-recognized principle that equity will grant relief from the consequences of mistake, "some unintentional omission, or error, arising from ignorance, surprise, imposition or misplaced confidence." 27 Am. Jur. 2d *Equity* § 28. It is not every mistake, however, which will justify the equitable remedy of rescission. The rule is well stated as follows:

> The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted where there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus ad idem. Generally speaking, however, in order

> to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words, it must be of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.
>
> A mutual mistake of such a character as to affect the validity of an executory agreement ordinarily affects the validity of an executed agreement.

17 Am. Jur. 2d *Contracts* § 143; *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800.

**[3]** In order for the remedy of rescission to be operable because of mistake of fact, there must be mutual mistake of fact. A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance. *Tarlton v. Keith,* 250 N.C. 298, 108 S.E. 2d 621; *Cheek v. R. R.,* 214 N.C. 152, 198 S.E. 626. The following pertinent statement aptly summarizes the requirement of mutuality:

> . . . It is said that ordinarily a mistake, in order to furnish ground for equitable relief, must be mutual; and as a general rule relief will be denied where the party against whom it is sought *was ignorant that the other party was acting under a mistake and the former's conduct in no way contributed thereto,* and a fortiori this is true where the mistake is due to the negligence of the complainant. . . . [Emphasis supplied.]

77 Am. Jur. 2d *Vendor and Purchaser* § 51 at 237.

Marriott points to *MacKay v. McIntosh, supra,* as authority supporting its position. In that case the defendant signed a contract to purchase property from the plaintiff in reliance upon the statement of the plaintiff's real estate agent that the subject property was zoned for business, and both the defendant and the plaintiff's agent acted under the mistaken belief that the property was so zoned. This Court held that the evidence supported rescission of the contract because of mutual mistake. *MacKay* is distinguishable from instant case in two respects: (1) the evidence in that case showed that the plaintiff's agents

had innocently but erroneously represented to the defendant that the subject property was zoned for business use, which was the sole use contemplated for the subject premises, and (2) the contract for the sale of real property in that case was executory rather than executed.

**[4]** Here defendant asserts no equitable defense. For the purpose of our consideration of this question, we assume, without deciding, that plaintiff has established the purchase of the subject property under a mistaken assumption that an effective driveway permit had been obtained by Pippin and that plaintiff would not have purchased the property without such permit. Even so, there is a complete absence of evidence tending to show that this mistaken assumption was induced by any misrepresentation, deceitful action, or misleading silence on the part of Capitol. Neither is there evidence that Capitol knew of the specific purpose for which plaintiff intended to use the property. Under these circumstances, in the absence of an express contrary understanding, the purchaser must assume the responsibility for obtaining the permits necessary for his particular use of the property. Further, there is nothing in the record to indicate that at the time of the conveyance *Capitol knew or should have known that Marriott mistakenly believed that the driveway permit had been obtained. See* Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions,* 45 Tex. L. Rev. 1273.

These reasons, standing alone, are sufficient to sustain the decision of the Court of Appeals denying relief on the ground of mutual mistake. Nevertheless, the correctness of the decision of the Court of Appeals as to this assignment of error is further sustained by a line of North Carolina cases beginning with *Crowder v. Langdon,* 38 N.C. 476.

In *Crowder,* the plaintiff and the defendant were partners in a mercantile business which had been actively operated by the defendant and one Thomas Whitaker. The plaintiff, being without knowledge of the business, proposed a dissolution of the partnership. The defendant Langdon objected but offered to sell his interest in the business to the plaintiff on the basis of a statement of value made to him by the defendant and assertedly based on the books and information furnished by Whitaker. It was later discovered that the statements as to value of the business were erroneous, and the plaintiff thereupon instituted an action based on fraud and mutual mistake. The

Court, in deciding against the plaintiff, made the following statement concerning mutual mistake:

> . . . The general rule unquestionably is, that an act done or a contract made under a mistake or ignorance of a material fact, is relievable in equity. [Citation omitted.] But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. The policy of the law is to administer relief to the vigilant, and to put all parties to the exercise of a proper diligence. In like manner, where the fact is equally unknown to both parties, or where each has equal and adequate means of information, or when the fact is doubtful from its own nature, in any such case, if the party has acted with entire good faith, a court of equity will not interpose. [Citations omitted.] Where each party is equally correct and there is no concealment of facts, mistake or ignorance is no foundation for equitable interference. . . .

In *Wilson v. Land Co.,* 77 N.C. 445, the plaintiff sought cancellation of a deed on the grounds of fraud and mutual mistake. In denying relief the Court, *inter alia,* stated:

> There must always be shown either the mistake of both parties, or the mistake of one with the fraudulent concealment of the other, to justify a court of equity in reforming a contract. [Citations omitted.] In order to set aside such a transaction, it is essential, not only that an advantage should be taken, but there must be some obligation in the party to make the discovery; not an obligation in point of morals only, but of legal duty; the policy of equity being to afford relief to the vigilant and put all parties upon the exercise of the most searching diligence. *This is peculiarly so in cases of written agreements—a solemn deed, as in this case.* The whole sense of the parties is presumed to be comprised in such an instrument, and it is against the policy of the law to allow parol evidence to add to or vary it, as a general rule. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, relief will be withheld, upon the ground that the written paper must be treated as the full and correct expression of the intent until the contrary is established beyond reasonable controversy. . . . [Emphasis supplied.]

*Accord: Cedar Works v. Lumber Co.,* 168 N.C. 391, 84 S.E. 521; *Anderson v. Rainey,* 100 N.C. 321, 5 S.E. 182; *Capehart v. Mhoon,* 58 N.C. 178.

Although this Court will readily grant equitable relief in the nature of reformation or rescission on grounds of mutual mistake when the circumstances justify such relief, we jealously guard the stability of real estate transactions and require clear and convincing proof to support the granting of this equitable relief in cases involving executed conveyances of land. *Maxwell v. Bank,* 175 N.C. 180, 95 S.E. 147. In the recent case of *Hinson v. Jefferson,* 287 N.C. 422, 215 S.E. 2d 102, we said:

> . . . 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 transactions and lead to the filing of many non-meritorious actions. Hence, we expressly reject this theory as a basis for plaintiff's rescission.

In instant case it is clear that Pippin assumed the sole risk of error in obtaining the desired driveway permit. Further the record does not disclose that Marriott made any investigation or inquiry concerning access to the property and therefore chose to proceed on its limited knowledge or to assume the sole risk of error. The means of information were equally open to all parties to the transaction. Neither Pippin nor Marriott required a contractual provision in the written instruments avoiding the transaction in case a driveway permit was not obtained.

The lack of diligence on the part of Marriott and Pippin also precludes the intervention of equity to avoid this completed sale and transfer of real property.

For the reasons stated, we hold that the Court of Appeals correctly sustained Capitol's assignments of error directed to the trial judge's findings and conclusions that the sale of the subject property was closed under a mutual mistake of fact.

**[5]** *Plaintiff's argument that the trial court erred in failing to* conclude that defendant's conduct amounted to fraud is without merit.

In *Davis v. Davis,* 256 N.C. 468, 124 S.E. 2d 130, this Court stated:

> To obtain relief from a contract on the ground of fraud, the complaining party must show: a false factual representation known to be false or made in culpable ignorance of its truth with a fraudulent intent, which representation is both material and reasonably relied upon by the party to whom it is made, who suffers injury as a result of such reliance. . . .

Here there is not a scintilla of evidence tending to show that Capitol, with fraudulent intent, made a false representation of a material fact which plaintiff relied upon to its injury.

**[6]** Plaintiff contends that the issuance of a valid driveway permit was a condition precedent to the contract of sale.

The correspondence between Capitol and Pippin took place while the option to convey the property was in effect. This correspondence indicated that Pippin would exercise the option upon obtaining a driveway permit. Pippin thereafter exercised the option by directing that a deed be made to plaintiff. Capitol thereupon executed a deed to plaintiff conveying a fee simple title without reciting conditions which might defeat the conveyance.

> In the absence of fraud or mistake, and in the absence of collateral contractual provisions or agreements which are not intended to be merged in the deed, the acceptance of a deed tendered in performance of an agreement to convey merges the written or oral agreement to convey in the deed, the agreement to convey being discharged or modified as indicated by the deed, and thereafter the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed. . . .

77 Am. Jur. 2d, *Vendor and Purchaser* § 290 at 448; 26 C.J.S. *Deeds* § 91c. *See Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548; *Conner v. Ridley,* 248 N.C. 714, 104 S.E. 2d 845.

We have decided that there was not such mistake or fraud as would permit rescission. We find no evidence of a collateral agreement, not intended to be merged in the deed, which amounts to a condition precedent defeating the conveyance. We

hold that the Court of Appeals correctly decided that the trial judge did not err in failing to conclude that the issuance of a driveway permit was a condition precedent of the contract of sale.

Marriott assigns as error the holding of the Court of Appeals that the trial court correctly granted the motion of Lawyers Title to dismiss under Rule 41(b). Marriott's position seems to be (1) that the lack of vehicular access to the subject property rendered the title unmarketable and (2) that even if the title is not unmarketable as a matter of law, Lawyers Title nevertheless insured against lack of access to the property and plaintiff does not have such access.

The relevant parts of the driveway ordinance provide:

> (b) *Permit required.* No person shall pave a driveway across any public sidewalk, walkway or parkway, or into any street or alley, or cut any curb for the construction of a driveway without first having obtained a permit therefor *as required herein.* . . .
>
> (c) *Application for permit.* Application for such permit shall be made to the director of public works in duplicate, and shall state, among other things, the location, grade, and dimensions of the proposed driveway and the purpose for which it is desired. *If the proposed driveway complies with provisions of this section the director of public works shall issue a permit therefor.* Two sets of plans showing all pertinent information shall accompany the application for all commercial or filling station driveways. Plans for residential driveways shall be furnished when requested by the traffic engineer. The applicant shall comply with section 19-22, and all other ordinances and regulations of the city.
>
> * * *
>
> (3) The traffic engineer may decrease the width of any driveway if it would create a hazard to pedestrians or traffic.
>
> (e) *Location and number of driveways.*
>
> (1) The number of driveways servicing any property may be limited to one where it is necessary for purposes of decreasing traffic and pedestrian hazards, as determined by the traffic engineer.

> Where special hazards exist adjacent to a lot abutting on two or more streets, the traffic engineer may require, as a condition of the issuance of a permit to construct driveways for access to such lot, that ingress to such lot shall be restricted to one street and egress from such lot shall be restricted to another street and that conspicuous signs be erected and maintained giving notice of the restricted use to which such driveways may be put. Failure of the person having control of such lot to erect and maintain such signs or the use of such driveways by any persons in violation of such restrictions after the erection of such signs, shall be unlawful. [Emphasis supplied.]

The pertinent provisions of the contract insure as follows:

Lawyers Title Insurance Corporation, a Virginia corporation, herein called the Company, for a valuable consideration paid for this Policy, HEREBY INSURES [plaintiff] designated in Schedule A as, and hereinafter called, the Insured, the heirs, devisees, personal representatives of such insured, or, if a corporation, its successors by dissolution, merger or consolidation, against loss or damage not exceeding the amount stated in Schedule A [$90,000], together with costs, attorneys' fees and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations hereof, which the Insured shall sustain by reason of:

> any defect in or lien or encumbrance on the title to the estate or interest covered hereby in the land described or referred to in Schedule A [the subject property], existing at the date hereof, not shown or referred to in Schedule B or excluded from coverage in Schedule B or in the Conditions and Stipulations; or
>
> unmarketability of such title; or
>
> lack of a right of access to and from the land;

all subject, however, to the provisions of Schedules A and B and to the Conditions and Stipulations hereto annexed; all as of the effective date shown in Schedule A of this Policy.

The conditions and stipulations provide, *inter alia:*

2. Exclusions from the Coverage of this Policy

This policy does not insure against loss or damage by reason of the following:

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or employment of the land, or regulating the character, dimensions, or location of any improvement now or hereafter erected on said land, or prohibiting a separation in ownership or a reduction in the dimensions or areea [sic] of any lot or parcel of land.

(b) Governmental rights of police power or eminent domain unless notice of the exercise of such rights appears in the public records at the date hereof.

(c) Title to any property beyond the lines of the land expressly described or referred to in Schedule A, or title to areas within or rights or easements in any abutting streets, roads, avenues, lanes, ways or waterways (except to the extent the right of access to and from said land is covered by the insuring provisions of this policy), or the right to maintain therein vaults, tunnels, ramps or any other structure or improvement, unless this policy specifically provides that such titles, rights or easements are insured.

The Court of Appeals disposed of this assignment of error by holding that the policy provisions insuring against lack of access apply only "when the insured landowner has no right of access to or from his land." The Court reasoned that even pedestrian access to the subject property was sufficient to preclude liability under the title insurance policy. We do not agree.

**[7]** The intention of the parties to an ambiguous policy is to be ascertained by the facts and circumstances surrounding the making of the contract as well as by the language of the contract. The test in construing the language of the contract is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. 43 Am. Jur. 2d *Insurance* § 261 at 320.

**[8]** This record shows that the subject property lies adjacent to a heavily traveled street in the City of Raleigh and is located

in a commercial area heavily populated with restaurants, stores, and automobile dealerships. Under these circumstances, it would strain credulity beyond reasonable limits to hold that the parties to this contract understood that the insurance as to access could be satisfied by pedestrian access. To the contrary, the insured must have contemplated insurance protection against lack of vehicular access. It is of interest that § 19-26 of the Raleigh City Code defines a commercial driveway as a driveway providing *vehicular* ingress and egress to and from property used for purposes other than residential.

We hold that when an insurer contracts to insure against lack of access to property, it must be deemed to have insured against the absence of access which, given the nature and location of the property, is *reasonable* access under the circumstances. In instant case mere pedestrian access cannot be deemed to be reasonable access.

However, we reach the same result as did the Court of Appeals. We do not think that the question of whether access has been denied to Marriott properly arises from the facts before us. After Marriott obtained a deed conveying the subject land in fee simple, it applied for *subdivision approval* pursuant to Sections 20-5 and 20-6 of the Raleigh City Code. The procedures for obtaining driveway permits are contained in Section 19-26 of the Raleigh City Code. There is no evidence that Marriott has applied for a driveway permit under this section or any other section of the Raleigh City Code. There is no showing that the proper authorities of the City of Raleigh have refused to issue such permit. Thus, plaintiff fails to show breach of policy provisions insuring access. *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129. However, in all probability, it would be an exercise in futility for Marriott to now apply for a driveway permit under the proper provisions of the Raleigh City Code.

It is well recognized in this jurisdiction that exclusions from coverage are construed strictly so as to provide coverage which would otherwise be afforded by the policy. *Trust Co. v. Insurance Co.,* 276 N.C. 348, 172 S.E. 2d 518; *Insurance Co. v. Insurance Co.,* 269 N.C. 341, 152 S.E. 2d 436. Even so, if the language of the policy is plain and unambiguous, the Court must give effect to the policy as written. *Trust Co. v. Insurance Co., supra; Walsh v. United Insurance Co.,* 265 N.C. 634, 144 S.E. 2d 817; 43 Am. Jur. 2d *Insurance* § 279 at 340.

[9] The City Council's 18 August 1969 resolution rejecting Marriott's application for subdivision approval, in part, stated that "it would be contrary to the public peace, safety and welfare of the inhabitants of the City of Raleigh to approve any subdivision allowing access to Wake Forest Road within 200 feet of Crabtree Creek Bridge. . . . " This unequivocal language makes it clear that the City Council would exercise its police power to deny any application for a driveway permit from Wake Forest Road to the Marriott property, or any other property within 200 feet of Crabtree Creek Bridge.

The provisions of Subsection (b) of the exclusions from coverage in subject policy in plain and unambiguous language exclude from coverage any loss or damage by reason of exercise of governmental police power unless notice of the exercise of such police power appears in the public records on 29 March 1969, the effective date of the policy. According to this record, such notice could not appear in the public records on the effective date of the policy.

For reasons stated the decision of the Court of Appeals is

Affirmed.

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STATE OF NORTH CAROLINA v. ROBERT GARY BOCK, JR.

No. 37

(Filed 27 August 1975)

1. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty constitutional**

The death penalty was properly imposed upon a conviction for first degree murder.

2. **Constitutional Law § 29; Jury § 7— juror opposed to capital punishment — challenge for cause — time of making**

A juror may be successfully challenged for cause when, before the trial has begun, he is irreparably committed to vote against the penalty of death.

3. **Constitutional Law § 29; Jury § 7— jurors opposed to capital punishment — challenge for cause by State — time of making**

The trial court did not err in allowing the State to challenge six jurors for cause before defendant had an opportunity to cross-examine them with reference to their views on capital punishment, since G.S. 9-21(b) provides in part that " . . . The State's challenge, peremptory

or for cause, must be made before the juror is tendered to the defendant. . . . "

4. **Homicide § 20— photographs of deceased — admissibility for illustration**

The trial court in a first degree murder prosecution properly allowed into evidence five photographs of the victim's body for the purpose of illustrating the testimony of two witnesses.

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

Evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder where such evidence tended to show that defendant and deceased engaged in sexual relations twice, deceased put pressure on defendant for money for services rendered, defendant had no money and an argument ensued, deceased started to slap defendant, but he slapped her first and knocked her to the ground, defendant returned to his car but then saw deceased coming at him with his open knife, defendant then grabbed deceased's arm but could remember nothing thereafter until he was driving from the area alone in deceased's car with his knife in it, defendant was larger than deceased and believed he would have no difficulty defending himself against her, deceased did not harm or hurt defendant in any way, the 55 stab wounds in deceased's body constituted grossly excessive force, and force which would have been lethal had deceased not already been dead was applied when the automobile was driven over her felled body.

6. **Criminal Law § 119; Homicide § 28— instruction on self-defense — request properly denied**

The trial court in a first degree murder prosecution did not err in refusing to give the jury defendant's requested instruction on self-defense since the instruction was not a correct statement of the law and there was no evidence tending to show any necessity, real or apparent, for defendant to kill deceased.

7. **Criminal Law §§ 6, 122— intoxication of defendant — additional instructions — no error**

The trial court's additional instructions given the jury bearing upon the evidence tending to show that defendant was intoxicated at the time deceased was killed were more favorable than defendant was entitled to receive.

8. **Criminal Law §§ 52, 53— hypothetical question — insufficiency of facts — opinion based on hearsay**

The trial court did not err in excluding testimony of an expert witness who was a psychiatrist as to whether defendant had complete recall of the events surrounding the time of the crime, since the facts assumed in the hypothetical question put to the witness were obviously insufficient to enable him to form a satisfactory opinion and the basis of the witness's opinion included hearsay evidence obtained by the witness from defendant's family and friends and from defendant himself during an examination to enable the witness to testify for defendant.

9. **Criminal Law § 53— doctor's expert opinion — hearsay as basis**

Generally, an expert witness cannot base his opinion on hearsay evidence, and when the facts are not within the knowledge of the witness himself, the opinion of an expert must be upon facts supported by evidence, stated in a proper hypothetical question; however, the opinion of a physician is not ordinarily rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure.

10. **Criminal Law § 5— amnesia — no defense to crime**

Amnesia itself is no defense to a criminal charge.

11. **Criminal Law § 75— statement by defendant — voluntariness**

Trial court's finding that defendant's statement to a deputy sheriff was voluntarily made after he had been fully advised of his constitutional rights and had understandingly waived them was supported by competent evidence and is conclusive on appeal.

Justice LAKE concurring in result.

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

APPEAL by defendant under G.S. 7A-27(a) from *McConnell, J.*, 4 March 1974 Session of the Superior Court of MOORE.

Defendant was tried upon an indictment, drawn under G.S. 15-144, which charged him with the murder of Karen Wilkes Stewart on 23 November 1973. From a verdict of guilty of murder in the first degree and sentence of death, defendant appealed.

The State's evidence tends to show the following facts:

About midnight on 22 November 1973 defendant arrived at the home of Martin Bergman in Moore County. He was driving the 1971 gold Mustang automobile which belonged to his companion, Miss Karen Wilkes Stewart. Bock and Bergman had known each other for about a year. They first met at the farm of Sergeant Gary Kiley, where they had worked together. Bock had visited in the Bergman home on prior occasions, but on this particular night he was not expected. When defendant and Miss Stewart first appeared at the Bergman home, they did not get out of the car. After stopping for a few seconds defendant drove away, but later Bergman observed him pass the house two or three times driving at a high rate of speed. Subsequently, defendant and Miss Stewart returned, and he told Bergman he was going to take the girl "over to the farm to show her a farm

and animals." This time they were gone only two or three minutes. When they returned they got out and joined the Bergman family and their four house guests around a camp fire. Defendant introduced Miss Stewart to the group as "Candy." After talking with the group for a while, defendant and Miss Stewart again left. Defendant was driving and Miss Stewart was seated on the passenger side. At this time defendant was wearing a shirt.

The next time Bergman saw defendant, he was again "racing up and down" in front of the house in Miss Stewart's Mustang, but at this time she was not with him. When defendant stopped at his house for the fourth time Bergman noticed that he was wearing only his T-shirt, which appeared to have spots of blood on it. Defendant had no visible injuries about his person. The shirt he had been wearing was in the automobile. When several people eventually asked defendant as to the whereabouts of Miss Stewart, his answers were conflicting. Once he said he had taken her back to Fayetteville. Then he said he had taken her down the road and thrown her out of the car.

Bergman, noticing a difference in defendant's appearance and demeanor when he returned the last time, took the car keys from him. In the car Bergman found Miss Stewart's purse, which contained her identification card and driver's license. Her automobile registration card was in the glove compartment. A cosmetic case or overnight bag was in the back seat. Kenneth Osbourne, one of the guests, found defendant's knife (State's Exhibit 2) underneath the steering wheel. There was blood on the blade, the tip of which was broken off. Defendant had nothing to say when he was questioned about the knife, "a guardian knife, approximately 4½ inches long closed, and approximately 8½ inches long with the blade open." When the blade opens the knife locks into position; when closed, each end of the knife is brass.

Sometime during the latter part of the night, defendant told Bergman that he and Miss Stewart had had sexual relations two times; that they were going to have relations again but on the third occasion, she demanded money which he did not have to give her.

About 5:30 a.m. Bergman and Sergeant Kiley asked defendant to show them where he had pushed the girl from the car. Following defendant's directions the three men then went searching for Miss Stewart but were unable to locate her.

Before 7:00 a.m. the next morning, police officers came to the Bergman home to question defendant. At that time defendant had no odor of alcohol about him, and he had no difficulty in walking. While there, the officers observed that the rear tire of the Mustang had red spots on it and found light colored hair in the shock absorbers. The officers also noticed that defendant was wearing a knife sheath which fitted the knife removed from the car the night before.

About 6:45 a.m. on 23 November 1973, Billy Shaw and two other deer hunters found the body of a blonde, female person, later identified as that of Miss Stewart, a few miles from the Bergman residence in the sandpits area of Moore County. There were tire marks on the body. Billy Shaw remained with the body until Ed Cockman, a detective from the Moore County Sheriff's Department arrived.

Detective Cockman testified that when he arrived at the sandpits he observed a nude body with many wounds and lacerations on the side of the neck, hip, and left breast. There were also stab wounds or lacerations about the face. There was blood on the ground. While there, he observed tire prints on the left leg of the victim. About two feet from the body of Karen Stewart, he observed a blanket and a pair of slacks. One shoe was close by and the other about 25 feet from the body. There were tire prints on the front and inside portion of the left leg, and there were also tire impressions on each side of the body.

After the body had been removed, Cockman returned to the Bergman residence where he found a brassiere under the small make-up kit in the car. He also observed stains which appeared to be blood stains on both rear tires of the automobile.

Cockman testified that about 10:30 a.m. he had a conversation with defendant at the sheriff's office. At this point defendant moved for a *voir dire* to determine the admissibility of defendant's statement in evidence. In the absence of the jury Cockman testified that he told defendant he wanted to question him with reference to the death of Karen Wilkes Stewart. Before doing so, however, he read him his constitutional rights in the words of the *Miranda* warning from a printed form, introduced in evidence as State's Exhibit 18. The form was then handed to defendant to read for himself. Defendant said that he understood his rights and then signed the following "Waiver of Rights":

"I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been made against me by anyone."

Defendant did not appear frightened, and was offered no reward for his statement. Cockman detected no odor of alcohol about him and in no way forced defendant to talk. The interview lasted about 30 minutes. During that time defendant made a statement which was reduced to writing.

Judge McConnell found as a fact that defendant's statement was freely and voluntarily made after he had been duly warned of all his constitutional rights and after he had freely and voluntarily waived his rights; that defendant was normal at the time, coherent, and was not confused. He ruled that defendant's statement was admissible in evidence.

Cockman then testified before the jury that defendant made the following statement to him:

"I was drinking heavy last evening, girl pulled up to a stoplight in Fayetteville and I got in the car. Mach I, color gold and black. We rode around all over Fayetteville and Spring Lake. We stopped someplace and had relations, then went to Martin Bergman's house after midnight. I had some more drinks. I was talking to Martin Bergman. Candy was talking to another guy about dogs. We left, went down road, took left out of Martin's yard, parked someplace around there and had relations again. I started driving around telling her lies, making her think I had money. Candy was putting pressure on me for money. I assumed it was for services rendered. I put my knife on the console someplace. Large pocket knife, brass ends. After this she started giving me a hassle with knife in her hand. I don't know what happened after that except I was going to put her out of the car. Next thing I remember I was at Martin Bergman's house. No one else had been with Candy and myself."

Cockman also testified that as defendant made his statement he identified the driver's license picture of Karen Wilkes Stewart as the girl he had accompanied on the night in question. He also identified the knife found in the victim's Mustang as belonging to him.

Dr. C. Harold Steffe, an expert pathologist who examined Miss Stewart's body about 11:00 a.m. on 23 November 1973, testified he found 55 stab wounds in the victim's body and that the cause of death was loss of blood into the chest caused by stab wounds into a major vessel which feeds into the left lung. He also observed two tire tracks on her body, one across her chest and another across the left leg—not quite parallel. In his opinion the body was run over after death. He found no sperm in the vaginal canal, but stated that the absence of sperm did not preclude the possibility of intercourse. A blood test revealed no evidence of alcohol.

An SBI chemist testified that the blood found on defendant's T-shirt, the knife, the left rear tire, and from the human tissue recovered from underneath the car was all of Group O, which was also the victim's blood type. Defendant's blood type was analyzed as Group A.

An SBI micro-analyst testified that hair samples recovered from the underside of the Mustang bore significant similarities to hair taken from the victim. The analyst also testified that fibers taken from a blanket found at the scene were almost identical to fibers taken from the bottom of the Mustang.

At this point the State rested and defendant moved for a nonsuit on the ground that the State had offered no evidence of a premeditated and deliberated murder. The court denied this motion, and defendant offered evidence.

As a witness in his own behalf, defendant's testimony tended to show:

On 22 November 1973 defendant was 19 years old; six feet and three or four inches tall; he weighed about 195 pounds. A native of Chicago, he was a member of the 82nd Airborne Division at Fort Bragg, N. C. From time to time he assisted Sergeant Gary Kiley, a member of his unit and a friend, on the Sergeant's farm near Fort Bragg. In pitching hay and feeding animals he used the knife (State's Exhibit 2) to cut bales of hay and tangled wire in the hay baler. On November 22nd, Thanksgiving, he was not required to perform any military duties, and he was wearing the knife in its sheath because he had expected to help Sergeant Kiley on the farm. He did not know whether the point on the blade was broken off on November 22nd. When he learned that Sergeant Kiley did not need him on the farm that day, he went with a group from his unit

to the NCO Club where he purchased two fifths of Bacardi Rum. By late afternoon he had consumed at least a fifth of liquor. Sometime that evening, under circumstances which he remembers only vaguely, he met a girl who identified herself as Candy.

The girl was on Raeford Road in a Ford Mustang, and he was walking. He does not know how he happened to get in the car. She slid over and he entered the automobile on the driver's side. He had never seen her before. They proceeded down a road and engaged in sexual intercourse on a blanket outside the automobile. He believes he was drunk at that time; that there was liquor in the back seat of the Mustang. They then drove to the Bergman residence, where he spoke to Bergman and left without getting out of the car. Subsequently they returned and left again several times.

The last time defendant and Miss Stewart returned together they got out and, for a while, sat around a camp fire with Bergman and his guests. Then, once more, they left and when defendant returned Miss Stewart was not with him. He testified that during his last absence they had gone to some dark area, which he could not find again, and there engaged in sexual relations on a blanket outside the car. Thereafter, they began to argue about money which had not theretofore been mentioned. He dressed in his pants and shirt and she dressed only in a sweater. Then they met at some point near the car and she attempted to slap him. In her hand he saw the brass ends of his closed knife, which he had placed on the console in the car. He had no fear of her and knocked her to the ground. He then went back to the car with the intention of leaving without her. However, he changed his mind and turned around to see her coming at him with his knife, which was then open. He grabbed her arm and recalls nothing which happened thereafter until he was turning the car around and leaving the area. He does not recall running over her, but it is possible that he did so. He recalls driving down the center of the road following the white line and arriving at Bergman's house.

Defendant testified "that at no time, including the time he first knocked Candy down and the time he saw her coming at him with the open knife, did he intend to kill her. But he does not specifically recollect stabbing her." Karen Stewart did not harm or hurt him in any way. Her height was about to his eye level and he does not believe he would have had any difficulty in defending himself against her. He does

recall making a statement to Detective Cockman on the following morning.

A Major, a Captain, and a First Lieutenant in defendant's 82nd Airborne Division testified that defendant's general character and reputation in the military community was "very good." Sergeant Kiley testified that his reputation was "outstanding." Mrs. Bergman said that in her opinion defendant was under the influence of alcohol when he was at her home on the night of November 22nd.

Sergeant Kiley testified that when he arrived at the Bergman residence at 5:30 a.m. on the morning of November 23rd he detected no odor of alcohol on defendant's breath, but defendant did not respond to his questions and what he said "did not make good sense." Defendant told him, in response to a direct question, that he had had intercourse with Miss Stewart. However, he did not mention her having a knife; nor did he say anything about having lost any portion of his memory. Yet his demeanor was unusual, and he seemed to be trying to recall the events of the preceding night.

Dr. Charles Smith, an "accepted" expert in psychiatry whom defendant called as a witness, testified that he examined defendant on 2 March 1974, two days before the term of court at which he was tried, for two hours in the sheriff's office. In answer to a hypothetical question based upon his examination of defendant and the assumption that defendant had inflicted the stab wounds found upon Miss Stewart's body, Dr. Smith testified that he was "unable to form an opinion" as to whether defendant "could have been not conscious of what was transpiring at the time he inflicted all or any of those wounds."

Upon a *voir dire,* in the absence of the jury, Dr. Smith testified that defendant had given him a history of excessive drinking followed by blackout spells or periods of amnesia. Based upon this history, which also included details of defendant's background, early development, and his life in more recent years, as well as statements from defendant's family and friends, he had concluded that defendant "is insecure, inadequate, and a chronically anxious person who is very prone to rebel and to make angry." It was his opinion that on 23 November 1973 defendant became pathologically intoxicated. Such intoxication is "marked by a state of hyper-excitement associated with aggressive behavior and also always associated with some loss of

recall for events transpiring during the period because consciousness is disturbed. With disturbed consciousness you have absence of recall." In Dr. Smith's opinion defendant is unable to recall what happened "in the totality of what went on." He thought he had "a fragmentary recalling but that there are portions of it he does not have a clear recall for."

In the presence of the jury, counsel propounded the following question to Dr. Smith:

"Dr. Smith, based upon your examination and observation of Robert Gary Bock, Jr., and further if the jury should find as a fact that at some time in the early morning of the 23rd of November, an altercation arose between Robert Gary Bock, Jr., and an individual identified as Candy, and that some time after that altercation Robert Gary Bock, Jr., was driving an automobile down a dirt road, do you have an opinion satisfactory to yourself as to whether or not Robert Gary Bock, Jr., could in fact be unable to recall that interval between those two incidents?"

The State's objection to the foregoing question was sustained. To this ruling defendant noted his exception No. 37. If permitted to answer Dr. Smith would have said:

"It is my opinion that during the period between the onset of this altercation and the last stated event in the hypothetical question the defendant entered into a state of pathological intoxication in which his consciousness was clouded to the extent that he probably in fact does not have complete recall for the events encompassed within this time span."

At the close of his evidence defendant again moved for judgment of nonsuit. When this motion was denied defendant tendered instructions "upon his right of self-defense," which the court declined to give.

Judge McConnell instructed the jury to return one of four verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter, or not guilty. The jury's verdict was guilty of murder in the first degree. From the sentence of death imposed upon that verdict, defendant appeals to this Court.

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

*W. S. Geimer for defendant appellant.*

SHARP, Chief Justice.

**[1]** Defendant's first and last assignments of error (Nos. 1 and 19) are based upon the premise that capital punishment is prohibited by U. S. Const. amend. VIII and amend. XIV, § 1. This is a contention which we have previously considered, and repeatedly rejected. 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).

Assignments of error Nos. 2 and 7 are specifically abandoned in appellant's brief.

Assignment of error No. 3 relates to the manner in which the jury was selected. During the process the State successfully challenged for cause six jurors, each of whom stated that he or she would not, under any circumstances, vote for a verdict which would require the imposition of the death sentence. Defendant contends that he was prejudiced not only by "the exclusion of death-scrupled veniremen" from the panel but by their exclusion *before* he had an opportunity to cross-examine them with reference to their views on capital punishment. Neither of these contentious can be sustained.

**[2]** Numerous decisions of this Court have established that a juror may be successfully challenged for cause when, before the trial has begun, he is irreparably committed to vote against the penalty of death. *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796 (1973); *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972). *See Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968).

**[3]** G.S. 9-21(b) provides in part: " . . . The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant. . . . " The obvious purpose of this section is to protect defendants in criminal cases by giving them

the last opportunity to challenge a venireman. As pointed out by Justice Branch in *State v. Harris,* 283 N.C. 46, 51, 194 S.E. 2d 796, 799 (1973), "G.S. 9-21(b) provides a procedure for the orderly selection of jurors. Its effect is to give to the defendant the last opportunity to exercise his right of challenge when the State had all pertinent information concerning the fitness and competency of the juror before he was tendered to the defendant." To allow defense counsel to cross-examine a juror who has informed the court and counsel that he is irrevocably committed to vote against any verdict which would result in a death sentence would thwart the protective purposes of G.S. 9-21(b). Further it would be a purposeless waste of valuable court time—a waste which the jury selection plan approved in *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970) was designed to eliminate.

Defendant relies upon *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974) to sustain his position on assignment No. 3. This decision, however, has no application to the facts of this case. In *Britt,* the trial judge refused to allow both 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. He also ruled that no mention was to be made in the jury's presence of the fact that they were trying a capital case or that the death penalty might be imposed upon their verdict. For this error we ordered a new trial. The decision in *Britt* established the right of both the solicitor and defense counsel to examine any prospective juror *tendered to him* for *voir dire* with reference to his attitude toward capital punishment. The defendant in this case was not denied that right. On the contrary, as in *State v. Perry, supra,* "the method of selection offered the defendant full opportunity to exercise all his constitutional rights. The panel selected did not contain any juror to which he had objection. He fails to allege that he had exhausted his peremptory challenges." *Id.* at 177-178, 176 S.E. 2d at 731. Assignment of error No. 3 is overruled.

**[4]** Assignment of error No. 4 challenges the admissibility in evidence of five photographs of Miss Stewart's body in different positions as it lay in the sandpit area clad only in a sweater pulled above her breasts. Three of the pictures showed, from different camera angles, the tire tracks on her left thigh; all showed some of the wounds which had been inflicted upon her. These photographs were relevant and material; they illustrated

the testimony of Billy Shaw, the deer hunter, who came upon the body on the morning of 23 November 1973, and Officer Cockman who arrived at the scene shortly afterwards. The jury was properly instructed that the photographs were admitted for the sole purpose of illustrating the testimony of the witnesses and not as substantive evidence. "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). *See State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); 2 Strong's N. C. Index 2d, *Criminal Law* §§ 42, 43 (1967); 1 Stansbury's North Carolina Evidence § 34 (Brandis Rev. 1973). Assignment of error No. 4 is without merit.

**[5]** Assignments of error Nos. 8 and 12 are directed to the court's "failure to sustain defendant's motion for nonsuit, particularly . . . as to the charge of murder in the first degree." In his brief defendant says that these assignments present the crucial question "whether the evidence supports a finding by the jury that the killing was done with premeditation and deliberation." In his argument under assignment No. 13 defendant concedes that "he probably killed deceased." All the evidence, albeit circumstantial, leads to that conclusion. Indeed, no other legitimate deduction arises.

As an argument that the evidence will not support a finding that the killing was done with premeditation and deliberation defendant says: "The crucial facts and circumstances immediately attendant to the death of the deceased will remain unknown. . . . The conduct of the appellant before and after the homicide is totally inconsistent with first degree murder. . . . " The evidence does not support this conclusion.

In this jurisdiction it is well established that "where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree." *State v. Hart,* 226 N.C. 200, 202, 37 S.E. 2d

487, 488 (1946), *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975).

As we said in *State v. Van Landingham,* 283 N.C. 589, 599, 197 S.E. 2d 539, 545 (1973): "Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered 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."

Defendant's statement to Detective Cockman and his testimony at the trial negate adequate provocation for the killing. After Miss Stewart and defendant had engaged in sexual relations for the second time she began "putting pressure" on him to pay her "for services rendered." He had no money—although he had represented himself to her as a well-to-do landowner—and an argument ensued. "She went to slap him and he slapped her instead and knocked her to the ground." He returned to the car and then saw her coming at him with his open knife, which weighed two pounds. He says that he grabbed her arm and remembers nothing thereafter until he was driving from the area—alone in her car, which was also carrying his knife. Defendant, a man over six feet tall, weighing 195 pounds, testified that Miss Stewart did not harm or hurt him in any way; that her height was about to his eye level, and that he did not believe he would have had any difficulty in defending himself against her.

Obviously, by any standards, Miss Stewart's death was an unnecessary and senseless killing, and the 55 stab wounds, "some quite deep," constituted "grossly excessive force." Furthermore, force which would have been lethal had Miss Stewart not already been dead was applied when the automobile was driven over her felled body. We hold that the evidence was sufficient to take the issue of defendant's guilt of first-degree murder to the jury. *State v. Van Landingham, supra,* and cases cited therein.

**[6]** In his 13th assignment of error defendant asserts that the trial judge erred in refusing to give the jury the following requested instruction: "Under certain circumstances, the killing

of another is legally excusable. Defendant has offered evidence which tends to show that he acted in self-defense. The right to kill in self-defense is based on the necessity, real or apparent, to kill to save one's self from death or great bodily harm. If, from the evidence, you believe that defendant killed the deceased and at the time he did so, he believed that he was in danger of death or great bodily harm, then the defendant had the right to use such force as he believed necessary to protect himself, even to the extent of inflicting death. If excessive force or unnecessary violence is used in self-defense, however, the killing of the adversary is manslaughter at least."

The court correctly refused to give the foregoing instruction. *First,* it is not a correct statement of the law, for it omits the requirement that before one may kill in self-defense he must have reasonable grounds to believe that it is necessary to kill to protect himself from death or great bodily harm. *State v. Jackson,* 284 N.C. 383, 200 S.E. 2d 596 (1973) ; *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620 (1953). *Second,* as noted in the preceding discussion of the question of nonsuit, there is no evidence tending to show any necessity, *real or apparent,* for defendant to kill Miss Stewart. She never hurt him in any way; he took the knife from her by simply grabbing her arm. By his own statement he does not believe he would have had any difficulty in defending himself against her; yet 55 stab wounds were inflicted upon her nude body.

The record is devoid of any evidence which would permit the jury to find that any one of the 55 stab wounds was inflicted in self-defense. Further, the law does not permit one to use a deadly weapon to repel a theratened simple assault by one whom he has disarmed and could subdue without it. *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973).

**[7]** After the jury had retired to consider its verdict, and "had been out three minutes," the solicitor requested the judge to instruct the jury with reference to the testimony of Mrs. Bergman and defendant that he was under the influence of alcohol during the night of November 22nd. The court recalled the jury and—as defendant concedes—correctly instructed it in accordance with the principles stated in *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 678, 174 S.E. 2d 385, 387

(1970); *State v. Propst,* 274 N.C. 62, 71-72, 161 S.E. 2d 560, 567 (1968). Specifically, the Court instructed:

" . . . Voluntary intoxication is not a legal excuse for crime. However, if you find the defendant was intoxicated you will consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder. In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. If, as a result of intoxication, the defendant did not have that specific intent to kill the deceased, formed after premeditation and deliberation, he is not guilty of first degree murder. However, you would consider the other charges."

Defendant's contention, based on his assignment No. 18, is that the timing of this instruction minimized the importance of the evidence tending to show that he was drunk on the night of November 22nd and that this evidence went to "the life or death distinction between first and second degree murder." With equal logic it could be argued that the importance of the instruction was emphasized when the judge called the jury back to receive it. We have noted that when errors occur in additional instructions requested by the jury, appellants invariably argue that the prejudicial effect is compounded because the jury heard them after the charge proper.

When the charge is considered as a whole the instructions bearing upon the evidence tending to show that defendant was intoxicated at the time Miss Stewart was killed were far more favorable than he was entitled to receive. Although defendant does not judicially admit he killed Miss Stewart, he concedes he "probably" did and asserts that, if he did, he was unconscious at the time and has no recollection whatever of having done so. *If* defendant was actually unconscious, the only explanation in the record for his unconsciousness is that it was produced by his voluntary intoxication.

Ordinarily "[u]nconsciousness is a complete, not a partial, defense to a criminal charge." 21 Am. Jur. 2d, Criminal Law § 29, p. 115 (1965). *See State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969). However, when unconsciousness results from voluntary drunkenness it cannot lead "to a complete acquittal." *Bratty v. A.-G for N. Ireland,* 3 All E.R. 523, 532-

533 (1961). If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated intent to kill, essential elements of murder in the first degree are absent and "it is said that 'the grade of the offense is reduced to murder in the second degree.' " *State v. Bunn,* 283 N.C. 444, 458, 196 S.E. 2d 777, 786 (1973). Notwithstanding, at defendant's request, in the body of his charge the court instructed the jury as follows:

" . . . [I]n all three of the homicides which I have just defined, that is, first degree murder, second degree murder and manslaughter, intentional killing is one of the elements. I instruct you that if you find that the defendant killed the deceased the State must also satisfy you beyond a reasonable doubt that the defendant was conscious of what transpired at that time, before you could return a verdict of guilty of any offense. If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability. The question of absence of consciousness is not to be confused with the defense of insanity. Defendant's conscious state and voluntary or intentional actions are not matters which he must disprove, but are elements of the offense which I have defined, and the burden remains upon the State to satisfy you of their existence beyond a reasonable doubt."

Thus, without reference to its cause, or making any distinction as to the effect of unconsciousness caused by drunkenness upon the degrees of homicide, the jury were told to find defendant innocent of *any* degree of homicide unless the State satisfied them beyond a reasonable doubt that defendant was conscious at the time the homicide was committed. Unconsciousness caused by drunkenness cannot lead to a complete acquittal.

The jury rejected both defendant's contention that he was unconscious at the time of Miss Stewart's death and that he was too drunk to have formed the specific intent to kill her. This rejection, however, cannot be traced to any error in the charge. Assignment No. 18 is overruled.

**[8]** Defendant's assignment No. 11, based on his exception No. 37, is to the court's ruling which sustained the State's objection

to the hypothetical question quoted on page 7 of the preliminary statement of facts. On the basis of his two-hour examination of defendant two days before the trial, and upon the assumptions (1) that, on the night Miss Stewart was killed, an altercation arose between her and defendant and (2) that sometime thereafter defendant was driving an automobile down a dirt road, Dr. Smith was asked whether, in his opinion, defendant "probably in fact does not have complete recall of the events encompassed within this time span."

If permitted to answer Dr. Smith would have said that, in his opinion, during the early morning hours of November 23rd, defendant was in a state of pathological intoxication and "that he probably, in fact, does not have complete recall for the events encompassed within this time span."

This testimony was properly excluded. In the first place, the facts assumed in the hypothetical question were obviously insufficient to enable Dr. Smith to form a satisfactory opinion. *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448 (1967); 1 Stansbury, N. C. Evidence § 137 (Brandis Rev., 1973). Patently, the doctor's opinion was based upon evidence which was not included in the question, as well as upon facts which were not in evidence at all. The latter was defendant's history of excessive drinking followed by blackout spells or periods of amnesia, which the doctor obtained from defendant, his family and friends. However, neither defendant himself nor anyone else testified that he had such a history. Obviously, therefore, Dr. Smith's opinion was based in major part upon hearsay evidence.

**[9]** "Where an expert witness testifies as to facts based upon his personal knowledge, he may testify directly as to his opinion. Generally, however, an expert witness cannot base his opinion on hearsay evidence. And when the facts are not within the knowledge of the witness himself, the opinion of an expert must be upon facts supported by evidence, stated in a proper hypothetical question. (Citations omitted)." *Cogdill v. Highway Commission* and *Westfeldt v. Highway Commission,* 279 N.C. 313, 326, 182 S.E. 2d 373, 381 (1971). The opinion of a physician, however, is not ordinarily rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, *if those statements are made in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. Penland v. Coal Co.,* 246 N.C. 26, 31, 97 S.E. 2d 432, 436

(1957). *See* 1 Stansbury's North Carolina Evidence § 136 (Brandis Rev., 1973). In such a situation it is reasonable to assume that the information which the patient gives the doctor will be the truth, for self-interest requires it. Here, however, Dr. Smith did not examine defendant for the purpose of treating him as a patient, but for the purpose of testifying as a witness for defendant in this case in which he is charged with first-degree murder. The motive which ordinarily prompts a patient to tell his physician the truth is absent here. The evidence was therefore incompetent and properly excluded.

**[10]** At this point we note that amnesia itself is no defense to a criminal charge. That a defendant is subsequently unable to remember is in itself no proof of his mental condition at the time the crime was committed. 21 Am. Jur. 2d, *Criminal Law* § 30 (1965). Assignment of error No. 11 is overruled.

Assignment of error No. 5, directed "to the admission of certain testimony of the witness Billy Shaw," is patently without merit and requires no discussion. *See State v. Greene,* 285 N.C. 482, 492-493, 206 S.E. 2d 229, 235-236 (1974) ; *State v. Colson,* 274 N.C. 295, 308, 163 S.E. 2d 376, 385 (1968).

**[11]** Assignment No. 6, to the admission of "a certain statement allegedly made by defendant to Deputy Sheriff Cockman," is also feckless. Upon defendant's motion the judge conducted a *voir dire* to determine its admissibility. Only Sheriff Cockman testified. Upon his uncontradicted testimony, the judge found that defendant's statement was voluntarily made after he had been fully advised of his constitutional rights and had understandingly waived them. These findings, being supported by competent evidence, are conclusive. *State v. Fox,* 277 N.C. 1, 24, 175 S.E. 2d 561, 575 (1970).

Assignments 9 and 10 relate to two questions directed to defendant, one on direct examination; the other, on cross-examination. The court's rulings upon the objections were clearly correct and these assignments are overruled without discussion. For the same reason assignments of error numbered 14, 15, 16, and 17, which challenge the court's instructions on the elements of first-degree murder and second-degree murder are likewise overruled.

We have considered the entire record in this case, as well as each of defendant's assignments of error, with care commensurate with the sentence from which defendant appeals. In his

trial and conviction we unanimously find no error. By a majority vote the Court also sustains the sentence of death. 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.

In the trial we find no error and sustain the death sentence by majority vote.

No error.

Justice LAKE concurring in result.

I concur in the result reached in the majority opinion but not in the statements therein concerning the defense of unciousness when that condition is due to voluntary drunkenness.

The burden of proving this defense, like that of insanity, is upon the defendant. *State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975), which overruled, on this point, *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328, cited in the majority opinion upon a different point. The defendant has the burden of proving to the satisfaction of the jury that he was unconscious at the time of the alleged criminal act. When, however, this fact is so established, it is a complete defense to the criminal charge, whatever may have caused it. Voluntary drunkenness, per se, is, of course, no defense to a criminal charge. However, the mere reflex action of one who has actually lost consciousness due to the effect of alcohol voluntarily consumed (i.e., one who has "passed out," as distinguished from loss of ability to understand, to intend, to reason) is not the basis for liability for a crime requiring his voluntary act. Such crimes include the lesser degrees of homicide as well as murder in the first degree. There is no evidence whatever of such unconsciousness in the present case.

WALTER PAINTER, PETER EGGIMANN, SHELTON V. BRIDGERS, AND TOMMY OAKLEY, AS CITIZENS AND TAXPAYERS OF WAKE COUNTY, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF WAKE COUNTY; AND WAKE COUNTY BOARD OF COMMISSIONERS, A BODY CORPORATE, PLAINTIFFS v. WAKE COUNTY BOARD OF EDUCATION, A BODY CORPORATE, AND VANCE RAYBON, JR., AND SALLIE K. RAYBON, DEFENDANTS v. KENNETH R. BALLENGER, CHARLES TERRY, LAURA TERRY, SYDNEY C. EDDINS, AND DONALD HORTON, INTERVENORS

No. 114

(Filed 27 August 1975)

1. **Judgments § 37— matters concluded**

A judgment on the merits is conclusive not only as to matters actually litigated and determined but also as to all matters properly within the scope of the pleadings which could and should have been brought forward.

2. **Judgments § 37— res judicata — matter which should have been raised in earlier suit**

Plaintiffs' claim against a county board of education regarding selection of a school site is barred by an earlier judgment involving essentially the same plaintiffs and defendants where the complaint in the earlier action sought to have the site selection declared void on grounds that plaintiffs were denied the opportunity to be heard and that the board improperly delegated its authority, and plaintiffs seek the identical relief in the present action but assert as an additional ground for recovery that the board abused its discretion in selecting the site, since the matters raised in the present suit concerning the selection of the site could and should have been raised in the earlier action.

3. **Schools § 6— exchange of property by school board — constitutionality of statute**

The statute permitting a school board to exchange property owned by it in full or partial payment for property to be acquired for public school purposes, G.S. 115-126(d), is not unconstitutional in failing to provide standards or guidelines since case law and other statutes, when read *in pari materia,* provide well-defined guidelines for the requirement that the school board not abuse its discretion in acquiring property for public school purposes, and the statute does not give the board of education any additional power to acquire land for school purposes but only provides an alternate method of payment for land which the board in its discretion decides to purchase.

4. **Public Officers § 8; Schools § 6— exchange of property — presumption of good faith**

It is presumed that a county board of education, in proposing an exchange of property, was acting in good faith and in accord with the spirit and purpose of G.S. 115-126(d), and the burden is upon a party asserting otherwise to overcome this presumption.

5. **Schools § 6— exchange of property — discrepancy in valuations — abuse of discretion**

A discrepancy in the valuations of properties proposed to be exchanged by a board of education bears only on the question of abuse of discretion and is only one of the factors to be considered in determining whether the board has abused its discretion.

6. **Jury § 1; Schools § 6— exchange of school property — valuation — jury trial — duty of court to make findings**

In an action to restrain a county board of education from exchanging property it owns for other property, plaintiffs are not entitled to a jury trial on the question of valuation of the two tracts involved, but the trial court should find the facts and determine as a matter of law whether under all the facts involved, including relative values, defendant board abused its discretion in proposing the exchange.

7. **Schools § 6— school boards — exchange of property — approval of county commissioners**

A county board of education was not required by G.S. 115-78(c) (1) to obtain the approval of the board of county commissioners for an exchange of property pursuant to G.S. 115-126(d).

ON appeal pursuant to G.S. 7A-31 from judgment by *Bailey, J.*, at the 11 November 1974 Session of WAKE Superior Court.

This action was initiated by the filing of a complaint on 29 August 1974 which alleged, in summary, that:

I. The plaintiffs are citizens and taxpayers of Wake County and represent a class of people too numerous to enumerate who are also citizens and taxpayers of Wake County and are similarly situated in all matters complained of herein, and the persons named as plaintiffs herein will fairly insure the adequate representation of all the persons in the said class.

II. The defendant Wake County Board of Education is a body corporate and has the power, pursuant to G.S. 115-27, to sue and be sued in its corporate capacity.

III. On or about 24 October 1973, the defendant voted to consolidate Knightdale, Wendell and Zebulon into a comprehensive high school to be located in eastern Wake County. On or about the same date, defendant also announced that the comprehensive high school would be located in the vicinity of Lizard Lick, just west of Zebulon.

IV. Thereafter defendant selected a site on the western edge of Zebulon commonly referred to in the community as "The Yancey Farm."

V. Thereafter the Wake County Board of Commissioners failed to approve funds for the purchase of the Yancey farm site, and still refuses to approve such funds.

VI. Despite the refusal of the Board of Commissioners to approve funds for the purchase of the Yancey farm site, defendant now proposes, pursuant to G.S. 115-126(d), to exchange 40.462 acres which it now owns in eastern Wake County for 40.46 acres of the Yancey farm site.

VII. On 21 August 1974, defendant filed notice with the Wake County Clerk of Superior Court of its intention to effect such exchange.

VIII. Plaintiffs believe that G.S. 115-126(d) is unconstitutional and void due to its vagueness and lack of any standard by which the Board of Education is to pattern its action in acquiring real property, and the proposed exchange is therefore also null and void in that it is an action to be taken pursuant to an unconstitutional statute.

IX. Plaintiffs believe that even if G.S. 115-126(d) is constitutional, defendant's action in attempting to exchange its parcel of land for land from the Yancey farm site constitutes a manifest abuse of discretion because plaintiffs are informed and believe that the land owned by defendant is worth approximately twice as much as the Yancey farm site.

X. Plaintiffs further believe that the defendant acted arbitrarily and in abuse of its discretion in that it knowingly used inaccurate population projection figures in reaching its determination as to the location of the school, and that as a result the great majority of the students will be required to ride a great distance to school.

XI. Plaintiffs believe they may suffer immediate irreparable injury for which there is no adequate remedy at law because the land now owned by the defendant could be transferred to an innocent purchaser for value.

For the above reasons, plaintiffs prayed the court, in summary, that:

1. G.S. 115-126(d) be declared unconstitutional as being an unlawful delegation of authority.

2. The selection of the Yancey farm site be declared null and void as having been made arbitrarily, capriciously, and in bad faith, amounting to a manifest abuse of discretion.

3. The consummation of the proposed exchange be permanently restrained and enjoined.

4. The court issue a preliminary injunction restraining and enjoining defendants from the consummation of the proposed exchange during the pendency of this action.

5. The court issue a temporary restraining order, and accept this verified complaint as an affidavit and motion for such order.

6. A jury trial be had on all issues.

7. The court grant such other and further relief as it deems just and proper.

On 29 August 1974, Judge McLelland granted plaintiffs' motion for a temporary restraining order and ordered the parties to appear on 5 September 1974 and show cause why the order should not be continued until final hearing.

After hearing oral testimony of the plaintiffs and reviewing affidavits and exhibits presented by both parties, Judge McLelland, by order dated 6 September 1974, granted plaintiffs' motion for a preliminary injunction pending final determination of the case on its merits.

On 23 September 1974, intervenors filed, pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, a motion supported by affidavits for leave to intervene. Intervenors alleged that plaintiffs do not adequately represent the purported class and that there is no community of interest between plaintiffs and members of the class that plaintiffs purport to represent.

On 7 October 1974, plaintiffs filed another complaint similar in many respects to the first, alleging that defendant had, on 1 October 1974, filed notice of its intention to exchange its

property for a different part of the Yancey farm site, and alleging that defendant was by that action seeking to circumvent the 6 September order granting plaintiffs a preliminary injunction. This complaint alleged the same grounds for relief as the earlier complaint, but in addition alleged that the proposed exchange would violate G.S. 115-78(c)(1), which provides that no contract for the purchase of any site shall be executed without the approval of the Board of County Commissioners.

Also on 7 October 1974, Judge McLelland granted plaintiffs' motion contained in their second complaint that they be granted a temporary restraining order, and further ordered that the parties appear on 10 October 1974 and show cause why the temporary restraining order should not be continued until final hearing.

On 17 October 1974, Judge McLelland entered an order, effective 11 October 1974, granting plaintiffs a preliminary injunction on their second complaint and consolidating the cases for the purpose of trial under Rule 42(a) of the North Carolina Rules of Civil Procedure. On the same date, Judge Bailey entered an order allowing the motion of intervenors to intervene.

On 28 October 1974, defendant filed an answer to plaintiffs' first complaint which alleged, in summary:

> I. Before the commencement of this action, on 30 November 1973, plaintiffs Peter Eggimann and Shelton Bridgers filed a class action against defendant in the Superior Court of Wake County seeking to have the selection of the Yancey farm site declared unlawful, unconstitutional and void. One of the defenses set forth in defendant's answer was that the selection of said site constituted a reasonable exercise of discretion on the part of defendant. Defendant's motion for summary judgment was granted in Wake County Superior Court on 28 January 1974, and the Court of Appeals affirmed in an opinion filed 17 July 1974, and reported at 22 N.C. App. 459. The North Carolina Supreme Court denied plaintiffs' petition for *certiorari*. Since the parties and issues in this action and in the former action are the same, trial and judgment in the former action was finally dispositive of the causes of action and issues relating to the selection and value of the Yancey farm site presented in this suit.

II. G.S. 115-126(d) is constitutional, but in the event said statute is unconstitutional, defendant nonetheless has authority to consummate the exchange of property sought to be enjoined pursuant to the laws of North Carolina.

III. G.S. 115-78(c)(1) does not apply to an exchange of real property pursuant to the provisions of G.S. 115-126(d).

IV. Plaintiffs have failed to utilize the administrative remedy provided them in G.S. 115-87.

V. Plaintiffs are guilty of unreasonable delay and laches in bringing this suit.

VI. The selection of the Yancey farm site as the site for a comprehensive high school was made after years of study, and the selection of that site constitutes a reasonable exercise of the discretion of defendant.

VII. The voters of Wake County approved a bond referendum in November 1973 which would finance the construction of a high school upon the Yancey farm site. The effect of plaintiffs' suit therefore is to challenge a political decision made by defendant and the voters of Wake County, which decision may not be the basis for a justiciable controversy.

On 1 November 1974, defendant filed answer to plaintiffs' second complaint similar in most respects to its first answer. Additionally, defendant alleged that plaintiff Wake County Board of Commissioners, under G.S. 153A-11 and G.S. 153A-12, lacks statutory authority to maintain the present action.

Also on 1 November 1974, defendant moved for summary judgment in both cases. On 13 November 1974, Judge Bailey granted defendant's motion as follows:

"This cause coming on to be heard on the 12th day of November, 1974, before the Honorable James H. Pou Bailey, Resident Judge of the Superior Court of Wake County, North Carolina, upon motions of the defendant Wake County Board of Education for summary judgment heretofore filed in actions 74-CVS-8272 and 74-CVS-9836; and said motions being consolidated for hearing and judgment, and defendant having filed affidavits and plaintiffs having filed counter-affidavits, and all of the parties to this action hav-

ing been represented by counsel who presented written and oral argument to the Court; and this cause having been heard;

"And it appearing to the Court that the Board of Education is given the power under the law to select school sites, and that the exercise of that power in a non-arbitrary, non-capricious manner without a manifest abuse of discretion is not reviewable by the Courts; that N.C.G.S. 115-126(d) permits a Board of Education to exchange property in full or partial payment for property to be acquired for public school purposes and that said statute is not unconstitutional; that plaintiffs have presented no facts tending to show that defendant contrived to have population figures projected in order to justify a site selection; that there exists a statutory presumption that the action of the Wake County Board of Education was correct and that in this cause said Board of Education is entitled to said presumption of regularity and to a presumption of constitutionality; that all of the matters raised in this suit concerning the selection of the school site could have been raised in a prior suit between substantially the same parties as the instant suit, said prior suit being designated Docket No. 73-CVS-11194, and the Wake County Superior Court having rendered final judgment therein for defendant; that the Wake County Board of Commissioners is not a body corporate and may sue only in those instances expressly authorized by statute and then only in the name of Wake County and that said body is improperly joined in this action; and that in the instant case the wisdom of the Wake County Board of Education in selecting school sites is not before the Court;

"AND THE COURT FINDING that the records and files in this matter, including the pleadings, affidavits, evidence, exhibits, and testimony, and the record in the case of EGGIMANN, ET AL. v. BOARD OF EDUCATION, 73 CVS 11194, show that there is no genuine issue as to any material fact and that the defendant, Wake County Board of Education, is entitled to a judgment as a matter of law.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED BY THE COURT:

"1. That the plaintiff, Wake County Board of Commissioners, is removed as a party plaintiff.

"2. That N.C.G.S. 115-126(d) is declared valid and constitutional.

"3. That all restraining orders and injunctions entered in the actions are hereby dissolved.

"4. That the plaintiffs' actions are hereby dismissed with prejudice.

"5. That the cost of the action be taxed against the plaintiffs."

Also on 13 November 1974, Judge Bailey entered the following order reinstating the preliminary injunction:

"Plaintiffs having given notice of appeal in this action, the Court, in the exercise of its discretion pursuant to the provisions of N.C.G.S. 1-500, orders that the preliminary injunctions rendered in 74 CVS 8272 and 74 CVS 9836 shall remain in full force and effect until said appeal can be heard; and it is further ordered that as a condition precedent to the issuance of this order, the Clerk of this Court, shall, on or before the 18th day of November, 1974, take from the plaintiffs other than the Wake County Board of Commissioners a written undertaking with sufficient sureties to be justified before and approved by the Clerk in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00), to the effect that the plaintiffs will pay the party enjoined against all loss, not exceeding FIVE HUNDRED THOUSAND DOLLARS ($500,000.00), which it may suffer on account of continuing such preliminary injunction as aforesaid, in the event that the judgment of this Court is affirmed on appeal. In the event said undertaking is not made on or before the 18 day of November, 1974, then this order shall be null and void."

Plaintiffs appealed and we allowed plaintiffs' petition for appellate review in this Court prior to determination in the Court of Appeals.

*Kirk & Ewell by Clarence M. Kirk for plaintiff appellants.*

*Davis, Davis & Debnam by F. Leary Davis, Jr. for defendant appellee.*

*Hatch, Little, Bunn, Jones, Few & Berry by William T. Hatch and Harold W. Berry, Jr. for defendant intervenors.*

MOORE, Justice.

We first consider whether the final judgment entered in *Eggimann v. Board of Education,* 22 N.C. App. 459, 206 S.E. 2d 754 (1974), bars plaintiffs as to issues regarding defendant's selection of the Yancey farm site.

**[1]** A judgment on the merits is conclusive not only as to matters actually litigated and determined but also as to all matters properly within the scope of the pleadings which could and should have been brought forward. *In re Trucking Co.,* 285 N.C. 552, 206 S.E. 2d 172 (1974); *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206 (1964); *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123 (1960); *Worthington v. Wooten,* 242 N.C. 88, 86 S.E. 2d 767 (1955).

As we said in *Gibbs v. Higgins,* 215 N.C. 201, 204-05, 1 S.E. 2d 554, 557 (1939), "' . . . The plea of *res ajudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties *exercising reasonable diligence,* might have brought forward at the time and determined respecting it.' [Citations omitted.]" (Emphasis added.) *Accord, In re Trucking Co., supra; Garner v. Garner,* 268 N.C. 664, 151 S.E. 2d 553 (1966); *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113 (1962); *Hayes v. Ricard, supra.* In *Garner, supra,* at 666, 151 S.E. 2d at 554, quoting from *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564 (1919), we stated: "' . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. . . .'"

**[2]** Applying this rule to the present case, we think plaintiffs' claim regarding *selection* of the Yancey farm site is barred by the earlier judgment involving essentially the same plaintiffs and defendants. The complaint in the earlier action prayed the court that selection of the Yancey farm site be declared void, alleging that the Board unlawfully denied plaintiffs opportunity to be heard and that the Board improperly delegated its authority in violation of law. Plaintiffs pray the court for identical relief in the present action, asserting as an additional ground for recovery that the Board abused its discretion in selecting the Yancey farm site. We think plaintiffs, in the exercise of a rea-

sonable degree of diligence, should have included this allegation in its earlier action.

The record in the earlier action discloses that defendant Board alleged in its answer that the selection of the Yancey farm site was made in the reasonable exercise of its discretion. Several affidavits relating in some detail the care taken in selecting the Yancey farm site were introduced by defendant in the prior action. The trial judge in allowing summary judgment for defendant in that action ordered: "That the action of the Wake County Board of Education in selecting the G. W. Yancey homeplace as the site for the establishment of a comprehensive high school is valid."

Additionally, the record contains the following statement made by one of plaintiffs' attorneys at a meeting of plaintiffs regarding the issue of site selection: "Ultimate relief by injunction would be fruitless in my opinion because the school board has so much discretionary authority to act and the facts and figures to be put into a lawsuit could be refuted by them to their satisfaction and within their discretionary authority." It thus appears that the failure to allege and offer proof in the earlier action that the Board abused its discretion in the selection of the Yancey site was the result of a conscious decision by plaintiffs. Plaintiffs must now abide the consequences of that decision. *See Hayes v. Ricard, supra,* at 494-95, 112 S.E. 2d at 130, and cases cited. We hold that the trial court did not err in holding that the matters raised in the present suit concerning the selection of the Yancey site should have been raised in the earlier action.

In view of this holding, only three questions which were not and could not have been reasonably raised in the prior action remain to be decided. First, is G.S. 115-126(d) constitutional? Second, did defendant abuse its discretion in offering to exchange its tract (Wakefield tract) for the Yancey tract? Third, is the Board of Education required to have the approval of the Board of County Commissioners for the exchange under the provisions of G.S. 115-78(c)(1)?

G.S. 115-126(d) provides:

> "In the *acquisition* by it of any property for *public school purposes* any county board of education, or any board of education for any city administrative unit, may exchange therefor, as full or partial payment therefor, any property

owned or held by it, without compliance with the provisions of this section: Provided, that for at least ten days before any exchange of real property shall be consummated, the terms of such proposed exchange shall be filed in the office of the superintendent of schools of such administrative unit and in the office of the clerk of the superior court in the county in which such property is located, and a notice thereof published one or more times in a newspaper having a general circulation in the administrative unit at least ten days before the consummation of said exchange." (Emphasis added.)

**[3]** Plaintiffs contend that under this statute a school board is given absolute and unbridled discretion in exchanging public land for private land in that no standards or guidelines are provided, and for this reason, under Article II, Section 1 of the North Carolina Constitution, this statute is unconstitutional.

The General Assembly has clearly stated the policy of the State with reference to the power of a county board of education. G.S. 115-27 provides in part:

" . . . The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and *transferring the same for school purposes,* and of prosecuting and defending suits for or against the corporation." (Emphasis added.)

G.S. 115-125 provides in part:

"County and city boards of education may *acquire* suitable sites for *schoolhouses or other school facilities* either within or without the administrative unit. . . . " (Emphasis added.)

G.S. 115-35(b) provides:

"General Powers and General Control.—All powers and duties conferred and imposed by law *respecting public schools,* which are not expressly conferred and imposed upon some other official, are conferred and imposed upon county and city boards of education. Said boards of education shall have general control and supervision of all matters *pertaining to the public schools* in their respective administrative units and they shall enforce the school law in their respective units." (Emphasis added.)

And, regarding the Board's power relating to school consolidation *per se,* the General Assembly has said in G.S. 115-76(1):

> " . . . [T]he board of education of the county . . . and the State Board of Education shall cause a thorough study . . . to be made, having in mind primarily the welfare of the students to be affected by a proposed consolidation and including in such study, among other factors, geographic conditions, anticipated increase or decrease in school enrollment, the inconvenience or hardship that might result to the pupils to be affected by such consolidation, the cost of providing additional school facilities in the event of such consolidation, and the importance of such school to the people of the community in which the same is located and their interest in and support of same. . . . "

In construing these statutes, our Court has consistently held that the Board of Education determines whether new school buildings are needed and, if so, where they shall be located. Such decisions are vested in the sound discretion of the Board. The Board's discretion with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. *Lutz v. Board of Education,* 282 N.C. 208, 192 S.E. 2d 463 (1972); *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513 (1966); *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714 (1950); *Board of Education v. Lewis,* 231 N.C. 661, 58 S.E. 2d 725 (1950); *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263 (1949); *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484 (1949); *Board of Education v. Pegram,* 197 N.C. 33, 147 S.E. 622 (1929); *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621 (1925); *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905 (1912); *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902 (1908). Thus, abundant case law and the above statutes, when read *in pari materia,* give well-defined contours to the requirement that the school board not abuse its discretion in acquiring property for public school purposes. *See In re Willis,* 288 N.C. 1, 215 S.E. 2d 771 (1975).

In *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310 (1953), which plaintiffs contend is supportive of their position, there was no such well-developed case law providing guidelines for the Turnpike Authority in the exercise of its duties "in the public interest." Further, the legislative power delegated in *Coastal Highway* was not the type usually granted local governments in aid of the functions of state government.

*See Turnpike Authority v. Pine Island,* 265 N.C. 109, 143 S.E. 2d 319 (1965); *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593 (1925).

G.S. 115-126(d) does not give the Board of Education any additional power to acquire land for school purposes. This power is given by G.S. 115-27, *supra;* G.S. 115-125, *supra;* and G.S. 115-35(b), *supra.* G.S. 115-126(d) only provides an alternate method of payment for land which the Board in its discretion decides to purchase. Before any exchange of real property can be consummated under G.S. 115-126(d), the exchange must be for school purposes, and the terms of the exchange must be filed in the office of the local superintendent of schools and in the office of the clerk of the superior court in the county where the property is located. In addition, the public is notified of the proposed exchange by publication in a newspaper of general circulation in the territory served by the Board at least ten days before the consummation of the exchange, and any qualified taxpayer has the right as was done here to challenge the validity of the transfer.

In considering the constitutionality of a statute, it is well established that the courts will indulge every presumption in favor of its constitutionality. *Vinson v. Chappell,* 275 N.C. 234, 166 S.E. 2d 686 (1969); *Sykes v. Clayton, Comr. of Revenue,* 274 N.C. 398, 163 S.E. 2d 775 (1968). A statute will not be declared unconstitutional unless it is clearly so, and all reasonable doubt will be resolved in favor of its validity. *State v. Anderson,* 275 N.C. 168, 166 S.E. 2d 49 (1969); *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781 (1936). As we said in *State v. Anderson, supra,* at 171, 166 S.E. 2d at 50, "In passing upon the constitutional question involved, this Court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears. *State v. Brockwell* [209 N.C. 209, 183 S.E. 378 (1936)]," and a doctrine which is firmly established in our law is that all power which is not limited by the Constitution inheres in the people. An act of our General Assembly is legal when the Constitution contains no prohibition against it. North Carolina Constitution, Article I, Section 2; *State v. Anderson, supra; Lassiter v. Board of Elections,* 248 N.C. 102, 102 S.E. 2d 853 (1958); *State v. Warren,* 211 N.C. 75, 189 S.E. 108 (1937). We find nothing in the Constitution which prohibits the Board of

Education from exchanging land which it owns for other land for school purposes. This assignment is overruled.

Plaintiffs next contend defendant abused its discretion in offering to exchange the Wakefield tract for the Yancey tract since the Wakefield tract is worth two and one-half times as much as the Yancey tract.

In *Teer v. Jordan,* 232 N.C. 48, 51, 59 S.E. 2d 359, 362 (1950), we said:

> " . . . 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. *S. v. Scott,* 182 N.C. 865, 109 S.E. 789; *Hinton v. Lacy,* 193 N.C. 496, 137 S.E. 669; *Freeman v. Commissioners,* 217 N.C. 209 (212), [7] S.E. 2d 354; *Shaw v. Liggett & Myers Tobacco Co.,* 226 N.C. 477, 38 S.E. 2d 313. . . . "

*Accord, Styers v. Phillips,* 277 N.C. 460, 178 S.E. 2d 583 (1971).

Absent evidence to the contrary, it will always be presumed:

> " . . . '"[T]hat public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. . . . Every reasonable intendment will be made in support of the presumption."' *Huntley v. Potter,* 255 N.C. 619, 628, 122 S.E. 2d 681, 686, 687. '[T]he burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence.' 6 N.C. Index 2d *Public Officers* § 8 (1968)." Id. at 473, 178 S.E. 2d at 591.

**[4]** In this case it is presumed the defendant, in proposing the exchange of property, was acting in good faith and in accord with the spirit and purpose of G.S. 115-126(d). The burden is upon plaintiffs to overcome this presumption.

Plaintiffs alleged and at the hearing offered proof tending to show that the land which the defendant now owns is worth two and one-half times as much as the tract for which defendant proposes to exchange. Defendant denied this allegation and offered evidence tending to show that the tract which it proposes

to acquire is more valuable than the one it now owns. Plaintiffs therefore contend that they are entitled to a jury trial on the issue of value.

**[5]** G.S. 115-126(d) does not limit an exchange to property of equal value. If a discrepancy in valuation does exist it bears only on the question of abuse of discretion, and any such discrepancy is only one of the factors to be considered in determining whether the Board has abused its discretion.

In *Barbour v. Carteret County,* 255 N.C. 177, 120 S.E. 2d 448 (1961), plaintiffs sought to enjoin the expenditure of county funds for the purchase of a tract of land on which to construct a public building, alleging that the commissioners had agreed to pay the sum of $75,000 for the land in question, which sum was more than twice the reasonable value of the property involved. In reversing a judgment which sustained a demurrer to the complaint, Justice Rodman, speaking for the Court, said:

> "County commissioners, in approving the design, the method of construction, the site for a public building, and the amount to be paid for the site, are performing duties inherent to their offices, expressly conferred by the Legislature. G.S. 153-9(8), (9). Courts have no right to pass on the wisdom with which they act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good. *Burton v. Reidsville,* 243 N.C. 405, 90 S.E. 2d 700; *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Waldrop v. Hodges,* [230 N.C. 370, 53 S.E. 2d 263]; *Jackson v. Commissioners,* 171 N.C. 379, 88 S.E. 521; *Commissioners v. Commissioners,* 165 N.C. 632, 81 S.E. 1001; *Newton v. School Comm.,* 158 N.C. 186, 73 S.E. 886; *Jeffress v. Greenville,* 154 N.C. 490, 70 S.E. 919."

In *McInnish v. Board of Education,* 187 N.C. 494, 122 S.E. 182 (1924), plaintiffs sought to enjoin the erection of a school building, alleging that the site selected would be dangerous to children attending school at that location. At the hearing, plaintiffs moved for a jury trial and tendered issues relating to the alleged dangerous agencies and to the question whether defend-

ant had abused its discretion. The trial judge denied plaintiffs' motion and this Court affirmed, stating:

> "The plaintiffs insist that they were entitled to a trial by jury as to the eligibility of the site selected and as to the dangers to which the children would be exposed while attending the school.
>
> " 'In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.' Constitution, Art. I, sec. 19.
>
> "In *Groves v. Ware,* 182 N.C., 553, it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute.
>
> "The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. *Comrs. v. George,* 182 N.C., 414; *Corporation Commission v. R. R.,* 170 N.C., 560; *Porter v. Armstrong,* 134 N.C., 447; *Ledbetter v. Pinner,* 120 N.C., 458, 43 L. R. A., 56; 16 R. C. L., 224."

*See In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1961); *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464 (1963).

In *Burton v. Reidsville,* 243 N.C. 405, 90 S.E. 2d 700 (1956), plaintiffs sought to enjoin defendant from destroying certain apartment buildings belonging to the city and situated on land leased by it. The complaint alleged that the apartments were of solid construction, were not injurious to life, health, or morals, did not constitute a slum condition or a fire hazard, violated no zoning regulations, and that the city council had been offered substantial consideration for the buildings but had refused to negotiate or consider the sale or any disposition of the property other than its destruction. Chief Justice Barnhill, speaking for the Court, said:

> "The disposition of the apartment houses described in the complaint, situated as they are on the land of others who demand one-half of the rents, rests within the sound

discretion of the defendant members of the Council of the City of Reidsville. [Citations omitted.] . . . .

"The acts of administrative or executive officers are not to be set at naught by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government. However, a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. *Pue v. Hood, Comr. of Banks* [222 N.C. 310, 22 S.E. 2d 896]. And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. . . . [T]he courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act—and rightly so.

* * *

"It is a question of fact for the court below to decide. After hearing the evidence, it should find at least the ultimate facts and render its judgment on the facts found."

*See* 2 McIntosh, N. C. Practice and Procedure § 1433 (2d Ed.).

**[6]** Plaintiffs are not entitled to a jury trial on the question of valuation of the two tracts involved. The trial court should find the facts and render its judgment on the facts found as to whether the Board abused its discretion in proposing the exchange.

**[7]** Plaintiffs finally contend that defendant was required to have the approval of the county commissioners for this exchange under the provisions of G.S. 115-78(c)(1) which provides:

> "(c) *The capital outlay fund* shall provide for the *purchase of sites,* the erection of all school buildings properly belonging to school plants, improvement of new school grounds, alteration and addition to buildings, purchase of furniture, equipment, trucks, automobiles, school buses, and other necessary items for the better operation and administration of the public schools in the following divisions:
>
> "(1) New Buildings and Grounds.—*Estimated total cost of new buildings including grounds,* heating, plumbing and electrical equipment, furniture and instructional apparatus, architect and engineering fees, and other costs; provided, the estimated cost of the site shall be included in the total estimated cost of the building but not as a separate item; *provided further, that no contract for the purchase of the site shall be executed nor any funds expended therefor without the approval of the board of county commissioners as to the amount to be spent for the site; and in case of a disagreement* between a board of education and a board of county commissioners *as to the amount to be spent for the site,* the procedure provided in G.S. 115-87 shall, insofar as the same may be applicable, be used to settle the disagreement." (Emphasis added.)

A reading of the above statute and G.S. 115-126(d) reveals that they are not in conflict but rather are speaking to different situations. G.S. 115-126(d) deals with the acquisition of school sites through transfers of real property owned by the Board for property needed by it. G.S. 115-78 deals with budgets and expenditure of money. It refers only to expenditure of funds when the county commissioners have approved the amount to be spent for a site and further provides the administrative machinery, under G.S. 115-87, in the event of a dispute. A reading of the proviso of G.S. 115-78(c)(1), including the statement that the procedure of G.S. 115-87 is to be utilized to settle disagreements, indicates a clear legislative intent to limit the proviso to situations in which sites are to be *purchased* by boards of education

with *money* furnished by county commissioners for the current budget year.

In the present case the Commissioners of Wake County are not required to levy taxes to enable defendant to acquire the Yancey site. It can be acquired by an exchange. G.S. 115-126(d) states that in acquiring a school site a board of education may exchange therefor any property owned or held by it. It is an undisputed fact that the Wakefield tract was purchased by defendant in 1969. The fact that defendant owned the Wakefield tract indicates either that it was acquired with the proceeds of a gift or that some taxing authority decided that its acquisition was a necessary expense. G.S. 115-78(c)(1) provides no authority for interference with the sound exercise of defendant's discretion in *exchanging* land.

The Wake County Commissioners withdrew their appeal from Judge Bailey's order removing them as parties plaintiff, and are no longer parties to this action. Hence, they are not now contesting this exchange.

For the reasons stated, the case is remanded to the Superior Court of Wake County for a hearing *de novo* for the court to determine as a matter of law whether under all the facts involved, including relative values, defendant Board abused its discretion in proposing this exchange. The judgment of Judge Bailey is in all other respects affirmed.

Modified and affirmed.

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SHERRY PAMELA SINK v. KENNETH WESLEY EASTER, JR.

No. 72

(Filed 27 August 1975)

1. **Rules of Civil Procedure § 60— relief from final judgments only**

   Rule 60(b) of the N. C. Rules of Civil Procedure has no application to interlocutory judgments, orders, or proceedings of the trial court but applies only by its express terms to final judgments.

2. **Rules of Civil Procedure §§ 56, 60— interlocutory order — motion for relief under Rule 60 improper — motion treated as summary judgment**

   Denial of defendant's Rule 12(b) motion to dismiss for insufficiency of service of process and lack of jurisdiction was an interlocu-

tory order, and defendant's subsequent Rule 60(b) motion to dismiss following the Supreme Court's opinion in plaintiff's father's action (which arose from the same automobile accident as plaintiff's action) was not a proper motion under Rule 60(b); however, the Supreme Court considers defendant's motion to dismiss as a motion for summary judgment based on the doctrine of collateral estoppel.

3. **Appeal and Error § 16— judgment of dismissal — correction entered in same term of court — no error**

Where the trial court filed a judgment on 21 March 1974 dismissing plaintiff's action and plaintiff filed notice of appeal on 28 March 1974, the court had jurisdiction to file on 28 March 1974 a correction to the 21 March 1974 judgment and to deny plaintiff's Rule 60(b) motion for relief from the 21 March 1974 judgment, since the orders were made during the same term in which the original judgment was entered.

4. **Rules of Civil Procedure § 60— granting of Rule 60 motion — discretionary matter**

The trial court erred in denying plaintiff's Rule 60(b) motion for relief from an earlier judgment of the court on the ground that the court had no discretion to consider the motion, since a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court, and appellate review is limited to determining whether the court abused its discretion.

5. **Appeal and Error § 15— jurisdiction after appeal — appeal abandoned**

The general rule that an appeal divests the trial court of jurisdiction becomes inoperative when the trial judge, after due notice and a proper showing, adjudges that the appeal has been abandoned.

6. **Appeal and Error § 16; Rules of Civil Procedure § 60— appeal from dismissal — adjudication that appeal abandoned**

Where plaintiff filed a Rule 60(b) motion on 28 March 1974 seeking relief from the trial court's judgment of dismissal on 21 March 1974, the trial court erroneously denied the motion on 28 March, plaintiff gave notice of appeal on 28 March, the trial court, cognizant of his error, acted on 1 April to set aside his order of 28 March denying plaintiff's Rule 60(b) motion, and the trial court conducted a hearing on the motion on 1 April, the proceedings of 1 April constituted an adjudication by the court that plaintiff's prior appeal from the denial of her Rule 60(b) motion had been abandoned. Thus the plaintiff, by appearing at the 1 April hearing, gave proper notice of her intention to abandon the appeal; therefore, though the trial judge was presiding over a different term of court than that in which the original judgment of dismissal was entered, he still had jurisdiciton to reconsider his prior denial of plaintiff's Rule 60(b) motion for relief from that judgment of dismissal.

7. **Appeal and Error § 15; Rules of Civil Procedure § 60— appeal from final judgment — appeal withdrawn — power of trial court to grant relief**

The filing and granting of a motion by the plaintiff to withdraw and abandon her appeal from the trial court's order dismissing her

action for lack of jurisdiction served to reinvest the trial court with jurisdiction over the entire cause, and the court therefore had sufficient jurisdictional power to grant plaintiff's Rule 60(b) motion for relief from the judgment of dismissal.

APPEAL as of right by plaintiff pursuant to G.S. 7A-30(2) to review decision of the Court of Appeals reported in 23 N.C. App. 296, 208 S.E. 2d 895 (1974) (opinion by *Britt, J.*, *Hedrick, J.*, concurring, *Baley, J.*, dissenting), which vacated the order entered by *Wood, J.*, at the 13 May 1974 Session of DAVIDSON County Superior Court.

Because the basic issue here presented involves the effect on this litigation of our prior decision in the action brought by Sherry Sink's father, James A. Sink, it is necessary to discuss both cases in some detail in order to present fully the factual background giving rise to the instant controversy.

On 3 September 1971 James A. Sink (hereinafter sometimes referred to as James) and his daughter, Sherry Pamela Sink (hereinafter referred to as Sherry), went to the law offices of Charles F. Lambeth, Jr., a member of the Davidson County Bar. At that time, Attorney Lambeth was informed that Sherry had suffered serious personal injuries in an automobile accident on 6 September 1968 while she was riding in a vehicle operated by Kenneth Wesley Easter, Jr.

On 4 September 1971 Attorney Lambeth commenced two law suits against defendant, Kenneth Wesley Easter, Jr. One of these actions was instituted on the behalf of Sherry for personal injuries and for medical expenses incurred subsequent to her attainment of majority. The other action was instituted on the behalf of Sherry's father, James, for Sherry's medical expenses incurred from the date of the accident until her attainment of majority. Both of these actions were commenced by the issuance of summonses pursuant to G.S. 1A-1, Rule 3. Application was made in both cases for an extension of time within which to file the complaints. The clerk found these applications to be in compliance with the statute and ordered (i) that the time for filing the complaints be extended to 24 September 1971, and (ii) that a copy of the application and order be delivered to defendant with a copy of each respective summons.

On 10 September 1971 Deputy Sheriff W. W. Campbell of the Guilford County Sheriff's Department returned both summonses with the following notation on each: "Kenneth Wesley

Easter—not to be found in Guilford county—in Amsterdam—address unknown."

On 23 September 1971 both of the complaints were properly filed with the clerk. Thereafter, on 1, 8 and 15 October 1971 notice of service of process by publication was published in the Thomasville Times. Among other things, these notices stated that defendant was required to make defense to such pleadings on or before 11 November 1971.

On 11 November 1971 defendant, through his attorney, Charles H. McGirt, made a "special appearance" in both actions solely for the purpose of presenting the following identical Rule 12(b) motions: "To dismiss the action in that the defendant, Kenneth Wesley Easter, Jr., has not been served with process and the court lacks jurisdiction of it."

Both of defendant's 12(b) motions were heard by Judge Wood at the 13 December 1971 Civil Session of Davidson County Superior Court. At that time, Attorney Lambeth submitted an affidavit of the newspaper publisher indicating publication at the above times. Attorney Lambeth also filed a personal affidavit in both causes in which he stated, *inter alia,* that subsequent to the return of both summonses with the notation "Kenneth Wesley Easter—not to be found in Guilford County—in Amsterdam—address unknown," he "called the *residence* of the defendant in High Point and was advised that the defendant was in Amsterdam but that the party at his *residence* did not have his address and did not know how long the defendant would remain in Europe or in Amsterdam, the Netherlands. Therefore summons by publication was instituted." (Emphasis supplied.)

On 27 December 1971 Judge Wood *signed* identical orders denying defendant's Rule 12(b) motions. Both orders further provided that defendant had 30 days "within which to answer or otherwise plead." Both orders were subsequently *filed* on 27 March 1972. Defendant objected and excepted to the entry of both and properly preserved his exceptions for determination upon any subsequent appeal as provided by G.S. 1-277(b).

On 25 April 1972 defendant filed identical answers in both causes in which he denied any negligence on his part and pleaded the following defenses: (i) lack of jurisdiction due to improper services of process; (ii) statute of limitations, G.S. 1-52; and (iii) contributory negligence.

At this point, we believe it would be helpful to state separately the subsequent events in *each* case.

*James A. Sink's Action*

Following the above narrated events, on 4 August 1972 defendant filed a motion for summary judgment in James' case on the ground that the action was commenced more than three years after the date the cause of action accrued. (No similar motion was filed by defendant in Sherry's case.) Specifically, defendant contended that the action was not commenced on 4 September 1971 (date summons issued) because the summons and order issued by the clerk extending time to file the complaint had not been served on him. Defendant conceded, however, that the action was properly filed on 23 September 1971 (date complaint filed).

Defendant's motion was heard by Judge James M. Long at the 6 November 1972 Session of Davidson County Superior Court. At that hearing, the parties stipulated that defendant "was out of the State from the last day of August 1971, until the 1st day of November 1971" and that "summons was issued for defendant . . . within the period of limitations" and further that "it could not be personally served on defendant . . . . " On 22 November 1972 Judge Long filed an order allowing defendant's motion on the ground that the action was barred by the statute of limitations.

The aforementioned order was excepted to and appeal was taken to the North Carolina Court of Appeals. That court, in an opinion reported in 19 N.C. App. 151, 198 S.E. 2d 43 (1973), reversed on two grounds: (i) the action was commenced on 4 September 1971 and the fact service by publication was made subsequent thereto was of no consequence; and (ii) the defendant was estopped from raising the failure of plaintiff to mail a copy of the complaint because of his stipulation that "defendant was served by publication."

On certiorari this Court, in an opinion by Justice Huskins, reported in 284 N.C. 555, 202 S.E. 2d 138 (1974), reversed the decision of the Court of Appeals and remanded with instructions to dismiss the action for lack of jurisdiction. The grounds for the decision were as follows:

(1) Defendant, on the facts presented, was not subject to service of process by publication since "plaintiff could have and

therefore should have effected personal service of process by leaving copies of the summons and court order at defendant's High Point residence with a person of suitable age and discretion living there . . . . " ; and

(2) Even if defendant was subject to service of process by publication, which he was not, such service was fatally defective "for failure to mail a copy of the notice of service of process by publication to defendant's known High Point address."

This Court concluded the opinion as follows:

> "When the summons was returned unserved by the Sheriff of Guilford County, plaintiff did not continue the action in existence by securing an endorsement upon the original summons for an extensison of time within which to complete service of process, Rule 4(d) (1), and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to Rule 4(d) (2). *This action was therefore discontinued ninety days after 4 September 1971, the date the summons was issued. Rule 4(e). Thereafter, the court was without authority to entertain defendant's motion for summary judgment or to enter any judgment in the action commenced on 4 September 1971 except a formal order of dismissal.* [Citation omitted.] Defendant's stipulation long after the action was discontinued that 'after the period of limitation had run, defendant was served by publication,' could not and did not revive the action." 284 N.C. at 561, 202 S.E. 2d at 143. (Emphasis supplied.) This opinion was filed on 25 January 1974.

*Sherry Pamela Sink's Action*

It appears from the record that Sherry's case remained in limbo from 25 April 1972 (date defendant filed answer) until 7 February 1974. On this latter date *defendant filed a motion pursuant to G.S. 1A-1, Rule 60(b)(6),* to dismiss Sherry's action on the grounds that the court's prior denial of his Rule 12(b) motion (entered 27 December 1971 and filed 27 March 1972) was "irregular and void" by reason of the opinion of this Court in James' case.

Judge Wood subsequently heard arguments on defendant's 60(b) (6) motion at the 18 February 1974 Session of Davidson County Superior Court. Thereafter, in a letter to Judge Wood dated 20 February 1974 (filed 21 February 1974) Attorney Lambeth stipulated that the judgment on defendant's motion

in Sherry's case could be rendered out of term and out of district. In this same letter, Attorney Lambeth made the following suggestion:

> "We plan to petition the Supreme Court for a rehearing in the case of JAMES A. SINK v. KENNETH WESLEY EASTER, JR. If you will withhold signing the judgment in the above case [Sherry's] until there is a final determination in the petition to rehear it might very well result in a considerable saving in litigation expenses for everyone concerned."

On 6 March 1974 James A Sink filed a petition with this Court to rehear his case reported in 284 N.C. 555, 202 S.E. 2d 138, on the grounds of "newly discovered evidence, and also a matter overlooked and an error of law; . . . " At this point, we quote directly from Mr. Sink's petition:

> "The attached affidavits constitute newly discovered evidence clearly establishing that 102 Woodlawn Drive, High Point, N. C. was not, in fact, the residence or usual place of abode or address of defendant at the time service was attempted on his person in the fall of 1971. In reaching its conclusion that the defendant was a resident of High Point with an address at 102 Woodlawn Drive, this Court relied on the original affidavit filed by Charles F. Lambeth, Jr., attorney for the plaintiff, containing an inadvertent and incorrect reference to 102 Woodlawn Drive as if it were the defendant's residence, when in fact what was meant was that this was his former or last known address. Prior to the Court's decision the plaintiff's affidavit as a source of admission of defendant's residence had never been raised by the parties and is not mentioned for this purpose anywhere in the record or the briefs. The official statement of the Sheriff on his return that personal service could not be had on defendant at 102 Woodlawn Drive, High Point, N. C., that he was out of the United States and that his address was unknown, had been accepted by the parties, and by the Superior Court and the Court of Appeals. Until this issue was raised plaintiff was not in a position to expect or prepare for it. All of the accompanying affidavits and documentary evidence is newly discovered evidence. None of this evidence was in plaintiff's possession during any stage of this case prior to the present petition."

Attached to this petition to rehear were seven affidavits all of which tended to show that defendant was not, in fact, a

resident nor did he have his address at 102 Woodlawn Drive, High Point, N. C., in 1971 when personal service was sought to be obtained.

James A. Sink's petition to rehear was denied by this Court on 15 March 1974. *See* 285 N.C. 597. Thereafter, on 18 March 1974 Sherry filed with Judge Wood the same affidavits presented to this Court by James E. Sink in his petition to rehear. Also, on this same date (18 March), Judge Wood signed a judgment granting defendant's Rule 60(b) (6) motion and dismissing Sherry's action "for lack of jurisdiction." This judgment was filed on 21 March 1974.

Thereafter, on 27 March 1974, Sherry submitted a motion pursuant to G.S. 1A-1, Rule 60(b) (1) & (2), seeking relief from the judgment of dismissal filed on 21 March 1974 on the grounds of mistake, inadvertence, etc., and newly discovered evidence. In support of this motion, she relied on the affidavits previously filed with the court on 18 March. Also on this same date (27 March), Judge Wood signed a correction of the judgment filed on 21 March 1974. In this Correction of Judgment, Judge Wood stated, *inter alia,* that:

> "At the time of the consideration of the defendant's motion to dismiss and prior to the ruling of the Court and rendition of Judgment the plaintiff offered certain affidavits and other evidence relating to said matter, which were duly filed on March 18, 1974, and are part of the record in this case. Said affidavits and evidence were not considered by this Court in ruling upon the motion to dismiss in this case inasmuch as this Court determined and ruled that in view of the decision of the Supreme Court of North Carolina in the case of JAMES A. SINK v. KENNETH WESLEY EASTER, JR., 284 N.C. 555 (1974), this Court had no jurisdiction to consider such affidavits and evidence."

The foregoing Correction of Judgment was filed on 28 March 1974. On this same date Sherry objected and excepted to the judgment dismissing her action and gave notice of appeal to the Court of Appeals. Judge Wood signed appeal entries and Sherry was given 60 days in which to serve her case on appeal.

Also, on 28 March 1974, Judge Wood filed an order denying Sherry's Rule 60(b) motion "as a matter of law inasmuch as this Court has no jurisdiction to consider said matters, based upon the decision of the Supreme Court of North Carolina in

JAMES A. SINK v. KENNETH WESLEY EASTER, JR., 284 N.C. 555 (1974)." Sherry objected and excepted to the denial of this motion and gave notice of appeal to the Court of Appeals. Judge Wood signed the appropriate appeal entries and Sherry was given 60 days to serve her case on appeal.

Thereafter, on 1 April 1974 Judge Wood, in open court and on his own motion, told the parties that he was setting aside the previous order filed on 28 March 1974 denying Sherry's Rule 60(b) motion "for the reason that the Court takes notice of the fact said Court would be in error if it was not aware that this Court had a motion under Rule 60, and under Rule 60 the Court has discretion . . . . " The court then proceeded, over defendant's objection, to conduct a hearing on this motion.

On 9 May 1974 Sherry submitted a motion of "withdrawal and abandonment" of her appeal previously taken from the judgment granting defendant's Rule 60(b)(6) motion and dismissing her action for lack of jurisdiction. On 15 May 1974 Judge Wood signed an order allowing this motion of "withdrawal and abandonment." This order was filed on 17 May 1974.

On 16 May 1974 Judge Wood signed an order allowing Sherry's Rule 60(b) motion; setting aside the judgment of dismissal filed 21 March 1974, as corrected on 28 March 1974; and denying defendant's Rule 60(b)(6) motion to dismiss the action for lack of jurisdiction. This order was filed on 17 May 1974.

On 21 May 1974 defendant objected and excepted to the actions of Judge Wood and gave notice of appeal to the North Carolina Court of Appeals. That court, as previously noted, vacated the order filed on 17 May 1974 on the grounds that Judge Wood was without jurisdiction to reconsider his previous denial of Sherry's Rule 60(b) motion on 1 April 1974.

Due to the complexity of this case, we believe the following table of all relevant dates pertinent to *Sherry's case* will be helpful. The table is arranged in chronological order and the special significance of each date is indicated.

| | DATE | SIGNIFICANCE |
|---|---|---|
| 1. | 6 September 1968 | Cause of action accrued. |
| 2. | 4 September 1971 | Action commenced by issuance of summons pursuant to Rule 3. Order granted giving plaintiff 20 days to file complaint. |

| | |
|---|---|
| 3. 10 September 1971 | Sheriff returned suit papers with notation "Easter not to be found in Guilford County—in Amsterdam—address unknown." |
| 4. 23 September 1971 | Formal complaint filed with clerk. |
| 5. 1, 8 & 15 October 1971 | Notice of service of process by publication published in Thomasville Times. |
| 6. 11 November 1971 | Defendant made "special appearance" and filed Rule 12(b) motion to dismiss for insufficiency of service of process and lack of jurisdiction. |
| 7. 13 December 1971 | Hearing before Judge Wood on defendant's 12(b) motion. |
| 8. 27 December 1971 | Judge Wood signed an order denying defendant's 12(b) motion and ordered him to answer the complaint within 30 days. Defendant objected and preserved his exception pursuant to G.S. 1-277(b). |
| 9. 27 March 1972 | The above order denying defendant's 12(b) motion was filed. |
| 10. 25 April 1972 | Defendant filed answer in which he denied negligence and pleaded the defenses of lack of jurisdiction, statute of limitations and contributory negligence. |
| 11. 25 January 1974 | This Court filed its opinion in the case of James A. Sink (father). 284 N.C. 555, 202 S.E. 2d 138. |
| 12. 7 February 1974 | Defendant filed a motion pursuant to Rule 60(b)(6) to dismiss the action on the grounds that the prior denial of his 12(b) motion was "irregular and void" by reason of the decision in 284 N.C. 555. |
| 13. 18 February 1974 | Judge Wood heard arguments on defendant's rule 60(b)(6) motion. |

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| 14. 21 February 1974 | Plaintiff's attorney, by letter to Judge Wood, stipulated that he could rule on defendant's motion out of term and out of district. He also informed Judge Wood that he planned to file a petition to rehear 284 N.C. 555 and requested that he withhold signing the judgment on defendant's motion until this Court had acted on the petition to rehear. |
| 15. 6 March 1974 | Petition to rehear 284 N.C. 555 was filed with this Court. |
| 16. 15 March 1974 | This Court denied the petition to rehear 284 N.C. 555. See 285 N.C. 597. |
| 17. 18 March 1974 | Plaintiff filed same affidavits submitted to this Court in petition to rehear 284 N.C. 555. |
| 18. 21 March 1974 | Judge Wood filed a judgment allowing defendant's Rule 60(b)(6) motion and dismissing plaintiffs cause for lack of jurisdiction (relying on 284 N.C. 555). |
| 19. 27 March 1974 | Plaintiff submitted a motion pursuant to Rule 60(b) for relief from the judgment filed on 21 March 1974 on the grounds of mistake, inadvertence, etc. and newly discovered evidence. |
| 20. 28 March 1974 | Plaintiff's 60(b) motion was filed. |
| 21. 28 March 1974 | Judge Wood filed a Correction of Judgment, signed on 27 March 1974, to the judgment filed on 21 March and stating that he did not consider any of the affidavits filed by plaintiff on 18 March 1974 in ruling on defendant's Rule 60(b)(6) motion. |
| 22. 28 March 1974 | Plaintiff objected to the corrected judgment granting defendant's Rule 60(b)(6) motion and gave notice of appeal to the Court of Appeals. Judge Wood entered proper appeal entries. |

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| 23. 28 March 1974 | Judge Wood signed and filed an order denying plaintiff's 60(b) motion on the grounds that he had no discretion to consider it based on the decision in 284 N.C. 555. |
| 24. 28 March 1974 | Plaintiff objected to the denial of her 60(b) motion and gave notice of appeal to the Court of Appeals. Judge Wood made proper appeal entries. |
| 25. 1 April 1974 | Judge Wood, on his own motion, set aside the denial of plaintiff's 60(b) motion (#23) on the grounds that he had not been aware that he had any discretion to consider such a motion when he denied same. Thereafter, over defendant's objection, Judge Wood held a hearing on plaintiff's 60(b) motion. |
| 26. 9 May 1974 | Plaintiff submitted a motion to "withdraw and abandon" her appeal from the judgment granting defendant's 60(b)(6) motion to dismiss (#'s 18 & 21). |
| 27. 15 May 1974 | Judge Wood signed an order allowing the above motion (#26). |
| 28. 16 May 1974 | Judge Wood signed an order granting plaintiff's 60(b) motion; setting aside the judgment of dismissal filed 21 March, as amended 28 March; and denying defendant's Rule 60(b)(6) motion to dismiss. |
| 29. 17 May 1974 | The above order (#28) was filed. Also, the order (#27) allowing plaintiff's withdrawal and abandonment of appeal was filed. |
| 30. 21 May 1974 | Defendant objected and excepted and gave notice of appeal to the Court of Appeals. |

*Brooks, Pierce, McLendon, Humphrey & Leonard by Hubert Humphrey and Michael D. Meeker and Lambeth, McMillan & Weldon by Charles F. Lambeth, Jr., for plaintiff appellant.*

*Walser, Brinkley, Walser & McGirt by Charles H. McGirt and G. Thompson Miller for defendant appellee.*

COPELAND, Justice.

This case is complicated essentially because so many errors were made before it reached this Court. In unraveling this chain of procedural events, we begin with defendant's motion to dismiss filed on 7 February 1974. This motion is reproduced in full below:

> "NOW COMES the defendant, who moves the Court to dismiss this action for lack of jurisdiction and respectfully shows unto the Court:
>
> 1. This action was instituted on September 4, 1971, by the issuance of summons and granting of an order extending time to file complaint until September 24, 1971. The summons and Court's order were delivered to the Sheriff of Guilford County and returned unserved September 10, 1971.
>
> 2. The plaintiff attempted to serve the defendant by publication, but the defendant was not subject to such service and the same was void and further, the attempted service for publication was fatally defective, all as set forth in the opinion of the Supreme Court of North Carolina filed January 25, 1974, in the companion case of JAMES A. SINK v. KENNETH WESLEY EASTER, JR., *which had identical facts.*
>
> 3. *The question decided in the case of JAMES A. SINK v. KENNETH WESLEY EASTER, JR., was raised at the same time in this case, arguments were held in the Superior Court at the same time, and identical orders were entered in each case denying the defendant's motion dated December 27, 1971.* The order heretofore entered in this cause is irregular and void by reason of the opinion of the Supreme Court of North Carolina, and the Court lacks jurisdiction except to enter a formal order of dismissal.
>
> 4. This motion is made pursuant to the provisions of Rule 60 (b) (6) Rules of Civil Procedure." (Emphasis supplied.)

The first issue for decision involves the legal effect of the above-quoted motion. Although inartfully drawn and mislabeled as having been made pursuant to Rule 60(b) (6), it is apparent on its face that the motion was intended as a defensive pleading of our decision in the father's case as collateral estoppel. For application of the doctrine of collateral estoppel in this type of situation *see, e.g., Crosland-Cullen Company v. Crosland,* 249 N.C. 167, 105 S.E. 2d 655 (1958) (defensive assertion). *Cf., King v. Grindstaff,* 284 N.C. 348, 200 S.E. 2d 799 (1973) (offensive assertion). For a general discussion of the doctrine *see, e.g.,* Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485 (1974); Note, Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff? 52 N.C. L. Rev. 836 (1974).

**[1, 2]** Rule 60(b) of the North Carolina Rules of Civil Procedure, which is nearly identical to Federal Rule 60(b), has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments. *See Wiggins v. Bunch,* 280 N.C. 106, 110, 184 S.E. 2d 879, 889 (1971); G.S. 1A-1, Rule 60(b). *See generally* 7 Moore's Federal Practice §§ 60.14(4) and 60.20 (1974) (hereinafter cited as Moore); Wright & Miller, Federal Practice and Procedure: Civil § 2852 (1973) (hereinafter cited as Wright & Miller); Annot., 15 A.L.R. Fed. 193 (1973). In this context, the prior *denial* of defendant's Rule 12(b) motion on 27 December 1971 constituted nothing more than an interlocutory order [*see, e.g., Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957) (refusal of motion to dismiss not "final" determination); 2 McIntosh, N. C. Practice and Procedure, §§ 1782(1) and (7) (2d ed. 1956), and 1970 pocket part; W. Shuford, N. C. Civil Practice and Procedure, § 54-3 (1975). As to the distinction between final and interlocutory judgments and orders *see* G.S. 1A-1, Rule 54(a), which is almost identical to former G.S. 1-208, and *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351 (1950)]. Hence, it follows that defendant's motion could not, as a matter of law, have been a proper motion under Rule 60(b). Parenthetically, we also point out that Judge Wood's prior denial of defendant's Rule 12(b) motion was not a "void" judgment, as defendant asserted, since the court always has jurisdiction to determine whether or not it has jurisdiction. *See, e.g.,* C. Wright, Federal Courts, 50-53 (2d ed. 1970), and numerous authorities there cited. Therefore, we elect to treat defendant's motion filed on 7 February 1974 as a motion for summary judgment based on the

doctrine of collateral estoppel. Likewise, we elect to treat Judge Wood's order (originally filed on 21 March 1974 and corrected on 28 March 1974) as a granting of a motion filed pursuant to Rule 56.

We next analyze the actions taken on 28 March 1974. In chronological order, they were as follows: (1) Plaintiff filed a motion pursuant to Rules 60(b) (1) and (2), seeking relief from the judgment of dismissal filed on 21 March 1974; (2) Judge Wood filed a correction to the judgment originally filed on 21 March 1974 in which he stated that he had not considered any of the affidavits filed by plaintiff on 18 March 1974 before ruling on defendant's motion; (3) Plaintiff objected to the corrected judgment and gave notice of appeal to the Court of Appeals; (4) Judge Wood filed an order denying plaintiff's Rule 60(b) motion; and (5) Plaintiff objected to the denial of a Rule 60(b) motion and gave notice of appeal to the Court of Appeals.

**[3]** No question arises as to Judge Wood's jurisdiction to enter the orders of 28 March 1974. In *Wiggins v. Bunch, supra,* this Court, in an opinion by Justice Branch, stated the rule applicable to this type of situation as follows:

> "For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court. In *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659, it was stated:
>
> > 'As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* " . . . (A) motion in the cause can only be entertained by the court where the cause is." Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal.' "
> >
> > 280 N.C. at 108, 184 S.E. 2d at 880.

*Wiggins* also held that the "general rule" above quoted "was not changed by Rules 59 and 60 of the New Rules of Civil Procedure." *Id.* at 109, 184 S.E. 2d at 882. We take judicial notice that from 25 March 1974 to 29 March 1974 Judge Wood held a regular one-week civil session in Iredell County Superior Court.

Therefore, under Exception No. 1 to the "general rule," above cited, Judge Wood had jurisdiction to enter the orders above referred to on 28 March 1974.

**[4]** Judge Wood's actions on 1 April 1974, however, raise serious jurisdictional questions. First, it is clear that Judge Wood committed error on 28 March 1974 when he denied plaintiff's Rule 60(b) motion on the ground that he had *no discretion* to consider it. As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. *See, e.g.,* Wright & Miller, *supra,* at § 2857 and numerous cases cited. Second, it is also clear that Judge Wood, cognizant of the aforementioned error, acted on 1 April 1974 to set aside his order of 28 March 1974 denying plaintiff's 60(b) motion and to conduct a hearing, over defendant's objection, on the motion. Thus, the question for decision is whether plaintiff's appeal from the prior denial of her 60(b) motion was properly abandoned as of 1 April 1974.

We take judicial notice that on 1 April 1974 Judge Wood began presiding over a regular two-week civil session of Davidson County Superior Court. Thus, he lost jurisdiction over the cause under the "Term Rule." As heretofore noted, the general rule in this State is that an appeal takes the cause of action out of the jurisdiction of the trial court. *See Wiggins v. Bunch, supra.* It is important to remember that plaintiff had two appeals pending (but not yet docketed with the Court of Appeals) on 1 April 1974. The first appeal concerned plaintiff's exception to Judge Wood's order granting defendant's motion to dismiss. The second appeal concerned plaintiff's exception to Judge Wood's denial of her 60(b) motion.

**[5, 6]** However, the general rule that an appeal divests the trial court of jurisdiction becomes inoperative when the trial judge, after due notice and on a proper showing, adjudges that the appeal has been abandoned. We construe the proceedings appearing in the record on 1 April 1974 to constitute an adjudication by the court that plaintiff's prior appeal from the denial of her Rule 60(b) motion had been abandoned and that plaintiff, by appearing at said hearing, gave proper notice of her intention to abandon the same. This is essentially the same conclusion reached by Judge Baley in his dissenting opinion. *See* 23 N.C. App. at 300, 208 S.E. 2d at 897. It follows therefore that the

Superior Court had jurisdiction on 1 April 1974 to reconsider its prior denial of plaintiff's Rule 60(b) motion.

A secondary question for decision involves the effect of a pending or completed appeal from a final judgment on the power of the trial court to grant relief under Rule 60(b). Although Rule 60(a) specifically permits the trial court to correct *clerical mistakes* before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court, Rule 60(b) is silent on the question. [Parenthetically, we note that Rule 60(a) does not authorize the trial court to set aside a previous ruling where the basis is a legal error. *See, e.g.*, Moore, *supra*, at § 60.06(4); Wright & Miller, *supra*, at § 2854; Annot., 13 A.L.R. Fed. 794 (1972).] However, with reference to the trial court's consideration of a Rule 60(b) motion during the pendency of an appeal from a final judgment, Wright & Miller, *supra*, at § 2873, states:

> "The earlier cases on Rule 60(b) took the view that the district court has no power to consider a motion under the rule after notice of appeal has been filed. This always seemed anomalous since the time for making the motion continues to run while the case is pending on appeal. These cases required a party seeking relief from a judgment during the pendency of an appeal first to present his ground to the appellate court. If it thought that the motion should be heard it would remand the case to the district court for that purpose. One alternative to actual remand was for the appellate court to give permission to the district court to rule on the motion.
>
> "Other cases have developed a different and more satisfactory procedure. They hold that during the pendency of an appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, application can then be made to the appellate court for remand. This procedure is sound in theory and preferable in practice. The logical consequence is that the district court may deny the motion although it cannot, until there has been a remand, grant it, and this seems to be the interpretation followed by many courts . . . . "

Therefore, were we to follow the procedure suggested by Wright & Miller, we could treat Judge Wood's order filed on 17 May 1974 as a "clear indication" that plaintiff's Rule 60(b)

motion would be granted if the cause was remanded for a *de novo* hearing. Plaintiff has filed a Rule 60(b) motion *directly* with this Court. Under these circumstances, we could treat plaintiff's motion as one to remand and enter the appropriate order. However, for the following stated reasons, it is not necessary to remand the case for such a hearing.

On 9 May 1974 plaintiff filed the following motion with the trial court:

> "NOW COMES the plaintiff and hereby withdraws and abandons the appeal previously taken by her from the judgment dismissing this action for lack of jurisdiction, and withdraws and abandons the notice of appeal from said judgment, dated March 28, 1974."

On 15 May 1974 Judge Wood signed the following order applicable to the motion above-quoted:

> "It appearing to the Court that the plaintiff gave notice of appeal from the judgment of this court dismissing the action (signed March 18, 1974 and corrected March 27, 1974), but plaintiff has not perfected said appeal and desires to and has withdrawn her appeal; and notice having been duly given, and it having been shown that plaintiff desires to and has abandoned said appeal, it is hereby ordered that said appeal is hereby withdrawn and abandoned."

Both the motion of withdrawal and abandonment and the order allowing same were filed together on 17 May 1974.

[7] The filing and granting of the aforesaid motion served to reinvest Judge Wood with jurisdiction over the entire cause. Hence, it follows that Judge Wood had sufficient jurisdictional power on 17 May 1974 to file his order granting plaintiff relief pursuant to Rule 60(b)(1) and (2). The order was therefore legally valid. We have carefully reviewed the findings of fact and conclusions of law recited by Judge Wood in this order, as well as plaintiff's affidavits relied on therein, and find no abuse of discretion.

Accordingly, for the reasons stated herein, the judgment of the North Carolina Court of Appeals is reversed and the cause is remanded to that court for the entry of the appropriate judgment and order reinstating the order filed by Judge Wood on 17 May 1974 and for further remand of the cause to the David-

son County Superior Court so that the lawsuit might thereafter proceed without further delay.

Reversed and remanded.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 93

(Filed 27 August 1975)

1. **Utilities Commission § 2— approval of utility's securities — application of statutes — foreign corporation in interstate commerce**

   Article 8 of G.S. Ch. 62 relating to the regulation of the securities of public utilities applies to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce.

2. **Constitutional Law § 27; Telephone and Telegraph Companies § 1— telecommunications — interstate commerce**

   The business of conducting telecommunications between persons in different states constitutes interstate commerce subject to the regulation of Congress.

3. **Constitutional Law § 27; Telephone and Telegraph Companies § 1; Utilities Commission § 2— approval of issuance of securities — burden on interstate commerce**

   Statutes and Utilities Commission rule adopted pursuant thereto requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce in violation of Art. I, § 8, of the U. S. Constitution when applied to Southern Bell Telephone and Telegraph Company, a utility which furnishes intrastate and interstate telephone service to customers in four states, which has 17% of its investment in telephone plants and 18% of its telephones in service in North Carolina, which derives from its interstate operations more than 30% of the operating revenues it receives from providing communications services, which made short term borrowings in all but six working days during 1972, and which has made one securities issue of long term and intermediate term debt each year for the past five years. Art. 8 of G.S. Ch. 62.

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

ON *certiorari* to review the decision of the Court of Appeals reported in 22 N.C. App. 714, 207 S.E. 2d 771 (1974), which reversed an order entered by the North Carolina Utilities Com-

mission on 12 June 1973 in Docket No. P-55, Sub. 728, docketed and argued in the Supreme Court at the Fall Term 1974 as Case No. 122.

This case had its inception in a letter dated 4 January 1973 in which the North Carolina Utilities Commission (Commission) directed Southern Bell Telephone and Telegraph Company (Southern Bell) to comply with N. C. Gen. Stats. Ch. 62, Art. 8 and Commisison's Rule R1-16 (adopted pursuant to Art. 8) by applying for and obtaining the Commission's approval before issuing any securities. Chapter 62 is the "Public Utilities Act of 1963." Article 8 governs "Security Regulations." As defined by the Act, " 'Securities' means stock, stock certificates, bonds, notes, debentures or other evidences of ownership or indebtedness, and any assumption or guaranty thereof." G.S. 62-3(26).

Southern Bell, a wholly owned subsidiary of American Telephone and Telegraph Company (A.T. & T.) is a New York corporation furnishing intrastate, interstate, and foreign telecommunication services to customers in North Carolina, South Carolina, Georgia, and Florida. The mandate in the Commission's letter reversed its 34-year policy toward Southern Bell. In 1939 the Commission had determined that its prior approval of Southern Bell securities should not be required. In 1956 and 1957 it re-examined this position. On 13 August 1956 the Commission wrote Southern Bell it had decided it would "not now claim or assert jurisdiction" over the sale of its securities. On 20 June 1957 it notified Southern Bell it had concluded that it had no jurisdiction over the issuance of securities by Southern Bell, "which is a New York corporation and subject to the regulatory authority of the State of New York." Until 4 January 1973 the 1957 "exemption letter" remained in effect.

At the time Southern Bell received the letter of 4 January 1973, it had pending a $350,000,000 bond issue, which had been scheduled for marketing. The delay incident to securing Commission approval of these securities by compliance with G.S. Ch. 62 and Commission's Rule R1-16 would have seriously jeopardized marketing prospects for the issue and interest rates then available. The Commission, therefore, granted Southern Bell's request to exempt this bond issue from the directive. It also agreed to continue the 1957 exemption letter in force pending its reconsideration at a formal hearing which was scheduled and held on 17 April 1973. Southern Bell was notified that at this hearing it had the burden of establishing (1) "the current status

of the filing of securities of foreign corporation utility companies" with the Commission, and (2) of showing cause why G.S. 62-160 *et seq.* should not be applicable to it.

At the hearing Southern Bell introduced the 1957 exemption letter and other 1956-57 correspondence between it and the Commission. In compliance with the Commission's order to produce as a witness "a responsible financial officer of the company," at the hearing Southern Bell examined its vice-president, treasurer, and chief financial officer, who was cross-examined by the Commission's attorney. No other evidence or witnesses were offered.

The facts relevant to the decision of this case are uncontradicted. As set out above and briefly summarized below they were stipulated by the parties on 28 February 1974, because the Commission's order, which is the subject of this appeal, did not detail them.

On 31 December 1972 Southern Bell had approximately 8,282,000 telephones in service. Of these, approximately 3,402,000 were located in Florida; 2,414,000 in Georgia; 1,008,000 in South Carolina; and 1,458,000 in North Carolina. On each business day of 1972 Southern Bell averaged 2,045,000 toll messages; of these, 903,000 were interstate messages. More than 30% of Southern Bell's operating revenues from communication services in the four states is attributable to its interstate operations. Between 31 December 1967 and 31 December 1972 Southern Bell's total investment in telephone plants increased from about $2,495,000,000 to about $4,740,000,000. Of this total $1,997,000,000 was invested in Florida; $1,361,000,000 in Georgia; $820,000,000 in North Carolina; and $562,000,000, in South Carolina.

To meet the continuously increasing demand for quality telephone service in the five years between 1967 and 1972, Southern Bell's total investment in telephone plants increased $2,245,000,000. Annual construction expenditures increased from approximately $352,000,000 in 1968 to approximately $819,000,000 in 1972. Construction expenditures for 1973 were expected to be about $1,030,000,000. Less than half the funds for this construction program came from internal service such as depreciation funds and retained earnings. The remainder came from the sale of debentures and additional equity investment by A.T. & T. Within the past five years Southern Bell has issued and sold long-term debentures and intermediate-term

notes totaling $1,075,000,000, and A.T. & T. made additional equity investments in Southern Bell of $697,000,000.

Southern Bell's ever-increasing construction program will continue to require it to obtain large sums of new capital from external financing on a day-to-day basis by means of short-term borrowings of less than two years. The sources of such borrowings are the sale of commercial paper, advances from A.T. & T., and bank loans. Southern Bell made short-term borrowings on all but six working days of 1972. When the limits to the amount of short-term debt which Southern Bell may incur are reached, the short-term debt must be repaid with the proceeds of permanent financing. Such financing must come from additional equity investment by A.T. & T., the issuance and sale of long-term or intermediate-term commercial paper, or both. The decision is made on the basis of a close evaluation of the total construction necessary to serve all the company's customers, the amount of money required, the company's total financial picture, its current capital structure and how it should properly be altered, the relative cost of debt and equity issues, the ratio of earnings to fixed charges, overall market conditions, and trends in interest rates.

When a decision to issue debt is made, management must consider not only the factors which will enable it to market the new issue on favorable terms; it must also coordinate the terms and maturity dates of the new issue with existing debt. It must decide whether the borrowings will be long-term, intermediate-term, or both, and whether competitive bidding by underwriters or a negotiated sale would be more advantageous to the company. In all these decisions, market conditions are prime considerations and timing in this regard is all important, for the company's options must be kept open as long as possible in an effort to minimize interest costs.

Since Southern Bell operates a multi-state communications business, its financing is governed by the needs and objectives of the company as a whole. When securities are issued, the company's total net income and entire credit is pledged, and the proceeds are used for its corporate needs in all four states in which it operates. In the past five years one securities issue has been made each year.

The regulatory provisions of the Securities Act of 1933 apply to Southern Bell. It is required to file with the Securities

and Exchange Commission (SEC), prior to public offerings of new securities, information relevant to the securities to be sold, the application of the proceeds thereof, a certified statement showing the financial position of the Company and much other information relevant to the construction expenditures and capitalization of the Company, its organization and business operations. A the present time SEC is the only agency which exercises any sort of prior approval of Southern Bell's financing. Compliance with the requirements of the Federal Securities Act offers ample protection to investors. None of Southern Bell's securities issues have ever been disapproved by the SEC.

Southern Bell is a public utility subject to the jurisdiction of the New York Public Service Commission. As such, each month it is required to file with that Commission a detailed report of the issuance of stock, bonds, notes or other evidence of indebtedness and the circumstances under which all such securities were issued. Much of the information required by Commission's Rule R1-16 would duplicate the data Southern Bell files with SEC and the New York Public Service Commission.

Southern Bell is also subject to regulation by the Federal Communications Commission (FCC) since a substantial part of the Company's revenue comes from interstate communications services. The FCC prescribes a uniform system of accounts which is applicable to Southern Bell. It establishes depreciation rates and standard procedures for separating property costs, revenues, expenses, taxes and reserves between interstate and intrastate services.

In addition to regulation by the SEC, the FCC, and the New York Public Service Commission, Southern Bell's intrastate rates, services, and other matters are subject to regulation and continued surveillances by the Utility Commissions of the four states in which it operates.

Neither of the other three states in which Southern Bell operates requires approval of its securities issues. Florida and South Carolina have no statutory provisions governing the issues of securities by telephone companies. Georgia has a statute which requires all companies subject to the jurisdiction of the Georgia Public Service Commission to obtain prior approval for securities issues, but that Commission had ruled itself without jurisdiction over the issuance of securities by Southern

Bell. Other multi-state companies which are A.T. & T. subsidaries, including the New England Company, the Southwestern Company, and the Northwestern Company, are required to seek prior approval of their respective states' commissions for their financing. To date this requirement has caused no problems because no securities issues have ever been disapproved or modified. "It is a perfunctory type operation from the beginning to the end."

Compliance with G.S. 62-160 and Rule R1-16 would require Southern Bell to notify the Commission within 10 days of the issuance of any notes with a maturity date of not more than two years. Because of the necessity for day-to-day financing compliance would require daily reports to be filed with the Commission. Southern Bell initiates its permanent financing after having geared its borrowing for some months to a particular date so that all of its short-term debts will be maturing roughly at the same time.

By an order entered on 12 June 1973, the Commission ruled that Article 8 (G.S. 62-160 to 62-171) made no exception for foreign corporations doing business in North Carolina, and that the Commission had "no basis in law or in fact" to further excuse Southern Bell from complying with its provisions and Commission rules adopted to implement them. Whereupon, it ordered that from and after 12 June 1973, Southern Bell would be required to comply fully with the provisions of Article 8 with reference to the issuance of its securities. To this order Southern Bell filed numerous exceptions and appealed to the Court of Appeals. Pursuant to G.S. 62-95, and for good cause shown, the Commission postponed the effective date of the order pending judicial review.

In the Court of Appeals, Southern Bell argued, *inter alia,* that (1) N. C. Gen. Stats., Ch. 62, Art. 8, "properly construed" is not applicable to Southern Bell, a foreign corporation operating a telecommunications business in intrastate and interstate commerce in North Carolina; and (2) even if Article 8 does purport to require Southern Bell to secure prior approval from the Commission before issuing and marketing its securities, such application would impose an unreasonable restraint upon interstate commerce in violation of U. S. Const., art. I, § 8, cl. 3 (the Commerce Clause).

The Court of Appeals rejected Southern Bell's first argument and sustained the second. Holding that "the asserted State

regulatory power as to Southern Bell would impose an undue burden on interstate commerce in contravention of the Federal Constitution," the Court of Appeals reversed the Commission's order 12 June 1973 from which Southern Bell had appealed. Upon the Commission's petition we allowed certiorari.

*Edward B. Hipp and E. Gregory Stott for plaintiff appellant.*

*Joyner and Howison and Moore & Van Allen for defendant appellee.*

SHARP, Chief Justice.

**[1]** For the reasons stated in the opinion of the Court of Appeals we agree that the General Assembly intended Article 8 to apply to all public utilities doing business in this State whether they be foreign or domestic corporations and even though they are also engaged in interstate commerce.

G.S. 62-160 provides that *no public utility* shall pledge its credit or property for the benefit of any bondholder or stockholder or any affiliated business interest without first applying to and receiving permission from the Commission so to do. G.S. 62-161(a) provides, *inter alia,* that *no public utility* shall issue any securities unless and until, and then only to the extent that, after investigation by the Commission of the purposes and uses of the proposed issues, the Commission by order authorizes such issue. "Public utility," as used in Article 8 and defined by G.S. 62-3(23)a.6 includes any corporation, "whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: . . . [c]onveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation." G.S. 62-171, which authorizes the Commission "to agree" with any corresponding agency which is empowered by another state to regulate and control the amount and character of securities to be issued by a public utility doing business in such state and in this State, clearly contemplated the Commission's regulation of a public utility which is also engaged in interstate commerce.

To construe Article 8 according to Southern Bell's contentions would set at naught the express words of the foregoing

statutes. A statute must be construed as written and where, as here, the language is clear and unambiguous, the Court must give it its plain and definite meaning. 7 N.C. Index 2d, *Statutes* § 5 (1968).

**[3]** The question presented by the Commission's appeal to this Court is whether, as applied to Southern Bell, Commission's Rule R1-16, that "[n]o public utility shall pledge its assets, issue securities, or assume liabilities of the character specified in G.S. 62-160 and 62-161, except after application to and approval by the Commission," imposes an undue burden on interstate commerce in contravention of the Commerce Clause of the United States Constitution. The Court of Appeals held that "constitutional limitations apply under the factual situation presented by this case to prevent the Commission from enforcing the provisions of Article 8 against Southern Bell," and we also affirm that holding.

**[2]** Indisputably Southern Bell is engaged in interstate commerce. The business of conducting telecommunications between persons in different states constitutes interstate commerce subject to the regulation of Congress. 15 C.J.S., *Commerce* § 31 (1967). "[I]t is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." *Pensacola Tel. Co. v. West. Union Tel. Co.*, 96 U.S. 1, 9, 24 L.Ed. 708, 710 (1877). *See* 15 Am. Jur. 2d, *Commerce* § 2 (1964).

In the four states in which Southern Bell operates its total investment in telephone plants on 31 December 1972 amounted to $4,740,000.000. Of this sum, approximately 42% was invested in Florida; 28½% in Georgia; 17% in North Carolina; and 11½% in South Carolina. Of the 8,282,000 telephones Southern Bell had in service on that date, about 12% were in South Carolina; 18% in North Carolina; 29% in Georgia; and 41% in Florida. More than 30% of the operating revenues received by Southern Bell from provision of communications services in the four states is attributable to its interstate operations.

During the five years between 1967 and 1972, Southern Bell's total investment in telephone plants increased approximately 50%, and it sold debentures and intermediate-term notes to the public in the amount of $1,075,000,000. Between 1968 and 1972, construction costs increased more than 44%. During 1973

these costs were expected to be about $1,030,000,000, and more than one-half of this amount would have to come from the sale of debentures and additional equity investment by A.T. & T. In all but six working days during 1972, Southern Bell made short term borrowings, and, in the past five years, one securities issue of long term and intermediate-term debt has been made each year. Southern Bell's entire credit and net income are pledged to the payment of the issue. The proceeds are used to meet the company's needs and objectives in the four states in which it operates but none of the securities are earmarked for use in a particular state.

As the Court of Appeals pointed out, "Under the stipulated facts there can be no question that Southern Bell's continued capability to provide facilities adequate for its ever-growing business, including its interstate business, is directly dependent upon its continuing issuance of securities. It is apparent that at least for the foreseeable future a very large portion of the tremendous volume of capital funds required simply cannot be raised in any other way. Therefore, State regulation and control over issuance of these securities will necessarily involve a large degree of State regulation and control over Southern Bell's ability to carry on its interstate activities." *Utilities Comm. v. Telegraph Co.*, 22 N.C. App. 714, 720, 207 S.E. 2d 771, 775 (1974).

Clearly the right to raise money to carry on the business of interstate telecommunications is an essential part of the operation for, if the utility cannot secure funds through the sale of its securities, it cannot function. If the Commerce Clause is broad enough to include telecommunications, it is broad enough to include the means without which such communication cannot be furnished. *Whitman et al, Public Service Commission v. Northern Cent. Ry. Co.*, 146 Md. 580, 589, 127 A. 112, 115 (1924).

To date Congress has not acted to place the regulation of the securities of interstate utilities under a single governmental agency. Nor has the United States Supreme Court dealt with a case involving a state's attempt to regulate the issuance of securities by a utility engaged in multi-state operations. *See Laird v. Baltimore & Ohio R. R. Co.*, 121 Md. 179, 191-192, 88 A. 348, 352 (1913); State Regulation of Interstate Utility Securities—The Need for a Reappraisal, 32 Journal of Air Law

and Commerce 262 (1966). General principles governing analogous situations, however, are relevant and controlling.

Where Congress has not regulated a matter of interstate commerce, the Commerce Clause protects the national commerce from inimical state legislation without the necessity of such legislation. The absence of federal regulation does not empower the state to directly regulate or materially burden interstate commerce. The Supreme Court will invalidate local regulations which impinge either directly or indirectly upon the means or instruments employed in that commerce. At the same time it leaves to the states wide scope for the regulation of matters of local concern, even though the regulation incidentally affects commerce, "provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769-770, 65 S.Ct. 1515, 1520-1521, 89 L.Ed. 1915, 1924-1925 (1945). *See Bibb v. Navajo Freight Lines,* 359 U.S. 520, 523-524, 79 S.Ct. 962, 964-965, 3 L.Ed. 2d 1003, 1006-1007 (1959); *Western Union Telegraph Co. v. Kansas ex rel. Coleman,* 216 U.S. 1, 26, 30 S.Ct. 190, 197, 54 L.Ed. 355, 365 (1910); 15 C.J.S., *Commerce* § 14 (1967).

The postulate applicable to this case is that "state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." *Morgan v. Commonwealth of Virginia,* 328 U.S. 373, 377, 66 S.Ct. 1050, 1053, 90 L.Ed. 1317, 1322 (1946).

The case of *South Covington & C Street R. Co. v. Covington,* 235 U.S. 537, 35 S.Ct. 158, 59 L.Ed. 350 (1915), involved an ordinance of the City of Covington, Kentucky, which purported to impose certain requirements upon a street railway corporation transporting passengers across an interstate bridge over the Ohio river into Cincinnati. In invalidating the ordinance as a direct burden upon interstate commerce and beyond the power of the State, the Supreme Court said: "If Covington can regulate these matters, certainly Cincinnati can, and interstate business *might* be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations *might*

be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. . . . '[C]ommerce cannot flourish in the midst of such embarrassments.'" (Emphasis added.) *Id.* at 547-548, 35 S.Ct. at 161, 59 L.Ed. at 354.

In part, the Supreme Court of Illinois duplicated the rationale of *Covington* when it decided *United Air Lines, Inc. v. Illinois Commerce Commission,* 32 Ill. 2d 516, 207 N.E. 2d 433 (1965). At that time the system of United Air Lines, a corporation engaged in providing air transportation for persons, property, and mail between 110 cities in 32 states and the District of Columbia, consisted of 17,420 route miles, of which 158 were within Illinois. In holding that the Illinois Commerce Commission had no jurisdiction to require United to secure its authorization before issuing its securities, the Court said:

"The power given the Commission to approve or disapprove the issuance of stocks and securities necessarily affects United's interstate activities, for if it cannot secure funds through the sale of its stocks and securities its continued existence in the highly competitive interstate air transportation industry would be difficult, if not impossible, to sustain. . . .

"If Illinois can exercise the power to approve or disapprove the issuance of United's securities because it transacts business here, then so also can each of the other sixteen States where United provides intrastate service. There would thus be a total of seventeen jurisdictions asserting the power to approve or reject any issuance of stock proposed by United. The task of seeking and gaining approval from such a number of States would be unjustifiably expensive, time consuming and burdensome, and could create delay which would directly impair the usefulness of United's facilities for interstate traffic. Just as important, each independent regulating authority would be required to apply locally defined standards of public interest and locally defined rules in order to approve or disapprove or, as our statute suggests (sec. 21), to conditionally approve a single issuance of securities. The result, we believe, would be chaotic. The issuance of securities is a single, indivisible act. It cannot be fractionalized and given portions allocated to specific States.

"It is suggested by the Commission that it is not proper to consider the 'possibility' of multi-state regulation and its effects, the implication being that the limitations on the powers of a

State over interstate commerce could not come into effect until there is an actual attempt at multiple regulation or an actual obstruction of commerce. The cases, however, reject this view and demonstrate that the possibility of conflict or dual regulation, may be sufficient to curtail powers sought to be asserted by an individual State over interstate commerce where such commerce might be impeded by conflicting and varying regulations. See: *South Covington & Cincinnati Street Railway Co. v. City of Covington,* 235 U.S. 537, 35 S.Ct. 158, 59 L.Ed. 350, 354; *Southern Pacific Co. v. State of Arizona,* 325 U.S. 761, 773-775, 65 S.Ct. 1515, 89 L.Ed. 1915, 1927-1928; *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed. 2d 1003; Application of United Air Lines, Inc., 172 Neb. 784, 112 N.W. 2d 414; cf. *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U.S. 767, 775, 67 S.Ct. 1026, 91 L.Ed. 1234, 1247." *Id.* at 525-526, 207 N.E. 2d at 437-438. *See In re Application of United Air Lines, Inc.,* 172 Neb. 784, 791-792, 112 N.W. 2d 414, 419 (1961); 64 Am. Jur. 2d, *Public Utilities* § 263 (1972).

We find the reasoning of the Illinois Court in *United Air Lines, Inc. v. Illinois Commerce Commission, supra,* inescapable.

**[3]** Any requirement for prior approval, by its very nature, contemplates that such approval may not be given. If the North Carolina Commission disapproves a proposed securities issue and the Georgia Commission approves it, Southern Bell is stymied, for it is put in an impossible position. In our view, the mere possibility of such a conflict, as applied to Southern Bell under the facts of this case, makes Rule R1-16, and the statutes which authorize the rule, a direct regulation and an impermissible burden on interstate commerce.

Further, should the North Carolina Commission attempt to exercise its asserted power to authorize or disapprove a securities issue, G.S. 62-161 requires that it investigate "the purposes and uses of the proposed issue and the proceeds thereof" before doing so. As Judge Parker noted in his cogent opinion in this case, "[T]he inevitable consequence would be that the Commission would be required to inquire into and pass upon the needs of Southern Bell and its customers in Florida, Georgia, and South Carolina, matters which are clearly beyond the Commission's lawful authority." 22 N.C. App. at 721, 207 S.E. 2d at 776.

On the stipulated facts, the decision of the Court of Appeals which reversed the order of the North Carolina Utilities Commission is

Affirmed.

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

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SUPERIOR FOODS, INC. v. HARRIS-TEETER SUPER MARKETS, INC., AND MERICO, INC.

No. 122

(Filed 27 August 1975)

1. **Appeal and Error § 42— case on appeal — failure to include all evidence — only relevant evidence necessary**

The Court of Appeals erred in declining to pass on three of plaintiff's assignments of error on the ground that all of the evidence was not sent up where the record contained a stipulation between counsel that the record on appeal contained "the necessary and relevant portions of the record and case on appeal needed to explain the exceptions and errors assigned."

2. **Appeal and Error § 42— sufficiency of evidence to support charge — evidence required in case on appeal**

It is not required that *all* the evidence in a case accompany an exception based on the insufficiency of the evidence to support an instruction to the jury; rather, only evidence toward which an instruction is directed must be included in the record on appeal.

3. **Contracts § 28— breach of contract action — instructions — sufficiency of evidence to support**

In an action to recover damages for breach of a contract by which plaintiff contracted with defendant Harris-Teeter to supply defendant with biscuits packaged under a private label, evidence was sufficient to support the trial court's charge that the evidence would permit the jury to find any one of three factual variations to constitute the agreement between plaintiff and defendant.

4. **Contracts § 17— time of termination — instructions proper**

In an action to recover damages for breach of a contract by which plaintiff contracted with defendant Harris-Teeter to supply defendant with biscuits packaged under a private label, the trial court did not err in failing to instruct the jury that a contract terminable at will, as here, could not be terminated by one party after the other party had performed acts thereunder which entitled him to compensation

where defendant terminated the contract, plaintiff was left with a six to eight months' inventory of private labels and materials suitable only for the use of defendant, and defendant instructed plaintiff to make the materials available to another supplier of biscuits but plaintiff failed to take action until three months later.

5. **Rules of Civil Procedure § 49— issue of fact — right to jury determination — waiver**

The right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires. G.S. 1A-1, Rule 49(c).

6. **Customs and Usages — usage of trade — jury question unless written**

Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder; however, when it is established that a usage of trade is embodied in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. G.S. 25-1-205(2).

7. **Customs and Usages; Rules of Civil Procedure § 49— unwritten usage of trade — waiver of jury question**

The trial court was not required to instruct the jury on the relevant law of usage of trade, though the alleged usage of trade was not in writing, where plaintiff made no demand for submission to the jury of an issue as to its existence and thereby waived its right to have the issue determined by the jury; and since the trial judge himself made no finding on the issue, he is deemed to have made a finding in accord with the judgment entered.

ON *certiorari* to the Court of Appeals to review its decision, 24 N.C. App. 447, 210 S.E. 2d 900 (1975), finding no error in judgment of *Ervin, J.*, 1 April 1974 Session, MECKLENBURG Superior Court.

This is a civil action to recover damages for breach of contract.

Plaintiff is a manufacturer of refrigerated biscuits. In 1968 it contracted with Harris-Teeter Super Markets, Inc. (Harris-Teeter) to supply that defendant with biscuits packaged under a private label. This made it necessary for plaintiff to acquire a substantial stock of materials, including cans and labels which could not be used in the performance of plaintiff's contracts with other customers.

Plaintiff acquired, and at all times maintained during the continuance of its contract with Harris-Teeter, an inventory of such materials sufficient for six to eight months' use. From 1968 until 2 July 1971, plaintiff maintained its inventory and

promptly supplied Harris-Teeter with its biscuit requirements appropriately packaged in cans with private labels thereon.

On 2 July 1971 plaintiff had on hand a six to eight months' inventory of private labels and materials suitable only for the private use of Harris-Teeter. On that date said defendant terminated its contract and entered into a contract with its codefendant, Merico, Inc., to buy biscuit requirements, including private labels and materials, from Merico, Inc.

Plaintiff alleges that pursuant to the terms of its contract with Harris-Teeter, and by reason of a course of dealing and usage in the trade, Harris-Teeter was obligated "to take and pay plaintiff for the aforesaid private labels and materials manufactured for the private use of the defendant Harris-Teeter Super Markets, Inc." Said defendant allegedly breached its obligation and agreement and wrongfully failed and refused to take or pay plaintiff for the private labels and materials on hand at the time the contract was terminated.

Plaintiff alleges that there is in the trade a course of dealing and usage by which the retailer (Harris-Teeter), before such arrangement is terminated, gives at least fifteen to thirty days' notice during which the new supplier (Merico, Inc.) contacts the old supplier (Superior Foods, Inc.) and arranges to pick up the inventory of private labels and related materials, the old and the new supplier agreeing at that time upon costs involved, etc. Plaintiff alleged and offered evidence tending to show that Merico, Inc., did not do this.

Plaintiff alleges and offered evidence tending to show that by reason of the breach of contract by defendants plaintiff has been damaged in the sum of $25,000 and is entitled to recover that amount from defendants jointly and severally.

Harris-Teeter admits in its answer that, pursuant to an agreement between the parties, plaintiff supplied it with biscuits packaged in containers bearing the private label of Harris-Teeter; that said arrangement continued from 1968 until July 1971 when it made arrangements to purchase its packaged biscuits from Merico, Inc. All other material allegations are denied.

Merico, Inc., admits in its answer that it sought the business, and beginning on 12 July 1971 Harris-Teeter purchased certain labels, packaging materials and biscuits from Merico,

Inc. It further admits that beginning in 1968 plaintiff supplied Harris-Teeter with biscuits packaged in containers with private labels attached and that the process of manufacturing and printing private labels and materials and packaging biscuits ordinarily requires about eight weeks. Merico, Inc., denies all other material allegations.

Evidence offered by plaintiff in support of its allegations, including the Harris-Teeter termination letter dated 2 July 1971, will be reviewed in the opinion.

Defendants offered no evidence.

At the close of plaintiff's evidence the motion of Merico, Inc. for a directed verdict was allowed, and no appeal was taken therefrom. Appropriate issues to determine the liability, if any, of Harris-Teeter Super Markets, Inc. to plaintiff were submitted to the jury and answered as follows:

> "1. Did the plaintiff and Harris-Teeter contract and agree that if Harris-Teeter terminated the contract, that Harris-Teeter would take and pay for packaging materials as of date of termination?
>
> ANSWER: No.
>
> * * * *
>
> 5. Did the defendant Harris-Teeter fail to give the plaintiff reasonable notice of its intention to terminate the contract?
>
> ANSWER: No."

From judgment on the verdict that plaintiff recover nothing from Harris-Teeter Super Markets, Inc., plaintiff appealed to the Court of Appeals. That court found no error, and we allowed certiorari to review the decision.

*Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage, for the plaintiff appellant.*

*R. C. Carmichael, Jr. of the firm Wade and Carmichael, for Harris-Teeter Super Markets, Inc., defendant appellee.*

HUSKINS, Justice.

All assignments of error brought forward in plaintiff's brief to this Court relate to alleged errors in the trial court's

instructions to the jury. Other assignments not properly presented and argued are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810 (1961).

**[3]** In assignments one, two and three, plaintiff contends the trial court charged on matters unsupported by the evidence. In the instructions challenged by these assignments, the trial judge charged that the evidence would permit the jury to find any one of three factual variations to constitute the agreement between plaintiff and Harris-Teeter. He told the jury that if it found that Harris-Teeter did not agree to take and pay for the packaging materials upon termination, it could find from the evidence that (1) Harris-Teeter agreed to pay for the packaging materials only if the materials were used by Harris-Teeter or by the new supplier (Merico) for Harris-Teeter's benefit (Plaintiff's Exception No. 1), or (2) Harris-Teeter agreed to do what was necessary to have the packaging materials released to its new supplier (Plaintiff's Exception No. 2), or (3) Harris-Teeter and plaintiff agreed that, upon request from Harris-Teeter, plaintiff would release the packaging materials to the new supplier and the new supplier would pay for the packaging materials (Plaintiff's Exception No. 3).

Plaintiff did not object to these instructions at the trial but now takes exception to them and assigns same as error. Plaintiff argues that Harris-Teeter neither alleged nor offered evidence to prove an agreement between the parties conforming to any of the alternatives above set out.

**[1]** The Court of Appeals declined to pass upon plaintiff's first three assignments based on Exceptions 1, 2 and 3 on the ground that all of the evidence was not sent up, citing *Atwell v. Shook,* 133 N.C. 387, 45 S.E. 777 (1903). Plaintiff asserts in this connection that the appellate courts are bound by the agreement of the parties that the record on appeal contains "the necessary and relevant portions of the record and case on appeal needed to explain the exceptions and errors assigned." Plaintiff therefore argues that the decision of the Court of Appeals violates Rule 19(5) of the Rules of Practice in the Supreme Court which is intended to discourage the printing of irrelevant and unnecessary matter on appeal.

*Atwell v. Shook, supra,* is distinguishable from the present case in that the record there did not contain a stipulation between counsel, as here, that the record on appeal contains "the

necessary and relevant portions of the record and case on appeal needed to explain the exceptions and errors assigned." The record as certified imports verity and we are bound thereby. *Rogers v. Rogers,* 265 N.C. 386, 144 S.E. 2d 48 (1965); *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734 (1962); *Griffin v. Barnes,* 242 N.C. 306, 87 S.E. 2d 560 (1955).

**[2]** In addition, the record in *Atwell v. Shook* contained a statement indicating that other *relevant* evidence had been omitted from the record on appeal, and for that reason the Court declined to pass on appellant's exception based on the alleged lack of evidence to support the court's instructions. We find nothing in this record to indicate that omitted testimony *was relevant to the questions posed* for determination. When the decision in *Atwell v. Shook* is read aright, it does not require that *all* the evidence in a case accompany an exception based on the insufficiency of the evidence to support an instruction to the jury. Only evidence *toward which an instruction is directed* must be included in the record on appeal. *Shepherd v. Dollar,* 229 N.C. 736, 51 S.E. 2d 311 (1949); *see Brown v. Telegraph Company,* 198 N.C. 771, 153 S.E. 457 (1930); *Felmet v. Express Co.,* 123 N.C. 499, 31 S.E. 722 (1898); *James v. R. R.,* 121 N.C. 530, 28 S.E. 537 (1897). For these reasons *Atwell v. Shook,* while obliquely applicable, is not controlling on the facts and circumstances of this case.

We now turn to appellant's contention on the merits of assignments one, two and three that the evidence was insufficient to support the trial court's instructions.

When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. G.S. 1A-1, Rule 51 (1969); *Link v. Link,* 278 N.C. 181, 179 S.E. 2d 697 (1971). He must relate and apply the law to variant factual situations presented by some reasonable view of the evidence. *Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202 (1964); *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523 (1961); *Worley v. Motor Co.,* 246 N.C. 677, 100 S.E. 2d 70 (1957). "When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error." *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435 (1929). Conversely, an instruction relating to a factual situation not properly supported by the evidence is also erroneous. *Dennis v. Voncannon,* 272 N.C. 446, 158 S.E. 2d 489 (1968);

*Dove v. Cain,* 267 N.C. 645, 148 S.E. 2d 611 (1966); *Powell v. Clark,* 255 N.C. 707, 122 S.E. 2d 706 (1961).

Applying the foregoing principles to assignments one, two and three, we hold that the court's instructions are properly supported by the evidence in the record. Plaintiff alleges that Harris-Teeter terminated, without reasonable notice, an agreement under which Harris-Teeter was obligated to take labels and materials manufactured for Harris-Teeter and pay plaintiff for them. To support the allegation plaintiff offered the testimony of D. H. Meenach, President of Superior Foods, Inc. He testified that in 1968 he met several times with Mr. Williams, the head buyer, and Mr. Harris, the President of Harris-Teeter. They discussed the normal procedure of the biscuit business and were in agreement as to "what happens if one side quits," including who pays for cylinder costs, private labels and other details. On cross-examination Mr. Meenach said the officials of Harris-Teeter told him "we will pay for any unfinished packaging materials."

Mr. Meenach further testified as to the usual practice of the trade concerning labels and packaging materials on hand after termination of a contract by the retailer. He stated on cross-examination:

> " . . . [T]he custom of the trade has been, and is now, that the retailer would write a letter to the present supplier telling him that he was being discontinued and usually with a notice, minimum of 15 days, usually more than that, usually 30 days, but minimum of 15 days, and then he was to release these labels to the new supplier. The custom of the trade was that the new supplier calls the old supplier to make arrangements with regards to the cans and labels, because there is [sic] other costs involved of packaging. . . . The custom of the trade would have been for Merico and Superior Foods to make arrangements with ClevePak to have at least those cans and labels which were on inventory at ClevePak released to the new man, Merico. . . . [ClevePak] couldn't release them unless Superior Foods give [sic] him the authorization. . . . But the contact comes direct from Merico to Superior, not through ClevePak. The contact goes from Merico to Superior Foods. . . . What we are talking about mainly is custom of the trade. . . . And the implicity [sic] in that would be, as released, they would be

paid for by Merico and charged back to the ultimate customer [Harris-Teeter] some way or another."

Mr. Meenach also stated that, insofar as the circumstances were in its control, Harris-Teeter had done everything it agreed to do upon changing suppliers "with exception to seeing that we actually got paid for the labels that had their name on it." Referring to a meeting he had with Mr. Thomas, biscuit purchaser for Harris-Teeter, following termination of the agreement, he said:

> "Mr. Thomas told us that he believed Harris-Teeter's obligations ceased when the letter that he had written requesting to release material and taking the finished product on hand. . . . Mr. Thomas expressed a willingness to sit down with Superior and other parties on a further discussion of the problem, but said he would not take any position because he felt he had handled his problem. . . . "

**[3]** The testimony of Mr. Meenach is ambiguous, and we think it is susceptible to the several interpretations given it by the trial court. In addition to plaintiff's allegation and evidence that Harris-Teeter expressly agreed to pay for the packaging materials, another permissible view of the testimony is that Harris-Teeter denied any contractual liability to Superior or Merico for the packaging materials after its letter of 2 July 1971 which confirmed termination of the contract *and requested Superior to make all packaging materials available to Merico.* If Harris-Teeter did not agree to pay for the packaging materials, but did agree to follow the normal practice in the biscuit business, it would have incurred subsequent liability for the packaging materials only when plaintiff complied with its request by releasing the materials to Merico according to trade practice and Merico used the materials thus received for Harris-Teeter's benefit. Such a view of the evidence supports that portion of the charge to which Exception No. 1 is directed.

Another permissible view of the evidence is that Harris-Teeter considered itself obligated to request plaintiff to release the packaging materials to Merico and, if necessary, to act as mediator between plaintiff and Merico. This interpretation supports the portion of the charge represented by appellant's Exception No. 2.

A third permissible view of the evidence is that Harris-Teeter and plaintiff had agreed that, upon termination of the

contract by either party, plaintiff would release the packaging materials upon Harris-Teeter's request, and that Harris-Teeter had fulfilled its obligations by so requesting in its termination letter to plaintiff on 2 July 1971. This interpretation supports the portion of the charge to which Exception No. 3 refers.

Pursuant to plaintiff's allegations and evidence, the trial judge instructed the jury with respect to reasonable notice of termination, the agreement to pay for leftover packaging materials allegedly made by Harris-Teeter, and the several permissible interpretations of the evidence challenged in these assignments. The jury answered the issues in favor of Harris-Teeter, and we find no reasonable cause to believe that the jury was misled or misinformed as alleged by plaintiff. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966); *Finance Co. v. Trust Co.*, 214 N.C. 478, 199 S.E. 733 (1938); 7 Strong, N. C. Index 2d, Trial § 33 (1968). Therefore, assignments one, two and three are overruled.

**[4]** In assignments five and fifteen plaintiff contends the trial court erred in its charge to the jury with respect to the termination of contracts. Plaintiff says the court failed to instruct the jury that a contract terminable at will, as here, cannot be terminated by one party after the other party has performed acts thereunder which entitled him to compensation. In support of this contention plaintiff cites *White v. Pleasants*, 225 N.C. 760, 36 S.E. 2d 227 (1945). We note at the outset, however, that the case cited and relied on is distinguishable in that it deals with *revocation* of a simple contract of agency after performance by one party, while the case before us deals with *termination* of an agreement for the sale of goods in which no terminal date is specified and which, therefore, is governed by the Uniform Commercial Code. G.S. 25-2-309(2) and (3) (1965).

G.S. 25-2-309(2) provides that where a contract calls for successive performances it is valid for a reasonable time and, thereafter, may be terminated *at any time* by either party unless otherwise agreed. *See Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953). Termination of a contract occurs when either party, pursuant to a power created by agreement or law, puts an end to the contract otherwise than for its breach; and when terminated, all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. G.S. 25-2-106(3) (1965).

G.S. 25-2-309(3) provides, *inter alia,* that termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party. Comment 8 to this section explains the reasonable notification requirement: "Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement." Among merchants under Article two of the Code, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. G.S. 25-2-103(b) (1965). Reasonable time depends on the nature, purpose and circumstances of the action to be performed within a reasonable time. G.S. 25-1-204(2) (1965); *see Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479 (1960).

When these statutory principles are applied to the facts and circumstances of this case, we find no error in this phase of the trial. Here, plaintiff has not proceeded on a theory in allegation or proof that it suffered damages because the notice of termination from Harris-Teeter did not provide adequate time to seek a substitute arrangement. Instead, the theory of recovery which plaintiff has presented on appeal is based on the contention that its losses on the leftover packaging materials were in some way caused by an alleged wrongful termination of the contract and the alleged failure to give reasonable notice, and that Harris-Teeter is responsible and liable for those losses. Stated a different way, plaintiff seems to contend that had Harris-Teeter not terminated the contract or had it given longer notice of termination, Superior would not have suffered losses on the leftover packaging materials. A review of the evidence shows that the trial judge adequately applied the law to the evidence plaintiff offered in support of its theory of recovery.

In addition to testimony heretofore related, Mr. Meenach further testified:

> "The history of this trade is that it is quite competitive. And the changing of suppliers happens frequently. This happens to everybody in the business and to the best of people, I might say. We took business from Merico and they, in turn, have taken business from us. And the same things is true with other suppliers. I got this business in 1968 [from Merico] and held onto it for a little better than three years.

And I got a telephone call on July 2, 1971 from Mr. Watson. And he told me over the telephone that they were changing suppliers. You discuss that there is a possibility of losing the business back in the originating of the contract and what happens if this does happen. It's always a possibility. When we made the initial agreement, we anticipated that what did in fact happen, could happen."

On 2 July 1971 Harris-Teeter wrote Superior Foods as follows:

"1. Harris-Teeter will terminate all agreements for manufacturing of dough products with Superior Foods as of this date.

2. We are requesting that all packaging materials on hand be made available to Merico.

We will appreciate the packaging supplies being made available with expediency."

According to the record before us, plaintiff *remained silent and did nothing* until 1 October 1971 when it wrote Harris-Teeter complaining that the contract had been discontinued without notice "and consequentially we have a considerable amount of labels and cans on hand." Meanwhile, Harris-Teeter bought and paid Superior for all the Harris-Teeter labeled canned biscuits Superior had on hand at the time of termination, and Merico somehow improvised alternate labels until it obtained an adequate supply of packaging materials, labels and cans from other sources. Mr. Meenach's testimony also shows that Harris-Teeter redesigned its biscuit label during the July 1-October 1 period. Obviously the old labels were useless thereafter, and it is understandable why Harris-Teeter and Merico were not interested in paying for the leftover supplies on October 1!

Mr. Meenach stated that the custom in the trade is "for the new supplier to contact the old supplier to find out what [the] terms and conditions are. . . . [I]n most instances . . . the new supplier is most anxious to contact the old supplier because he needs labels badly. . . . " On the basis of this alleged "custom in the trade," plaintiff contends that Merico was obligated to come to it and ask it to release the packaging materials, and that until such contact came from Merico it was in no way obligated to follow up Harris-Teeter's request that the packaging materials be made available to Merico.

There is no evidence whatsoever in this record that Merico would have been unwilling to take and pay for the leftover packaging materials had plaintiff merely informed Merico of their availability. If plaintiff had merely taken this initiative, all consequences of the termination for which it seeks compensation probably would have been avoided. But be that as it may, counsel for plaintiff conceded on oral argument, and the record bears it out, that the whole process normally followed in the canned biscuit trade for transferring leftover packaging materials to a new supplier broke down when plaintiff failed to act on Harris-Teeter's letter because it thought the "custom of the trade" required Merico to contact it first.

We have carefully considered the charge. The court's instructions on termination and reasonable notice, although not couched in the exact terminology of the Uniform Commercial Code, are in substantial accord with the law. With these instructions the court properly submitted issues concerning Harris-Teeter's obligations on termination of the contract, and the jury rejected plaintiff's contentions (1) that Harris-Teeter had expressly agreed to pay for the labels and packaging materials and (2) that Harris-Teeter failed to give reasonable notice of termination.

The first issue submitted encompasses plaintiff's claim that Harris-Teeter was liable for plaintiff's *prior performance* in acquiring the packaging materials which were left on hand upon termination of the contract. All obligations based on *prior performance* of a contract survive its termination, G.S. 25-2-106(3); and *if* the jury had found that Harris-Teeter agreed to pay for leftover packaging materials, Harris-Teeter would be liable for costs incurred by plaintiff in acquiring the materials. However, the contrary finding negates Harris-Teeter's liability based on performance under the contract. Implicit in the jury's finding on the first issue is that Harris-Teeter only agreed to pay for the finished product. According to the practice in the trade contemplated by the parties, the leftover packaging materials should have been transferred to Merico, and Merico should have paid for them. Harris-Teeter fulfilled its obligation when it took and paid for all the finished product plaintiff had on hand at the time of termination.

The fifth issue submitted and the court's instruction thereon adequately present plaintiff's contention that Harris-Teeter failed to give reasonable notice of termination. The jury finding

establishes that Harris-Teeter gave reasonable notice and that Harris-Teeter was not liable for any damages allegedly suffered from lack of fifteen to thirty days' notice of termination. The letter of termination gave plaintiff sufficient opportunity to dispose of the leftover packaging materials according to the practice in the trade. Plaintiff knew that time was an essential factor in making leftover packaging materials available to the new supplier, yet it failed to contact Merico or notify Harris-Teeter that Merico had not made the initial contact. In that factual setting, it was permissible for the jury to find that the notice was reasonable in that it gave plaintiff fair opportunity to follow the trade practice for avoiding the losses. The parties had apparently agreed to follow that procedure for handling the leftover materials regardless of the length of notice. If plaintiff has suffered any loss in this case, the loss is not due to lack of notice but to its own failure and neglect to make the packaging materials on hand available to Merico, the new supplier. Assignments five and fifteen are therefore overruled.

In assignments six, seven and nine, plaintiff assigns as error the failure of the trial court to instruct the jury on statutory rules relating to usage of trade under G.S. 25-1-205(2), (3) and (5). Plaintiff requested no such instructions at trial and contends no request was required since "usage of trade" is a substantial feature of the case.

**[5]** Plaintiff had the right, unless waived, to have the jury determine all issues of fact arising from the evidence. N. C. Const., Art. IV, §§ 13 and 14; *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971). In that connection, Rule 49(c) of the Rules of Civil Procedure reads as follows:

> "(c) *Waiver of jury trial on issue.*—If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered."

Thus, the right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires. *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168

(1972). The reason for the rule is explained in the following Comment:

> "The idea is that the inadvertent omission of an issue ought not to jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. Ample means for a party to protect his right to jury trial on all issues are clearly available. All he has to do is demand their submission 'before the jury retires.'" Comment, G.S. 1A-1, Rule 49 (1969).

**[6, 7]** G.S. 25-1-205(2) defines usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder. When, however, it is established that a usage of trade is embodied in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. G.S. 25-1-205(2) (1965); *See* 1 Anderson, Uniform Commercial Code § 1-205:6 (1970). Here, the alleged usage of trade is not in writing. The question of its existence was not submitted to the jury as an issue of fact, and plaintiff made no demand for its submission before the jury retired. Since the trial judge himself made no finding on the issue, he is "deemed to have made a finding in accord with the judgment entered." G.S. 1A-1, Rule 49(c) (1969). In that factual setting, plaintiff has waived its right to have the issue determined by the jury. It necessarily follows that the trial judge was not required to instruct the jury on the relevant law.

Issues relating to usage of trade, like other factual issues, should be prepared by the attorneys appearing in the action, or by the presiding judge, and reduced to writing before or during the trial. G.S. 1A-1, Rule 49(b) (1969). Formulation of such a factual issue after trial comes too late and does not entitle a party to a new trial on that issue. Assignments six, seven and nine are overruled.

In assignment ten plaintiff alleges error in the failure of the trial court to instruct the jury concerning anticipatory repudiation under G.S. 25-2-610 (1965). That section of the Uniform Commercial Code deals with repudiation of a contract with respect to a performance not yet due. It is not applicable to this

case. Here, Harris-Teeter had a right to terminate the contract. Assignment ten is overruled.

Assignment twenty-three and plaintiff's argument on *quantum meruit*, which is not represented by an assignment of error, were not preserved and discussed in plaintiff's brief in the Court of Appeals. These matters are therefore not properly before us. *Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968).

It is unnecessary to discuss other assignments relating to plaintiff's remedies allegedly available under the Uniform Commercial Code. The determinative issues have been answered by the jury in favor of defendant. The jury determined that Harris-Teeter was not obligated to pay for the labels and packaging materials. Thus, assignments relating to remedies allegedly available under the Code become moot and need not be considered on appeal. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967); *Perry v. Doub*, 249 N.C. 322, 106 S.E. 2d 582 (1959).

For the reasons stated the decision of the Court of Appeals upholding the verdict and judgment in favor of the defendant Harris-Teeter Super Markets, Inc., is

Affirmed.

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## STATE OF NORTH CAROLINA v. SAMUEL McCOTTER

No. 56

(Filed 27 August 1975)

**1. Criminal Law § 22— arraignment defined**

In criminal practice arraignment is the formal act of calling a defendant by name to the bar of the court, informing him of the offense with which he is charged, demanding of him whether he is guilty or not guilty, and entering his plea.

**2. Criminal Law § 22— failure of record to show arraignment**

Defendant is not entitled to a new trial because of the failure of the record to show a formal arraignment where the record shows that he was tried as if he had been arraigned and had entered a plea of not guilty. Statements to the contrary in *State v. Lueders*, 214 N.C. 558, and *State v. Cunningham*, 94 N.C. 824, are nullified.

3. **Criminal Law § 91— motion for continuance — appointment of additional attorney — solicitor's compliment to trial judge**

The trial court did not err in the denial of defendant's motion for a continuance for the appointment of an additional attorney where defendant stated that he was not dissatisfied with his court-appointed attorney but felt he needed more than one attorney; nor did the trial court err in the denial of the motion for continuance on the ground that, at the beginning of the term and in the presence of the jury, the solicitor stated that he had known the trial judge all his life and admired him as a person and a judge.

4. **Criminal Law § 34— testimony showing another crime — circumstances of incriminating statements**

In a prosecution for conspiracy to commit murder, the trial court did not err in permitting a witness to testify that he and defendant escaped from jail where the purpose of the testimony was not to show that defendant had committed the crime of escape but to explain the circumstances under which defendant made incriminatory statements relating to the conspiracy charge to which the witness testified.

5. **Criminal Law § 89— noncorroborative hearsay — harmless error**

In a prosecution for conspiracy to commit murder, defendant was not prejudiced by an officer's testimony as to one statement made to him by a witness which did not corroborate the testimony of the witness where the court immediately struck the testimony and instructed the jury to disregard it; furthermore, the admission of the stricken testimony was harmless beyond a reasonable doubt in view of the plenary competent, substantive evidence tending to establish the conspiracy charged.

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

APPEAL by the State pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 24 N.C. App. 76, 210 S.E. 2d 91 (1974), which reversed the judgment entered by *Exum, J.*, at the 25 February 1974 Session of the Superior Court of CRAVEN.

Defendant was convicted upon an indictment which charged that on 1 March 1973 he did "feloniously agree, plan, combine, conspire and confederate" with Jacqueline B. Graham to kill and murder Mary Patricia Elizabeth McGrath Waldo (Mrs. Waldo). The evidence for the State tended to show:

On the night of 21 April 1973, Mrs. Waldo visited a patient at the Craven County Hospital. Upon leaving she went to the parking lot and, as she attempted to start her automobile, she was shot in the head through the right front window. The shot shattered the glass and left seven or eight pellet holes in the

sun visor. Mrs. Waldo, bleeding very badly, got out of the car and slumped to the pavement. Someone came to her aid, and she was taken into the emergency room. Afer being x-rayed she was transferred to the Greenville Hospital. She testified that for about six weeks afterwards, "pieces of shot were pulled out of her head."

Vernie Swift (Swift), who worked at the Marine Naval Rework Facility (NARF) at Cherry Point, is a relative of defendant. She testified that she first met Mrs. Jacqueline B. Graham, a resident of Havelock, in February 1973 at a "Woman's Liberation meeting" over which Mrs. Waldo was presiding. After that meeting she continued to see and converse with Mrs. Graham. Once she helped Mrs. Graham clean house. One evening —"it could have been between March or April"—Mrs. Graham took Swift to New Bern and Swift introduced her to defendant. On two or three other occasions she was in the presence of both of these people. One time the three were together at or near a "rest area" four miles outside New Bern, where Mrs. Graham and defendant discussed "ways and means of getting rid of Mrs. Waldo. . . . There was a plan made that day."

Thereafter, from time to time, Swift delivered messages from Mrs. Graham to defendant—"messages like to tell Sammy [Samuel McCotter] to call her. It was urgent that he call her." Mrs. Graham gave Swift a picture of Mrs. Waldo which Swift delivered to defendant. She never carried any messages from defendant back to Mrs. Graham.

Once, after a "liberation meeting," Mrs. Graham met Swift in the lobby of NARF and gave her an envelope containing money, which Swift delivered to defendant. The money was counted in her presence and Swift saw $250.00. Later, in the ladies' restroom at NARF, Mrs. Graham gave Swift more money "in a ball, with a twenty-dollar bill on the outside." Swift also delivered this money to defendant.

After Mrs. Waldo was shot, Swift talked to Detective Sergeant Windham of the New Bern Police Department. He came to Cherry Point, and she told him everything she knew about this case.

Vance Banks, who was confined in the Craven County jail upon a charge of breaking and entering, was put in the same cell

with defendant. Except when quoted, Banks' testimony is summarized as follows:

During the night of May 16th Banks "overpowered Mr. Chamblee" (presumably the jailer) and took his gun away from him. Then Banks, defendant "and another man, whose first name is John," escaped. About 2:00 a.m. defendant and Banks went to the house of Bud Moses, a quarter of a mile from the jail. About 8:00 a.m. a young lady came in, and Sam had a conversation with her. After that, "he got another young lady by the name of Tanya." After a brief conversation with Tanya, he sent her to get a man by the name of Charles Lindsey, who (defendant said) was a "cold hearted young man." After four or five minutes, defendant told Banks that "this girl Jacqueline had hired him to shoot Mrs. Waldo . . . and he has asked Chuck Lindsey to do it"; that if "Jackie" had kept her mouth closed nobody would have found out about it. Banks had seen Officer Windham several times and had talked to him at least one time while he was in jail.

Detective Sergeant Windham investigated the shooting of Mrs. Waldo on the night of 21 April 1973 and, in the course of the investigation, he had a conversation with Swift at NARF at Cherry Point. At that time she made a statement to him with reference to "the incident at the Craven County Hospital" and "concerning Sam McCotter and Jacqueline Graham." Over defendant's objection Windham testified:

"Verna Swift told me that on a date in either late February or early March, she met with Mr. McCotter and Mrs. Graham in New Bern. They drove to a rest area about four miles outside of New Bern, and Mr. McCotter and Mrs. Graham discussed ways to kill Mrs. Waldo. That following that meeting, she carried some messages from Mrs. Graham to Mr. McCotter. That she did deliver some of the messages and some others she did not. That several weeks after the Highway 70 East meeting, Mrs. Swift delivered a sum of money from Mrs. Graham to Mr. McCotter. That after the next pay day she delivered a second sum of money. . . . That she delivered a photograph to Sam McCotter that Jacqueline Graham had given her. . . . She said it was a picture of Mary Patricia Waldo."

Before Judge Exum admitted the foregoing testimony, he instructed the jury that Swift's statement to Windham was not substantive evidence of the facts she had related to him; that

it was admitted solely for the purpose of corroborating the testimony Swift had given from the witness stand if the jury should find that it did corroborate her testimony.

Windham also testified that Swift stated to him that "one afternoon in March, Mrs. Waldo was to visit a home of a friend that had died and that Mrs. Graham and Mr. McCotter and herself went to Havelock and the purpose of this was for Mrs. Graham to point Mrs. Waldo out to Sam." Upon defendant's motion to strike this statement Judge Exum sustained the motion and instructed the jury "to strike" it from their minds and "not to consider it in any way in this case."

Windham's testimony further tended to show: Defendant was arrested on or about 2 May 1973. Thereafter, during the month of June 1973, he had a conversation with Vance Banks at the Craven County jail. At that time Banks stated to Windham that after he and defendant left the Craven County jail they went to "Moses' house"; that a young lady came into the house and defendant sent her for a second young lady named Tanya and then sent Tanya to get a man named Chuck; that Sam told Banks at that time, "This is a cold hearted young man that I just sent for; he is the gunman"; that defendant also told Vance "he was hired by Jacqueline Graham to kill Mrs. Waldo; that he in turn hired Charles Lindsey to do the shooting." This statement was admitted over defendant's objection, and after Judge Exum had given the jury the same limiting instruction which preceded the admission of Swift's statement to Windham. Windham's testimony concluded the State's case. Defendant's motion for judgment as in case of nonsuit was denied and defendant chose to introduce no evidence.

Upon the jury's verdict finding defendant "guilty as charged," the court adjudged that defendant be imprisoned for ten years in the State Prison. Upon appeal, the Court of Appeals reversed defendant's conviction and ordered a new trial upon the sole ground that the record failed to show the arraignment of defendant. One member of the panel having dissented, the State appealed to this Court as a matter of right.

*Rufus L. Edmisten, Attorney General, R. Bruce White, Jr., Deputy Attorney General, and Zoro J. Guice, Jr., Assistant Attorney General, for the State.*

*Michael P. Flanagan for defendant appellee.*

SHARP, Chief Justice.

[1] In criminal practice *arraignment* is the formal act of calling a defendant by name to the bar of the court, informing him of the offense with which he is charged, demanding of him whether he is guilty or not guilty, and entering his plea. *See Crain v. United States,* 162 U.S. 625, 637-638, 16 S.Ct. 952, 956, 40 L.Ed. 1097, 1100 (1896); Ballentine's Law Dictionary (1948 Ed.); Black's Law Dictionary (Revised 4th Ed., 1968); 22 C.J.S., *Criminal Law* § 406 (1961).

In 1890, in *Crain v. United States, supra,* the Supreme Court reversed a felony conviction because the record failed to show that the accused was ever formally arraigned. Mr. Justice Harlan, speaking for six members of the Court, said: "[W]e think it may be stated to be the prevailing rule, in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that unless this fact appears affirmatively from the record the judgment cannot be sustained." *Id.* at 643, 16 S.Ct. at 958, 40 L.Ed. at 1102. Mr. Justice Peckham, with whom two members of the Court concurred, wrote a dissenting opinion which was to become the law twenty-four years later when the Supreme Court overruled *Crain v. United States* in *Garland v. Washington,* 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914).

In *Garland v. Washington,* speaking for a unanimous Court, Mr. Justice Day said with reference to *Crain v. United States:*

"Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain Case,* when he said:

" 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived

that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.' " *Id.* at 646, 34 S.Ct. at 457, 58 L.Ed. at 775.

The logic of the words of Mr. Justice Peckham is inescapable, and his words are applicable in toto to this case. Today the modern trend is that "[a]rraignment may be waived by pleading not guilty or by silence, at least in all except capital cases, if the accused is fully informed as to the charge and is not otherwise prejudiced in the trial of the case by the omission of that formality." 21 Am. Jur. 2d, *Criminal Law* § 457 (1965); 22 C.J.S., *Criminal Law* § 408 (1961).

The opinion of the Court of Appeals in this case made it quite clear that, in awarding defendant a new trial because of the record's failure to show his arraignment, it acted under the compulsion of this Court's decision in *State v. Lueders,* 214 N.C. 558, 200 S.E. 22 (1938).

In *Lueders* the defendant was tried upon a warrant which charged him with "practicing photography without a license and without being registered with the State Board of Photographic Examiners" in violation of Chapter 155, Public Laws of 1935. The "frankly avowed" purpose of Lueders' appeal was to test the constitutionality of the law under which the warrant was drawn. The case was originally tried in the Greensboro municipal court. The defendant was convicted and appealed to the Superior Court. There, upon an agreed statement of facts, the jury returned the following verdict: "Upon the foregoing statement of agreed facts, the jury for its verdict finds the defendant guilty."

To justify avoiding the constitutional question presented, this Court noted "certain irregularities" appearing on the face of the record: (1) "[T]he defendant entered no plea in the Superior Court, where, on appeal, the cause was to be tried de novo." (2) "[T]he verdict of the jury was rendered on an

agreed statement of facts, and the defendant excepts to the verdict. . . . There is no contention that the verdict is a special one." *Id.* at 560, 200 S.E. at 23.

With reference to the first irregularity the Court said: "In the absence of a plea to the indictment or charge, there was nothing for the jury to determine." *Id.* In support of this statement Chief Justice Stacy relied upon the rationale of Ashe, J., "speaking to a similar situation" in *State v. Cunningham,* 94 N.C. 824, 825 (1886), that where defendant filed no plea there was no issue to be submitted to the jury; that consequently the verdict returned was a nullity, and no judgment could be pronounced upon such a verdict.

In *Cunningham,* Justice Ashe also noted that the Superior Court had no jurisdiction of the simple assault with which defendant was charged because The Code gave exclusive original jurisdiction of offenses to Justices of the Peace during the six months following the assault.

Obviously, both the substantive and procedural facts of *Lueders* and *Cunningham* differ materially from those of this case. Further, as noted in the opinion of the Court of Appeals, the facts in each of the other cases cited in the *Lueders'* opinion are not comparable. *See State v. McCotter,* 24 N.C. App. 76, 77, 210 S.E. 2d 91, 92 (1974).

In this case there can be no doubt either that defendant was fully aware of the charge against him or that he was in nowise prejudiced by the omission of a formal arraignment—if indeed it was omitted. When the case was called for trial defendant's first motion was to quash the bill of indictment because "a charge of conspiracy violated his rights under the Constitutions." At the beginning of his charge Judge Exum read the bill of indictment to the jury and then said, "To this charge the defendant has entered a plea of not guilty." Neither defendant nor his counsel arose to deny that he had entered such a plea. Under all the circumstances the judge's recitals are entitled to full faith and credit.

**[2]** From beginning to end, defendant's trial was a completely adversary proceeding. While the record is silent as to defendant's arraignment, it shows that he was tried as if he had been arraigned and had entered a plea of not guilty. In such case the absence of formal arraignment does not constitute reversible

error, and the statements in *State v. Lueders, supra,* and *State v. Cunningham, supra,* are nullified.

We hold that the Court of Appeals erred in ordering a new trial because of the failure of the record to show defendant's formal arraignment. Its decision, therefore, is reversed.

Because the Court of Appeals ordered a new trial upon a ground it held to be a threshold error, it considered only that one assignment. Ordinarily our review is restricted to the rulings of the Court of Appeals which are challenged in the petition for certiorari or on direct appeal and brought forward in appellant's brief filed in this Court. This case, however, is unusual in that it is a criminal case in which the State appeals to this Court. For that reason we elect to consider defendant's remaining assignments of error. *See State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971). (With respect to appeals taken on or after July 1, 1975 which involve this situation, see North Carolina Rules of Appellate Procedure, Rule 16(a) (1975)).

**[3]** Defendant's second assignment is that the court erred in denying his motion "for a continuous for the appointment of additional counsel." In reply to the judge's inquiry, defendant said that he was not dissatisfied with his court-appointed attorney; he did not suggest his counsel was incompetent. He merely said he felt he needed more than one attorney. In view of the uncontradicted evidence of defendant's guilt of the crime charged, there is no reason to believe that additional attorneys could have been of assistance. Obviously, defendant's real need was for a witness.

As another ground for continuance, defendant argued that he had been prejudiced by the solicitor's statement, made at the beginning of the term and in the presence of the jury, that he had known Judge Exum all his life and admired him as a person and a judge. Defendant said he felt the compliment which the solicitor paid the judge "would tie the solicitor in closer to the judge," and that "they would give more credence to the State's witnesses." The judge then explained to defendant that "the District Solicitor is not trying the case; the assistant solicitor is trying the case." Defendant's reply to that was, "He is just as bad. Whatever they are doing when they do it, they are trying to do it to me."

Upon the grounds stated, defendant's motion for a continuance was addressed to the sound discretion of the trial judge,

and his ruling thereon is not subject to review absent an abuse of discretion. Continuances should not be granted unless some reason is established. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). No abuse of discretion has been shown.

**[4]** Defendant's assignment that the court erred in permitting Banks to testify that he and defendant *escaped* from jail on May 16th is patently feckless. This statement introduced Banks' testimony that it was while they were on escape that defendant made contact with that "cold hearted young man," Chuck Lindsey, and that he told Banks he had asked Lindsey to shoot Mrs. Waldo. The purpose of this testimony was not to show that defendant had committed the crime of escape, but to explain the circumstances under which he made the incriminatory statements which Banks related from the witness stand. This assignment is obviously without merit. Equally meritless is the fifth ground upon which defendant contends his conviction should be reversed, that is, that the judge erred "in failing to quash the indictment and in failing to grant his motion for nonsuit." *See State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969).

**[5]** Defendant's final assignments of error raise the question, "Did the trial judge err in allowing hearsay testimony?" The answer is No. The only incompetent hearsay which appears in the record was elicited during the examination of Sergeant Windham, who—for the purpose of corroborating testimony of Swift—was asked to relate what statements Swift had made to him concerning Mrs. Graham and defendant. He testified to one statement which was not corroborative. This testimony, which is quoted in the preliminary statement, was immediately stricken by the judge, who also instructed the jury to disregard it.

We hold that the court's specific instructions to the jury not to consider the stricken statement but to erase it from their minds, was sufficient to prevent any prejudice from it. *See 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). Furthermore, in view of the plenary competent, substantive evidence tending to establish the conspiracy charged, the admission of the stricken evidence was harmless beyond a reasonable doubt. We note that Swift herself testified she delivered to defendant a picture of Mrs. Waldo, which Mrs. Graham had given her. "Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless." *State v. Hudson,* 281 N.C. 100, 106-107, 187 S.E. 2d 756, 761 (1972).

After a careful examination of the record and of all defendant's assignments of error, we find no error in the trial below. The decision of the Court of Appeals is

Reversed.

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

ANDREWS v. INSURANCE CO.

No. 40.

Case below: 26 N.C. App. 163.

Plaintiffs' motion to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

AYERS v. BROWN

Nos. 124 PC and 33.

Case below: 25 N.C. App. 476.

Petition for writ of certiorari to North Carolina Court of Appeals improvidently granted 6 June 1975 (reported 287 N.C. 464) is denied 2 September 1975.

BLOUNT v. TYNDALL

No. 133 PC.

Case below: 25 N.C. App. 559.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

BOWES v. INSURANCE CO.

No. 3 PC.

Case below: 26 N.C. App. 234.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

BRITT v. BRITT

No. 186 PC.

Case below: 26 N.C. App. 132.

Petition for writ of certiorari to North Carolina Court of Appeals denied 27 August 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 27 August 1975.

CITY OF ASHEBORO v. AUMAN

No. 176 PC.

Case below: 26 N.C. App. 87.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

CITY OF DURHAM v. DEVELOPMENT CORP.

No. 1 PC.

Case below: 26 N.C. App. 210.

Petition for writ of certiorari to North Carolina Court of Appeals denied 27 August 1975.

CREASMAN v. WELLS

No. 155 PC.

Case below: 25 N.C. App. 645.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

DENDY v. WATKINS

No. 164 PC.

Case below: 26 N.C. App. 81.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

EARLES v. EARLES

No. 37 PC.

Case below: 26 N.C. App. 559.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

FITCH v. FITCH

No. 35 PC.

Case below: 26 N.C. App. 570.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

HARTSELL v. STRICKLAND

No. 168 PC.

Case below: 26 N.C. App. 68.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

HENDERSON v. MATTHEWS and ROGERS v. HENDERSON and NEWKIRK v. HENDERSON and LANIER v. HENDERSON

No. 200 PC.

Case below: 26 N.C. App. 280.

Petition of Marion Henderson for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

HILL v. JONES

No. 182 PC.

Case below: 26 N.C. App. 168.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

HUDSON v. BOARD OF TRANSPORTATION

No. 122 PC.

Case below: 25 N.C. App. 435.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

IN RE JOHNSON

No. 46 PC.

Case below: 26 N.C. App. 745.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

IN RE LONG

No. 137 PC.

Case below: 25 N.C. App. 702.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

KLEIN v. INSURANCE CO.

No. 22 PC.

Case below: 26 N.C. App. 452.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

KNUCKLES v. SPAUGH

No. 193 PC.

Case below: 26 N.C. App. 340.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

LEASING, INC. v. DAN-CLEVE CORP.

No. 15.

Case below: 25 N.C. App. 18.

Petition for writ of certiorari to North Carolina Court of Appeals improvidently granted 6 May 1975 (reported 287 N.C. 260) is denied 30 July 1975.

MANUFACTURING CO. v. MANUFACTURING CO.

No. 17 PC.

Case below: 26 N.C. App. 414.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

MILLER v. CITY OF CHARLOTTE

No. 144 PC.

Case below: 25 N.C. App. 584.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

MITCHELL v. K.W.D.S., INC.

No. 15 PC.

Case below: 26 N.C. App. 409.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

NELSON v. BOARD OF ALCOHOLIC CONTROL

No. 188 PC.

Case below: 26 N.C. App. 303.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 25 August 1975.

NORRIS v. INSURANCE CO.

No. 180 PC.

Case below: 26 N.C. App. 91.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

PRICE v. PENNEY CO.

No. 185 PC.

Case below: 26 N.C. App. 249.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

RORIE v. BLACKWELDER

No. 177 PC.

Case below: 26 N.C. App. 195.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

SMITH v. FORD MOTOR CO.

No. 184 PC.

Case below: 26 N.C. App. 181.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

STATE v. ANDERSON

No. 9 PC.

Case below: 26 N.C. App. 422.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. BAKER

No. 30 PC.

Case below: 26 N.C. App. 605.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. BALDWIN

No. 25 PC.

Case below: 26 N.C. App. 359.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

STATE v. CARON

No. 196 PC.

Case below: 26 N.C. App. 456.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

STATE v. CARTER

No. 161 PC.

Case below: 26 N.C. App. 84.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. CLARK

No. 150 PC.

Case below: 25 N.C. App. 677

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. COGDELL

No. 2 PC.

Case below: 26 N.C. App. 522.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. COURTNEY

No. 94 PC.

Case below: 25 N.C. App. 351.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. DAIL

No. 174 PC.

Case below: 25 N.C. App. 552.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. DANIELS

No. 157 PC.

Case below: 25 N.C. App. 681.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. DARK

No. 20 PC.

Case below: 26 N.C. App. 610.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. ENSLIN

No. 134 PC.

Case below: 25 N.C. App. 662.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 25 August 1975.

STATE v. GANTT

No. 31 PC.

Case below: 26 N.C. App. 554.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. HACKETT

No. 197 PC.

Case below: 26 N.C. App. 239.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. HAMRICK

No. 21 PC.

Case below: 26 N.C. App. 518.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. HICKSON

No. 146 PC.

Case below: 25 N.C. App. 619.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. HUNTER and GRAY

No. 29 PC.

Case below: 26 N.C. App. 489.

Petition by defendant Gray for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. HUTCHISON

No. 190 PC.

Case below: 26 N.C. App. 290.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. JOHNSON

No. 142 PC.

Case below: 25 N.C. App. 630.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. JONES

No. 7 PC.

Case below: 26 N.C. App. 467.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. JORDAN

No. 29.

Case below: 25 N.C. App. 481.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. JOYNER

No. 24 PC.

Case below: 26 N.C. App. 447.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

STATE v. KING

No. 170 PC.

Case below: 26 N.C. App. 86.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. LISK

No. 27.

Case below: 25 N.C. App. 659.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. LOCKLEAR

No. 189 PC.

Case below: 26 N.C. App. 300.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. MARR

No. 46.

Case below: 26 N.C. App. 286.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. MEDLEY and McCURDY

No. 195 PC.

Case below: 26 N.C. App. 331.

Petition by defendant McCurdy for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. MOORE

No. 192 PC.

Case below: 26 N.C. App. 193.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. NEWCOMB

No. 44 PC.

Case below: 26 N.C. App. 595.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

STATE v. NORRIS

No. 191 PC.

Case below: 26 N.C. App. 259.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. PERRY

No. 42.

Case below: 26 N.C. App. 185.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. PUGH

No. 8 PC.

Case below: 26 N.C. App. 534.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. RIMMER

No. 160 PC.

Case below: 25 N.C. App. 637.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. ROOK

No. 39.

Case below: 26 N.C. App. 33.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. SCOTT

No. 41.

Case below: 26 N.C. App. 145.

Petition by defendant Scott for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

STATE v. SIMON

No. 162 PC.

Case below: 26 N.C. App. 71.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. SIZEMORE

No. 181 PC.

Case below: 26 N.C. App. 347.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. SNOWDEN

No. 156 PC.

Case below: 26 N.C. App. 45.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. SORRELL

No. 183 PC.

Case below: 26 N.C. App. 325.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1975.

STATE v. STITT

No. 140 PC.

Case below: 25 N.C. App. 680.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. VAIL

No. 171 PC.

Case below: 26 N.C. App. 73.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. WEBB

No. 10 PC.

Case below: 26 N.C. App. 526.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. WHITEHEAD

No. 151 PC.

Case below: 25 N.C. App. 592.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. WOLFE

No. 16 PC.

Case below: 26 N.C. App. 464.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. WOODWARD

No. 158 PC.

Case below: 25 N.C. App. 679.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

STATE v. WYNN

No. 163 PC.

Case below: 25 N.C. App. 625.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

TRUST CO. v. ELZEY

No. 165 PC.

Case below: 26 N.C. App. 29.

Petition for writ of certiorari to North Carolina Court of Appeals denied 25 August 1975.

TUGGLE v. HAINES

No. 14 PC.

Case below: 26 N.C. App. 365.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 September 1975.

WAFF BROS., INC. v. BANK

No. 129 PC.

Case below: 25 N.C. App. 517.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

WILLIFORD v. WILLIFORD

No. 173 PC.

Case below: 26 N.C. App. 61.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 25 August 1975.

# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

# RALEIGH

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## FALL TERM 1975

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STATE OF NORTH CAROLINA v. ALBERT LEWIS CAREY, JR.

No. 82

(Filed 7 October 1975)

1. **Criminal Law § 57— size of lead pellets — qualification of expert**

   The trial court properly allowed a State's witness to give his opinion that lead pellets removed from a homicide victim's body were No. 6 buckshot where the evidence showed that the witness, through both study and experience, had acquired the requisite skill to give his opinion as to the size of the lead pellets, although the witness had been tendered as an expert in firearms identification and not as an expert in ballistics.

2. **Criminal Law § 62— testimony officer assigned to polygraph unit**

   In this prosecution for homicide and conspiracy to commit armed robbery, defendant was not prejudiced by a police officer's testimony that he was then assigned to the polygraph unit since the jury heard no testimony as to the results of a polygraph test.

3. **Criminal Law § 75— admissibility of confession — misinformation as to punishment — statements concerning polygraph**

   There is no merit in defendant's contention that his confession was involuntary and inadmissible on grounds that he was misinformed as to the severity of punishment for the charges against him (i.e., imprisonment as opposed to death), and that he was told that a polygraph test (which was not completed) would be for his own benefit and the benefit of the police department and that nothing elicited during the polygraph test would be used in evidence against him, where

defendant did not contend that he confessed because police were using the threat of a polygraph test to force incriminating admissions from him or that his confession was based on any improper inducement generating a hope that he might thereby obtain relief from the charges to which the confession related.

4. **Criminal Law § 34— evidence of other crimes**

*In* a prosecution for a particular crime, 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 such evidence tends to prove any other relevant fact, it will not be excluded merely because it also shows defendant to have been guilty of an independent crime.

5. **Criminal Law § 34— evidence of other crimes — competency to show common plan**

In a prosecution for murder committed during an attempted armed robbery and conspiracy to commit armed robbery, the trial court did not err in the admission of testimony by a police officer that defendant had placed a check mark and his initials beside certain armed robberies, including the one in question, on a list presented to him since (1) this evidence tended to prove the relevant fact that he had admitted participating in the robbery in question, and (2) defendant made no objection to the testimony.

6. **Criminal Law § 88— right of cross-examination — polygraph evidence — opening door for evidence by State**

Defendant was not deprived of the right effectively to cross-examine an officer concerning the circumstances surrounding defendant's confession by the court's ruling that if defendant brought out evidence concerning a polygraph examination, the State would be allowed to bring out all the circumstances regarding the polygraph examination on redirect.

7. **Homicide § 2— murder during perpetration of conspiracy — guilt of conspirators**

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.

8. **Homicide § 4— dismissal of felony charge — conviction of felony-murder**

Where the theory of the State's case in a first degree murder prosecution was that defendant and others had conspired to commit the felony of armed robbery of a service station and that one of the conspirators shot and killed a service station attendant during the attempted robbery, defendant could be convicted of a felony-murder notwithstanding a charge against defendant for the felony of armed robbery had been dismissed in a previous trial.

9. **Conspiracy § 8; Criminal Law § 26; Homicide § 31— conspiracy to rob — felony-murder — conviction of both**

A defendant can properly be convicted of both first degree murder committed in the perpetration of an armed robbery and conspiracy to commit the armed robbery since the conspiracy is a completed crime

when it is formed and does not merge into the offense of first degree murder.

10. **Criminal Law §§ 34, 89; Husband and Wife § 6— prior inconsistent statements of defendant's wife — unrelated crimes by defendant**

In this prosecution for murder committed during perpetration of an armed robbery and conspiracy to commit armed robbery, the trial court properly allowed the State to cross-examine defendant's wife about prior inconsistent statements tending to show that she knew the "trigger man" in the killing prior to the date of the offenses and to introduce the statements into evidence for the purpose of impeachment; even if these statements tended to implicate defendant in other unrelated crimes, they were competent as tending 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 commission of the crimes charged and to connect defendant with their commission. G.S. 8-57.

11. **Criminal Law § 102— fair trial — facial expressions of district attorney**

Defendant will not be deemed to have been denied a fair trial because of alleged facial expressions of the district attorney in response to testimony by defendant's wife where there is nothing in the record to show what the facial expressions were.

12. **Criminal Law § 102— jury argument by district attorney — reasonable comment on evidence**

The district attorney's statement in his jury argument that defendant was shown a list of armed robberies and told to check and initial those in which he was involved "and that one was checked" was a reasonable comment on the evidence and did not deny defendant a fair trial.

13. **Criminal Law § 102— jury argument of district attorney — fair comment on evidence**

In this prosecution for murder committed in perpetration of armed robbery and conspiracy to commit armed robbery, defendant was not denied a fair trial by the district attorney's jury argument that the "trigger man" was only fifteen years old and defendant was twenty-three, and that it was not justice for a fifteen year old boy to carry the burden alone for the murder, that the responsibility for the crime lay on the shoulders of defendant, and that a man was killed as a result of the planning of defendant, since the argument was legitimate under the evidence presented in the case.

14. **Constitutional Law § 36— death penalty for first degree murder**

The death penalty was constitutionally imposed for first degree murder.

Justice LAKE concurs in result.

Chief Justice SHARP dissenting.

Justice BRANCH concurs in the dissenting opinion.

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

APPEAL by defendant from *Snepp, J.*, at the 16 December 1974 Regular "C" Session of the Superior Court of MECKLENBURG. This case was docketed and argued at the 1975 Spring Term as No. 67.

Defendant was convicted of two charges upon two separate bills of indictment which were consolidated for trial. In one indictment, drawn under G.S. 15-144, defendant was charged with the murder of James D. Sloop, Sr. on 19 June 1973. Upon this charge the jury returned a verdict of "Guilty of Murder in the first degree." From the mandatory sentence of death imposed upon the verdict defendant appealed directly to this Court pursuant to G.S. 7A-27(a). In the second indictment it was charged that on 19 June 1973 defendant feloniously conspired with James Calvin Mitchell, Anthony Carey and others to attempt to commit the crime of armed robbery (G.S. 14-87) by attempting to steal, take and carry away money from the person of James Sloop by the use of a shotgun whereby Sloop's life was endangered and threatened. Upon this charge the jury returned a verdict of "guilty of felonious conspiracy." The judge imposed a sentence of ten years, and defendant appealed to the Court of Appeals. Upon defendant's motion this conviction was certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a).

Defendant was convicted of these same charges at his first trial before Judge Sam J. Ervin III at the 26 November 1973 Session of Mecklenburg County Superior Court. On appeal from these first convictions, this Court, in an opinion by Justice Lake, awarded defendant a new trial for failure of the trial judge to permit defendant to interrogate prospective jurors concerning their views with reference to the imposition of the death penalty and for failure to permit defendant to inform the jury, during final arguments, that under the law of this State, the prescribed punishment for first-degree murder is death. *See State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974).

The theory of the State's case (at both trials) was that defendant (known as "Butch"), his younger brother (Anthony Douglas Carey), James Calvin Mitchell (known as "Peanut"), Harold Givens and Antonio Dorsey together planned and conspired to rob with firearms the operators of an Exxon service station located at the intersection of West Trade and Cedar Streets in Charlotte, North Carolina. During the course of the attempted armed robbery on 19 June 1973, James D. Sloop, Sr.,

who was assisting Mr. Freeman B. Williams (owner) in the operation of the station, was shot in the abdomen with a sawed-off shotgun. Mr. Sloop died on 3 July 1973 from an infection of his digestive organs, which was caused by the wound inflicted on 19 June. James Calvin "Peanut" Mitchell (hereinafter sometimes referred to as Mitchell) fired the fatal shot. After the shotgun was discharged, Mitchell fled the scene without getting any money or anything else.

All five of the aforementioned individuals were originally charged with conspiracy to commit this offense. Mitchell, who was fifteen-years-old at the time of the incident, was allowed to plead guilty to second-degree murder in exchange for his testimony against his alleged co-conspirators.

Defendant's brother, Anthony Douglas Carey, was the first of these co-defendants to go to trial. He was convicted of conspiracy to commit armed robbery and of first-degree murder before Judge Sam J. Ervin III at the 29 October 1973 Regular "A" Session of Mecklenburg County Superior Court. Mitchell testified for the State at this trial and his testimony, was to the effect that he, defendant, defendant's brother, Harold Givens and Antonio Dorsey planned to rob the Exxon service station located on West Trade and Cedar Streets; that defendant supplied him with a sawed-off shotgun and transported him to the vicinity of the station in his automobile; that he and Givens went to the service station with the intent to rob it; that he shot James D. Sloop, Sr., with the sawed-off shotgun; and that he and Givens then ran back to the automobile driven by defendant and were transported away from the scene. On appeal from these convictions, this Court, in an opinion by Justice Huskins, granted defendant's brother a new trial. *See* 285 N.C. 497, 206 S.E. 2d 213 (1974).

The next co-defendant to come to trial was Harold N. Givens. At this trial Mitchell again testified for the State. However, this time Mitchell's testimony was to the effect that he had taken no part in the armed robbery and that he was at home at the time it occurred. At the close of the State's evidence, defendant Givens' motion for judgment as in the case of nonsuit was granted.

Defendant was the third of these co-defendants to come to trial (first trial before Ervin, J.). Mitchell once again testified for the State. This time Mitchell testified that he, defendant, defendant's brother and Antonio Dorsey planned the service sta-

tion robbery prior to the date it was attempted; that he was in the company of defendant and defendant's brother on the 18th of June from late morning until approximately 6:00 p.m.; that he met defendant and defendant's brother between 4:00 and 5:00 p.m. on 19 June 1973 and rode around with them for about two hours, passing the Exxon station five or six times; and that he had originally been charged with first-degree murder, but had pled guilty to second-degree murder and had not been sentenced. See *State v. Carey, supra.*

Subsequent to the above proceedings, the State elected to drop the charges against defendant's brother and against the co-defendant Dorsey. As previously noted, co-defendant Givens had the charges against him nonsuited.

At defendant's second trial before Judge Snepp, the State's evidence, summarized except where quoted, tended to show the following:

Freeman B. Williams testified that on 19 June 1973 he was the owner and the operator of the Exxon service station at the corner of West Trade and Cedar Streets, Charlotte, North Carolina. Williams further testified that on the evening of 19 June, at approximately 7:00 p.m., he and his employee, James D. Sloop, Sr., were in the process of closing the station when two boys came around the Cedar Street side of the station. One of the boys was carrying a sawed-off shotgun. One of the boys, he did not know which one, said "Gimmee," and Mr. Sloop spoke up and said, "Oh boy, I wouldn't give you anything." When Mr. Sloop made the above statement, the boy with the shotgun "just whirled around like that and shot him . . . right in the stomach. His intestines just dropped down, and, of course, they ran, the two boys. They ran back around the way they came . . . behind the station on the Cedar Street side." Williams positively identified Mitchell, who was present in the courtroom, as the boy who fired the fatal shot. Williams further testified that defendant was not the "other boy" with Mitchell.

Patrol Officer B. B. Davis testified that on 19 June 1973 he was operating a mobile unit in uptown Charlotte when he received a call at approximately 7:00 p.m. and proceeded to Williams' Exxon station. When he arrived, he jumped out of the squad car and ran inside the office portion of the station. Mr. Sloop was standing inside the office, about three feet from the door. "He was standing there with his hands clasped together under his stomach and his stomach was slit open and his intes-

tines were hanging out in his hands." Patrolman Davis told Sloop to sit down, that an ambulance was en route. Sloop responded: "It's too late, I'm dying."

James Calvin "Peanut" Mitchell was called by the State and he testified that he was seventeen-years-old and was then incarcerated in the Mecklenburg County jail. He stated that he was serving a forty year sentence "for murder and armed robbery" (he had apparently been sentenced sometime subsequent to defendant's first trial).

As to the events of 19 June 1973, Mitchell testified as follows:

> "On June 19, 1973, I was fifteen years old, I don't remember what time it was, but remember going to the Exxon Station at West Trade Street here in Charlotte. When I got there, I went up there and told the man to freeze and give me all he had. Then he went for a gun and I shot him. After I shot him I went across the fence and ran. I ran down by Irwin Avenue and on across Seaboard Street through the Fairview Homes. From Irwin Avenue up the path there to Seaboard Street and then on to Fairview Homes.
>
> "After then, I messed around up there on Oaklawn Playground and then went home.
>
> "Q. Was anybody with you at the time?
>
> "A. Nope.
>
> "Q. How did you get to the Exxon Service Station?
>
> "A. How did I get to the Exxon Service Station?
>
> "Q. Yes.
>
> "A. I walked.
>
> "Q. Did anybody go with you?
>
> "A. No, didn't nobody go with me. It was a guy who was down at Irwin Avenue playing basketball. So I told him to go to the service station with me to get a drink. He went up there. So when I pulled the gun on the man, he throwed the drink down and ran."

At this point, the State moved the court to declare the witness Mitchell "hostile." The trial judge excused the jury and conducted a *voir dire* hearing, and after finding facts and con-

cluding that Mitchell was in fact hostile, permitted the State to ask him leading questions during the remainder of the direct examination. After reading a portion of his testimony at defendant's first trial, Mitchell admitted the authenticity of the questions and answers then propounded and given, but denied the truthfulness of all of his responses.

Lieutenant Detective Wade Stroud testified that in July of 1973 he was commander of the "Task Force," a uniformed division of the Charlotte Police Department normally given special assignments. He stated that at approximately 1:00 a.m. on 10 July 1973 he went to 305 Oregon Street, Charlotte, North Carolina, in order to serve arrest warrants on defendant and defendant's brother. He found both of these individuals asleep in an upstairs bedroom. After defendant and his brother had been placed under arrest, Stroud walked back downstairs looking for another person that he had a warrant for. As he entered the kitchen area, he observed, to the left of the stove, a partially opened drawer that contained a box of approximately thirteen .20 gauge 3-inch magnum shotgun shells. Stroud seized the box. The box and the shells were introduced into evidence by the State.

B. J. Sloan, a firearm examiner of the Crime Laboratory of the Charlotte Police Department, testified that his duties included the examination of weapons to determine if they were in good mechanical condition; the examination of bullets and cartridge cases to determine if they came from a particular weapon; the examination of ammunition to determine the caliber; the examination of weapons to determine the caliber and gauge; and the examination of shotgun shells and shotgun shell components to determine size and make.

Over defendant's objection, the State tendered the witness Sloan as an expert, qualified to testify in the field of firearms identification. After defendant's objection was overruled, Sloan testified that based on his examination of the four lead shot pellets removed from the body of James D. Sloop, Sr., during an autopsy, he had concluded that they were No. 6 buckshot.

On cross-examination, Sloan testified that he had not examined any of the shot contained in the box of shotgun shells seized by Detective Stroud at defendant's apartment and therefore did not know if this shot was No. 6 or not.

W. O. Holmberg took the stand and testified that he was assigned to the polygraph unit of the Charlotte Police Depart-

ment. At this point, defendant's counsel asked the court to excuse the jury so he could "address some remarks to the court." After the jurors left the courtroom, defendant's counsel told the court that the district attorney had been requested at the pre-trial conference not to bring out any evidence "concerning the polygraph examination." The court stated this fact was irrelevant and thereafter denied defendant's motion to strike the answer.

Thereafter, Officer Holmberg testified that on the morning of 11 July 1973 he had occasion to see defendant in the polygraph room, located on the fourth floor of the Law Enforcement Center. Before Holmberg could testify as to an incriminating statement and admission made by defendant at that time, defendant's counsel objected and moved to suppress such evidence. The trial judge conducted a *voir dire* hearing, and after finding the facts, concluded that the evidence was admissible. The exact nature of this evidence and its admission into evidence will be more fully considered in the opinion.

Following the *voir dire* hearing, Detective R. J. Whiteside testified that on 11 July 1973 he checked defendant out of the Mecklenburg County jail and escorted him back to the Law Enforcement Center. Detective W. D. Starnes was with Whiteside at this time. After they had entered a conference room in the Criminal Investigation Bureau, defendant was given the Miranda warnings and a standard waiver of rights form. It was read to him and he signed it. Defendant told the detectives that he understood his rights. Thereafter, defendant was questioned with regard to the Sloop shooting at the Exxon station. Defendant denied any knowledge of the incident. Defendant was thereafter taken to the fourth floor and turned over to Officer Holmberg. Detectives Whiteside and Starnes then entered an "observation room" adjacent to Holmberg's office where they could see defendant and Holmberg through a two-way mirror and could hear what they said through a PA system setup.

At this point, W. O. Holmberg was recalled and testified that after defendant was brought into his office (the polygraph room) at approximately 9:00 a.m. on 11 July 1973 he stated that he, Givens and Mitchell had planned the robbery of Williams' Exxon on the night prior to the incident; that on the date of the incident he had his wife's automobile; that had driven Givens and Mitchell to the intersection of Trade and Clarkson Streets and had there let both of them out of the car with the under-

standing that they were going to rob Williams' Exxon service station.

After defendant had made the above recited statement, Holmberg testified that he left the polygraph room and asked Detectives Whiteside and Starnes for a list of alleged armed robberies that had been committed in the Charlotte area. Holmberg stated that he took this list with him back into his office (polygraph room) and placed it in front of defendant. He then asked defendant to put a check mark, along with his initials, beside any of the robberies that he had been involved in. Holmberg stated that defendant looked at the list and made "several check marks and initials behind each check mark." At this point, the State introduced an exhibit showing only defendant's marks beside the robbery at Williams' Exxon on 19 June 1973. More detailed examination of the events surrounding this incident will be considered in the opinion.

Detective R. J. Whiteside was recalled and testified that he had been in a position to hear and to see the conversation that Officer Holmberg had just testified to. Whiteside testified that defendant told Holmberg "that he was involved in this matter to the extent of taking these persons to the Exxon Station in his automobile and letting them out, and knew they were going to rob Sloop."

At this time, the State rested its case.

Defendant's evidence, summarized except where quoted, tended to show the following:

Defendant took the stand and testified that he did not know James Calvin "Peanut" Mitchell prior to being arrested on these charges. Defendant further testified that:

> "I did not take part in or help plan any robbery of the Exxon Station. I did not take Mitchell and somebody named Givens to the corner of Clarkson Street or Cedar and Trade. I did not kill James Sloop and I did not help plan the robbery at all. The shotgun shells that Officer Stroud says he found are not mine. I did not buy them and I did not know anything about them being in that house at all."

At the time of the incident, defendant stated that he was at his father-in-law's residence, which was located approximately one block from the Exxon station. Defendant's contentions regarding the alleged statement and checking on the list of robberies will be considered in the opinion.

On cross-examination defendant reasserted that he did not know a James Calvin "Peanut" Mitchell at any time prior to 19 June 1973, the date of the robbery. He denied ever going over to Mitchell's house and picking him up at any time for the purpose of committing robberies or for any other purpose.

Pamela Carey, defendant's wife, testified and more or less corroborated defendant's contentions regarding his defense of alibi.

On cross-examination, Pamela testified that the first time she met "Peanut" Mitchell was when she and her mother went to the Mecklenburg County jail on 10 July 1973. She stated that she had never met Mitchell before that time. At this point, the district attorney commenced to "sift" the witness concerning two prior inconsistent statements she had given Detective H. R. Thompson on 10 July 1973. Both statements indicated that Pamela had known Mitchell prior to 19 June 1973 and that Mitchell and her husband had committed several armed robberies in the Charlotte area. Pamela read these documents and admitted that she had "signed" them both, but denied having made any of the statements contained therein. After further cross-examination, defendant's attorney objected to this particular line of questioning. At this point, the trial judge excused the jury and heard arguments by counsel, after which he indicated that he would let the State introduce into evidence Pamela's two inconsistent prior statements on the theory that whether or not she knew Mitchell was not a collateral matter (*see* Detective Thompson's testimony below). The contents of both statements and their admission into evidence will be more fully considered in the opinion.

At this point, with the State's consent, the testimony of Charles Glenn, given at defendant's first trial, was read to the jury. Glenn, who was defendant's father-in-law, testified that he and defendant were drinking beer and playing cards at his home at the time of the robbery.

Defendant then rested his case.

As rebuttal evidence, the State first called Eleanor C. Mitchell, who was James Calvin "Peanut" Mitchell's mother. She testified that she knew defendant during June of 1973; that she had seen him at her home; that he and his wife and a "couple of other fellows" would come by her house and pick up her son

from time to time; and that prior to 9 July 1973 defendant had come by her home approximately twelve times.

The State also called Detective H. R. Thompson as a rebuttal witness. Thompson testified that during June and July of 1973 he had participated in the investigation of the Williams' Exxon station robbery and that as part of that investigation he had an opportunity to meet one Pamela Carey. Thompson further testified, over objection, that on 10 July 1973, after informing Pamela of her Miranda rights and having her execute the standard waiver form, she made two statements regarding various armed robberies that her husband and Mitchell had participated in. After Thompson identified State's Exhibits 11, 12 and 13 as the waiver form and statements, these documents were introduced into evidence and submitted to the jury for their examination.

Other pertinent facts and evidence will be discussed in the opinion.

*Attorney General Rufus L. Edmisten by Assistant Attorney General John R. B. Matthis for the State.*

*John H. Hasty for defendant appellant.*

COPELAND, Justice.

**[1]** Defendant first assigns error to the action of the trial court in ruling that the State's witness, B. J. Sloan, was an expert in the field of firearms identification, and in permitting the witness to testify that based on his examination of the four lead pellets removed from the body of James D. Sloop, Sr., he concluded that they were No. 6 buckshot. Defendant argues that since the witness was tendered as an expert in the field of "firearms identification," he was not qualified to testify in the field of ballistics. This assignment is without merit.

The qualification of an expert is ordinarily addressed to the sound discretion of the trial court and "[t]he court's findings that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies." *See generally* 1 Stansbury, N. C. Evidence § 133 (Brandis Rev. 1973); 2 Strong, N. C. Index 2d, Criminal Law § 51 (1967). The evidence in the instant case clearly indicates that the witness Sloan, through both study and

experience, had acquired the requisite skill to give his opinion as to the size of the lead pellets taken from the decedent's body. In *State v. Jenerett,* 281 N.C. 81, 90, 187 S.E. 2d 735 (1972), the defendant contended that the trial court erred in allowing a police officer, over the defendant's objection, to give an opinion as to the caliber of the bullet taken from the body of the deceased. In rejecting this contention, this Court, in an opinion by Justice Moore, stated:

> "While the trial court did not expressly find the witness to be an expert in ballistics, the court did allow him to give his opinion as to the caliber of the bullet. By admitting the testimony as to the caliber of the bullet, the court presumably found him to be an expert. There was ample evidence to support such finding. [Citations omitted.]"

Even assuming, *arguendo,* that the admission of this testimony was error, it was clearly harmless since the witness Sloan testified on cross-examination that he had not compared any of the shot contained in the box of shotgun shells seized at defendant's residence with the shot taken from the decedent's body. This assignment is therefore overruled.

Defendant next assigns as error the overruling of his objection to the admission into evidence of his alleged statement given to Officer Holmberg and overheard by Officer Whiteside. The evidence indicated that Officer Starnes was in a position where he may have heard the statement, but he did not testify. Defendant also contends that the trial court committed prejudicial error by allowing the State to elicit on direct examination of Officer Holmberg the fact that he was assigned to the polygraph unit. Defendant has grouped these two arguments together. We will do likewise.

**[2]** When Officer Holmberg initially took the stand he testified that he had been employed by the Charlotte Police Department for twenty-three years and that he was presently assigned to the polygraph unit. At this point, defendant's counsel asked the court to excuse the jury and thereafter told the court that the solicitor had been requested at the pretrial conference not to bring out any evidence "concerning the polygraph examination." The court stated it was irrelevant and overruled defendant's objection and denied his motion to strike.

Defendant relies on *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961), where this Court, in an opinion by Chief Justice Winborne, held that the *results* of a polygraph test are not ad-

missible to establish the guilt or the innocence of one accused of a crime. The Court went on to state that: "Moreover, the parties should not be permitted to introduce lie detector results into evidence by indirection. [Citations omitted.]" *Id.* at 709, 120 S.E. 2d at 172. Defendant's reliance on *Foye* is misplaced. In *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282 (1971), this Court, in an opinion by Justice Lake, held that, under the circumstances there presented, there was no prejudicial error from testimony that the defendant had agreed to take and took a polygraph test, since "[t]here was no evidence, before the jury, as to the nature of the test, the questions propounded, the answers given, or the results of the test." *Id.* at 524, 184 S.E. 2d at 288. In the instant case, as in *Williams,* the jury never heard any testimony as to the results of a polygraph test. In fact, defendant was not administered a complete polygraph examination and there were no results for the jurors to hear. This portion of the assignment is therefore overruled.

**[3]** It is also defendant's contention that any alleged statement given by defendant to Officer Holmberg should be inadmissible because (i) the statement was not freely and voluntarily given; and (ii) the statement was induced by misrepresentations concerning the ultimate use of the polygraph examination. Defendant brought forward a similar objection to the introduction of this statement on the prior appeal. See 285 N.C. 509, 206 S.E. 2d 222 (1974). In that case, this Court, after carefully reviewing all the evidence presented on *voir dire,* as well as the Court's findings of fact and conclusions of law, found no error in the ruling permitting the police officers to testify as to the statement made to them by defendant. *Id.* at 516-17, 206 S.E. 2d at 227. The evidence at the second trial on this subject is substantially the same as that produced at the first.

In his brief, defendant concedes that the prior appeal constitutes the "law of the case" as to this issue but specifically asks that we reconsider the question in the light of *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975). In *Pruitt,* this Court, in an opinion by Justice Branch, held that the defendant's confession was not properly admissible in evidence since it was obtained "by the influence of hope or fear implanted in defendant's mind by the acts and statements of the police officers during defendant's custodial interrogation." *Id.* at 455, 212 S.E. 2d at 100. The *Pruitt* decision was not grounded on the failure of the police to comply with the procedural safeguards enunciated by the United States Supreme Court in *Miranda v. Arizona,* 384

U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), but on the fact that the confession was not "voluntarily and understandingly made." *Id.* at 454, 212 S.E. 2d at 100. This has been the ultimate test as to the admissibility of confessions in this State since *State v. Roberts,* 12 N.C. 259 (1827).

Defendant contends that both *Pruitt* and *Roberts* render his confession inadmissible. In support of this contention, defendant asserts that he was misinformed as to the severity of the punishment for the charges against him (i.e., imprisonment as opposed to death); that he was told that the polygraph examination would be for his own benefit and for the benefit of the Charlotte Police Department; and that nothing elicited during the polygraph examination would be used in evidence against him.

Under the facts disclosed in this record, we find no merit in defendant's contentions. Defendant does not contend that he made the alleged statement to Officer Holmberg because the police were using the threat of a polygraph examination as a tool to force incriminatory admissions from him. Furthermore, defendant does not assert that he made the statement based on any improper inducement generating a hope that by doing so he might obtain relief from the criminal charges to which the confession related. *See State v. Pruitt, supra,* 286 N.C. at 458, 212 S.E. 2d at 102-103. *See also, State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975). On the contrary, defendant affirmatively testified on direct examination that he did not make *any* incriminatory statement of any nature to Officer Holmberg or to any other officer on 11 July 1973, or at any other time. Under these facts, we cannot say that the statement and admission obtained from defendant were made under the influence of fear or hope, or both, growing out of language or acts of those who held him in custody. The admissibility of this evidence was for the trial judge. Based on the evidence produced on *voir dire,* the trial judge found facts and made conclusions of law to the effect that defendant freely and voluntarily made the statement and admission as the State contended. There was ample evidence to support the trial judge's findings, and those findings in turn support the trial judge's conclusions that defendant freely, understandingly, voluntarily, and intelligently made a statement and admission to Officer Holmberg on 11 July 1973, 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 those rights; and that after being advised on these rights, he knowingly and

intelligently waived his right to the presence of counsel at the time he made the inculpatory statement and admission. *See State v. Thompson, supra,* 287 N.C. at 318, 214 S.E. 2d at 755. *See also State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *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 (1974). Thus, we adhere to our former opinion holding this evidence admissible. This assignment is overruled.

Defendant next contends that the trial court committed prejudicial error in allowing the State to introduce into evidence Exhibit 8-A, which was an excerpt from a list of armed robberies that included the attempted robbery of Williams' Exxon service station at Trade and Cedar Streets in Charlotte. Prior to its introduction into evidence, the court conducted a *voir dire* hearing and held that "the list may be received into evidence" provided that "all other parts of the document (other than the robbery at Williams' Exxon) shall be eliminated from the exhibit . . . so that the jury will see only that portion relating to the Sloop Exxon Station matter."

**[4]** The general rule in North Carolina is that in a prosecution for a particular crime, 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. *See, e.g., State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853 (1949). *See generally* E. Cleary, McCormick on Evidence, 444-454 (1972); 1 Stansbury, N. C. Evidence, § 91 (Brandis Rev. 1973); 2 Strong, N. C. Index 2d, Criminal Law § 34 (1967). But, if the evidence of other offenses tends to prove any other relevant fact, it will not be excluded merely because it also shows the defendant to have been guilty of an independent crime. *See, e.g., State v. Grace,* 287 N.C. 243, 213 S.E. 2d 717 (1975). *See generally* 1 Stansbury, *supra,* at § 91, and authorities there cited; 2 Strong, *supra,* at § 34.

**[5]** The evidence complained of under this exception does not appear to be State's Exhibit 8-A, which was shown to the jury, and on which defendant had placed his check mark and initials beside a reference to the attempted armed robbery and murder at Williams' Exxon. On the contrary, defendant's exception appears to be directed to the testimony of the police officers pre-

ceding the introduction of State's Exhibit 8-A that tended to show defendant had placed a check mark and his initials beside other armed robberies on the list presented to him. Accordingly, defendant concludes that it made no difference that the other entries on the list had been deleted when State's Exhibit No. 8-A was introduced.

It is true that preliminary questioning showed defendant looked at a list and made several check marks and initials beside several armed robberies noted thereon. But, for the following reasons, we find no prejudicial error in the admission of this testimony.

First, it could be argued that since this evidence tended to prove another relevant fact, i.e., that defendant had admitted participating in the attempted robbery of Williams' Exxon, it was not excludable merely because it also showed defendant to have participated in other unspecified armed robberies in the Charlotte area. More importantly, when Officer Holmberg testified about a list of armed robberies presented to defendant, on which defendant made "several check marks," defendant made no objection. The North Carolina law on the failure to object in this situation is as follows: "The well established rule [is] that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost . . . . " *State v. Godwin*, 224 N.C. 846, 847, 32 S.E. 2d 609, 610 (1945). *Accord, e.g., State v. Grace, supra; State v. Stegmann*, 286 N.C. 638, 653, 213 S.E. 2d 262 (1975) ; *State v. Jenerett, supra; State v. Little*, 278 N.C. 484, 180 S.E. 2d 17; (1971) ; *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971) ; *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). Accordingly, even if the evidence of the other crimes was incorrectly admitted, its admission was rendered harmless by its prior admission without objection.

**[6]** Defendant next contends that the trial court committed prejudicial error in limiting defendant's right to cross-examine the witness W. O. Holmberg.

The question involved is intertwined with the admissibility of defendant's inculpatory statement. Defendant contends that he was faced with a choice of either letting the alleged statement go into evidence unchallenged or of examining Officer Holmberg concerning the circumstances surrounding the alleged statement and thereby bringing out further evidence concerning the polygraph examination. Accordingly, defendant concludes

he was "boxed in" and such a choice deprived him of the right to effectively cross-examine Holmberg concerning the circumstances under which defendant's statement was made.

While defendant's counsel was cross-examining Officer Holmberg, he asked the court to provide him with further instructions as to questions regarding the polygraph examination. The trial judge excused the jury and the following exchange occurred:

"MR. HASTY: All right. If it please the Court, so that I will understand, now am I to take it that you do not want me to ask Mr. Holmberg—

"COURT: I don't care what you ask Mr. Holmberg.

"MR. HASTY: I understand.

"COURT: But my point is, you were in chambers very emphatic that you didn't want this about the polygraph to come out. Now, if you're going to ask Mr. Holmberg what he told him the day before, I'm going to let him tell them everything he told him the day before because it's not fair to let you have your cake and eat it, too.

"MR. HASTY: Well, sir, I, of course, realize that I could open the door, as they say, but I don't believe I would do that unless I specifically asked him about any test.

"COURT: No, sir. When you start saying what he told him the day before, then the State is entitled to have the whole thing spread on it.

"MR. HASTY: Then I take it that you would rule the same way if I were to ask him if he told him that it would be to his benefit to take the examination.

"COURT: The polygraph test, and you would have opened it up.

"MR. HASTY: All right sir.

"COURT: Now, you can't put in half about the polygraph test. If you don't want it before the jury, why that's a decision you will have to make.

"MR. HASTY: That's the exact argument I made to the Supreme Court, and that is, of course, what the Supreme Court is letting the State do, get in half of it, and I, of

course, am saddled with that decision. I realize that. All right, sir.

"COURT: And you're asking him if he told him something about the polygraph test, and wanting the jury to infer he's telling him about this statement. Now, that I can't permit.

"MR. HASTY: Well, yes, sir.

"COURT: He is going to have to explain what he said to him was about a polygraph test. Now, this is where we come to.

"MR. HASTY: Of course, the State is doing the exact opposite thing, letting the jury infer that this was a statement given without fear of a polygraph, which is, of course, not true. I will, of course, abide by your feelings.

"COURT: I am just telling you what is going to happen. If you don't, I'm going to let the State bring it all in.

"MR. HASTY: I just wanted to see where the perimeters were."

In his brief, defendant's argument is as follows: (1) *State v. Foye, supra, State v. Williams, supra,* hold that the *results* of a polygraph test cannot be either directly or indirectly introduced into evidence; (2) in order for defendant to effectively cross-examine Holmberg as to the circumstances surrounding the alleged confession, it was necessary to elicit testimony pertaining to the polygraph test, which the aforementioned rule does not permit; (3) therefore, defendant has been deprived of his absolute right of cross-examination.

Defendant's argument is faulty in two respects. First, the evidence defendant refers to was not the *result* of any polygraph test and it was not elicited during the course of a polygraph examination. Hence, neither *Foye* nor *Williams* is directly applicable. Second, the trial judge, in answer to a question by the defense as to the scope of permissible cross-examination, stated that he did not care what defendant's counsel asked Holmberg. However, the court also noted that if defendant "opened the door" as to the polygraph issue, then he would permit the State to bring out all the circumstances regarding the polygraph examination on redirect. Defendant's argument falls of its own

weight and does not support his contention that he was deprived of his absolute right to cross-examination.

" 'One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses.' " *Barnes v. Highway Commission,* 250 N.C. 378, 394, 109 S.E. 2d 219, 232 (1959), *quoting from* 1 Stansbury, N. C. Evidence, § 35 (Brandis Rev. 1973). *See generally* E. Cleary, McCormick on Evidence § 19 (2d ed. 1972). Judge Snepp did not infringe upon defendant's right of cross-examination by any means. On the contrary, he told defendant's counsel "I don't care what you ask Mr. Holmberg." This assignment is therefore without merit and is overruled.

**[8]** In his next assignment of error, defendant argues that the trial court should have granted his motion for judgment as in case of nonsuit.

Defendant was originally charged with conspiracy to commit armed robbery, armed robbery, and felony-murder. All three charges were consolidated at defendant's first trial; however, a judgment of nonsuit was entered as to the charge of armed robbery.

Defendant now argues that since our Court held in its first opinion that a conviction of conspiracy to commit armed robbery does not merge into the murder charge, but is a separate offense, it cannot be used as a basis for a felony-murder conviction under G.S. 14-17. Defendant therefore concludes that he stands improperly convicted of first-degree murder since there is no principal felony upon which to base the felony-murder rule. Defendant's argument is based upon a misinterpretation of this Court's opinion.

**[7]** It is well settled that "[w]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by anyone of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." *State v. Fox,* 277 N.C. 1, 17, 175 S.E. 2d 561, 571. *Accord, State v. Albert Lewis Carey, Jr., supra,* (former appeal in the present case) ; *State v. Anthony Douglas Carey,* 285 N.C. 497, 206 S.E. 2d 213, (companion case to the present one).

G.S. 14-17 expressly provides that a murder perpetrated in an attempt to commit robbery is murder in the first degree. For this reason, at the first trial the trial court properly refused to

submit the charge of armed robbery to the jury as a separate offense. It should not, however, have been nonsuited. Our statement to the contrary in the first opinion was an inadvertence. The theory of the State's case was that defendant and four others had conspired to rob with firearms the operator of a filling station and, in the attempted robbery, one of the conspirators, "Peanut" Mitchell, shot and killed James Sloop.

It is perfectly clear from the evidence that "Peanut" Mitchell was guilty of murder in the first degree, although he was later permitted to plead guilty to second degree murder.

*State v. Fox, supra,* holds in such a situation that all the conspirators are guilty of murder in the first degree. In the companion case of *State v. Anthony Douglas Carey, supra,* Justice Huskins, speaking for the Court, stated: "Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in a unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy." *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508 (1951).

"The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment necessarily or probably required the use of force and violence which may result in the taking of life unlawfully, *every party* in such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. [Citations omitted.]" *State v. Anthony Douglas Carey, supra,* at page 503.

It seems to us that the better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration or attempt to perpetrate a felony under the provisions of G.S. 14-17, would be that the solicitor should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169 (1973). If the separate felony indict-

ment is treated as surplusage, and only the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972). So in this case it served no purpose to nonsuit the felony charge of armed robbery at the first trial and it should not have been done.

**[8]** Nevertheless, this does not prevent the use of this fact (attempt to commit armed robbery) in the prosecution of the defendant for murder in the first degree. To establish the defendant's guilt, the State proves the defendant's participation in the conspiracy to rob. It is the proof of this fact which makes the defendant equally guilty with Mitchell, the trigger man, under the rule of *State v. Fox, supra.* The use of the fact that the defendant participated in the conspiracy to rob in order to tie him to the shooting of Mr. Sloop by Mitchell does not change the offense of murder. The proof of murder in the first degree is complete when the State proves beyond a reasonable doubt that Mitchell shot and killed Mr. Sloop in Mitchell's attempt to rob him. The conspiracy to rob is not an element of the murder. The offense of first-degree murder would have been the same had there been no conspiracy between Mitchell and this defendant. The purpose of proving the conspiracy is not to establish an element of the crime of first-degree murder, but to fasten responsibility therefor upon the defendant along with Mitchell.

**[9]** Conspiracy is a separate offense from the attempt to rob. Conspiracy is a completed crime when it is formed, without any overt act designed to carry it into effect. Thus, it follows that the conspiracy to rob does not merge into the offense of first-degree murder. The defendant can properly be sentenced for both offenses. *State v. Albert Lewis Carey, Jr., supra; State v. Goldberg,* 261 N.C. 181, 202, 134 S.E. 2d 334 (1964); *State v. Brewer,* 258 N.C. 533, 539, 129 S.E. 2d 262 (1963); *State v. Davenport,* 227 N.C. 475, 494, 42 S.E. 2d 686 (1947).

It is clear, therefore, that the nonsuit motion of the defendant was properly overruled. It was entirely proper to submit the case to the jury as to the defendant's guilt of the separate offenses of conspiracy to rob and murder in the first degree. These offenses do not merge. This assignment of error is overruled.

**[10]** In his next series of assignments, defendant contends: (1) That the trial court committed prejudicial error in allowing the State to cross-examine defendant's wife concerning prior incon-

sistent statements and by inquiring into the statements by reading them into evidence; (2) that the trial court committed prejudicial error in permitting the State to introduce defendant's wife's inconsistent statements into evidence; and (3) that the trial court erred in denying defendant's motion for a mistrial based on Nos. (1) and (2) above. Defendant has combined these questions in his brief for purposes of argument. We will do likewise.

Pamela Carey, defendant's wife, voluntarily testified for defendant and on direct examination more or less corroborated defendant's defense of alibi. However, on cross-examination, Pamela denied, among other things, that she knew James Calvin "Peanut" Mitchell before 10 July 1973 when she saw him at the Mecklenburg County jail. Upon further cross-examination Pamela admitted that she had signed two statements (State's Exhibits Nos. 12 and 13) in the presence of Officer H. R. Thompson on 10 July 1973. However, she denied having made any of the statements contained in either of these documents. Both of the prior statements indicated that Pamela had in fact known James Calvin "Peanut" Mitchell prior to 10 July 1973 and that she had been with her husband and "Peanut" and others on at least two occasions. State's Exhibit No. 12, about which Pamela was cross-examined, was offered into evidence by the State in rebuttal. It reads as follows:

> "About a month ago, I don't remember whether it was morning or evening, but I had asked Butch [the defendant] to carry me to my mother's to check on her. When he left, he came back in about an hour. Tony Dorsey was with him and a boy named Peanut (I don't know his real name), and Anthony Carey. Butch asked me if I was ready to go, and I said I would be ready in a minute as I had just got out of the bathtub. We went up to 77. We got on 77 at Belhaven Boulevard. He went out 77 and he got off on Morehead. Butch said, 'I'll take you to your mother's in a minute. I want to stop right down here.' We then turned on the street next to the tuxedo rental place on South Boulevard. We turned down by that place and turned right, and he stopped at the first corner. I said, 'Since we are here, I'm going to stop and talk to Miss Evelyn.' Her sons were sitting on the porch. I saw Peanut raising up to get out, but I didn't pay any attention to where he was going.

"I talked to the boys on the porch, and then I walked up to Miss Bee's house where I saw Shelia Clark sitting on the porch. Then I talked to her about two or three minutes. When Butch left, he said, 'I'll be back in a minute.' Butch, Anthony, and Tony pulled out. They were gone about five or ten minutes. They were gone just long enough to have ridden around the block. Then I got in the car. Anthony, Peanut, Tony and Butch were already in the car when I got in.

"Then they went up Park Avenue and they took me to my mother's house on Wilmore Drive, and I got out. Peanut was laying down in the back of the car until we got down to about South Tryon and Park Avenue, and then he raised up out of the back seat. I didn't see a gun or anything. They let me out at my mother's and I said, 'Wait and let me see if she's home.' Butch said he'd be back in about an hour. I was looking at T.V. that night at home by myself, and I saw where the U-Drive It on South Boulevard was robbed or something, but I didn't pay attention to every detail. Then I got nervous and scared.

State's Exhibit No. 13 referring to 9 June 1973, about which Pamela was cross-examined, was offered into evidence by the State in rebuttal. It reads as follows:

"I was at home over on Oregon Street and Butch, Anthony, Tony and Peanut came by the house to get me. Butch said, 'Are you ready to go to the store?' I said, 'Yes, I'm ready.' Butch gave me a ten dollar bill and Tony, Anthony, Peanut, Butch and I got in the car. We came up to Rozzell's Ferry Road and Butch parked in the parking lot at Norman's Grocery Store. I got out and I went in the store. I stayed in there about fifteen minutes looking and seeing what I wanted to buy. As I came out the door, I saw Peanut running up the street, and he turned a corner to the left beside the store, and the boy who was running behind him stopped at the corner, and he put a gun up and he pulled the trigger. He didn't look around to see if anybody was standing on the street or nothing and just started shooting. He shot once. Peanut ran to the left beside the store. There was a truck there, and he got behind the truck and then ran on up the path. You can go up that path and get to where we stay.

"When Butch saw Peanut running, he drove off. Anthony, Tony and Butch were all in the car when he pulled out. They came back and picked me up and took me home. When we got there, Peanut was upstairs just sitting in a room. I saw him messing with his arm, and Peanut said, 'I can get it out.' and he took a knife he had in his pocket and pulled a little shot out of his shoulder. I told Butch to get Peanut out of the house and not to bring him back any more. I gave Butch the change, and he handed me three dollars back and told me to keep it. They all left in the car, and they came back without Peanut a little later."

G.S. 8-57 provides, in pertinent part, as follows: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

When defendant's wife was examined as a witness for defendant, she was therefore subject to be cross-examined to the same extent as if unrelated to him. *State v. Bell,* 249 N.C. 379, 381, 106 S.E. 2d 495, 497 (1959). *See also State v. Tola,* 222 N.C. 406, 23 S.E. 2d 321 (1942). Accordingly, if based on information and asked in good faith, it was permissible for the district attorney to ask Pamela Carey about *her* prior inconsistent statements as they related to *her* previous relationship with "Peanut" Mitchell for purposes of impeachment. *See State v. Bell, supra.* See also *State v. Mathis,* 13 N.C. App. 359, 185 S.E. 2d 448 (1971), where the Court of Appeals dealt with a similar problem. *See generally* Comment, A Survey of the North Carolina Law of Relational Privilege, 50 N.C. L. Rev. 630 (1972). Both of Pamela's inconsistent statements revealed that she knew "Peanut" Mitchell prior to the date of this offense. But in neither of these statements does she say that her husband was involved in other crimes. In fact, she puts herself at a substantial distance from the events. In State's Exhibit No. 13 she does indicate that she heard about a robbery on the TV program that night. By this she certainly does not involve the defendant in that armed robbery. So the contention of the defendant that she could not be cross-examined on matters con-

cerning her husband's unrelated criminal offenses has no application to the facts of this case. The statements about which Pamela was cross-examined, and which were later offered into evidence, did nothing more or less than show that Pamela had made two prior inconsistent statements and by these she acknowledged that she had known "Peanut" Mitchell for more than a month before the date of the statements on 10 July 1973.

Justice Ervin in the landmark case of *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954), sets forth the rule upon which defendants rely:

> "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.] This is true even though the other offense is of the same nature as the crime charged. [Citations omitted.]"

Then follows the eight exceptions to the rule. We believe that one of these is applicable to our case. It reads:

> "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." *Id.* at 176, 81 S.E. 2d at 367.

The defendant contends that the court committed prejudicial error by permitting the cross-examination of Pamela as to prior inconsistent statements and by the introduction of those inconsistent statements because they tended to implicate defendant in other unrelated crimes. We do not believe this to be so, but if it is subject to this interpretation, Rule 6 of the exceptions in *McClain, supra,* is authority for its competency.

Accordingly, for the reasons stated herein, these assignments are overruled.

**[11]** Defendant next contends that he was denied a fair and impartial trial due to the remarks, actions, and arguments made

to the jury by the district attorney. During the cross-examination of Pamela Carey, she indicated that she had signed State's Exhibits Nos. 11, 12 and 13, but stated that she did not remember making any of those statements. At this time, the following occurred:

> "MR. HASTY: If it please the Court, I would like for you to instruct the Solicitor to stop making facial expressions.
>
> "COURT: Speak up, Mr. Hasty.
>
> "MR. HASTY: I would like for you to instruct the Solicitor to stop making facial expressions to the jury in reply to the witness's question.
>
> "COURT: I haven't observed him.
>
> "MR. HASTY: Well, sir, I did.
>
> "COURT: Well, I have not.
>
> "MR. HASTY: All right, sir."

If defendant had wished to preserve this exception on appeal, then he should have attempted to place in the record what he complained were the facial expressions of the solicitor and how such expressions were prejudicial to him. There is nothing in the record to indicate what they were, and therefore, there is nothing for us to decide. For this reason, this contention is dismissed.

**[12]** Defendant's second contention under this general heading relates to the comments of the district attorney in his argument to the jury. The district attorney was discussing the alleged confession to Officer Holmberg in the presence of Officers Starnes and Whiteside when he said: "And he was brought in a list of armed robberies and said 'check these things off and put your name, put your initials by the ones that you were involved in,' *and that one was checked.*" (Emphasis supplied.) We find nothing objectionable in this statement. It seems to be only a reasonable comment on the evidence. State's Exhibit 8-A, as limited by the trial judge, had previously been offered into evidence as part of defendant's purported confession. This assignment is overruled. *See, e.g., State v. Stegmann, supra; State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125.

**[13]** Defendant next contends that the solicitor engaged in impermissible jury argument when he told the jury that the "trigger" man was "Peanut" Mitchell, who was fifteen-years-old at the time, as compared to the defendant who was twenty-three-years-old. The district attorney further argued that it was not justice for a fifteen-year-old to carry the burden alone for the murder of Mr. Sloop; that the responsibility of the crime lay upon the shoulders of defendant Carey; that defendant Carey had been picking up "Peanut" Mitchell from time to time from May until July 1973; and that as a result of the planning of the defendant, a man was killed. This argument is certainly legitimate under all the evidence presented in this case. The district attorney did not venture into an area forbidden by this Court. He in no way created an atmosphere which prohibited the jury from arriving at the truth based upon the evidence. "In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge." *State v. Williams,* 276 N.C. 703, 712, 174 S.E. 2d 503, 509 (1970). *Accord, State v. Stegmann, supra; State v. Monk, supra; State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971).

Defendant next contends that the trial court committed prejudicial error in refusing to give defendant's requested instructions to the jury. In his brief, counsel for defendant states he understands that it is well within the trial court's province to select the manner and wording of the charge to the jury and that the court has discretion so long as it presents to the jury an accurate explanation of the law which applies in each case. Defendant argues that the instructions which were requested present the law applicable in a light which is neither more favorable to the State nor to the defendant. Defendant fails to state a proper cause for relief in this instance and his objections are all overruled.

Defendant next contends that the trial court committed prejudicial error in certain other portions of his charge to the jury. We have closely examined all of the instructions complained of and find them to be free from any prejudicial error. Therefore, these assignments are all overruled.

**[14]** Finally, defendant complains that it was error for the trial judge to enter the judgment of death. Defendant contends that the death penalty is not authorized under the Constitution

and the statutes of North Carolina. This Court has heretofore considered and a majority has consistently rejected all of the arguments on this point and does so here. *See, e.g., State v. Gordon,* 287 N.C. 118, 213 S.E. 2d 708 (1975); *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975); *State v. Burns,* 287 N.C. 102, 214 S.E. 2d 56 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (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. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *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). No useful purpose would be served in reiterating the reasons for the above decisions. The death sentence was the only one that the court below could impose upon a conviction of first degree murder under authority of *State v. Waddell, supra.*

The defendant, age twenty-three, used James Calvin "Peanut" Mitchell, age fifteen, to accomplish the murder. He has been twice convicted by a jury. We have carefully considered the entire record and all of defendant's assignments of error. In his trial and conviction we find no error. The majority of this Court also holds that the sentence of death should be sustained. However, for the reasons stated in the dissenting opinions to *State v. Williams, supra,* 286 N.C. at 434-441, 212 S.E. 2d at 121-125, 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.

Justice LAKE concurs in result.

Chief Justice SHARP dissenting.

According to the State's evidence, Mr. Sloop died 3 July 1973 from wounds inflicted by a sawed-off shotgun discharged by James Calvin "Peanut" Mitchell on 19 June 1973.

Defendant testified he did not know Mitchell prior to his arrest on 10 July 1973 on charges relating to the attempted robbery of 19 June 1973.

Pamela Carey, defendant's wife, testified she first met Mitchell on 10 July 1973 when she and her mother went to the Mecklenburg jail.

The court admitted in evidence, over defendant's objections, State's Exhibits 12 and 13, statements purporting to have been made by Pamela on 10 July 1973. At trial, under cross-examination, Pamela admitted she had signed these exhibits but testified the statements therein were not true.

Exhibit 12 shows that the statement first quoted in the court's opinion was made with reference to "Complaint #73-50216; Re: U-Drive It Rental Company; 1501 South Boulevard; Armed Robbery 6/8/73." Exhibit 13 shows that the statement last quoted in the court's opinion was made with reference to, "Complaint #73-50268; Re: Wyatt's Spur Station; 2815 Rozzells Ferry Road; Armed Robbery; 6-9-73."

When Exhibits 12 and 13 were admitted, the court instructed the jury they were for consideration only as bearing upon the credibility of Pamela's testimony *not* as bearing upon the guilt of the defendant.

The statements in these exhibits indicate that Pamela had testified falsely when she said she had not known Mitchell prior to 10 July 1973. However, they go far beyond the purpose for which they were purportedly offered, that is, to discredit Pamela's testimony by prior inconsistent statements. They are to the effect that defendant also testified falsely when he said he had not known Mitchell until after his arrest in connection with the attempted robbery of 19 June 1973. Further, although they fall far short of charging defendant, Mitchell, and others, with robberies on South Boulevard and on Rozzells Ferry Road the statements strongly suggest that defendant was involved in these robberies with Mitchell and others.

In *State v. Reid,* 178 N.C. 745, 747, 101 S.E. 104, 105 (1919), Justice (later Chief Justice) Hoke, speaking for the Court said: "Under our statute, Revisal, secs. 1634 and 35 [G.S. 8-57, 1974 Supp.] the wife was neither competent nor compellable to testify to her husband's hurt in a proceeding of this character and, *a fortiori,* her declarations against him should not be received when not made in his presence nor by his authority." Also, see *State v. Warren,* 236 N.C. 358, 360, 72 S.E. 2d 763, 764 (1952); *State v. Dillahunt,* 244 N.C. 524, 94 S.E. 2d 479 (1956);

1 Stansbury's North Carolina Evidence (Brandis Rev. 1973) § 59. Since the introduction or use of such evidence is forbidden by statute, in the furtherance of public policy, it is the duty of the trial judge, on his own motion, to disallow the evidence. *State v. Warren, supra* at 360, 72 S.E. 2d at 764.

Assuming arguendo that whether Pamela knew "Peanut" Mitchell on June 8th and 9th was material and not collateral to the issue whether defendant participated with him in the robbery on June 19th, the sole purpose for which these exhibits were admissible might have been attained by excising all portions of the statements except those to the effect that Pamela knew Mitchell and was with him and others on June 8th and June 9th of 1973. The instructions that the jury exclude from their consideration the prejudicial effect of these exhibits upon the credibility of defendant and upon his guilt was a futile gesture. *See State v. Gardner,* 226 N.C. 310, 37 S.E. 2d 913 (1946).

The Court holds applicable to the present factual situation the rule that "[e]vidence 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," this being the sixth exception to the exclusionary rule as stated by Justice Ervin in *State v. McClain,* 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954). I disagree. When this exception is applicable the other crimes must be proven by competent substantive evidence, not by declarations admissible solely to impeach the credibility of the testimony of a defense witness. *See* 1 Stansbury's North Carolina Evidence (Brandis Rev. 1973) § 46.

For the reasons stated I vote to remand the case to the Superior Court for a trial *de novo.*

Justice BRANCH concurs in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILBUR JAMES SANDERS

No. 20

(Filed 7 October 1975)

1. **Assault and Battery § 14; Property § 4— damage to person and property by use of explosives — sufficiency of evidence**

Evidence for the State was sufficient to permit the jury to find that defendant was present at the scene of the offense for the purpose of aiding the perpetrators and that the perpetrators were aware of such purpose where the evidence tended to show that defendant was present when a bomb was placed in an SBI agent's car, defendant was seated at that time in the automobile of one of the perpetrators guarding a State's witness with a pistol, and defendant and the witness remained in the car after the witness pointed out the SBI agent's car to the perpetrators.

2. **Criminal Law § 9— aider and abettor — finding required**

The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense; rather, to support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators.

3. **Criminal Law § 169— failure to object to evidence — subsequent similar evidence properly admitted**

The trial court did not err in allowing testimony which defendant alleged was hearsay since almost identical testimony was previously given and defendant made no objection.

4. **Property § 4— damage to property by use of explosives — description of property in indictment — sufficiency**

The trial court did not err in failing to quash the bill of indictment charging defendant with wilful and malicious damage to personal property by means of an explosive device since the description of the property as a "1974 Ford Torino owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr." was a sufficient description of the automobile in question to inform defendant with certainty as to the crime that he had allegedly committed.

5. **Criminal Law § 26— one explosion — damage to person and property — two offenses — no double jeopardy**

Where defendant was tried under separate bills of indictment for wilful and malicious damage to occupied personal property, an automobile, by means of an explosive device and for wilful and malicious injury to a person by means of an explosive device, the trial court did not err in refusing to quash the second indictment though both of-

fenses arose from the same explosion, since two separate offenses occurred which were punishable under two separate statutes.

6. **Criminal Law § 45— experimental evidence — substantially similar conditions**

In a prosecution for damage to occupied personal property and for injury to a person by means of an explosive device, the trial court did not err in admitting experimental evidence where the testimony of the agent conducting the experiment was sufficient to show that he had created substantially similar conditions as those that produced the actual explosion.

7. **Criminal Law § 102; Property § 4— district attorney's use of word "explosion" — no invasion of jury province**

Where defendant stipulated early in the trial that " . . . there was in fact one explosion damaging . . . " an automobile and its occupant, and where the occupant testified without objection that he received certain injuries as a result of the explosion and described the explosion, defendant could not complain that the use of the word "explosion" by the district attorney in questioning witnesses invaded the province of the jury by assuming that an explosion had occurred.

8. **Criminal Law §§ 43, 95— admission of photographs — restrictive instruction — sufficiency**

Defendant was not prejudiced where the trial court instructed the jury that photographs were admissible only to illustrate witnesses' testimony but the court failed to instruct that the photographs were admissible for illustrative purposes only if the jury found that they did illustrate the witnesses' testimony.

9. **Criminal Law § 114— instructions — more time devoted to State's evidence — no expression of opinion**

Though the trial court spent more time summarizing the State's evidence than the evidence of defendant, the court did not thereby express an opinion on the evidence in violation of G.S. 1-180, since the greater amount of time was spent on State's evidence because the State had presented considerably more evidence than had defendant.

10. **Criminal Law § 163— jury instructions — failure to object at trial — no consideration on appeal**

Defendant's objections to the trial court's charge stating one of defendant's contentions and recapitulating the evidence came too late when they were made for the first time on appeal.

11. **Criminal Law § 113— defendant as aider and abettor — jury instructions applying law to facts**

The trial court properly applied the law to the evidence and set forth the acts of the defendant that would constitute aiding and abetting where the court instructed the jury that they must find beyond a reasonable doubt that " . . . defendant was present at the time the crime was committed and that he aided or encouraged [the perpetrators] by holding a pistol on Hutton and keeping him from running to the officers and that in so doing the defendant knowingly

advised, instigated, encouraged or aided Sellers or Blackmon or either of them. . . . "

12. **Criminal Law § 116— charge on defendant's failure to testify — statutory language not mandatory**

In charging the jury on defendant's failure to testify the trial court is not required to use the exact language of G.S. 8-54 that such failure "shall not create any presumption against him."

13. **Criminal Law § 113— defendant as aider and abettor — finding of one or both principals' guilt required**

Where defendant was tried separately from the principals in this case, the trial court did not err in making it clear that as long as the jury found that one or both of the principals were guilty of all elements of the crimes charged, then defendant could be guilty of aiding and abetting if so found.

14. **Assault and Battery § 15; Property § 4— damage to person and property by use of explosive — instructions**

The trial court's charge, when construed contextually, made it clear to the jury that defendant was charged with wilful injury to a person by use of explosives and with wilful damage to occupied personal property, and the jury was not misled into thinking that they need only find injury to a named person in order to convict in both cases.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 20 January 1975 Special Criminal Session of CABARRUS Superior Court.

Defendant was tried on separate bills of indictment charging him with willful and malicious damage to occupied personal property, an automobile, by means of an explosive device, in violation of G.S. 14-49.1, and with willful and malicious injury to Albert Stout, Jr., by means of an explosive device, in violation of G.S. 14-49. The case was transferred from Rowan County on defendant's motion for a change of venue. The bills of indictment were consolidated for trial without objection, and defendant entered pleas of not guilty to both charges.

The testimony of Albert Stout, Jr., tended to show that he was an undercover agent for the State Bureau of Investigation, residing in Salisbury, North Carolina. He was assigned to the Charlotte area, where he was engaged in buying narcotic drugs from known sellers and aiding in their prosecution. On 9 September 1974, in Charlotte, Stout went to the home of Jule Hutton on several occasions from 3:00 p.m. to 10:30 p.m., but failed to contact Hutton.

Agent Stout returned to his home in Salisbury about midnight on 9 September 1974, parked his car, a brown 1974 Torino, in the parking area adjacent to his apartment, locked it, and went into his apartment. He returned to his car the next morning, 10 September 1974, about 8:00 a.m., unlocked the door and got in. Upon turning the key in the ignition, he felt "a searing pain" as if he were "caught up in a vacuum" and heard a "loud, bursting noise." Stout was severely injured in the explosion. His right foot and leg were blown off, his right eye and ear destroyed or severely damaged, his right hand mangled, and various bones were broken.

Stout had testified against Jeannette Grier in connection with some heroin buys and against Otis James Blackmon, a codefendant not on trial. He had never met or testified against defendant.

Further evidence presented by the State may be summarized as follows: Following the explosion, the local law enforcement officers cordoned off the area. Two SBI forensic chemists searched the area thoroughly, photographing and cataloging numerous items of evidence. Pieces of orange and yellow wire and a metal clip were found in the vicinity of the Stout automobile. SBI chemist Cone found an alligator clip connected to one of the posts of the starter. SBI chemist Pearce testified that traces of certain chemicals had been found on the wires and floorboard, and from his analysis it was his opinion that the explosion was caused by dynamite.

Jule Hutton, a codefendant not on trial, testified that he was an informer for the Charlotte Police Department and the SBI and that he knew Agent Stout, whom he was supposed to meet on 9 September 1974. About noon on 9 September, Hutton had gone to the home of Jeannette Grier in order to meet a girl named Sissy Gal. When he arrived, he found the defendant (whom Hutton only knew as "Chuck"), Otis Blackmon and Jack Sellers. Blackmon grabbed Hutton and hit him. Sellers then gave defendant a .38-caliber pistol which defendant held on Hutton. During this time Hutton saw a brown paper bag which contained four or five sticks of dynamite, some wire, clips and silver-looking capsules. Later that night Sellers, armed with the same .38-caliber pistol, took Hutton to Hutton's house. Shortly thereafter, Stout arrived and knocked on the door. When Hutton and Sellers failed to answer, Stout left. Soon thereafter, Hutton and Sellers returned to Grier's house.

About midnight, defendant, Sellers and Hutton left in Sellers' car and drove down I-85 to the Salisbury exit. There they met Blackmon and drove to Agent Stout's apartment where Hutton pointed out Stout's brown 1974 Torino. Blackmon and Sellers, carrying the same brown bag in which Hutton had previously seen the dynamite, wires, etc., went to Stout's car, opened the hood, and were out of sight for some eight or ten minutes. They returned without the brown bag.

Defendant, Sellers and Hutton returned to Charlotte after leaving Blackmon where he had parked his car.

The State rested and defendant moved for judgment as of nonsuit in each case, which motions were denied.

Defendant did not testify but offered testimony tending to show an alibi through Eva Spraggins, with whom he lived, Bernice Scott, Eva's mother, Darrell Evans, Eva's cousin, and Al Porter. Their testimony placed defendant at the Spraggins' home during the afternoon of 9 September and that evening from approximately 6:00 p.m. until 11:30 p.m., at which time he left with Wiley Lawrence Anderson. He returned to the Spraggins' home about 12:45 a.m. and spent the remainder of the night there with Eva Spraggins.

Other evidence pertinent to decision will be set out in the opinion.

The jury returned verdicts of guilty as to both charges and defendant was sentenced to life imprisonment for the willful and malicious damage to occupied personal property by means of an explosion, and to fifteen years in prison for the willful and malicious injury to Albert Stout, Jr., by means of an explosion. Defendant appealed from the judgment imposing life imprisonment and we allowed *certiorari* prior to determination by the Court of Appeals on the charge of willful and malicious injury to Albert Stout, Jr.

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

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

MOORE, Justice.

Defendant first assigns as error the failure of the trial court to allow his motion for nonsuit at the close of the State's

evidence and at the close of all the evidence. This assignment is without merit.

**[1]** Defendant was present when the bomb was placed in Agent Stout's automobile. At that time, he was seated in Jack Sellers' automobile guarding the witness Hutton with a pistol. Defendant and Hutton remained in the car after Hutton had pointed out Stout's car. Blackmon and Sellers got out of Sellers' car carrying a brown bag which earlier in the night had contained four or five sticks of dynamite. After Blackmon and Sellers reached Stout's car, they raised its hood and worked for some eight or ten minutes, then closed the hood and returned to Sellers' car without the brown bag. The four men then left and returned to where Blackmon's car had been parked. Blackmon then got in his own car and the others returned to Charlotte.

Earlier that night defendant had been with Sellers at Jeannette Grier's house when Blackmon arrived carrying a brown bag. Sellers took four or five sticks of dynamite out of the bag, together with some wire folded up with clips on the end, and some silver-looking capsules. Sellers later, armed with a pistol, took Hutton to Hutton's house apparently to verify that Hutton had been seeing Stout and that Hutton had been acting as an informer to Stout. When Stout arrived at Hutton's home and knocked on the door, Hutton, acting under orders from Sellers, failed to respond. Stout then left and Sellers and Hutton returned to Jeannette Grier's home. From then until Sellers and Blackmon went to Stout's car, defendant continued to point the pistol at Hutton. After the men returned to Charlotte, defendant told Sellers that they had no reason to kill Hutton, that Hutton was a part of it, and that if anything happened Hutton was dead anyway. Defendant then knocked Hutton down and Hutton crawled out of the house to his car and left.

**[2]** The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963). To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual

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

It is elementary that for the purpose of ruling upon a motion for judgment of nonsuit, evidence for the State is to be taken to be true and every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded. *State v. Rankin, supra; State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

The evidence for the State was sufficient to permit the jury to find that defendant was present at the scene of the offense for the purpose of aiding Blackmon and Sellers and that Blackmon and Sellers were aware of such purpose. Thus, there was no error in the denial of the motion for judgment of nonsuit.

**[3]** Defendant next contends the court erred in allowing hearsay testimony. The witness Stout was asked the question, "Was he [Hutton] there?" Stout answered, "No, he was not." Defendant contends that this was indirect hearsay since the answer was based on a statement made by a Negro female when Stout asked her if Hutton was home, and she replied that he was not. This contention is without merit. Almost identical testimony had just been given by Stout without objection when he testified: "A Negro female came to the door. She informed me that Mr. Hutton was not there and who was calling and I told her it was a friend and I then left." Since defendant made no objection to this testimony, his subsequent objection to evidence of the same or similar import was of no avail. *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4 (1967). This same rule applies to the other questions objected to by defendant as they had also been substantially answered by other witnesses. This assignment is overruled.

**[4]** Defendant next assigns as error the failure of the trial court to quash the bill of indictment charging defendant with willful and malicious damage to personal property by means of an explosive device, for the reason that the property was only

described as a "1974 Ford Torino," which defendant alleges was not an adequate description. Defendant cites *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), in support of this position.

It is noted that in *Conrad,* the Court did not hold that the description of the automobile in the indictment was insufficient. The description in that bill of indictment was strikingly similar to the description in the bill of indictment in the present case. There, the automobile was described as "the 1966 Mercury Comet automobile, the property of Fred C. Sink, and located at 318 Spruce Street in Lexington." In the present case, in addition to the description, a "1974 Ford Torino," the following was added: "owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr." This was a sufficient description of the automobile in question to inform defendant with certainty as to the crime that he had allegedly committed. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970). Had defendant required additional information for the preparation of his defense, he could have requested a bill of particulars prior to the trial. *State v. Springer,* 283 N.C. 627, 197 S.E. 2d 530 (1973).

**[5]** Defendant further contends that the second indictment should be quashed for the reason that it arises from the same alleged criminal act as the first and that he is being subjected to multiple prosecutions for the same offense. He relies on *State v. Potter,* 285 N.C. 238, 204 S.E. 2d 649 (1974), to support this contention.

In *Potter,* the defendant was charged with two separate offenses of robbery, in violation of G.S. 14-87. The facts as disclosed by the opinion in that case are as follows:

> "Each indictment refers to the felonious taking of $265.00 on 29 December 1972. Neither alleges the ownership of the $265.00 to which it refers. Although the reading of the two indictments, *side by side,* leaves the impression each refers to the same $265.00, and that Hall and Harrell were robbed on the same occasion, neither refers to the other. Each indictment is complete.
>
> "The evidence discloses *all* of the $265.00 defendant obtained from Hall and Harrell belonged to the Food Market, their employer; and that, on the same occasion, and in the

immediate presence of both, defendant, by the *threatened* use of a revolver, first obtained from Hall the cash in register No. 1 and immediately thereafter obtained from Harrell the cash in register No. 2. Although we find no evidence that defendant actually pointed the revolver at Hall or at Harrell, each was put in fear by defendant's threatened use of the revolver. Neither Hall nor Harrell was physically injured in any manner.

"The evidence indicates that, when the robbery occurred, Hall had immediate charge of register No. 1 and Harrell had immediate charge of register No. 2. However, the cash in both registers belonged to their employer. Both Hall and Harrell had custody thereof for their employer and the right to retain possession of *all* of it against robbery or theft.

"In the light of the evidence, we hold that the verdicts have the same effect as if defendant had been found guilty after trial on a single indictment which charged the armed robbery of Hall and Harrell on 29 December 1972 in which $265.00 of the money of Food Market, their employer, had been taken from their persons and presence."

*Potter* is clearly distinguishable from the present case. Here, the record is clear that defendant was charged in two separate indictments with two separate offenses. In the first, he is charged with damage to personal property occupied by an individual, in violation of G.S. 14-49.1; and in the second, he is charged with willfully and maliciously injuring an individual by the use of explosives, in violation of G.S. 14-49. Admittedly, all injuries arose out of the same explosion, but two separate offenses occurred which were punishable under two separate statutes.

In *Potter*, only one robbery occurred. There the Court specifically implied that if other offenses arose out of the same original wrongful act it would not necessarily treat such attendant offenses as part of the original offense, stating:

"We express no opinion as to factual situations in which, in addition to robbery, an employee is physically injured or killed, or to factual situations in which, in addition to the theft of the employer's money or property, the robber takes money or property of an employee or customer."

*See State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Alexander,* 284 N.C. 87, 199 S.E. 2d 450 (1973), cert. den. 415 U.S. 927, 39 L.Ed. 2d 484, 94 S.Ct. 1434 (1974); *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971).

The motions to quash the bills of indictment were properly overruled.

**[6]** Defendant next assigns as error the trial court's conclusion that an experiment carried out by Special Agent Pearce was carried out under substantially similar circumstances as those which surrounded the original transaction (the explosion), and the further conclusion that the experimental testimony was admissible in evidence.

In a recent case, *State v. Jones,* 287 N.C. 84, 98, 214 S.E. 2d 24, 34 (1975), Justice Branch, after reviewing the authorities from this and other states, stated the rule as to the admissibility of experimental evidence 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* [457 P. 2d 622 (Alaska)]."

*See* 2 Strong, N. C. Index 2d, Criminal Law § 45, and cases therein cited.

In the present case, the trial judge found:

> "COURT: Let the record show that during the direct examination of Special Agent Pearce, that the Solicitor asked the witness about a certain experiment at which time the defendant objected and the jury was sent from the jury room—courtroom, for the purpose of Voir Dire. That after hearing the evidence and argument of counsel, the Court makes the following findings of fact: That the witness took a similar Ford Torino automobile, and placed a clip on the

starter post; that he placed another clip on a ground position on the motor vehicle; that he took an electrical blasting cap and placed to the end of the wire; that the clips were alligator type clips; that he used an Atlas blasting cap; that the wire is consistent with Atlas blasting cap wire; that after attaching the blasting cap and the clip to the post and the clip to the ground, he then turned the ignition on and the blasting cap detonated immediately.

"Based on the foregoing findings of fact, the Court concludes that the experiment was carried out under substantially similar circumstances as to those which surrounded the original transaction and the Court concludes that the experimental testimony can be introduced into evidence."

The record reveals that the testimony of Special Agent Pearce was sufficient to show that he had created substantially similar conditions as those that produced the actual explosion. He conducted the experiment by using clips and wires similar to those he found in the wreckage of the victim's car and by using an identical 1974 brown Ford Torino. He placed a clip on the starter post of the experimental car in the position he had found a clip on the damaged car. The wire that had been found was of the composition and color of Atlas blasting cap wire, thus indicating that an Atlas blasting cap was used in the actual explosion. Therefore, in the experiment an Atlas blasting cap was used to simulate actual conditions.

Agent Pearce further concluded from traces of nitroglycerin and ethylene glycol deposits found on a piece of wire running from the starter post clip and on the floorboard that the damage had been caused by dynamite. His investigation of the location of the physical evidence, including the wires and clips on the damaged automobile, indicated to him that a complete circuit was constructed through the use of these materials which was culminated by the spark caused by the ignition being turned on. Therefore, on the experimental car, Agent Pearce actually placed a clip on the starter post and a clip on a ground position on the car and attached an Atlas blasting cap to the end of these wires. He then turned on the ignition of the experimental automobile and the blasting cap detonated immediately.

This experimental evidence was relevant and of probative value since it tended to enlighten the jurors in their search for

the truth. Precise reproduction of circumstances is not required, and we hold that the trial judge correctly concluded that the circumstances of the experiment were substantially similar to those surrounding the actual explosion. Therefore, the trial judge correctly admitted the experimental evidence.

**[7]** Defendant further contends that in questioning various witnesses the district attorney at times assumed that an explosion had occurred, thereby invading the province of the jury. For example, on one occasion Agent Pearce, a forensic chemist thoroughly qualified in the field of explosives, was asked:

> "Q. Based on your findings of the presence of sodium nitrate and ethyleneglycol dinitrate, did you form an opinion satisfactory to yourself as to what caused the explosion heretofore described by Special Agent Stout?
>
> "A. Yes, sir, I did. OBJECTION. OVERRULED. EXCEPTION.
>
> "Q. And what is your opinion, Mr. Pearce?
>
> "A. It is my opinion. . . .
>
> "OBJECTION. OVERRULED. EXCEPTION.
>
> "A. . . . that this explosion was caused by dynamite.
>
> "MR. HORTON: The defendant moves to strike his answer.
>
> "MOTION DENIED. EXCEPTION."

Defendant contends that Agent Pearce answered one of the very questions before the jury for consideration: "Was there an explosion injuring Mr. Stout and damaging the automobile?" The evidence clearly shows that an explosion had occurred. Agent Stout had previously testified without objection that his right eye was destroyed as a result of the *explosion*. He further testified without objection that he had a compound fracture of the tibia, and of smaller bones in the front foot area as a result of the *blast*. The victim, Agent Stout, described the occurrence as follows: His automobile was parked where he left it the night before. He opened the door with the key and then put the key in the ignition of the automobile. He turned the ignition and there was a searing pain as if he were caught up in a vacuum. Then there was a loud, bursting noise and he was thrown to the seat of the automobile face down. Furthermore, early in the trial, counsel for defendant stated: " . . . [W]e can stipulate there

was in fact one explosion damaging the automobile and injuring Mr. Stout by its force." The real question involved in the present case is not did an explosion occur, but did defendant aid and abet those who made it occur. In view of the stipulation and Agent Stout's testimony without objection that he was injured by the *explosion* or blast, the objection to the use of the word "explosion" by the district attorney came too late. *State v. Stegmann, supra; State v. Van Landingham, supra; State v. Davis, supra; State v. Jarrett, supra.*

The court allowed certain exhibits into evidence and instructed the jury that these were introduced for illustrative purposes only. Defendant contends that there was not sufficient foundation for the introduction of these exhibits. Whether there is sufficient evidence of the correctness of such an exhibit to render it competent to be introduced into evidence for the purpose of illustrating or explaining the witness's testimony, is "a preliminary question of fact for the judge." *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948); *State v. Matthews*, 191 N.C. 378, 131 S.E. 743 (1926); 1 Stansbury's N. C. Evidence, § 34 (Brandis Rev. 1973); 2 Strong, N. C. Index 2d, Criminal Law § 43. The record discloses that there was ample evidence to justify the court's permitting their introduction.

**[8]** Defendant further contends that the court erred in instructing the jury with reference to these photographs as follows: " . . . These photographs are introduced for the purpose of illustrating the witness' testimony and for no other purpose." Defendant excepts to the failure of the court to instruct the jury that the photographs were admissible for illustrative purposes only if the jury found that they did illustrate the witnesses' testimony. No request was made by defendant that the admission of the photographs be limited or restricted. In the absence of such request, an unrestricted admission would not be error. *State v. McKissick*, 271 N.C. 500, 157 S.E. 2d 112 (1967); *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939); 2 Strong, N. C. Index 2d, Criminal Law § 43. Nevertheless, the judge, having undertaken to instruct the jury, should have completed the instruction as he did on the introduction of other photographs, when he stated: "State's Exhibits 3 and 4 are introduced for the purpose of illustrating the witness' testimony, if you find that it does illustrate the witness' testimony and for no other purpose." We fail to see, however, how this omission could prejudice defendant.

The photographs to which defendant objected were of the wire found at the scene, a metal clip also found at the scene, and the clip found on the starter. There was no evidence to contradict the fact that these photographs properly depicted each of the items shown or that these items had not been found at the scene. Later, the objects themselves were introduced without objection. Defendant also objected to the introduction of State's Exhibit 5, a diagram showing the streets and buildings, which was explained by the witness who drew it to scale. At the request of defendant's counsel, this witness was asked if this diagram fairly and accurately represented the complex at the time he visited it. The witness replied that it did. The court thereupon stated: "Let it be introduced. . . . This also is introduced for the purpose of illustrating the witness' testimony, if you find that it does illustrate their testimony." Again, we fail to perceive how defendant could be prejudiced by the admission of this diagram or by the judge's instruction concerning it. This assignment is overruled.

Other assignments concerning the introduction of testimony have been considered and found to be without merit.

**[9, 10]** Defendant has brought forward a number of assignments of error relating to the court's charge. First, defendant assigns as error the failure of the trial court to give a statement of defendant's evidence equal to that given the evidence for the State, and to equally stress the contentions of the State and defendant, as required by G.S. 1-180. Defendant complains that the evidence elicited on direct examination by the State was extensively recapitulated while that elicited on defendant's cross-examination was scarcely mentioned. This assignment is without merit. The requirement of G.S. 1-180 that the judge state the evidence is met by presentation of the principal features of the evidence relied on by the prosecution and the defense. *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965); *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444 (1957). A "verbatim recital of the evidence" is not required. *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974). A party desiring further elaboration must aptly tender requests for further instructions. *State v. Guffey, supra.* Here, the trial judge set forth fairly and accurately the most important testimony offered by each side. It is true that the court spent more time summarizing the State's evidence than the evidence of the defendant but this was simply because the State presented considerably more evidence than

the defendant. *See State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668 (1941). Secondly, defendant maintains that the trial court substantially misstated his contentions in the following portion of the charge:

> "On the other hand, the defendant says and contends that you ought not to find him guilty from all the evidence in this case. That you ought not to believe what the State's witnesses say about it and at the very least you ought to have some reasonable doubt in your mind and return a verdict of not guilty in both cases."

Defendant states that the court should have said that it is the contention of the defendant that he was not even present at the Stout apartment in Salisbury and that he offered alibi witnesses to support this contention. Further, the court, according to the defendant, substantially misstated a portion of the evidence when it reviewed the testimony of Agent Cone on recall and stated that this testimony " . . . tends to show that he made an examination of an automobile registered to Jeannette Grier and that that automobile was clean; that they could find no debris or anything in the car." Defendant maintains Cone's testimony, that fingerprints taken from the car were those of Hutton and Sellers but that no fingerprints of the defendant were identifiable, should have been included in the court's recapitulation. However, defendant's objections come too late.

> " . . . [I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Virgil,* 276 N.C. 217, 230, 172 S.E. 2d 28, 36 (1970); *State v. Fowler, supra; Emanuel v. Clewis,* 272 N.C. 505, 158 S.E. 2d 587 (1968).

Defendant made no such objections. This assignment is overruled.

**[11]** Defendant next assigns as error the failure of the court to apply the applicable law to the evidence in not setting forth the acts of the defendant that would constitute aiding and abetting. The court in charging on this feature of the case first instructed the jury that they must find beyond a reasonable doubt that the crimes were committed by Sellers and Blackmon,

or either of them, and that in order to find this defendant guilty of aiding and abetting, the State must prove that the defendant was present at the time the crimes were committed, and that he " . . . knowingly advised, instigated, encouraged or aided Jack Sellers or Otis Blackmon or either of them to commit the crime . . . , " and that " . . . a person is not guilty of a crime merely because he is present at the scene. Even though he may silently approve of a crime or secretly assist in its commission. To be guilty, he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. . . . " The court then specifically charged the jury that if they found " . . . beyond a reasonable doubt, . . . Sellers and Blackmon or either of them . . ." committed the crimes as charged and that " . . . defendant was present at the time the crime was committed and that he aided or encouraged them by holding a pistol on Hutton and keeping him from running to the officers and that in so doing the defendant knowingly advised, instigated, encouraged or aided Sellers or Blackman or either of them . . . it would be your duty to return a verdict of guilty as charged. However, if you do not so find or have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of not guilty." This assignment is without merit. *See State v. Rankin, supra; State v. Gaines, supra; State v. Hargett, supra; State v. Holland, supra.*

In a related point, the defendant asserts that the court erred in failing to require a finding that defendant *knowingly* aided and abetted others in the commission of the crime charged. Defendant does concede that the court used the word "knowingly" in one portion of the charge. In fact, a perusal of the charge discloses that all four times the court directly charged as to what the jury must find to return a verdict of guilty, the term "knowingly" was used. This assignment is overruled.

Next, defendant asserts that the court erred in reiterating the testimony of SBI Agent Pearce that in his opinion the explosion was caused by dynamite. He contended that this repetition left the clear impression with the jury that an explosion had occurred, thereby invading the province of the jury on this issue. As to this contention, we refer to our earlier discussion of Stout's testimony that he was injured by an "explosion," and to the stipulation entered by defendant's counsel that Stout was

injured by an explosion. Defendant is in no position to object to a repetition of this testimony in the charge.

Defendant's next assignment of error challenges the court's instruction concerning defendant's failure to testify. Defendant submitted the following special instruction to the court:

> "The defendant in this case has not testified. Any defendant may or may not testify in his own behalf and his failure to testify shall not create any presumption against him."

Rather than give the tendered instruction, the court charged the jury as follows:

> "Now, ladies and gentlemen of the jury, the defendant did not take the stand and testify in his own behalf. The Court instructs you the defendant has a right to testify if he so elects or he has a right to remain off the stand and the fact that the defendant has not taken the stand and testified in his own behalf should not be considered by you against him or to his prejudice at any stage for the defendant was exercising a right which the law gives to him."

**[12]** Defendant contends that he is entitled to an instruction in the *mandatory* language of G.S. 8-54 that his failure to testify "shall not create any presumption against him." However, defendant did not cite and we cannot find any case so holding. Our cases do not prescribe any mandatory formula but instead look to see if the spirit of G.S. 8-54 has been complied with. *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968) ; *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948) ; *State v. Proctor,* 213 N.C. 221, 195 S.E. 816 (1938). Justice Lake, speaking for the Court in *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974), stated the general rule that " . . . any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. . . . " The instruction in the present case easily meets this test. This assignment is overruled.

**[13]** Since defendant was being tried separately from the principals in this case, the trial judge charged the jury on the elements of the crimes for which Sellers and Blackmon, *or either of them,* must be found guilty before defendant could be

convicted of aiding and abetting. Defendant excepts to this alternative wording, complaining that it is confusing and misleading. The evidence clearly shows that both Sellers and Blackmon were principals; but, the court made it clear that as long as the jury found that one or both of them were guilty of all elements of the crimes, then defendant could be guilty of aiding and abetting if so found. No prejudicial error is made to appear by the use of the alternative wording.

**[14]** Finally, defendant maintains that the court erred in not accurately charging as to the elements of the crimes with which defendant is charged. Defendant stood charged with two crimes: willful and malicious injury to a *person*, Albert Stout, by use of explosives and willful and malicious damage to *occupied personal property*, a 1974 Ford Torino, by means of explosives. Defendant now contends that the charge on the elements of these crimes was confusing and misled the jury into thinking that they only need find injury to Agent Stout in order to convict in both cases, rather than also finding damage to occupied personal property. Portions of the instruction are admittedly not models of clarity; however, construing the charge contextually we do not find any prejudicial error. The court correctly read the bills of indictment and the applicable statutes at the beginning of the charge. The court repeatedly referred to the two crimes accurately as: "damaging personal property, it being occupied at the time, by use of explosives," and "injuring Albert Stout, Jr., by use of explosives." Immediately before the jury retired to the jury room, the court repeated the two crimes for which defendant could be convicted and then gave the jury a sheet of paper on which the two separate charges were written to use in its deliberations.

A charge will be construed contextually as a whole, and when so construed it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained even though the instruction might have been more aptly given in different form. 7 Strong, N. C. Index 2d, Trial § 33; *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966); *Phillips v. R. R.*, 257 N.C. 239, 125 S.E. 2d 603 (1962). All of the evidence showed extensive damage to the automobile as well as serious injury to Stout. We have carefully reviewed these instructions and we do not believe the jury was misled or confused as to the nature of the charges.

Other assignments concerning the jury instructions have been considered and found to be without merit.

An examination of the entire record discloses that defendant received a fair trial, free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

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EDDIE HARDY, JR. v. CHARLES L. TOLER AND PAMLICO MOTOR COMPANY, A CORPORATION

No. 12

(Filed 7 October 1975)

1. **Damages § 11— punitive damages**

Punitive damages may be awarded only where the wrong is done wilfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights.

2. **Damages § 15; Fraud § 13— fraud in sale of automobile — no punitive damages**

In an action to recover damages for fraud in the sale of an automobile, the evidence was insufficient to be submitted to the jury on the issue of punitive damages where it tended to show that defendants represented that the automobile was a one-owner vehicle, had been driven only 23,000 miles, had never been wrecked, and that the warranty could be transferred to plaintiff, that defendants knew the car was a second-owner vehicle, had been wrecked, and had been driven over 79,000 miles when plaintiff purchased it, and that the warranty could not be transferred to plaintiff.

3. **Fraud § 13; Unfair Competition— unfair or deceptive acts in commerce — question for court — representations by automobile salesman — stipulations — question of law**

While it would ordinarily be for the jury to determine the facts and for the court, based on the jury's finding, to determine as a matter of law whether defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in violation of G.S. 75-1.1, false representations made by defendants in the sale of a car to plaintiff are held by the Supreme Court to constitute unfair or deceptive acts or practices in commerce as a matter of law based upon stipulations by the parties that defendants falsely represented to plaintiff that the car was a one-owner vehicle which had not been involved in a wreck and that the warranty would transfer to plaintiff, and plaintiff is entitled to recover treble damages.

Justice HUSKINS concurring in result.

Justices LAKE and EXUM join in the concurring opinion.

ON *certiorari* to review the decision of the Court of Appeals, 24 N.C. App. 625, 211 S.E. 2d 809 (1975), vacating judgment of *James, J.*, 7 May 1974 Session, CRAVEN Superior Court.

Material portions of the complaint are summarized as follows: On or about 11 November 1971, plaintiff purchased from defendants a 1970 Dodge automobile for $2,350. The odometer of the automobile registered approximately 21,000 miles and the defendants represented the vehicle as having had only one previous owner. The vehicle was warranted to be in good condition and the plaintiff was informed that the Chrysler warranty could be transferred to him for the additional sum of $25.00, which plaintiff paid.

On 30 May 1972, plaintiff was advised by defendants that the warranty could not be transferred to plaintiff and defendants attempted to return the $25.00 transfer fee. At this time plaintiff became aware that the vehicle was not in conformity with the representations that had been made and upon which plaintiff had relied in purchasing the automobile. The vehicle was found to have had over 79,000 miles on it at the time it was purchased; the vehicle had been sold twice prior to the sale to the plaintiff, making the car a third-owner vehicle to which the warranty would not transfer. Moreover, the automobile had been damaged in a collision while previously owned, a fact known to the defendants at the time of sale to the plaintiff.

In June and July of 1972, plaintiff notified defendants that he had revoked his acceptance and demanded a refund of the purchase price or seasonable cure of the nonconformity, neither of which occurred. The fair market value of the automobile as represented and warranted was $2,350; its actual value was $1,450. Plaintiff prayed for actual damages in the amount of $900, punitive damages in the amount of $50,000, and for treble damages, as provided by G.S. 75-16, for unfair and deceptive acts and practices in the conduct of trade and commerce as condemned in G.S. 75-1.1.

In their answer defendants admitted that their representations as to the transferability of the Chrysler warranty and prior ownership of the vehicle were erroneous, but that they were made through an honest mistake. They alleged that one of the owners had only kept the car overnight and that the sale had been voided on their books; that they did not find out about the non-transferability of the warranty until they heard

from Chrysler Corporation at which time they offered to refund the plaintiff's $25.00 and make the warranty good themselves, which offer was refused by the plaintiff.

At the close of all evidence at trial, defendants' motion for a directed verdict as to the issue of punitive damages was allowed over plaintiff's objection and exception. Plaintiff's motion for a directed verdict on the issue of whether the defendants had breached any express warranty made to the plaintiff was also allowed. The trial judge refused to submit to the jury the issue of whether the representations of the defendants constituted unfair and deceptive acts and practices under G.S. 75-1.1, and following the jury's award of $600 actual damages refused to treble that amount under G.S. 75-16, to which plaintiff excepted.

On appeal, the Court of Appeals held that the action of the trial court in refusing to submit an issue regarding punitive damages was correct, but that the court erred in refusing to submit the issue regarding unfair or deceptive acts and practices in the conduct of trade or commerce. The judgment of the trial court was then vacated and the case remanded for a new trial. We allowed *certiorari* on 6 May 1975.

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

*Attorney General Rufus L. Edmisten and Assistant Attorney General Donald A. Davis, amicus curiae, for the State.*

*Ward & Ward, by Jerry F. Waddell and Kennedy W. Ward for plaintiff appellant.*

*Wilkinson and Vosburg by John A. Wilkinson for defendant appellees.*

MOORE, Justice.

Plaintiff first assigns as error the holding of the Court of Appeals affirming the action of the trial court in allowing defendants' motion for a directed verdict under Rule 50(a) as to the issue of punitive damages.

This action is based upon fraudulent representations made by Toler on behalf of himself and his principal, Pamlico Motor Company, which were relied upon by the plaintiff in purchasing the automobile in question. Defendants represented to the plaintiff that the automobile was a one-owner vehicle which had

been driven approximately 23,000 miles, that it had never been wrecked, and that the Chrysler warranty could and would be transferred to plaintiff. Plaintiff offered testimony tending to show that all of these representations were false. The parties stipulated that the car had had two prior owners, had been involved in a wreck, and that the Chrysler warranty would not transfer to plaintiff. Although the plaintiff's evidence and the stipulations of the parties provide ample basis for a recovery based on actionable fraud, this was not sufficient to subject the defendants to punitive damages.

In North Carolina, whether a person may recover punitive damages in an action for fraud depends upon the character of the acts alleged to constitute fraud in each case. Furthermore, it is the general rule that ordinarily punitive damages are not recoverable in an action for fraud. *Davis v. Highway Commission,* 271 N.C. 405, 156 S.E. 2d 685 (1967); 3 Strong, N. C. Index 2d, § 11, p. 181, and cases cited therein.

In *Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497 (1967), the Court quoted with approval from *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785 (1953), which held that plaintiffs were not entitled to punitive damages in an action for fraud merely upon a showing of misrepresentations which constituted the cause of action, without more:

> " ' . . . " 'Punitive damages' are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." . . .
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> * * *
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> " 'We are inclined to the view that the facts in evidence here are not sufficient to warrant the allowance of punitive damages. There was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded.' "

*Accord, Davis v. Highway Commission, supra; Van Leuven v. Motor Lines,* 261 N.C. 539, 135 S.E. 2d 640 (1964); *Rubber Co. v. Distributors, Inc.,* 253 N.C. 459, 117 S.E. 2d 479 (1960); *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894 (1943).

**[1, 2]** Punitive damages may be awarded only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard

of the plaintiff's rights. *Davis v. Highway Commission, supra; Nunn v. Smith, supra; Rubber Co. v. Distributors, Inc., supra; Swinton v. Realty Co., supra.* The court correctly refused to submit an issue as to punitive damages. This assignment is overruled.

The trial court below refused to submit the following proposed issue to the jury:

> "Did the false representations of the defendant to the plaintiff in connection with the sale of said vehicle, as alleged in the complaint, constitute unfair or deceptive acts or practices in the conduct of trade or commerce?"

This refusal was based on the trial court's opinion that the proposed issue was not one of fact for the jury but one of law for the judge. The Court of Appeals disagreed, holding the evidence and stipulations of the parties sufficient to raise a jury question and remanding for a new trial.

G.S. 75-1.1, in part, provides:

> "*Methods of competition, acts and practices regulated; legislative policy.*—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> "(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."

G.S. 75-16 provides:

> "*Civil action by person injured; treble damages.*—If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict."

For general comment on these sections, *see* 48 N.C.L. Rev. 896 (1970); 6 Wake Forest Intra. L. Rev. 1 (1969).

The issue now before us is whether the determination that certain acts or practices constitute unfair or deceptive acts or practices, in violation of G.S. 75-1.1, is to be made by the judge or by the jury.

This issue appears to be one of first impression before this Court. Some guidance may be obtained by reference to federal decisions on appeals from the Federal Trade Commission, since the language of G.S. 75-1.1 closely parallels that of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1973 Ed.), which prohibits "unfair or deceptive acts or practices in commerce." The federal courts, while according great weight to the evidentiary findings of the F.T.C., have made it clear that the ultimate determination of what constitutes unfair competition and deceptive practices rests with the courts. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 13 L.Ed. 2d 904, 85 S.Ct. 1035 (1965); *Fed. Tr. Comm'n v. Keppel & Bro.*, 291 U.S. 304, 78 L.Ed. 814, 54 S.Ct. 423 (1934); *Firestone Tire and Rubber Company v. F.T.C.*, 481 F. 2d 246 (6th Cir. 1973); *accord*, *Wisdom v. Norton*, 507 F. 2d 750 (2d Cir. 1974).

Other states have also had occasion recently to interpret similar consumer protection statutes. In *Commonwealth v. DeCotis,* 316 N.E. 2d 748 (Mass. App. 1974), the court conceded that the Massachusetts statute, like our counterpart here, furnishes no definition of what constitutes an unfair act or practice made unlawful under the statute. Since the Massachusetts trial court sits in equity without a jury, the appellate court did not specifically address itself to the division of function between jury and judge in determining whether a violation had occurred. However, the reasoning of the court throws light on its thinking on the issue:

> "The defendants next contend that they engaged in no deception or unfair act and practice. In light of the *facts* found by the Judge and by us, such an argument can succeed only if *as a matter of law* their conduct was not an unfair or deceptive act or practice within the meaning of those words. . . . The existence of unfair acts and practices must be determined from the circumstances of each case. . . . What we can determine is that the collection of resale charges by the defendants was an unfair act or practice." *Id.* at 753-54. (Emphasis added.)

An even more recent case, *PMP Associates, Inc. v. Globe Newspapers, Co.*, 321 N.E. 2d 915 (Mass. 1975), indicates again that the court reserves for itself the ultimate determination as a matter of law of what constitutes an unfair trade practice.

Although neither the federal nor Massachusetts decisions are directly in point because of the posture of the cases, one an appeal from an administrative ruling, another from a judge sitting in equity, their reasoning is persuasive and supported by logic. The traditional function of the jury has been a fact-finding one but the determination as to liability under those facts should be found by the court as a matter of law.

Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true. *D.D.D. Corporation v. F.T.C.*, 125 F. 2d 679 (7th Cir. 1942). In *Garland v. Penegar*, 235 N.C. 517, 70 S.E. 2d 486 (1952), Chief Justice Devin, speaking for the Court in an automobile fraud case, said:

> "Plaintiff alleged and offered evidence tending to show that the defendant, an automobile dealer, falsely and fraudulently represented that the automobile then being sold him was a 'new demonstrator,' that it had been driven only 1,000 miles as the speedometer apparently indicated, and that the automobile was in perfect condition. Plaintiff testified that instead of being as represented the automobile was not a new one but had been previously sold to another person who drove it 8,000 miles and then turned it back to the defendant. Plaintiff also testified the automobile was not in good condition, and that he had incurred trouble and expense in repairs.
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> * * *
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> "It is apparent from an examination of the record that the plaintiff offered sufficient evidence to carry the case to the jury on the issue of actionable fraud and deceit, and that defendant's motion for judgment of nonsuit was properly denied. *Whitehurst v. Ins. Co.*, 149 N.C. 273, 62 S.E. 1067; *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5; *Gray v. Edmonds*, 232 N.C. 681, 62 S.E. 2d 77."

Courts in other jurisdictions have decided cases involving similar factual situations under new statutes similar to G.S. 75-1.1. *See Slaney v. Westwood Auto, Inc.*, 322 N.E. 2d 768

(Mass. 1975); *In re Brandywine Volkswagen, Ltd. v. Dept. of Community Affairs,* 312 A. 2d 632 (Del. 1973); *Danforth v. Independence Dodge, Inc.,* 494 S.W. 2d 362 (Mo. App. 1973).

**[3]** Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. However, in the present case, the parties have stipulated as follows:

"1. That the plaintiff is a citizen and resident of Craven County, North Carolina, and that the defendant, Charles L. Toler, at the times hereinafter complained of, was a citizen and resident of Beaufort County, North Carolina; that at the times hereinafter complained of, the said Charles L. Toler, was employed as the sales manager of this co-defendant, Pamlico Motor Company, which is a corporation duly organized under the laws of the State of North Carolina, engaged in the business of buying and selling new and used cars in Beaufort County, North Carolina; that the said Charles L. Toler was a notary public in and for the State of North Carolina, as well as was the secretary-treasurer of said corporation, and one of its two principal stockholders.

"2. That on or about the 11th day of November, 1971, the plaintiff, Eddie Hardy, Jr., purchased from the defendant corporation, through its agent, servant and employee, Charles L. Toler, a 1970 Dodge automobile for the total purchase price of $2,350.00 and that at that time the said automobile's odometer reflected mileage of no less than 21,000 nor more than 23,000 miles.

"3. That the said automobile sold to the plaintiff, was represented by the defendant, Charles L. Toler, as the agent, servant and employee of Pamlico Motor Company, as being a one-owner vehicle, and that if the plaintiff purchased the same, the remaining portion of the original new car warranty could be transferred to him upon his payment of the additional sum of $25.00 for a transfer fee, and this representation was made part of the bargain for the purchase of the Dodge automobile, and that the said sum was in fact paid, along with the purchase price. That the said automobile in fact, had been sold twice prior to this time,

by the defendant corporation, and this was known by the individual defendant, Charles L. Toler, for the vehicle had been previously sold to Jasper Willis Fleming and then subsequently to Guy L. Satterthwaite. That during the period the car was owned by Guy L. Satterthwaite, it was involved in a collision and was wrecked, and this information was known by the defendant at the time of the sale to the plaintiff, as well as that this was the third sale of the said vehicle."

Based on these stipulated facts, we hold as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of G.S. 75-1.1, and treble damages should have been awarded as provided by G.S. 75-16 in the amount of $1,800.

For the reasons stated, the case is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Craven County for entry of judgment in favor of plaintiff against the defendants Charles L. Toler and Pamlico Motor Company, a corporation, in the amount of $1,800. As so modified, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

Justice HUSKINS concurring in result.

We have said that punitive damages are damages, other than compensatory or nominal damages, awarded against a person " 'to punish him for his outrageous conduct.' . . . In some cases, in actions to recover damages for fraud, where punitive damages are asked, it is suggested that a line of demarcation be drawn between aggravated fraud and simple fraud, with punitive damages allowable in the one case and refused in the other. In a note in 165 A.L.R. 616, it is said: 'All that can be said is that to constitute aggravated fraud there must be some additional element of asocial behavior which goes beyond the facts necessary to create a case of simple fraud.' " *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953).

In the case before us defendants represented that the car involved was a one-owner car, had been driven only 23,000 miles, had never been wrecked, and that the warranty could be transferred to plaintiff. Plaintiff purchased the vehicle upon

those representations. The truth of the matter was that the car was a second-owner vehicle, had been wrecked, had been driven 80,000 miles when plaintiff bought it, and the warranty could not be transferred. When plaintiff discovered the truth and sought to rescind the contract, Toler denied that the car had been wrecked and said plaintiff must have wrecked it himself. In the face of all that, both defendants *stipulated* at the trial that they knew at the time of the sale that the vehicle had been sold on two previous occasions and had been involved in a wreck prior to the sale to plaintiff. And uncontradicted evidence shows that defendants knew the car had over 80,000 miles on it while telling plaintiff the mileage was only 23,000. In my view such conduct is "outrageous conduct" and contains an additional element of asocial behavior which goes beyond simple fraud and constitutes aggravated fraud. Nothing else appearing, the facts in evidence here are sufficient to warrant the allowance of punitive damages.

I concur in the result reached in this case, however, because G.S. 75-16 is itself punitive in nature and provides for the recovery of damages in treble the amount fixed by the verdict. Having sought and recovered treble damages, plaintiff's right to punitive damages is thereby excluded. For these reasons I concur in the result reached by the majority.

Justices LAKE and EXUM join in this concurring opinion.

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STATE OF NORTH CAROLINA v. ROGER DALE CURRY

No. 43

(Filed 7 October 1975)

**Burglary and Unlawful Breakings § 7; Larceny § 9— not guilty of felonious breaking — guilty of felonious larceny — defendant as aider and abettor of larceny committed pursuant to breaking**

Where there is evidence that defendant aided and abetted two principal perpetrators in the commission of a felonious breaking and entering and larceny pursuant to the breaking and entering, under appropriate jury instructions a jury verdict of not guilty of breaking and entering and guilty of felonious larceny is a conviction of felonious larceny.

Chief Justice SHARP dissenting.

Justices MOORE and COPELAND join in the dissenting opinion.

ON *writ of certiorari* to the North Carolina Court of Appeals to review its decision reported at 25 N.C. App. 101, 212 S.E. 2d 509 (1975) in which it found no error either in the trial of defendant or in the judgment imposed upon him by *Wood, J.*, at the June 6, 1974 Criminal Session of DAVIDSON Superior Court.

Defendant was tried on a three-count bill of indictment. The first count alleged that on November 5, 1973, he did unlawfully, wilfully and feloniously break and enter the dwelling of one Bobby Ketchie with the intent to commit the felony of larceny therein. The second count charged that "after having unlawfully, wilfully and feloniously broken into and entered" Ketchie's dwelling the defendant did feloniously steal certain personal property of Ketchie, including two television sets, some high fidelity sound reproduction equipment, one hundred record albums, valuable coins, beer, and a hair dryer, having a total value of $1676. The third count charged defendant with feloniously receiving these same items of personal property.

The trial judge submitted only the felonious breaking and felonious larceny charges to the jury, but did not submit the felonious larceny charge on the theory that the property had a value of more than $200. The record reveals that "the jury returned into open court with a verdict of guilty of felonious larceny and not guilty of breaking or entering." Defendant was sentenced to a term of not less than eight nor more than ten years.

*Rufus L. Edmisten, Attorney General, William F. O'Connell, Assistant Attorney General, and Robert R. Reilly, Associate Attorney, for the State.*

*Eubanks, Villegas & Reavis, by Larry L. Eubanks, for defendant appellant.*

EXUM, Justice.

Although defendant in the Court of Appeals did not direct any assignment of error to the point, the State in its brief before that court took the position, as it does now before us, that Judge Wood erred in sentencing defendant as if he had been convicted of felonious larceny. Both State and defendant suggest that the case should be remanded for the imposition of sentence upon a conviction for misdemeanor larceny on the authority of

*State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Lilly,* 25 N.C. App. 453, 213 S.E. 2d 418 (1975); and *State v. Teel,* 20 N.C. App. 398, 201 S.E. 2d 733 (1974). Defendant's petition for certiorari is based upon, and we allowed the petition to consider, this proposition.

In *State v. Jones, supra,* defendant was charged in a three-count bill of indictment with the felonies of breaking and entering, larceny, and receiving, in language which in all material aspects is identical to the language used here. The jury found the defendant not guilty of breaking and entering but guilty "as charged" on the larceny count. Reciting that the defendant had been "found guilty on the second count of larceny in excess of $200" the trial judge imposed a sentence of three years imprisonment. He had not, however, submitted the felonious larceny charge to the jury on the theory that the personal property had a value of more than $200. We held that since the jury acquitted the defendant of felonious breaking and there was no instruction regarding the value of the goods taken, the trial court erred in treating the verdict as a conviction of felonious larceny. We vacated the sentence and remanded the case for judgment "as upon a verdict of guilty of misdemeanor-larceny." 275 N.C. at 439, 168 S.E. 2d at 385. Applying N.C. Gen. Stat. 14-72 (1967 Cum. Supp.) we said that, absent a breaking:

> "[I]t is incumbent *upon the State* to prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars; and, value in excess of two hundred dollars being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. (Citations omitted.) The basis for this requirement is the elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury.
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> * * * *
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> "Although an indictment charges, and *all* the evidence tends to show, that the value of the stolen property was more than two hundred dollars, *the jury,* under appropriate instructions, *must find* from the evidence beyond a reasonable doubt that this is the fact." 275 N.C. at 436-37, 168 S.E. 2d at 383-84.

A cursory comparison of the present case with *Jones* leads one to the conclusions that *Jones* is controlling and that we

ought here to remand for resentencing as upon a verdict of guilty of misdemeanor larceny. Careful analysis, however, satisfies us that there are important differences between the case at bar, and *Jones* and that the Court of Appeals reached the right result.

Underlying the result in *Jones* and two Court of Appeals decisions which followed it, *State v. Lilly, supra,* and *State v. Teel, supra,* was the deduction, expressly relied on in *State v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634 (1965), "that the verdict of not guilty as to the first count establishes that defendant did not commit the alleged larceny pursuant to an unlawful and felonious breaking and entering and therefore G.S. 14-72, as amended, does not apply." 265 N.C. at 583, 144 S.E. 2d at 635-36. The deduction was valid in these cases because the defendant in each was tried on the theory that he was guilty, if at all, as a principal in the first degree. The trial here, on the other hand, proceeded on the theory that defendant Curry was guilty, if at all, as an aider and abettor of two other principal perpetrators—Floyd Francis and Larry Hamilton. Defendant, in other words, was tried as a principal in the second degree. See, for the distinction, Strong, North Carolina Index 2d, Criminal Law § 9 (1967) and cases cited therein; A. Loewy, Criminal Law § 10.01 (West 1975).

The State's evidence in chief consisted of the testimony of the victim Ketchie and two Davidson County Deputy Sheriffs, Captain Bobby Beck and Detective Sergeant Billy Nail. Ketchie testified that upon returning home from work on November 5, 1973, he observed that a front window of his dwelling had been broken out and the items listed in the bill of indictment were missing. He said these items had a total value of $2,200. Captain Beck testified that during the course of his investigation he had occasion to interrogate defendant on November 9, 1973, at the Davidson County Sheriff's office. Defendant, after being duly advised of and waiving his rights, said essentially that he did not go into the house, that he did not recall the names of the persons who did, that he had sold the color television set which was removed from the house, and that he would recover this item himself. The television set was never recovered. Sergeant Nail testified that he was present on November 9, 1973, when defendant "was in custody and signed a waiver of his rights." He said defendant "after signing that . . . did make a statement in my presence and he did talk with me and I wrote it down as to

what he stated." Defendant's statement, according to Sergeant Nail, was as follows:

> "Mr. Curry talked to me and he stated that there was a truck involved; that he was in this truck; that he was with two other parties; that the two parties, they decided to break in the house; further stated that he stayed with the truck; one subject stayed near the edging of the lawn near the home; another party went up to the house; stuff was brought back; he stated he went up and down the road; he stated when the goods was loaded they left at that time and took all the goods to Larry Hamilton's trailer; he also stated to me two different locations where the valuable coins that had been taken to and pawned or sold; at that time an officer was sent to pick the coins up; he further stated that the young lady, Hamilton's wife, had no knowledge of this break-in or the items being stolen that was placed into her trailer; also made a statement about the TV he had sold. We repeatedly asked him if he would let us try to do our job as far as picking the goods up; he stated he would rather do this himself rather than involve any other party. Larry Hamilton's name was the only name mentioned as far as any other party; he didn't say at that time he was with him; he just stated he took it to his trailer."

Defendant testified in his own behalf and also offered the testimony of Larry Hamilton and Floyd Francis. Hamilton and Francis testified, essentially, that they had broken and entered Ketchie's dwelling, stolen the items in the bill of indictment, but that Curry did not participate in these crimes. They testified that although they discussed committing the crimes in Curry's presence he refused to have anything to do with it and got out of the car in which they were riding before the crimes were committed. Hamilton admitted on cross-examination that he had earlier signed a statement in which he implicated defendant. He repudiated this statement, however, at trial on the ground that when he made it he thought defendant had "ratted"on him. Curry testified that on the day in question he was with Hamilton and Francis when they discussed the breaking and larceny but that he refused to take part in it because he was at that time on probation. When they got close to Ketchie's dwelling he got out of the car and hitchhiked home. Later Hamilton and Francis came to defendant's home. Defendant testified, "They

asked if I wanted to go to Larry's house. They did not tell me about breaking into the house. I went to Larry's house then. There was some stuff in the back with a blanket over it. I didn't ask about that." Defendant then admitted watching Hamilton and Francis unload the vehicle and place the items in Hamilton's housetrailer. He said they asked him to help them unload but he couldn't because of an injury he had earlier suffered to one of his hands. Defendant denied making the incriminating statement attributed to him by Sergeant Nail.

In rebuttal the State offered the testimony of Mrs. Larry Hamilton that on November 5, 1973, she and Hamilton were living as husband and wife. She was at home when Hamilton, Francis, and defendant arrived in the afternoon. She observed them "bringing some TV's and stuff in." The items were brought in by defendant and Francis since her husband was on crutches with a broken foot and could not help them. She was told that defendant and his wife had separated and the items came from defendant's home. She later learned that they had come from the break-in at Ketchie's.

On this evidence unlike *Jones, Lilly,* and *Teel, supra,* a not guilty verdict on the breaking count is not necessarily a finding by the jury that the larceny was not committed by defendant pursuant to a breaking. It could be a finding simply that defendant was not an aider and abettor on the breaking count. The jury could, therefore, consistently with its verdict on the breaking count find that felonious larceny was committed pursuant to a breaking by Hamilton and Francis and defendant, by reason of aiding and abetting, was guilty of the felony as a principal in the second degree, provided, of course, this theory of the case was presented to them in the trial judge's instructions. We note, in passing, that the theory of felonious larceny pursuant to a breaking was not presented to the jury in either *Jones* or *Holloway.*

With regard to the larceny count here the jury was instructed that it could find defendant guilty if the State proved beyond a reasonable doubt that defendant took and carried away personal property of Ketchie without Ketchie's consent intending at the time to deprive him of its use permanently, knowing that he, the defendant, was not entitled to take the property, *"that the property was taken from the building after or during a breaking or entering,"* and,

"that for a person to be guilty of the crime, it is not necessary that he himself do all these acts which are necessary to constitute the crime of larceny after felonious breaking or entering. If two or more persons act together with common purpose to commit the crime of larceny, each of them is held responsible for the acts of the other done in the commission of the crime of larceny; *or if you find that the defendant aided and abetted Hamilton and Francis in the commission of larceny from this house, the same thing would apply to larceny as I have already instructed you applies to breaking or entering.*

"So I charge that if you find from the evidence beyond a reasonable doubt that on or about Nov. 5, 1973, Roger Dale Curry acting either by himself or acting together with Floyd Francis and Larry Hamilton, *or that he aided and abetted Francis or Hamilton and you find this beyond a reasonable doubt, that on about this date that this defendant aided and abetted or acted in concert and took and carried away TV sets and other property* which you will recall the testimony about that, *the property of Mr. Ketchie without the consent of Mr. Ketchie from a building during a breaking or entering or after breaking or entering,* knowing that he was not entitled to take the same and intending at the time of the taking to deprive Robert Ketchie of its use permanently, *it would be your duty to return a verdict of guilty of felonious larceny;* however, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty." (Emphases supplied.)

After the jury had retired and deliberated some fifteen minutes it returned to the courtroom for further instructions. The record reveals the following colloquy:

"JUROR: There was a question raised on the aiding and abetting—whether or not it would be a charge of aiding and abetting larceny or to breaking and entering—would it be separate or combined to the whole thing?

"COURT: I again instruct you that aiding and abetting—I instructed you as to aiding and abetting as to both larceny and as to breaking or entering; they are separate charges, separate crimes. I instructed you that the same elements of aiding and abetting apply to either—does that answer your question?

"JUROR: Yes, that was the question raised."

Thereafter verdicts of guilty of felonious larceny and not guilty of breaking or entering were returned.

The trial judge instructed the jury, in essence, that defendant Curry would be guilty of felonious larceny if the jury found beyond a reasonable doubt that he aided and abetted Francis and Hamilton when *they* stole the personal property of Ketchie pursuant to a breaking or entering by *them* of Ketchie's premises. Having received similar instructions on the theory of aiding and abetting with reference to the breaking count, the jury inquired whether defendant under this theory would have to be found guilty on both counts or whether they could apply the theory of aiding and abetting to either count. The court replied that the theory could be applied to both counts or either of them whereupon the verdicts as recorded were returned.

Given the facts produced at trial, the instructions of the trial judge and the verdicts, the jury must have found that defendant aided and abetted Hamilton and Francis in a larceny committed by them pursuant to a breaking or entering, a felony under N. C. Gen. Stat. 14-72(b)(2), but did not aid or abet Hamilton and Francis with regard to the charge of breaking and entering. By attributing these findings to the jury the two verdicts are logically reconciled.

For the reasons stated the decision of the Court of Appeals is

Affirmed.

Chief Justice SHARP dissenting:

The judge instructed the jury that it could return two of four verdicts: guilty or not guilty of breaking or entering; guilty or not guilty of felonious larceny. He did not submit the issue of defendant's guilt of receiving stolen goods knowing them to have been feloniously stolen, as charged in the third count of the indictment. The verdicts were not guilty of breaking or entering and guilty of felonious larceny.

Defendant assigns only three errors in his trial: (1) the denial of his motion to nonsuit all charges against him; (2) the denial of his motion for a mistrial after the court admitted (unspecified) "prejudicial" evidence; and (3) the denial of his motion to set aside the verdict because "there was no evidence"

that defendant was guilty of larceny. In his brief in the Court of Appeals defendant's only argument is that on the evidence the jury should have acquitted him.

The record in this case leaves me in no doubt that the defendant is guilty of the felonious breaking and entering and larceny charged in the bill of indictment. The State's evidence and the adminicular circumstances are more than sufficient to show that while defendant's two confederates feloniously broke and entered the Ketchie dwelling for the purpose of stealing property located therein, he drove the truck, which carried away the stolen television sets and other articles from the dwelling, up and down the road. *State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660 (1967); *State v. Peeden*, 253 N.C. 562, 117 S.E. 2d 398 (1960). Notwithstanding, the jury acquitted defendant of breaking and entering. Their request for further instructions suggests to me that they were confused by the charge, but—be that as it may—we are not at liberty to disregard their verdict.

Defendant has assigned no error to the charge, but in his brief filed in this Court he notes correctly that Judge Wood failed to instruct the jury that if they acquitted defendant of felonious breaking and entering, but found him guilty of larceny, they "must also determine that the value of the goods stolen was in excess of $200 in order to find defendant guilty of felonious larceny." Appellant's sole contention here is that defendant "must be returned to the Superior Court to be sentenced as a misdemeanant as the law clearly dictates." With the contention, I agree. It was for this purpose only that we allowed certiorari.

In this case, to convict defendant of *felonious* larceny, G.S. 14-72 obliges the jury to find either that the stolen property had a value in excess of $200 or that defendant acquired the property pursuant to a felonious breaking or entering *for which he himself* is criminally responsible. *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969). The jury made neither finding. In my view *State v. Jones* requires that this case be remanded to the Court of Appeals with instructions that it be returned to the Superior Court for the pronouncement of judgment as upon a verdict of guilty of misdemeanor-larceny.

Justices MOORE and COPELAND join in this dissent.

## STATE OF NORTH CAROLINA v. LARRY BERNARD

No. 5

(Filed 7 October 1975)

**1. Jury § 7— jurors opposed to capital punishment — equivocal answers — excusal for cause**

Two prospective jurors were properly excused for cause where their answers to questions on *voir dire* concerning their attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence neither juror would have voted to convict if conviction meant imposition of the death penalty.

**2. Jury § 7— general reservations about death penalty — excusal for cause — harmless error**

The trial court erred in excusing for cause a prospective juror who stated only that he did not believe in the death penalty and another prospective juror who said he "thought" he would automatically vote against the imposition of the death penalty regardless of the evidence; however, the exclusion of such jurors did not result in error so prejudicial as to warrant a new trial since (1) the sole function of the jury was to decide guilt or innocence and not punishment, (2) there was no systematic exclusion of all veniremen who opposed capital punishment by the intentional application of an improper standard, and (3) defendant did not exhaust his peremptory challenges.

**3. Criminal Law §§ 120, 138— death penalty upon verdict of guilty of rape — refusal to give instruction — harmless error**

The trial court in a rape case erred in the denial of defendant's written request for an instruction that the death penalty would be imposed upon the return of a verdict of guilty of rape since G.S. 15-176.4 makes it mandatory that the trial judge give the instruction upon the request of either party; however, such error was not prejudicial where nothing in the record indicates the jury was confused or uncertain as to the punishment which would result upon the return of a verdict of guilty of the crime of rape, each impaneled juror was examined at length as to his attitude toward the death penalty, and the record reveals that each juror knew that the death penalty would be imposed if a verdict of guilty was returned on the charge of rape.

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

Imposition of the death penalty for the crime of rape did not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments of the U. S. Constitution and by Article I, §§ 19 and 24 of the N. C. Constitution.

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

APPEAL by defendant from *Tillery, J.*, 30 September 1974 Session of NEW HANOVER Superior Court.

Defendant was tried upon bills of indictment charging him with rape, kidnapping, armed robbery and felonious automobile larceny. The charges were consolidated for trial and defendant entered a plea of not guilty to each of the charges.

The State's evidence tended to show that on 30 November 1973 at about 9:30 p.m., Mrs. Alice Faye Lee was at the Woolco parking lot in New Hanover County and as she entered her husband's automobile, defendant forced his way into the car and by use of a knife held to her throat obtained the automobile keys, took money from her and then drove to a wooded area of the county where against her will and by threat to kill with the knife he had sexual relations with Mrs. Lee. He then forced her to get out of the car and tied her to a nearby fence post. Defendant left in Mr. Lee's automobile and Mrs. Lee thereafter freed herself and went to a trailer where she called the police. Defendant was arrested a short time later in Wilmington, North Carolina, as he emerged from Mr. Lee's automobile. On the same night, Mrs. Lee identified defendant in a six-man lineup. At the time of identification, defendant was wearing Mr. Lee's ring which at the time of the kidnapping was on the directional signal of the Lee automobile. Defendant made a full confessison concerning all of the charged crimes and at trial these statements were admitted into evidence after the trial judge conducted a *voir dire* hearing and found that the statements were made freely, understandingly and voluntarily. At trial, Mrs. Lee made a positive in-court identification of defendant. There was medical evidence showing that Mrs. Lee was examined on the night of 30 November 1973 and that live male sperm was found in her vagina. The State offered other cumulative and corroborative evidence. Defendant offered no evidence.

The jury returned verdicts of guilty on all charges and the trial judge imposed the death penalty in the rape case and imposed consecutive sentences on the other jury verdicts. Defendant appealed from all judgments entered.

*Attorney General Rufus L. Edmisten, by Special Deputy Attorney General E. M. Speas, Jr., and Associate Attorney Joan H. Byers, for the State.*

*Mathias P. Hunoval for defendant appellant.*

BRANCH, Justice.

Defendant's principal assignment of error is that his constitutional rights were violated by the exclusion of jurors who voiced only general objections to the death penalty. He relies upon the rule set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770. In *Witherspoon,* the jury was entrusted with two responsibilities: (1) to determine whether defendant was guilty or innocent and (2) if found guilty, to determine whether his sentence would be imprisonment or death. The prosecution eliminated nearly one-half of the venire by successfully challenging any venireman who expressed any qualms about capital punishment. The jury found defendant guilty and fixed his penalty at death. Thereafter the Court dismissed his petition for *habeas corpus* and the Supreme Court of Illinois affirmed. The Supreme Court allowed *certiorari* and in reversing the Supreme Court of Illinois held that a sentence of death could not be carried out if the jury which imposed or recommended it was chosen by excluding veniremen for cause who simply voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. However, the Court made it clear that the prosecution *could* challenge jurors who state that their feelings concerning capital punishment would prevent them from making an impartial decision as to defendant's guilt and that the prosecution could challenge for cause any venireman who said that he could never vote to impose the death penalty or would refuse to consider its imposition in the case before him.

We consider briefly the *voir dire* of the prospective jurors whose exclusion from the jury panel was challenged by the defendant.

Prospective juror Corbett stated that she would automatically vote against the imposition of the death penalty regardless of the evidence. Prospective juror Dobson stated that he would vote against the imposition of capital punishment without regard to the evidence. It seems clear that the statements of both these jurors disclose that neither could make an impartial decision as to defendant's guilt and that they would refuse to consider the death penalty regardless of what the evidence might disclose. These jurors were properly excluded for cause.

[1] The concluding portion of the examination of prospective juror Durant was as follows:

> Q. MRS. DURANT, DO YOU HAVE ANY RELIGIOUS OR MORAL SCRUPLES OR BELIEFS AGAINST CAPITAL PUNISHMENT?
>
> A. I DON'T BELIEVE IN IT.
>
> Q. WHAT YOU ARE TELLING ME IS THAT UNDER NO CIRCUMSTANCES WOULD YOU VOTE TO IMPOSE CAPITAL PUNISHMENT REGARDLESS OF WHAT THE EVIDENCE IS?
>
> A. NO.
>
> MR. COBB: I CHALLENGE HER FOR CAUSE.
>
> THE COURT: THANK YOU, MRS. DURANT, I'LL LET YOU STEP ASIDE FOR THAT CASE.

The pertinent portion of the *voir dire* examination of prospective juror Smith disclosed the following:

> Q. ARE YOU TELLING ME THAT YOU WOULD OR WOULD NOT VOTE TO RETURN A VERDICT OF GUILTY IN A CAPITAL CASE IF YOU ARE SATISFIED BEYOND A REASONABLE DOUBT HE WAS GUILTY? WOULD YOU VOTE TO RETURN A VERDICT OF GUILTY WHICH WOULD MEAN TO GIVE A PERSON THE DEATH SENTENCE OR NOT?
>
> A. NO.
>
> Q. SO REGARDLESS OF THE EVIDENCE YOU WOULD NOT VOTE TO CONVICT SOMEBODY IF IT WOULD MEAN THE IMPOSITION OF A DEATH SENTENCE?
>
> A. NO.

The difficulty in deciding whether jurors Durant and Smith were improperly excluded from the jury panel lies in interpreting the record. The jurors' answers on *voir dire* seem equivocal when only isolated portions of the record are examined; however, when considered contextually, the responses to the rather awkwardly phrased questions leave little doubt that the prospective jurors Durant and Smith expressed attitudes toward the death penalty which required their exclusion from the jury panel. The judge clearly interpreted the answers to mean that

regardless of the evidence neither juror would vote to convict if conviction meant imposition of the death penalty. More importantly, defense counsel must have interpreted the answers in the same manner since at trial he sought no clarification and interposed no objection to the trial judge's action in excusing the prospective jurors. We, therefore, conclude that prospective jurors Smith and Durant were properly excluded for cause.

[2] We quote a portion of the *voir dire* examination of prospective juror Gantt:

> Q. Do you have any religious or moral scruples or beliefs against capital punishment?
>
> A. Well, I don't believe in the death penalty, no.
>
> Q. Sir?
>
> A. I don't believe in the death penalty, no.
>
> Q. It would be impossible regardless of the evidence for us to put enough evidence in there to satisfy you to bring in a verdict of guilty if it meant the imposition of the death penalty, is that right?

An unequivocal answer to the final question asked by the solicitor would have determined prospective juror Gantt's competence to serve on the panel so far as the *Witherspoon* rule might apply. However, this record discloses no answer to the question and we are of the opinion that this juror was erroneously excused for cause. The trial judge also erred by excusing the prospective juror Howell who said that he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence.

We are thus brought to the question of whether the exclusion of prospective jurors Gantt and Howell for cause because of their attitude toward the death penalty resulted in error so prejudicial as to warrant a new trial. We considered a similar question in the recent case of *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125. There after finding that a challenge for cause was erroneously allowed when the prospective juror only expressed general reservations concerning the death penalty, this Court stated:

> Even so, when the mandates of *Witherspoon* are followed in the selection of other jurors, as here, "the errone-

ous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case." *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). A defendant has no "vested right to a particular juror." *State v. Vann,* 162 N.C. 534, 77 S.E. 295 (1913). We adhere to this view. *Accord, Bell v. Patterson,* 402 F. 2d 394 (10th Cir. 1968), *cert. denied,* 403 U.S. 955, 29 L.Ed. 2d 865, 91 S.Ct. 2279 (1971); *State v. Conyers,* 58 N.J. 123, 275 A. 2d 721 (1971). Unpersuasive decisions contra include *Marion v. Beto,* 434 F. 2d 29 (5th Cir. 1970), *cert. denied,* 402 U.S. 906, 28 L.Ed. 2d 646, 91 S.Ct. 1372 (1971); *Woodards v. Cardwell,* 430 F. 2d 978 (6th Cir. 1970); *People v. Washington,* 71 Cal. 2d 1170, 459 P. 2d 259, 81 Cal. Rptr. 5 (1969). When no systematic exclusion is shown, defendant's right is only to *reject a juror prejudiced against him;* he has no right to *select one prejudiced in his favor. 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); *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); *State v. Vann, supra.* Thus the improper exclusion of Mrs. Lewis was not prejudicial and does not necessitate a new trial. Defendant's first assignment is overruled.

Initially it must be borne in mind that the case before us differs from *Witherspoon* in that the *Witherspoon* jury was called upon to decide both the issue of the defendant's guilt and whether if guilty the punishment would be death or imprisonment. Here the sole function of the jury was to decide whether defendant was guilty or innocent. A more compelling and convincing distinction between *Witherspoon* and the case before us for decision lies in the fact that in *Witherspoon* there was a systematic exclusion of all veniremen who opposed capital punishment by the intentional application of an improper standard. Such action does not appear in the record of the case before us. Finally, we note that defendant did not exhaust his peremptory challenges; nor did the State exhaust the peremptory challenges allotted to it. This is strong evidence that no juror was impaneled who was prejudiced against defendant. In fact, this record does not disclose a vestige of evidence that a juror was impaneled who was

not qualified and competent to serve. For the reasons stated, this assignment of error is overruled.

We again note that many of the problems growing out of prospective jurors' attitudes toward the death penalty could be avoided if district attorneys would prepare and use in the *voir dire* examination of prospective jurors questions framed according to the clear language of *Witherspoon.*

**[3]** Defendant next assigns as error the denial of his written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court." He argues that this ruling denied him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article I, §§ 19, 23 and 36 of the North Carolina Constitution.

G.S. 15-176.4, *effective 1 July 1974,* provides:

> Instruction to jury on consequences of guilty verdict.—When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime.

Defendant's request for this written instruction was filed on 2 October 1974.

In *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817, *filed 15 May 1974,* we stated:

> . . . [I]f 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.

This language indicates that the instruction was not necessary if the jury knew that one of its verdicts would result in a mandatory death sentence.

G.S. 15-176.4 makes it *mandatory* that the trial judge give the instruction upon the request of either party. It is, therefore, obvious that the trial judge erred when he refused to give the

instruction mandated by the statute. It is equally obvious that there could be no prejudice to the defendant if the jury *knew* the sentence of death would be imposed upon the return of a verdict of guilty of the crime of rape. Nothing in this record indicates that the jury was confused or uncertain as to the punishment which would result upon the return of a verdict of guilty of the crime of rape. Each impaneled juror was examined at length as to his or her attitude toward the death penalty. Unquestionably this record reveals that each juror knew that the death penalty would be imposed if a verdict of guilty was returned on the charge of rape. Thus there was no prejudicial error in the trial judge's failure to give the requested instruction.

**[4]** Finally defendant assigns as error the imposition of the death penalty, contending it to be cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments of the Constitution of the United States and by Article I, §§ 19 and 24 of the North Carolina Constitution. This contention and the supporting arguments here made have heretofore been considered and consistently rejected by this Court. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335; *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894; *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *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.

This assignment of error is overruled.

Since the death penalty was imposed, we have carefully examined this entire record and find no error warranting a new trial. Such examination discloses that defendant was accorded a fair trial and that the jury's verdict was based on overwhelming evidence including his own voluntary confession and irrefutable evidence identifying him as the person who committed the crimes charged.

No error.

Chief Justice SHARP dissenting as to the death sentence:

The rape for which defendant has been convicted occurred on 30 November 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 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), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

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LAURIE PRITCHETT, JAMES L. FAGAN AND JOHN D. COOK, PETITIONERS v. PAUL W. CLAPP, HAROLD R. CHEEK, O. H. LEAK, AND SAMUEL E. BURFORD, AS MEMBERS OF THE BOARD OF EXAMINERS OF THE HIGH POINT POLICEMEN'S PENSION AND DISABILITY FUND, CITY OF HIGH POINT AND HIGH POINT BANK AND TRUST COMPANY, RESPONDENTS

No. 85

(Filed 7 October 1975)

1. **Pensions— policemen's pension and disability fund — benefits defined — disability benefits unrestricted**

"Benefits," as that term is used in Section 3 of the Act establishing the High Point Policemen's Pension and Disability Fund, means the benefits specified in G.S. 128-27, which, *inter alia,* provide for both service retirement benefits (G.S. 128-27(a)) and unrestricted disability retirement benefits to qualified members (G.S. 128-27(c)), and under the latter section, a member's entitlement to disability benefits is not limited to disability resulting from injury sustained in the actual performance of his duties as a policeman.

2. **Pensions— policemen's pension and disability fund — benefits same as for State Retirement System**

In revising Section 3 of an Act to establish the High Point Policemen's Pension and Disability Fund, the General Assembly intended to

give High Point policemen retirement benefits equal to those provided by the State Retirement System but did not intend to provide discretionary disability benefits for a member injured in the line of duty in addition to disability benefits under G.S. 128-27(c); therefore, Section 4 of the Act providing for such discretionary disability benefits, which was inconsistent with the 1973 revision of Section 3 of the Act, was repealed by Section 7 of the 1973 revision which repealed "all laws and clauses of laws in conflict with the provisions of this Act."

APPEAL by defendants from *Rousseau, J.*, 23 December 1974 Session of GUILFORD County Superior Court, certified for initial appellate review by the Supreme Court of North Carolina pursuant to G.S. 7A-31(a), docketed and argued as Case No. 81 at the Spring Term 1975.

This is a proceeding to obtain judicial review of orders of the Board of Examiners (Board) of the High Point Policemen's Pension and Disability Fund (Fund) denying the application of petitioner Pritchett for disability retirement benefits and terminating benefits previously awarded petitioners Fagan and Cook. The material facts are admitted.

The Fund was established by N. C. Sess. Laws, ch. 496 (1955). This Act was thereafter amended by N. C. Sess. Laws, ch. 825 (1957); N. C. Sess. Laws, ch. 133 (1959); N. C. Sess. Laws, ch. 761 (1971); and N. C. Sess. Laws, ch. 282 (1973). The 1955 Act, *as amended through 1973*, will be hereinafter referred to as the Act.

Petitioners Pritchett, Fagan, and Cook are retired employees of the High Point Police Department. Under Section 5 of the Act, the individual respondents, by virtue of their respective positions, are members of the Board. Paul W. Clapp is Mayor of the City of High Point; Harold R. Cheek is City Manager; Samuel E. Burford is a member of the City Council; and O. H. Leak is the member of the Police Department elected to the Board. Also named as respondents are the City of High Point (admitted to be "a real party in interest") and the High Point Bank and Trust Company, the custodian of the Fund.

Each of the petitioners, at the time of his retirement or application for benefits under the Act, had theretofore been a full-time, paid member of the High Point Police Department with more than five years of creditable service in that capacity, and, had made the contributions to the Fund as required by the Act.

In May 1973 petitioner Fagan applied to the Board for disability retirement benefits because of injuries sustained in the performance of his official duties. On or about 1 July 1973 the Board found that Fagan was entitled to receive disability benefits in the amount of $450.45 per month. This sum was paid to him until 22 November 1974.

In October 1973 petitioner Cook applied to the Board for retirement benefits on account of disability which did not result from injuries sustained in the actual performance of his duties as a policeman. The Board found Cook entitled to disability retirement benefits in the amount of $434.08, and he received this sum each month until 22 November 1974.

On 4 November 1974 petitioner Pritchett applied for disability retirement benefits upon his retirement as chief of police of the City of High Point. On 22 November 1974 the Board denied Pritchett's application for disability retirement on the ground "that the present pension plan of the High Point Police Department does not cover general disability, but only disability from an injury resulting in the actual performance of duty," and Chief Pritchett has not "suffered from an injury incurred in the actual performance of duty."

At the time the Board denied benefits to Pritchett it suspended payments to Fagan and Cook "until such time as full determination is made of their eligibility to receive payments."

In order to understand the present controversy, the history of the Act must be examined in some detail. Prior to 27 April 1973 the right of a member of the High Point Police Department to receive retirement benefits from the Fund was determined by Sections 3 and 4 of the Act which then read as follows:

"Sec. 3. Any person, who is a full-time paid member of the High Point Police Department as shown by the records of the City of High Point at the time of the ratification of this act, or who becomes a full-time paid member thereof after the ratification of this act, and has or shall have a service record of twenty years as full-time paid member of said department and has or shall have reached the age of fifty-five years, or has or shall have attained the age of sixty-five, regardless of the length of his service, shall be eligible for *retirement from service* in the Police Department of the City of High Point and upon

retirement or dismissal from the department shall receive. . . . [specified benefits]" (Emphasis added.)

"Sec. 4. In the event any full-time paid member of the High Point Police Department shall hereafter become, in the opinion of the Board of Examiners, disabled from injury sustained in the actual performance of his duties, and is found by the Board of Examiners to be unable to work as a policeman, he shall receive each month from said Pension Fund during such disability whatever portion of the salary paid him by the City of High Point that the Board of Examiners, in its sole discretion, shall find that he is entitled to receive, after taking into consideration the nature and extent of his disability, his length of service prior to his disability, his income and compensation from all other sources, whether received directly or indirectly, the amount of the Pension Fund, and his ability to earn an income from any other source: Provided, that in no event shall the amount paid under this section exceed $100.00 per month. Provided, further, that in no event shall any compensation be paid him under this Section during such time as his income and compensation from any other source shall equal or exceed the salary paid him by the City of High Point at the time of his disability; and it is further the true intent, meaning and purpose of this act that the Board of Examiners shall be empowered hereunder, in its discretion, to pay any amount less than the maximum enumerated, and said board may refuse to make payment in any amount in any case in any or all the classes herein enumerated under this Section."

Section 3 of the Act was rewritten by N. C. Sess. Laws, ch. 282, § 2 (1973), effective 27 April 1973. The section as amended governed petitioners' rights to benefits on 22 November 1974. It provides:

"Sec. 3. Any person who is a full-time member of the High Point Police Department as shown by the records of the City of High Point at the time of the ratification of this act, or who becomes a full-time paid member thereof after the ratification of this act, shall, *upon his termination from service,* be entitled to receive benefits equal to those he would have received based upon his eligibility under the provisions of Chapter 128 of the General Statutes governing the North Carolina Local Governmental Employees Retirement System, as amended from time to time, had he been a member of that retirement system, exclusive of an employer providing lump sum death benefit. Post retire-

ment benefit increases shall not apply to members retired prior to the ratification of this act except at the discretion of the Board of Examiners." (Emphasis added.)

Although Section 3 was almost completely rewritten by Chapter 282, that Chapter did not mention Section 4 of the Act quoted above. Section 7 of Chapter 282, however, repealed "all laws and clauses of laws in conflict with the provisions" of that Chapter.

Obviously Article 3 of the Act, as amended in 1973, purports to provide that a full-time policeman of High Point is, upon his termination from service, entitled to benefits equal to those he would have received under the statutes regulating the North Carolina Local Governmental Employees Retirement System (State Retirement System) had he been a member of that system. Therefore, certain sections of the statutes regulating the State Retirement System (found in N. C. Gen. Stat., ch. 128, art. 3) are relevant to decision here. These are set forth below:

"§ 128-21(19) 'Retirement' shall mean withdrawal from active service with a retirement allowance granted under the provisions of this Article. . . ."

"§ 128-27. Benefits.—(a) Service Retirement Benefits.—

(1) Any member in service may retire upon written application to the Board of Trustees setting forth at which time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have 30 years of service or shall have attained the age of 60 years, or if a uniformed policeman or fireman he shall have attained the age of 55 years, and notwithstanding that, during such period of notification, he may have separated from service." (§ 128-27(b4)) details the method of computing the service retirement allowances for members retiring on or after 1 July 1973.)

"§ 128-27(c) Disability Retirement Benefits.—Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than 30 and not more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medi-

cal examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired." (§ 128-27(d3)) details the method of computing the disability retirement benefits of persons retiring on or after 1 July 1971.)

When the Board entered its orders on 22 November 1974 denying and terminating their benefits, petitioners promptly sought judicial review in the Superior Court of Guilford County. In their petition they contended:

(1) N. C. Gen. Stat., ch. 128, art. 3, which Section 3 of the Act incorporates, specifically provides for both service retirement benefits and disability benefits which are not limited to disability resulting from injuries sustained in the performance of police duties. (2) Section 3 of the Act, which now determines his right to periodic benefits, declares without restriction or limitation that *upon his termination from service* he is entitled to receive the same benefits to which a member of the State Retirement System with "his eligibility" would be entitled. (3) Section 4 of the Act, which provided for the *discretionary* payment of benefits to members *disabled in the performance of duty,* is inconsistent with Section 3 of the Act as rewritten in 1973. Section 4 was, therefore, repealed by Section 7 of Chapter 282. (4) The Board acted arbitrarily and in disregard of law in denying Pritchett's application and in suspending the benefits previously allowed Fagan and Cook.

When this cause came on to be heard, Judge Rousseau, after marshaling the admitted facts as his findings, made the following conclusions of law: (1) Under Section 3 of the Act all members of the Fund are entitled to all retirement benefits for which G.S. 128-27 provides, including the disability retirement benefits specified in G.S. 128-27(c). (2) Section 4 of the Act violates the equal protection clauses of both the State and Federal Constitutions in that it provides no "acceptable standards" for determing the benefits "to which members of the Fund injured in the actual performance of duties" would be entitled, and would permit unequal and arbitrary payment of benefits. (3) The Board's action in suspending the payment of disability retirement benefits to Fagan and Cook and in denying Pritchett's application was illegal.

Based upon the foregoing conclusions, Judge Rousseau entered judgment remanding the matter to the Board with directions that it (1) "determine Pritchett's application for disability retirement benefits upon its merits" pursuant to the provisions of the Act and G.S. 128-27; (2) reinstate the disability retirement benefits to which it had previously determined Fagan and Cook entitled and continue paying such benefits "until such time as it shall be determined that he is otherwise subject to an increase or decrease in such benefit"; and (3) pay Fagan and Cook each in a lump sum the total of all monthly benefits withheld by the action of the Board on 22 November 1974.

From the foregoing judgment respondents appealed to the Court of Appeals. Upon the petition of both appellants and appellees, we certified the cases for initial appellate review by the Supreme Court.

*Haworth, Riggs, Kuhn and Haworth for petitioner appellees.*

*Knox Walker for respondent appellants.*

SHARP, Chief Justice.

This appeal presents these questions: Did N. C. Sess. Laws, ch. 282 (1973) incorporate the disability retirement benefits of G.S. 128-27(c) into Section 3 of the Act in addition to the service retirement benefits of G.S. 128-27(a)? If so, does Section 4 of the Act now provide an additional benefit to a member who is disabled from injury sustained in the actual performance of his duties, or is Section 4 in conflict with Section 3, as amended, and therefore repealed by Section 7 of Chapter 282?

Respondent-appellants contend that repeals by implication are not favored, and the legislature manifested its intent to amend Section 3 only with reference to service retirement benefits by its failure to repeal or to mention Section 4. They also contend that the trial judge erred in passing upon the constitutionality of Section 4 when that question was not raised by the parties. Petitioner-appellees make the same contentions here which they made on appeal to the superior court.

As an aid to construction we first consider the history of the Act. As originally enacted by N. C. Sess. Laws, ch. 496 (1955), Section 3 of the Act specified the benefits which members "eligi-

ble for *retirement from service*" were entitled to receive "upon retirement or dismissal."

Section 4 of the Act authorized the Board to pay a monthly disability allowance—the amount to be determined by the Board "in its sole discretion" within specified maximums—for any full-time paid member of the High Point Police Department "disabled from injury sustained in the active performance of his duties," and found by the Board "to be unable to work as a policeman. . . ." In its sole discretion the Board could also "refuse to make payment in any amount in any case. . . ."

Subsequent to 1955 the Act was amended by the enactments listed in the preliminary statement. Until 1973 these amendments involved only changes in the contributions which members of the police force were required to make to the Fund and in the monthly benefits specified by sections 3 and 4. However, after the General Assembly rewrote Section 3 of the Act in 1973, any full-time member of the High Point Police Department, "upon his retirement from service" became entitled to receive *benefits* "equal to those he would have received based upon his eligibility under the provisions of Chapter 128 of the General Statutes governing the North Carolina Local Governmental Employees Retirement System . . . had he been a member of that retirement system." The 1973 enactment (Ch. 282, § 1) also rewrote Section 1(c) of the Act to provide (1) that the monthly deductions from the pay check of every member of the fund "shall at all times conform to the provisions of the North Carolina Local Governmental Employees Retirement System"; and (2) that the city of High Point shall contribute to the Fund on the same basis it contributes to the State Retirement System for its other employees.

**[1]** The 1973 revision of Section 3 of the Act unequivocally states the legislative intent (1) that any full-time member of the High Point Police Department shall make the same contribution to the Fund which members of the State Retirement System make, and (2) that, upon the termination of his service, a member shall receive from the Fund the same service and disability retirement *benefits* a member of the State Retirement System with his eligibility would receive from the State Retirement Fund. Thus, we hold that "benefits," as that term is now used in Section 3 of the Act, means the benefits specified in G.S. 128-27, which, *inter alia,* provides for both service retire-

ment benefits (G.S. 128-27(a)) and *unrestricted* disability retirement benefits to qualified members (G.S. 128-27(c)). Under the latter section, a member's entitlement to disability benefits is not limited to disability resulting from injury sustained in the actual performance of his duties as a policeman as it was under Section 4 of the Act.

Had the General Assembly, when it rewrote Section 3 in 1973, intended to limit Section 3 benefits to service retirement benefits under G.S. 128-27(a), it is inconceivable that it would not have restricted the term *benefits*. It would have modified that term by the adjective phrase "service retirement" or it would have specifically excluded disability benefits under G.S. 128-27(c) just as it excluded "employer providing lump sum death benefit." Further, the use of the all-embracing phrase "termination from service" as rewritten in Section 3 of the Act manifests the legislative intent to encompass any cessation of employment. It includes resignation, discharge, disability and service retirement.

**[2]** It is quite true, as heretofore pointed out, that when Section 3 was rewritten in 1973, Chapter 282 made no reference to Section 4 of the Act. However, by Section 7, Chapter 282 repealed "all laws and clauses of laws in conflict with the provisions of this Act." In our view Section 4 is totally inconsistent with the 1973 revision of Section 3 of the Act and it was, therefore, repealed by Section 7 of Chapter 282, quoted above. Of course, a clause specifically repealing Section 4 would have been preferable, but sometimes even Solons nod. Sections 3 and 7 of Chapter 282 leave no doubt that the legislative purpose was to give High Point policemen retirement benefits equal to those provided by the State Retirement System and no more. We do not for a moment entertain the idea that the legislature ever intended to provide discretionary disability benefits under Section 4 for a member injured in the line of duty in addition to disability benefits under G.S. 128-27(c).

Thus, we hold that this Section (N. C. Sess. Laws, ch. 496, § 4 (1955)), as amended, was repealed by N. C. Sess. Laws, ch. 282 § 7 (1973). Our conclusion that this was the intent of the General Assembly is bolstered by its enactment of N. C. Sess. Laws, ch. 691 (1975) (effective 25 June 1975). Section 5 of this enactment specifically repealed Section 4 of the Act, and Section 4 of the 1975 enactment amended Section 3 of the Act so that

the Act now specifically provides benefits, "including both service retirement and disability retirement." Where the Act amended is ambiguous, the amendment "may be resorted to for the discovery of the legislative intention in the enactment amended." *Taylor v. Crisp,* 286 N.C. 488, 212 S.E. 2d 381 (1975); *Childers v. Parker's, Inc.,* 274 N.C. 256, 162 S.E. 2d 481 (1968).

Our construction of N. C. Sess. Laws, ch. 282 (1973) makes it unnecessary to decide whether the judge correctly considered or decided the constitutionality of Section 4 of the Act.

For the reasons stated herein the judgment of the Superior Court is

Affirmed.

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ADA GRANSON WILLIAMS v. PILOT LIFE INSURANCE COMPANY

No. 35

(Filed 7 October 1975)

1. **Appeal and Error § 57; Trial § 58— review of findings of fact**

   The trial court's findings of fact in a nonjury trial have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.

2. **Trial § 58— findings by court — ultimate facts**

   The trial court in a nonjury trial is required to find and state the ultimate facts only and not the evidentiary facts. G.S. 1A-1, Rule 52(a)(1).

3. **Insurance § 50— accident policy — death from accidental bodily injury — sufficiency of court's findings**

   In an action to recover under a policy insuring against death occurring "solely as a direct result, and independent of all other causes, of accidental bodily injury," the trial judge found the ultimate facts sufficient to support his judgment for plaintiff when he found that insured died as a result of an accidental fall and that her death "was solely as a direct result thereof and independent of all other causes," since by so finding the judge rejected opposing inferences raised by defendant's evidence that the fall was not accidental and was caused by a preexisting disease or infirmity, i.e., an epileptic seizure.

APPEAL by defendant from decision of the Court of Appeals, 25 N.C. App. 505, 214 S.E. 2d 230 (1975), upholding judgment

of *Moore, J.*, 19 August 1974 Session, DURHAM County District Court.

Civil action to recover the sum of $5,000.00 allegedly due under the terms of a life insurance policy. By consent, the case was tried before Judge Moore without a jury.

On 12 March 1962 Pilot Life Insurance Company (Pilot) issued its Policy No. 3436384 wherein Doris Yvonne Ryals was the insured and plaintiff Ada Granson Williams was the beneficiary. Said policy was in full force and effect on 5 April 1973 when Doris Yvonne Ryals died under circumstances hereinafter set out. The policy provides that after it has been in effect for ten years Pilot will pay death benefits in the sum of $5,000.00 if the death of the insured occurs "solely as a direct result, and independent of all other causes, of accidental bodily injury" sustained while the policy is in effect.

Plaintiff's evidence tends to show that on the morning of 3 April 1973 Doris Yvonne Ryals was in her kitchen preparing pork chops for breakfast. The kitchen floor had been wet mopped five or ten minutes earlier by Mabel Louise Scott, who lived in the same house with Mrs. Ryals. Mabel Scott heard her say "oh" and ran downstairs where she found Mrs. Ryals stretched out on her back on the floor. She asked what happened, and Mrs. Ryals replied, "I slipped and fell." Mrs. Ryals got up unassisted, went to a chair, and said her head felt "like it's ready to burst." An ambulance was summoned and took Mrs. Ryals to Duke Hospital. Although apparently in great pain, she talked sensibly and coherently.

By deposition, Dr. David Rosenfield, employed at Duke Hospital by the Department of Neurology, stated that Mrs. Ryals died at the hospital at 5:15 p.m. on 5 April 1973. He said that members of Mrs. Ryals' family told him that she was standing in front of the refrigerator and all of a sudden fell "and started having movements." He said whoever the person was who furnished that information said "he or she was sitting next to the breakfast table and that the patient got up and went to the refrigerator and just stood there for a second or so after having opened the door and then fell and had the movements which we were discussing."

Dr. Rosenfield testified on cross-examination that, according to his notes, Doris Ryals denied having seizures on 3 April 1973 or at any other time. He said she was well oriented, knew

where she was, knew what year it was, and knew her name. Dr. Rosenfield said he did not know whether she had seizures or not. He further stated in his deposition that his notes indicated Mrs. Ryals was admitted at the Duke emergency room at 10:34 a.m.; that he saw her at 1:00 p.m. and she was unable at that time to carry on any kind of coherent conversation.

Plaintiff testified she had known Mrs. Ryals since she was three weeks old and never knew her to have seizures.

Plaintiff rested. Defendant's motion for dismissal under Rule 41(b) was denied.

Defendant offered the Duke Hospital medical records on Doris Yvonne Ryals showing, among other things, that she was admitted at 10:34 a.m. on 3 April 1973 with an entry "seizure and struck head." The history section of the records recites that Mrs. Ryals had an apparent seizure which was observed by her brother earlier that morning while patient was working with the stove "when she became stiff and fell down and struck her left occipital area on the floor." The hospital records further note that the "patient was well until this morning when she had this first seizure while cleaning a refrigerator. Observed by her brother. She then had a second seizure in the Duke emergency room." Included in the hospital report is a death summary which indicates that Mrs. Ryals had a history of chronic alcoholism and had been drinking heavily on the weekend prior to admission. "There is no previous history of seizures or head trauma."

In rebuttal, plaintiff offered the following from the deposition of Dr. Podell, Department of Psychiatry at Duke Medical Center: "There is no way that I could tell, based on my actual examination of this patient, whether or not she ever had a seizure prior to her admission to the hospital. . . . I personally did not obtain any information from her with respect to the cause of the fall."

Mabel Louise Scott was recalled and testified that Mrs. Ryals' brother might have been the one who gave the information contained in the Duke Hospital records concerning seizures. She stated, however, that decedent's brother was not present when the fall occurred. Rather, "he only came back to the house when we were going to the hospital and had alcohol on his breath and was staggering. He did not observe Doris at any time from the time she fell or immediately prior thereto. I

don't know how he was telling these doctors that she had had a seizure because I know that she did not have a seizure."

The parties stipulated that Pilot's Policy No. 3436384 was in effect when the insured died on 5 April 1973 and that the sole issue to be determined is "whether or not insured . . . died solely as a direct result, and independent of all other causes, of accidental bodily injury, as set forth in the policy. . . ."

The trial judge found, *inter alia*, that:

1. The policy of insurance sued upon was issued by Pilot on 12 March 1962.

2. On 3 April 1973 the insured sustained an injury while in the kitchen of her home and was taken to Duke Hospital where she died on 5 April 1973.

3. Plaintiff was named as beneficiary in the policy and, since the policy had been in effect more than ten years, the amount, if any, to be paid for accidental death was $5,000.00.

4. "[T]he insured suffered an accidental fall in her home on April 3, 1973, and as a result of said fall died on April 5, 1973. That said death was solely as a direct result thereof and independent of all other causes, which resulted in accidental bodily injury and death of the insured, Doris Yvonne Ryals."

The trial judge thereupon entered judgment for $5,000.00 in favor of plaintiff with interest from 5 April 1973 until paid. On appeal, the Court of Appeals affirmed with Clark, J., dissenting. Defendant thereupon appealed to the Supreme Court as of right under G.S. 7A-30(2).

*W. O. King and R. Hayes Hofler III, Attorneys for defendant appellant.*

*Richard N. Watson and Eugene C. Brooks, Attorneys for plaintiff appellee.*

HUSKINS, Justice.

The determinative question is whether the insured died solely as a direct result of *accidental bodily injury and independent of all other causes.* The trial judge made findings of fact and, upon those findings, answered the question affirmatively and entered judgment in favor of plaintiff. The Court of Appeals affirmed. Defendant contends the facts found are insufficient

to support the judgment and, on appeal to this Court, contends that the trial court's refusal to make findings of fact as to *the specific cause of the fall* (slipping on the floor, a seizure, or both) constitutes error requiring reversal or, in the alternative, remand for appropriate findings.

**[1]** The trial was by the judge without a jury. In that setting the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968). The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567 (1962). If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. *Hodges v. Hodges, supra.* "There is no difference in this respect in the trial of an action upon the facts without a jury under Rule 52(a) (1) and a trial upon waiver of jury trial under former G.S. 1-185. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts." *Blackwell v. Butts,* 278 N.C. 615, 180 S.E. 2d 835 (1971).

**[2]** Under our former practice, when a jury trial was waived, former G.S. 1-185 required the trial judge: "(1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. [Citations omitted.] In addition, he must state his findings of fact and conclusions of law separately. [Citation omitted.] The judge complies with this last requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. [Citation omitted.] There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. [Citations omitted.] G.S. 1-185 requires the trial judge to find and state the ultimate facts only." *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951). These sound principles of law are just as applicable today in the trial of civil actions without a jury under Rule 52(a) (1) as formerly under G.S. 1-185.

**[3]** The crucial finding of fact by the trial judge, the sufficiency of which is controverted by defendant, reads as follows: "That upon the hearing of the evidence, the Court further finds as a fact that the insured suffered an accidental fall in her home on April 3, 1973, and as a result of said fall died on April 5, 1973. That said death was solely as a direct result thereof and independent of all other causes, which resulted in accidental bodily injury and death of the insured, Doris Yvonne Ryals." Defendant argues that the insured suffered a seizure which caused the fall so as to constitute the seizure itself a cause of her death. Thus defendant argues that death did not result from accidental bodily injury *independent of all other causes* and contends the findings of fact do not resolve the conflicts in the evidence bearing on the disputed cause of death. Plaintiff, on the other hand, contends that the facts found are the ultimate facts and are sufficient to support the judgment.

Here, the trial judge acted in the dual capacity of judge and jury. The evidence raised conflicting inferences of causation of the insured's death. He weighed these conflicting inferences and determined that the insured died as a result of an *accidental* fall and that her death "was solely as a direct result thereof and independent of all other causes. . . . " By so finding, the judge rejected opposing inferences that the fall resulting in death was *not accidental* and was caused by a preexisting disease or infirmity, *i.e.*, an epileptic seizure. The finding resolved the ultimate issue, *Taney v. Brown*, 262 N.C. 438, 137 S.E. 2d 827 (1964), and that resolution is binding on appellate courts since the evidence supports the findings and the findings support the judgment. *Blackwell v. Butts, supra; Knutton v. Cofield, supra*, and cases there cited.

Defendant relies on *Penn v. Insurance Co.*, 160 N.C. 399, 76 S.E. 262 (1912); *Harris v. Insurance Co.*, 193 N.C. 485, 137 S.E. 430 (1933); *Skillman v. Insurance Co.*, 258 N.C. 1, 127 S.E. 2d 789 (1962); *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70 (1965); and *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966). We find nothing in any of these cases at variance with the conclusion we have reached.

In *Penn* plaintiff sued on an accident policy for the loss of an eye. The policy insured against "bodily injuries effected, directly and independently of all other causes, through external, accidental, and violent means." Plaintiff offered evidence tending to show that he lost the sight of his eye when he accidentally

fell from a train. There was also evidence that, at the time of the alleged injury, plaintiff had a cataract on that eye which would have eventually destroyed the sight. The conflicting evidence as to the cause of plaintiff's loss of his eyesight was submitted to the jury, the court charging that if the jury found by the greater weight of the evidence that plaintiff's loss of sight was caused directly and independently of all other causes, through external, accidental, and violent means, to answer for the plaintiff; but to answer for defendant if plaintiff's accident operated in connection with the old cataract to destroy the eye. Held: The charge was correct.

In *Harris* plaintiff sued on an accident insurance policy which covered injury resulting "directly and exclusively of all other causes from bodily injury sustained . . . solely through external, violent, and accidental means. . . . " Plaintiff's evidence tended to show that he had suffered a gunshot wound in his hip twenty years prior to taking out the policy but the wound had cured; that plaintiff accidentally fell in a stump hole and suffered serious injury disabling him to work. The leg had not bothered plaintiff in twenty years before the accident. About four weeks after the accident the wound began to run and pieces of bone came out. Defendant offered medical evidence tending to show that the old gunshot wound as well as the alleged fall into a stump hole combined to cause the trouble complained of. Held: The conflicting evidence on the question of causation carried the case to the jury.

In *Skillman* plaintiff sued to recover under a double indemnity clause in a policy of insurance which provided for double indemnity in case death of the insured "resulted directly and independently of all other causes from bodily injury inflicted solely through external and accidental means," and affirmatively provided that if an existing disease or illness contributed to the accident resulting in death, the insurer was not liable under the double indemnity clause. The evidence tended to show that insured was suffering from hypertension, and while driving his car along a straight highway ran off the road and into the river. There was expert testimony that insured died from a coronary occlusion and not from drowning. Held: The trial court correctly instructed the jury to the effect that if the disease was the cause of the accident or contributed to it the insurer would not be liable under the double indemnity clause.

In *Horn* plaintiff sued under the supplementary provision of an insurance policy which provided for additional payments if death of the insured was caused directly and exclusively by external, violent and accidental means. The evidence showed that insured had theretofore suffered heart attacks and the doctor who performed the autopsy testified that the wounds received by insured in the accident were superficial and could not alone have caused death. Held: Nonsuit should have been entered.

In *Chesson* the policy in question provided for payment of a stated sum upon receipt of proof that the insured "has sustained bodily injury resulting in death within ninety days thereafter through external, violent, and accidental means, death being the direct result thereof and independent of all other causes. . . . " The policy contained a provision that the accident indemnity provision did not apply if death occurred "from disease or from bodily or mental infirmity in any form." There was evidence that insured had been repeatedly committed for acute alcoholism and resulting mental disorder during the prior year; that on the occasion in question he was standing in a corridor in a nervous condition, suddenly threw his arms and hands across his chest, jumped straight backward striking his head on the cement floor, and died of cerebral hemorrhage. Held: The evidence was insufficient to show that death resulted solely through violent, external and accidental means—if insured voluntarily jumped backward the fall was not through accidental means, and if he jumped backward as a result of hypertension, delirium tremens, or other mental or physical infirmity, the fall was not the sole cause of his death.

In the case before us there is plenary evidence to support the finding that the insured "suffered an accidental fall" and that her death was a direct result thereof, independent of all other causes. This finding supports the judgment. In light of the equivocal nature of the evidence concerning a seizure, the failure of the fact-finder to accept defendant's version is understandable.

For the reasons stated, the result reached by the Court of Appeals upholding the findings and judgment of the trial judge is

Affirmed.

STATE OF NORTH CAROLINA v. PAUL SHEPHERD

No. 3

(Filed 7 October 1975)

1. **Criminal Law § 5; Homicide §§ 7, 28— insanity — effect on premeditation and deliberation — jury instructions**

The trial court in a first degree murder case did not err in failing to instruct the jury as to the effect of insanity or mental weakness on premeditation and deliberation.

2. **Homicide § 21— first degree murder — insanity and premeditation and deliberation — sufficiency of evidence**

The trial court properly denied defendant's motion for nonsuit as to first degree murder based primarily on defendant's claim that he was insane at the time of the killing and that the State failed to prove that the killing was with premeditation and deliberation where the evidence tended to show that defendant did know right from wrong at the time of the crime and did know that he had killed his wife, defendant was remorseful and tried to justify what he had done by the explanation that his wife was running around with one or more men, there was no evidence to indicate provocation on the part of deceased, and defendant used grossly excessive force by apparently firing the entire load of fourteen cartridges from a semi-automatic rifle, with four of the bullets striking deceased in the back.

3. **Criminal Law § 112— reasonable doubt — jury instruction proper**

The trial court's instruction to the jury that reasonable doubt was "not a doubt suggested by the ingenuity of counsel or your own ingenuity not legitimately warranted by the testimony" was correct and proper, though the trial court was not required to define "reasonable doubt" absent a request to do so.

4. **Criminal Law § 101— dismissal of jury overnight — admonitions proper**

The trial court's instruction to the jury, before letting them go to their homes for the night, to refrain from discussing the case with anyone and to receive no information concerning the case from TV, radio, newspaper or individuals was fair and without error.

5. **Criminal Law § 101— jury — break between charge and deliberations — no error**

The trial court did not err in telling the jury to take a ten minute break after the charge before going to the jury room, since the court had every reason to believe that the deliberations of the jury could be long and tedious.

6. **Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence — discretionary matter**

Defendant's motion to set aside the verdict as contrary to the weight of the evidence was addressed to the trial court's discretion and the court's decision is not reviewable on appeal.

APPEAL by defendant from *Friday, J.*, at the 3 June 1974 Session of the Superior Court of BUNCOMBE County. (Petition for writ of certiorari allowed 27 January 1975.)

Defendant was convicted of first-degree murder of his wife. The judgment of the court was that the defendant be confined in Central Prison for the rest of his natural life and that he be given credit for the seven years, eight months, and twenty-one days of incarceration pending trial.

The State's evidence tended to show that on 14 September 1966 the defendant shot and killed his wife on a highway in Buncombe County and then shot himself. He used a semi-automatic .22 caliber rifle. There were at least four entrance wounds in the back of the deceased. The rifle held fourteen cartridges and fourteen spent cartridges were found at the scene. Witnesses testified that the defendant stated that he shot his wife and that he was crying. He told some witnesses that he was going to die and wanted to see his mother. He later told substantially the same thing to an Asheville police detective at the hospital. The defendant told some of the witnesses that he shot his wife because she was running around with other men.

A true bill of indictment was returned by the Buncombe County Grand Jury at the October 1966 term. On 19 December 1966 the defendant was committed to Dorothea Dix Hospital, Raleigh, N. C., pursuant to the provisions of G.S. 122-91 to determine his competency to stand trial. He remained there until 5 October 1971 when he was discharged. This discharge provided that the defendant "now understands the true nature and possible consequences of his criminal charge, and he is able to assist in his defense. This patient should be returned to court inasmuch as he is competent to stand trial." Thereupon the defendant was returned to Buncombe County and on 13 December 1971 he was readmitted to Dorothea Dix Hospital. He remained there until 26 March 1974 when it was recommended that he be returned to the Superior Court of Buncombe County, but that he should remain in the hospital until shortly before his trial. It was determined at this time that the defendant "has the capacity to comprehend his legal position and understand the nature and object of the proceedings against him. He is able to conduct his defense in a rational manner, and to cooperate with his attorney to the end that any available defense may be presented."

The defense offered the evidence of Dr. Robert Rollins, who was identified as the Director of the Forensic Unit of Dorothea Dix Hospital. Dr. Rollins expressed the opinion that the defendant could not distinguish right from wrong at the time he shot his wife. It developed on cross-examination that Dr. Rollins did not see the defendant until 1 October 1971, more than five years after the killing. He had to rely substantially on his examination at that time, plus the records made by others in the hospital. No one at the hospital had seen the defendant prior to the time of the killing. Without objection, the discharge records of Dorothea Dix Hospital were permitted into evidence. These indicated that the defendant was originally under the care of Dr. Laczko who died in July of 1971. Dr. Rollins succeeded him as Director of the Forensic Unit. Dr. Rollins indicated that the fact that defendant killed his wife "could have contributed to the depressive state Dr. Laczko found him in." Even though Dr. Rollins determined that the defendant was depressed at the time of the crime, it was his opinion that the fact of the crime "probably would have contributed to his subsequent illness."

The only other witness for the defendant was his sister who indicated that the defendant was in an accident in Florida in 1958 and was committed to a psychiatric unit in Florida for some five weeks following hospitalization for the accident. The defendant did not testify in his own behalf.

Other pertinent facts in evidence will be discussed in the opinion.

*Attorney General Rufus L. Edmisten by Associate Attorney Joan H. Byers for the State.*

*Peter L. Roda, Public Defender for Buncombe County, for defendant appellant.*

COPELAND, Justice.

[1] The defendant first assigns as error that the court failed to instruct the jury as to the effect of insanity or mental weakness on premeditation and deliberation.

The court instructed the jury as to the proper test for determining whether or not defendant was legally sane at the time of the killing. The defendant requested no further instructions when the trial judge made inquiry about it. Our Court

has previously ruled on this particular problem in two recent cases, *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975), and *State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51 (1975). In *Wetmore* our Court discussed, but clearly did not adopt, what has been called the theory of diminished responsibility with respect to the specific intent to commit a crime such as first-degree murder. Under this theory, some of the States hold that a defendant may offer evidence of an unusual or abnormal mental condition which is not sufficient to establish legal insanity, but tends to show that he did not have the capacity to premeditate or deliberate at the time of the murder.

Finally, as to this first assignment of error, in this type of murder the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. G.S. 14-17; Strong, N. C. Index 2d, Homicide, § 4, and numerous cases therein cited. "[A] specific intent to kill is a necessary ingredient of premeditation and deliberation. [Citations omitted.] It follows, necessarily, that a defendant who does not have the mental capacity to form an intent to kill, or to premediate and deliberate upon the killing, cannot be convicted of murder in the first degree, . . . The jury by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts. . . . That finding, supported as it is by ample evidence, is conclusive on appeal, . . . " *State v. Cooper, supra,* at 572, 213 S.E. 2d at 320. This is so even though the opinion of Dr. Rollins was to the contrary as indicated in assignments of error discussed below. This assignment of error is overruled.

Defendant's Assignment of Error No. 2 is the denial of his motion to nonsuit at the close of the State's evidence and at the close of all the evidence.

On a motion for nonsuit the evidence for the State must be considered in its most favorable light and should be taken to be true. Conflicts and discrepancies in the evidence should be resolved in the State's favor. *State v. Cooper, supra; State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

**[2]** In our situation, the motion for nonsuit as to first-degree murder was primarily based on defendant's claim that at the time of the killing, the defendant was insane, and, therefore, not responsible for his acts. In addition, the defendant contends

the State has failed to prove beyond a reasonable doubt that the killing was with premeditation and deliberation.

The evidence indicates sanity as well as premeditation and deliberation. Three witnesses and a police officer saw and heard the defendant shortly after the killing. Mary Jo Jarvis arrived at the scene of the killing and observed the defendant. She heard him say, "I just killed my wife and shot myself." Later the defendant walked up closer to Mrs. Jarvis and said, "Please get my mother, I haven't got long to live, I want my mother." William C. Autry came upon the scene and saw a woman lying out in the road and a rifle nearby. He went to a telephone and reported this to the police authorities. When he returned, he found that the body of the woman had been moved to the side of the road. He saw the defendant kneeling beside her. The defendant twice told him that he had killed the woman and that he had caught her with some men up on the mountain. The defendant had apparently been shot in the chest at this time. Defendant, who was partly crying at the time, also said to Mr. Autry, "I'm shot, and I'm dying." Frank Tweed observed the defendant at the scene and heard him say, "I killed my wife." R. D. Poore, a detective sergeant with the Asheville police, made the investigation. He identified the Remington .22 caliber semi-automatic rifle, a butt loader that only shoots .22 caliber long shells. He found fourteen spent .22 cartridges there on the pavement. The police officer later went to the hospital and saw the defendant. A voir dire hearing was conducted by the court and it was determined that the statements made by defendant to the police officer were admissible. After the defendant had been advised that he could call an attorney or a friend, he said to the police officer: "I don't want no counsel or call nobody. I've shot my wife. I've killed my wife and I want to die." He then added that he killed his wife because he caught her running around with a man; that she was no good but that he loved her. These statements were made by the defendant not in response to any question from the police officer.

Dr. Rollins, a medical expert specializing in the field of psychiatry and now Director of the Forensic Unit at Dorothea Dix Hospital, gave as his opinion that the defendant was unable to distinguish right from wrong at the time of the killing. Unfortunately, Dr. Rollins did not examine the defendant until more than five years after the killing. In the meantime he had been under the care of Dr. Laczko, now deceased. Dr. Laczko

did not see the defendant until more than three months after the killing. Dr. Rollins had to base his opinion upon the records of Dr. Laczko and his personal examinations more than five years after the killing. It is interesting to note that Dr. Rollins on cross-examination admitted that the murder could have contributed to the defendant's unstable mental condition when he entered Dorothea Dix Hospital on 19 December 1966.

The witnesses and the police officer observed the defendant immediately after the crime. Certainly what they observed at the time did not indicate insanity. These actions, shortly after the slaying, tend to show that the defendant did know right from wrong and that he knew that he had killed his wife. He was obviously remorseful and tried to justify what he had done by the explanation that she was running around with one or more men. Certainly, as Dr. Rollins indicated, the fact that the defendant had committed this crime probably could have contributed to his subsequent depression and mental illness. In view of the evidence, the question of legal insanity was for the jury to decide.

On 26 August 1975 counsel for defendant filed with this Court a memorandum of additional authority, to wit, *Mullaney v. Wilbur,* 17 Cri. 3063, 44 L.Ed. 2d 508 (1975), to sustain these contentions. *Mullaney* was not based on a plea of insanity and is no authority for these assignments of error.

As indicated above, defendant also contends the evidence was insufficient to satisfy the jury with respect to premeditation and deliberation.

> "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. [Citations omitted.] 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 the defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased has been felled." *State v. Buchanan,* 287 N.C. 408, 420-21, 215 S.E. 2d 80, 87-88 (1975).

In our case, premeditation and deliberation can be inferred from (1) the lack of any evidence to indicate provocation on

the part of the deceased; (2) the statements of the defendant made shortly after the killing giving the reason for the murder, to wit, the deceased was running around with one or more men; and (3) the use of grossly excessive force by the apparent firing of the entire load of fourteen cartridges from a semi-automatic rifle, with four of the bullets striking the deceased in the back. The defendant has failed to show any merit in these assignments of error and they are overruled.

**[3]** The defendant assigns as error the charge of the court to the jury that reasonable doubt was "not a doubt suggested by the ingenuity of counsel or your own ingenuity not legitimately warranted by the testimony." It is the law that a trial judge is not required to define "reasonable doubt" without a request to do so, but if he does undertake to define it, the definition should be in substantial accord with the definitions of this Court. *State v. Hammonds,* 241 N.C. 226, 232, 85 S.E. 2d 133, 138 (1954); *State v. Steele,* 190 N.C. 506, 512, 130 S.E. 308, 312 (1925). The charge given was suggested by our Court in *Steele* and approved by our Court in *Hammonds.* The charge given as to reasonable doubt was correct and conforms to our requirements. This assignment of error is without merit and is overruled.

**[4]** The defendant next assigns as error the court's instruction to the jury to think about the evidence and arguments of counsel overnight before the court gave its charge. The judge stated that it was the usual custom to keep a jury housed overnight in a case of this type, but that the court would allow them to go home with the following instruction:

> "First is that you will not discuss the case with anyone in the interest of fairness. Don't talk about it with your wife, husband, friend, or family at all. Just don't mention it overnight. Think about the evidence and the arguments, but do not discuss it. Do not receive any information about the case in any way, Members of the Jury, that is, now, by radio, or by newspaper, or from any person by way of telephone. Walk away from it or do not listen to it or do not read it. Don't receive any information about it.
>
> "Again, Members of the Jury, in the interest of fairness, don't do anything overnight, Ladies and Gentlemen of the Jury, which would in any way cast any detrimental reflection upon your high and important position as a

fair and impartial juror in the trial of this case that is now under consideration."

The instruction as given was completely fair and this assignment of error is totally without merit. *State v. Dalton*, 206 N.C. 507, 174 S.E. 422 (1934).

**[5]** Counsel for the defendant next contends that the court erred in telling the jury to take a ten minute break after the charge before going to the jury room. At this stage, the trial judge had every reason to believe that the deliberations of the jury could be long and tedious. Certainly there was nothing wrong with this act of courtesy by the trial judge. This assignment of error is totally without merit.

**[6]** Finally, the defendant contends the court erred in denying his motion to set aside the verdict as contrary to the weight of the evidence. If the motion had been based on the insufficiency of the evidence, the question of law would be the same as that raised by a motion for nonsuit. But here the motion is for the alleged reason that it is "contrary to the weight of the evidence." Under this motion the trial court is "[V]ested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony." *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E. 2d 373, 380 (1954). The decision of the court involves the exercise of its discretion. This is a question of law and not reviewable. *Roberts v. Hill*, *supra*. This assignment of error is overruled.

Examination of the entire record discloses that the defendant received a fair trial, free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

J. L. CANADY, TRADING AS J. L. CANADY PLUMBING & HEATING COMPANY v. ERVIN E. CREECH AND WIFE, DOROTHY CREECH AND RAY P. KORTE AND WIFE, BARBARA D. KORTE

No. 80

(Filed 7 October 1975)

1. **Laborers' and Materialmen's Liens § 7— claim of lien — reference to wrong date materials first furnished**

Claim of lien for labor and materials filed on 8 October 1973 which recited that labor and materials were first furnished upon defendants' property on 4 December 1973 was not fatally defective, since the date of first furnishing was an obvious clerical error which could not mislead any interested party.

2. **Laborers' and Materialmen's Liens § 8— lien predating purchase — erroneous date in claim of lien — lien not defeated**

Where plaintiff contracted with defendants Creech to furnish labor and materials in connection with construction of a dwelling on property owned by the Creeches, the Creeches conveyed the property to defendants Korte on 20 August 1973, plaintiff filed a claim of lien on 8 October 1973 which was within 120 days from the last day materials and supplies were furnished, and the claim erroneously stated that materials were first furnished on 4 December 1973, defendants Korte, who had constructive notice of the facts upon which the claim of lien was based, could not take advantage of the scrivener's error in the claim upon which they had not relied to defeat the lien which related back to a time predating the Kortes' purchase.

APPEAL of right by plaintiff pursuant to N. C. Gen. Stat. 7A-30(2) from a decision of the North Carolina Court of Appeals, 23 N.C. App. 673, 209 S.E. 2d 511 (1974), which affirmed, *Baley, J.*, dissenting, an order of District Court Judge Barnette.

This case was docketed and argued as No. 53 at the Spring Term 1975.

Plaintiff's action was brought to recover some $4,496.95 from defendants and to have a laborer's and materialman's lien for this amount declared and enforced on certain real estate. Plaintiff alleged: (1) a contract between him and the Creeches pursuant to which plaintiff furnished certain labor and materials in connection with the construction of a dwelling on property owned by the Creeches; (2) on August 20, 1973, the Creeches conveyed this property to the Kortes, the deed being recorded on August 21, 1973; (3) on October 8, 1973, plaintiff filed a claim of lien within 120 days from the last day the

materials and supplies were furnished; and (4) plaintiff commenced his action within 180 days from the last day of furnishing. The claim of lien, attached to the complaint as Exhibit A, recited, in pertinent part, that "[t]he labor and materials were first furnished upon said property by the claimant on or about December 4, 1973." Plaintiff's answers to certain interrogatories propounded by defendants Korte revealed that the actual date of first furnishing of labor and materials was November 3, 1972.

Defendants Korte moved to dismiss the action with prejudice for failure to state a claim and for discharge of the claim of lien. Judge Barnette, after concluding that the "lien filed by the plaintiff on October 8, 1973, is fatally defective as it is impossible for the plaintiff claimant to have first furnished labor and materials on or about December 4, 1973," allowed defendants Korte's motion, dismissed the action with prejudice as to them pursuant to Rule 41(b), N.C.R. Civ. P., and discharged the claim of lien.

*Mast, Tew & Nall, P.A., by Allen R. Tew, Attorneys for the plaintiff.*

*No counsel contra.*

EXUM, Justice.

The questions for decision are: (1) Whether plaintiff's claim of lien is fatally defective because of the erroneous statement of the date of first furnishing? (2) If not, whether the defect in any event precludes enforcement of the lien against defendants Korte? Both questions, we hold, are properly answered negatively.

Part 1, Article 2, Chapter 44A of our General Statutes provides for statutory liens on real property for mechanics, laborers and materialmen who deal with the owner of the property. Properly perfected liens "take effect from the time of the first furnishing of labor or materials . . . . " N. C. Gen. Stat. 44A-10. Such liens are perfected by filing a claim of lien in the Clerk's office in the County where the real property is located "at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials. . . ." N. C. Gen. Stat. 44A-12 (a)(b). The form for a claim of lien is prescribed by N. C. Gen. Stat. 44A-12(c). This section provides that a claim of

lien must "substantially" comport with the form set out. Item 5 of the form provides a place for furnishing the "[d]ate upon which labor or materials were first furnished upon said property by the claimant." Immediately following the prescribed form there is this provision: "A general description of the labor performed or materials furnished is sufficient. It is not necessary . . . to file an itemized list . . . or a detailed statement . . . . " N. C. Gen. Stat. 44A-12(c).

**[1]** Because of an error in plaintiff's claim of lien whereby the date of first furnishing was given as being beyond the date of filing of the claim itself, both the trial court and the Court of Appeals were of the opinion that the claim of lien was fatally defective. The Court of Appeals reasoned:

> "If laborers can file notices of lien stating an incorrect date of first furnishing and then enforce their liens with priority as of the actual date of first furnishing, it would be impossible for anyone to determine the priority of laborer's liens by a search of the records." 23 N.C. App. at 675-76, 209 S.E. 2d at 513.

The Court of Appeals suggested also that it would be impossible to uphold the date actually given in the claim of lien.

We disagree. First, we are not dealing here with priorities of competing liens nor with any party who relied on the claim of lien as filed. Second, the Court of Appeals seems to have assumed that if the lien were effective at all it would have to be effective either from the date of actual first furnishing or from the date of first furnishing as given in the claim of lien. There are other possibilities.

We agree with Judge Baley that the date of first furnishing "is an obvious clerical error which could not mislead any interested party." 23 N.C. App. at 676, 209 S.E. 2d at 513. This is so because one whose interest in the property arose after the date this claim of lien was filed would be on notice not only that the stated date of first furnishing was obviously error but also that the first furnishing of labor and materials must have antedated the filing of the claim itself. The lien could then without prejudice be given effect at least as of the date of filing.

None of our cases deal with the precise point here involved. They were decided before the enactment of Chapter 44A under a statute which required that all claims of lien

"shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof." N. C. Gen. Stat. 44-38 and its predecessors. They also involve claims of lien defective in respects other than, and in some cases in addition to, an incorrect statement of the date of furnishing materials and labor. *Lumber Co. v. Builders,* 270 N.C. 337, 154 S.E. 2d 665 (1967); *Lowery v. Haithcock,* 239 N.C. 67, 79 S.E. 2d 204 (1953); *Jefferson v. Bryant,* 161 N.C. 404, 77 S.E. 341 (1913); *Cook v. Cobb,* 101 N.C. 68, 7 S.E. 700 (1888); *Wray v. Harris,* 77 N.C. 77 (1877). Our Court has, however, sustained the claim of lien when it was "a reasonable and substantial compliance with the statute." *Cameron v. Lumber Co.,* 118 N.C. 266, 268, 24 S.E. 7, 7 (1896) ("No one need misunderstand it who should become interested in the property.")

Cases from other jurisdictions are more on point and instructive. *Schwartz v. Lewis,* 138 App. Div. 566, 123 N.Y.S. 319 (Sup. Ct. App. Div. 1910) was an action to foreclose a mechanic's lien. Claim of lien, filed April 18, 1908, stated that the first furnishing occurred October 24, 1907, and the last furnishing January 29, 1907. The New York lien statute required the dates of both first and last furnishings to be given. In fact, the last furnishing occurred January 29, 1908. The Court said:

> "If by any fair construction the statement can be read so as to show the date intended, and that date is substantially correct, effect will be given to the notice." *Id.* at 568, 123 N.Y.S. at 320.
>
> "The first item was furnished October 24, 1907. The lien was filed April 18, 1908. The last item *must necessarily have been* subsequent in point of time to the first, and *prior in point of time to the filing* . . . . We may therefore reject the year after January as surplusage which does not mislead anyone." (Emphasis supplied.) *Id.* at 568, 123 N.Y.S. at 321.

In *Pearce v. Knapp,* 71 Misc. 324, 127 N.Y.S. 1100 (Otsego County, 1911) claim of lien stated that the first work was performed April 20, 1910, and the last work about May 2, 1910; that the first item of material was furnished about May 20, 1910, and the last item about May 2, 1910. The court sustained the lien holding that the dates of furnishing materials were obviously transposed as could be ascertained by looking at the

claim in its entirety. *Robison v. Thatcher,* 252 Ore. 603, 451 P. 2d 863 (1969) affirmed a decree foreclosing a mechanic's lien. The claim of lien stated in one place that the owner did not request some extra work involved and in another place stated that he did. The court held that such an internal inconsistency in the claim of lien caused by scrivener's error would not defeat an otherwise valid lien.

**[2]** Having determined that the claim of lien is not fatally defective because of an obvious scrivener's error in stating the date of first furnishing we now consider whether the lien might in any event be enforced against defendants Korte who purchased before the claim was filed. If we assume the claim was filed within "120 days after the last furnishing of labor or materials," N. C. Gen. Stat. 44A-12(b), and the Kortes, consequently, purchased before the claim of lien was required to be filed, they were in effect charged with notice of the facts giving rise to the lien. "[I]t is entirely possible for a buyer of improved real estate to complete a purchase in the belief that the title is clean and then, a month or two later, to find himself faced with a lien filed by an unpaid workman hired by the former owner." Dale A. Whitman, "Transferring North Carolina Real Estate, Part I: How the Present System Functions." 49 N.C. L. Rev. 413, 441 (1971). Having constructive notice of the facts upon which the claim of lien is based, the Kortes may not take advantage of a scrivener's error in the claim relative to these facts and upon which they did not rely to defeat a lien which, because of these facts, relates back to a time that predates their purchase. N. C. Gen. Stat. 44A-10. *Lumber Co. v. Trading Company,* 163 N.C. 314, 79 S.E. 627 (1913); *Miller v. Condit,* 52 Minn. 455, 55 N.W. 47 (1893); *Chapman v. Brewer,* 43 Neb. 890, 62 N.W. 320 (1895); *see also Georgia State Savings Assn. v. Marrs,* 178 Ark. 18, 9 S.W. 2d 785 (1928); *Union Trust Co. v. Casserly,* 127 Mich. 183, 86 N.W. 545 (1901).

In *Lumber Co. v. Trading Company, supra,* the Court had under consideration an early predecessor of the present lien statute which required that the claim of lien be filed within twelve months after completion of the work "provided, that as to the rights of a purchaser for value and without notice, the notice of lien must be filed within six months." Pell's Revisal of 1908, § 2028 (Supp. 1911). The facts were that the claim of lien was filed less than twelve months but more than

six months after completion of the work on the property in question. Purchaser bought the property before the claim of lien was filed but had actual notice that the lienor had a claim generally but not the amount nor the details thereof. This Court upheld the lien as against such a purchaser holding that the purchaser was not "without notice" of the lien within the meaning of the statute. The Court said, "[A]s to purchasers, that 'where one has notice of an opposing claim, he is put "upon inquiry" and is presumed to have notice of every fact which a proper inquiry would have enabled him to find out.' " 163 N.C. at 317, 79 S.E. at 629. In *Miller* receiver of a mechanic's lienor sought to foreclose the lien free from the mortgage of one Drexel. The actual first furnishing of labor was May 17, 1889, but the claim of lien stated it to be July 10, 1889. Drexel took his mortgage on June 1, 1889, having actual notice of the work being done which gave rise to the lien. The Minnesota court held that the lien was not invalid and since Drexel had actual notice of the work being done giving rise to the lien, the lien was effective as of May 17.

In *Chapman* mortgagees attempted to foreclose free from an asserted materialman's lien. Work giving rise to the lien had actually begun on November 5 or 7, 1889. On November 15 mortgages were executed and were recorded on November 21 and 27. On March 17, 1890, a claim of lien was filed stating that the first furnishing of materials occurred on December 30, 1889, and the last furnishing on January 25, 1890. The Nebraska court gave the materialman's lien priority over the mortgages. It said:

> "The fact that the date of the commencement of labor or furnishing of material was stated to be December 30, 1889, when it should have been November 5th or 7th, could not and did not, have any significance for or to mortgage lienholders, or in any manner affect their rights under the mortgages executed during the month of November at a time when the work and furnishing which were the foundation of the lien were in progress, and had been from a date prior to such execution, as they were bound to take notice of these things, and their mortgages were taken subject to any rights of lien which had accrued or attached in favor of mechanics or materialmen. Their rights were acquired long prior to the time the statement was filed in which appeared the erroneous date, and such statement

> was not notice to them, nor could or were their liens or rights in any way affected by it, and the evidence of the true date was competent and its reception in no manner or extent harmful or prejudicial to the parties holding the mortgages." 43 Neb. at 896-897, 62 N.W. at 322.

Although the Nebraska statute did not require the dates of performance to be stated in the claim of lien it did provide that the lien was effective as of the date of first furnishing. Consequently the court's reasoning with regard to the effect of an erroneously stated date of first furnishing on a mortgagee taking before the filing of the claim of lien applies to this aspect of the instant case.

It was, consequently, error for the Wake County District Court to dismiss with prejudice plaintiff's claim for relief against the Kortes and to discharge the claim of lien. The decision of the Court of Appeals affirming this order is, therefore, reversed and this case is remanded to that Court with instructions to remand it to the District Court of Wake County for further proceedings in accordance with this opinion.

Reversed and remanded.

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STATE OF NORTH CAROLINA v. PINKNEY THOMAS MITCHELL, JR. AND WALLACE CHARLES LANFORD, JR.

No. 7

(Filed 7 October 1975)

1. **Criminal Law § 92— consolidated trial of two defendants**

   Indictments charging two defendants with the same crimes may be consolidated for trial in the discretion of the court.

2. **Criminal Law § 92— consolidated trial of two defendants — absence of prejudice**

   The consolidation of charges against two defendants for first degree murder and felonious burning of personalty was not prejudicial to the first defendant because the brother-in-law of the second defendant testified as to admissions to him by both defendants; nor was the consolidation prejudicial to the second defendant because the first defendant testified at trial and attempted to mitigate the killing on the ground he was under the influence of intoxicants and drugs where the first defendant attempted to exonerate the second defendant.

**3. Homicide § 21— first degree murder — sufficiency of evidence**

In a prosecution for first degree murder, the State's evidence was sufficient to support an inference of premeditation and deliberation as well as the other elements of the offense where it tended to show that defendants abducted the sixteen-year-old victim and had sexual relations with her; defendants told another that they had killed the victim; defendants departed in the victim's automobile and later burned it in order to destroy any evidence in it; defendants secured another vehicle in which to leave the county; and the victim was found tied to a tree, gagged, and stabbed numerous times in vital areas of the body.

**4. Criminal Law § 43; Homicide § 20— admissibility of photographs**

In a prosecution for first degree murder and felonious burning of the victim's automobile, photographs of the area in which the victim lived and where she was seen with defendants and photographs of deceased, her automobile and its contents were properly admitted to establish the identification of the victim, the ownership of the automobile, and the identification of the general area where the crimes had their inception.

**5. Homicide § 15— home life of victim — harmless error**

In a prosecution for first degree murder allegedly committed after the victim had been kidnapped and raped, the admission of evidence of the victim's home life, if erroneous, was clearly harmless beyond a reasonable doubt.

APPEAL by defendants from sentences of death imposed by *Grist, J.*, 21 October 1974 Criminal Session of GASTON County Superior Court. Upon motion of each defendant, we certified for initial appellate review by this Court their appeals from the prison sentences imposed in the same trial upon their convictions of felonious burning of personal property.

Defendants were tried upon bills of indictment charging them with first-degree murder and felonious burning of personal property. The cases were consolidated for trial over objection of each defendant. Defendants entered pleas of not guilty to each charge and the jury returned a verdict of guilty on both charges.

The State's evidence tended to show the following: On 21 April 1974 Kathy Smiley and her twelve-year-old sister, Patricia, left their home in Atlanta to meet their father, F. Dale Smiley (who was separated from their mother), for breakfast at a restaurant about five miles away. Kathy drove a reddish-orange Volkswagen which belonged to her father. After breakfast, the father and Patricia left to go to Lake Lanier for boating. Kathy intended to go home and to get her water skis

and pick up her boyfriend before joining her father. The last time the father saw Kathy she was crossing I-85.

Kathy was seen walking down an access road near a Shell service station in Atlanta at about 10:15 a.m. The Volkswagen was parked close by with the blinker lights on. Between 10:00 a.m. and noon Kathy was seen at the Shell service station in the Volkswagen with both defendants. Nothing unusual occurred at that time.

On the same day, defendants and Kathy arrived in Gaston County in the Volkswagen. They picked up the witness Rafferty, who got in the back seat with Kathy. They drove into a wooded area and Mitchell said to Kathy, "This is it." Kathy was taken down into the woods and Mitchell had sexual relations with her while Lanford waited at the car. Then Lanford went down and had sexual relations with her. Afterwards they drove towards Crowder's Mountain and Rafferty got out of the car at a stop sign. The body of Kathy was found later at about 5:00 p.m. on the same day at the site of the old Lincoln Academy which is near Crowder's Mountain. She had been "gagged" with an electrical cord and her dead body tied to a tree. She had been stabbed many times in the neck, the heart, and other parts of the body.

The defendants were afterwards seen alone in the Volkswagen. Later that evening Lanford, in the presence of Mitchell, told his brother-in-law (Stewart), "We done the big one. . . . We killed a girl. . . . Murder one." Defendant Mitchell said in reply, "Yeah, we did, there's her car." (Referring to the Volkswagen.) Lanford asked Stewart for his car and weapons, but Stewart refused any assistance. Also Lanford tried to convince his brother-in-law that he had killed the girl and offered to take him to the Lincoln Academy site to prove it. Stewart declined to go and the defendants drove off alone. When they returned to Stewart's house about one hour later, they reported that the girl's body had been removed. Later that evening in the vicinity of Lincoln Academy (where Kathy's body was found) there was an explosion and the Volkswagen was observed burning.

The next day Mitchell, in the presence of Lanford, said that they had burned the Volkswagen; that the owner of the Volkswagen was dead; and that the girl who was killed on Crowder's Mountain the night before was the owner of the Volkswagen.

As a result of this conversation, defendants obtained a blue Datsun from Frances Mitchell (defendant Mitchell's sister) and returned to the home of Lanford's brother-in-law (Stewart) seeking weapons, but they had been moved to Lanford's father's house. While at the brother-in-law's house, Lanford admitted having intercourse with Kathy, but said that it was not rape. Counsel for Lanford, on instructions from his client, did *not* cross-examine Stewart.

The evidence presented by defendant Mitchell tended to show the following: On 21 April 1974 he was in Atlanta with defendant Lanford. They were taking dope and drinking and planned to hitchhike to Gaston County. They observed a girl walking up the road and engaged her in conversation. She said that she had "done dope" before and wanted some more and that her automobile was out of gasoline. Defendant Lanford went to a filling station and got a can of gasoline. Later she directed them to a place to get dope, but no one was there. Thereupon she said that she had some in the dashboard. They smoked marijuana and drank some whiskey. Mitchell asked Kathy to take them to North Carolina. She agreed on the condition that they buy her some gasoline. She placed a telephone call to her mother before leaving. Mitchell stated that in addition to smoking "grass" and drinking some liquor on that day, he had also taken some THC and cocaine. He said he seduced Kathy on the way back to North Carolina. Upon arriving in Gaston County they went to the Lincoln Academy area and again had sexual intercourse. Mitchell then asked her to commit oral sex on him and she refused. Mitchell knocked her to the ground, grabbed her by the hair and stabbed her repeatedly. About this time, defendant Lanford came up from behind and grabbed him. He told Lanford to leave him alone and in a fit of anger threw Lanford to the ground, hitting him three or four times. Lanford got up and ran away. Just before leaving, Lanford said, "Don't cut me." Mitchell said that the next thing he remembers he was carrying the girl's dead body up through the woods. He was on dope and was "seeing things." He tied Kathy to a tree in a sitting position. Shortly thereafter, Mitchell told Lanford he had killed the girl. Lanford said, "I know you are crazy enough to kill me, but I don't believe you killed that girl." Later Mitchell said that he did not remember killing her, but he had blood all over him and she was dead. That night he went back and burned the car. Lanford was present. Mitchell said that he had sexual relations with Kathy, but that defend-

ant Lanford did not touch her and had nothing to do with the killing. Mitchell also denied conversations with others who had testified against him.

Defendant Mitchell, who had been convicted of traffic offenses, assault, fighting, larceny, and the larceny of an automobile, had escaped from the North Carolina Department of Corrections and had been at large for four months when this killing occurred.

Defendant Lanford offered no evidence.

*Attorney General Rufus L. Edmisten by Associate Attorney Robert W. Kaylor for the State.*

*Robert H. Forbes for Pinkney Thomas Mitchell, Jr. and Robert E. Gaines for Wallace Charles Lanford, Jr., representing defendant appellants.*

COPELAND, Justice.

Defendants were represented by separate counsel and filed separate appeals. Some of the assignments of error are the same and some relate only to one defendant.

**[1]** Our Court has held that where there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court. *State v. Combs,* 200 N.C. 671, 674, 158 S.E. 252, 254 (1931). "The Court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. [Citations omitted.]" *Id.* at 674, G.S. 15-152; *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962).

**[2]** Defendant Mitchell contends the consolidation was prejudicial to him because of the testimony of William Richard Stewart, the brother-in-law of defendant Lanford. A careful examination of the record indicates that Stewart testified as to substantially similar incriminating statements made by each defendant in the presence of one another. In essence, Mitchell adopted Lanford's admissions to Stewart. This assignment is overruled.

Defendant Lanford contends that the consolidation was prejudicial against him because defendant Mitchell testified in his own behalf at the trial and attempted to mitigate the killing and reduce it to second-degree murder because of his use of drugs and intoxicants. Lanford contends that this especially hurt his case since he elected not to testify in his own behalf. There is absolutely nothing in the record to indicate that the trial judge in making his ruling on consolidation knew that Mitchell would take the witness stand. In any event, Mitchell had a right to testify if he wished and Lanford could cross-examine him. Moreover, it is difficult to understand how Lanford can contend that he was prejudiced by Mitchell testifying when in fact Mitchell admitted the killing and the burning of the vehicle and attempted by his testimony to exonerate Lanford in every way. It was proper and appropriate for the two defendants to be tried together and there is no merit to this assignment of error.

Defendants Lanford and Mitchell next contend that the court should have dismissed the cases against them as of nonsuit and for mistrial for the charges of first-degree murder at the close of the State's evidence and at the close of all the evidence. Lanford makes a similar contention with respect to the charge of felonious burning of personal property.

Upon a motion for nonsuit, the trial court must consider the evidence in the light most favorable to the State. The trial court is not concerned with the weight of the testimony, but only with whether the evidence, be it direct or circumstantial, supports sending the case to the jury. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Conflicts and discrepancies in the evidence should be resolved in the State's favor. *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. McNeil, supra; State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

In order to convict the defendant of first-degree murder, the State must satisfy the jury beyond a reasonable doubt of all the elements thereof, to wit, an unlawful killing of a human being with malice and with a specific intent to kill and committed after premeditation and deliberation.

"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. [Citations omitted.] 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 the defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased has been felled. [Citations omitted.]" *State v. Buchanan*, 287 N.C. 408, 420-21, 215 S.E. 2d 80, 87-88 (1975). *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Hamby* and *State v. Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970); *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Walters*, 275 N.C. 615, 170 S.E. 2d 484 (1969); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961).

**[3]** An analysis of the facts of the case in relation to these factors reveals a want of provocation by the deceased—a sixteen-year-old girl. The conduct of defendants before and after the killing supported an inference of premeditation and deliberation as well as the other elements of the crimes charged. The State's evidence permits the following reasonable inferences: defendants abducted the victim and had sexual relations with her; defendants told Stewart that they had killed the victim; defendants later departed in the victim's automobile and burned it in order to destroy any evidence; and defendants secured another vehicle in which to leave Gaston County. The use of grossly excessive force was indicated when the deceased was found tied to a tree, gagged, and stabbed numerous times in vital areas of the body. In summation, there was plenary evidence as to both defendants from which to show premeditation and deliberation as well as the other elements of the crimes involved. This assignment of error is without merit and is overruled.

Defendant Mitchell contends that the trial court committed error in the charge to the jury. Counsel for Mitchell, with commendable frankness, states that none of the exceptions, in his opinion, would entitle Mitchell to a new trial. Counsel requests the court to review the charge. This has been done and we conclude that there was no error.

Defendant Mitchell contends the court erred in permitting the witness Shellnut to change his description of the defendants on voir dire. There was no voir dire of Shellnut and he did not identify defendants. There is no merit in this argument.

Defendant Mitchell also contends that it was improper for the court to receive evidence concerning the home life of the deceased, photographs of the area in which she lived and where she was seen with the defendants, and photographs of the deceased, the automobile, and its contents.

In connection with these assignments of error, counsel for the defendant concedes that none of these individually would entitle the defendant to a new trial, but should be considered reversible error when considered as a whole.

**[4, 5]** All of this evidence, save that of the home life of the victim, was competent and relevant to establish the identification of the victim, the ownership of the Volkswagen, and the identification of the general area where the crimes had their inception. The photographic evidence was introduced with limiting instructions for the purpose of illustrating the testimony of the witnesses. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). If the evidence pertaining to the home life of the deceased was error, then it was clearly harmless beyond a reasonable doubt. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972) ; *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). These assignments of error are overruled.

Defendant Mitchell also contends that admission of the testimony of the witness Stewart was prejudicial error. As stated earlier in the discussion on consolidation, there is no merit in this related contention for the reasons there stated.

A further contention of Mitchell is that the failure of Lanford to testify caused the jury to have grave doubts concerning Mitchell's defense. This argument has no merit. The record indicates that Mitchell by his own testimony admitted the killing and the burning of the Volkswagen and attempted to excuse himself of murder in the first degree because of the use of drugs and intoxicating beverages.

Defendant Mitchell contends that he did not have sufficient mental capacity to form the necessary premeditation and deliberation. In this connection, the trial court properly charged the jury on the law relative to voluntary intoxication and voluntary use of drugs. It was properly left for the jury to determine whether Mitchell's mental condition was so affected by intoxication or drugs that he was rendered incapable of forming a deliberate and premeditated purpose to kill. *State*

*v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). This assignment of error is overruled.

Both defendants contend that the court erred by refusing to set the verdict aside as being against the greater weight of the evidence and refusing to declare a mistrial. These motions were addressed to the discretion of the trial court. That discretion was not abused. 3 Strong, N. C. Index 2d, Criminal Law, §§ 128, 132. As a matter of fact, we have fully considered this in the discussion on the motions for nonsuit. These assignments are without merit and are overruled.

The defendants have had a fair trial free from prejudicial error. Kathy was sent to her death in a vicious manner by these defendants. The case was ably prepared and presented by the district attorney and carefully and fairly tried by Judge Grist.

In the trial we find

No error.

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DICK PRUITT AND WIFE, STERLING PRUITT v. ARDEL WILLIAMS AND WIFE, MRS. ARDEL WILLIAMS

No. 17

(Filed 7 October 1975)

1. **Injunctions § 12— preliminary injunction — definition**

   The term "preliminary injunction" refers to an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits. G.S. 1A-1, Rule 65.

2. **Appeal and Error § 6— appeal from interlocutory order — deprivation of substantial right**

   G.S. 1-277, in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a *substantial right* which he would lose if the ruling or order is not reviewed before final judgment.

3. **Injunctions § 12— preliminary injunction — requisite for granting**

   To justify the issuance of a preliminary injunction, ordinarily it must be made to appear that (1) there is probable cause that plaintiff will be able to establish the rights which he asserts and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief

appears reasonably necessary to protect plaintiff's rights during the litigation.

4. **Injunctions § 12— preliminary injunction — issuance discretionary matter**

To issue or to refuse to issue an interlocutory injunction is usually a matter of discretion to be exercised by the trial court, and the purpose of such preliminary injunction is to preserve the status quo of the subject matter involved until a trial can be had on the merits.

5. **Appeal and Error § 58— review of preliminary injunction — findings of fact not binding**

On an appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself.

6. **Appeal and Error § 58; Injunctions § 13— obstructing roadway — preliminary injunction — appeal dismissed**

Where the evidence tended to show that a road over defendants' land had been used continuously since 1939 as the primary, and until recently, the sole means of ingress and egress from plaintiffs' property, the road had been used by all types of vehicular traffic and by guests, invitees and business associates of the plaintiffs and their predecessors in title, telephone and power lines had been built beside the road, the meter reader for the local power company used the road, while a new road into their property had recently been built by plaintiffs, it was impassable in inclement weather, plaintiffs had been unable to secure carrier contracts guaranteeing delivery to the bakery located on their property because of the condition of the new road in inclement weather, and in the event of an emergency the old road provided the quickest and safest means of egress, and there was no evidence that showed a reasonable probability that defendants would incur the loss of a substantial right by the granting of the preliminary injunction unless reviewed before final judgment, such evidence was sufficient to support the granting of a preliminary injunction prohibiting defendants from blocking the road, and defendants' appeal from the order granting the preliminary injunction should have been dismissed.

7. **Injunctions § 12; Rules of Civil Procedure § 65— preliminary injunction — statement of reasons for issuance — failure to request findings of fact and conclusions of law**

The trial court complied with the provisions of G.S. 1A-1, Rule 65(d) by setting forth the reasons for its issuance of a preliminary injunction, and the court was not required to make specific findings of fact and conclusions of law absent a request from one of the parties.

APPEAL by defendants under G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 25 N.C. App. 376, 213 S.E. 2d 369 (1975), affirming the order of *Thornburg, J.*,

entered 25 September 1974 in CALDWELL Superior Court, granting plaintiffs a preliminary injunction.

Plaintiffs instituted this action on 22 August 1974 seeking temporary and permanent injunctions restraining defendants from obstructing a road over lands of defendants in which plaintiffs claim a right-of-way by prescription.

In their complaint, plaintiffs allege in pertinent part as follows: By virtue of a conveyance dated 20 September 1973, plaintiffs became owners of a 13.4 acre tract of land in Caldwell County. A portion of the land is farmland, and also contains plaintiffs' residence and a bakery business operated by plaintiffs. A road extends from plaintiffs' property, across defendants' land for approximately 200 feet, and then into a public road. The road across defendants' land has existed for many years and has been used by plaintiffs, their predecessors in title, and the general public for more than twenty years, providing the sole, practical access to plaintiffs' property. If said road is not a public road, plaintiffs have the right to use the road by prescription. On or about 3 July 1974, defendants blocked this road by placing debris on it.

A temporary restraining order was issued on 23 August 1974 and was extended on 28 August and 5 September 1974 ordering defendants to remove the obstruction and to leave the road open for use by plaintiffs and others pending hearing. Defendants filed answer on 10 September 1974 denying all material allegations of plaintiffs' complaint.

Following a hearing an order was entered on 25 September 1974 granting plaintiffs a preliminary injunction requiring defendants to leave the road unobstructed until the final determination of the cause.

On appeal, the Court of Appeals, with Judge Morris dissenting, affirmed the action of the trial court in issuing the preliminary injunction, holding that the trial court's failure to make specific findings of fact and conclusions of law was not error and that the plaintiffs had met the burden of establishing their right to a preliminary injunction. Defendants appealed by reason of the dissent.

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

*Wilson, Palmer and Simmons by George C. Simmons, III, for defendant appellants.*

*No counsel contra.*

MOORE, Justice.

Defendants appeal under G.S. 1-277 from an order entered by Judge Thornburg on 25 September 1974 issuing a preliminary injunction restraining defendants from blocking a road until the final determination of the action.

**[1]** At the threshold of this appeal, we are confronted with the question of whether an appeal lies from the order of the trial judge granting the preliminary injunction. The term, "preliminary injunction" refers to an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits. G.S. 1A-1, Rule 65; *Setzer v. Annas,* 286 N.C. 534, 212 S.E. 2d 154 (1975).

**[2]** G.S. 1-277, in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a *substantial right* which he would lose if the ruling or order is not reviewed before final judgment. *Consumers Power v. Power Co.,* 285 N.C. 434, 206 S.E. 2d 178 (1974); *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311 (1956); *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669 (1951); *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377 (1950).

Thus, G.S. 1-277 serves as a roadblock to appeals from interlocutory orders which do not deprive the appellant of a substantial right. The reason for the rule is more important today, due to the constantly increasing volume of appeals to our appellate courts, than it was when stated by Justice Ervin in 1949:

> "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, *i.e.,* to administer 'right and justice . . . without sale, denial, or delay.' N. C.

Const., Art. I, Sec. 35." *Veazey v. Durham, supra,* at 363-64, 57 S.E. 2d at 382.

The first question presented then is whether the evidence discloses that defendants have been deprived of any substantial right which they might lose if the order granting the preliminary injunction is not reviewed before final judgment. Defendants did not offer any evidence. Neither did they allege the loss of any substantial right which might occur if the preliminary injunction was granted. They only denied that plaintiffs had the right to use the road. Apparently, defendants take the position that plaintiffs' evidence does not entitle plaintiffs to injunctive relief, or that the evidence discloses that defendants will indeed lose a substantial right unless the plaintiffs' entitlement to the preliminary injunction is reviewed on appeal prior to the final determination of the action.

**[3]** The burden is on the plaintiffs to establish their right to a preliminary injunction. G.S. 1A-1, Rule 65(b); *Setzer v. Annas, supra; Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545 (1968). To justify the issuance of the preliminary injunction, ordinarily it must be made to appear that (1) there is probable cause that plaintiff will be able to establish the rights which he asserts and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during the litigation. *Setzer v. Annas, supra; Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619 (1962).

**[4, 5]** To issue or to refuse to issue an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. Its purpose is to preserve the status quo of the subject matter involved until a trial can be had on the merits. *In re Assignment of Albright,* 278 N.C. 664, 180 S.E. 2d 798 (1971); *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116 (1953). 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. *Telephone Co. v. Plastics, Inc.,* 287 N.C. 232, 214 S.E. 2d 49 (1975); *In re Assignment of Albright, supra; Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309 (1924). On an appeal from an order of a superior court judge granting

or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself. *Telephone Co. v. Plastics, Inc., supra; Setzer v. Annas, supra; In re Assignment of Albright, supra.*

**[6]** Plaintiffs' evidence tends to show that the road has been used continuously since 1939 as the primary, and until recently, the sole means of ingress and egress from the plaintiffs' property. The road has been used by all types of vehicular traffic and by guests, invitees and business associates of the plaintiffs and their predecessors in title. Telephone and power lines have been built beside the road, and the meter reader for the local power company has used the road. Further, affidavits and oral testimony tended to show that while a new road into their property was recently built by plaintiffs, it is impassable in inclement weather due to its steep incline and many drop-offs, and for this reason plaintiffs have been unable to secure carrier contracts guaranteeing delivery to the bakery located on their property during inclement weather. Moreover, in the event of an emergency, the old road provides the quickest and safest means of egress.

The trial judge, after hearing the testimony and considering the pleadings, conducted a view of the premises and then entered his order of 25 September 1974, finding:

> "1. That the plaintiffs have exhibited a good cause of action and are entitled to have proper issues submitted to a court to determine the matters set forth in the complaint and affidavits.
>
> "2. There is reasonable certainty that the plaintiffs are entitled to the equitable relief sought.
>
> "3. That the status quo in the case at bar consists of the open and unobstructed use of the road in question which road has been recently blocked off by the defendants, and that the failure to restore said status quo would cause immediate and irreparable injury to the plaintiffs.
>
> "4. That to require that the defendants open the road heretofore blocked and to leave said road open and passable pending the outcome of this action would not greatly inconvenience or damage the defendants, but to allow said road to remain blocked pending the outcome of this action would greatly inconvenience and damage the plaintiffs."

Based on these findings, the trial judge then ordered that the road be cleared and that it not be blocked pending the final determination of the cause.

The trial court's findings were amply supported by the evidence, and the findings justified the granting of the preliminary injunction. On the other hand, there is no evidence that shows a reasonable probability that defendants will incur the loss of a substantial right by the granting of the preliminary injunction unless reviewed before final judgment. We hold, therefore, that defendants' appeal from the order granting the preliminary injunction should have been dismissed.

**[7]** Defendants further contend, however, that the preliminary injunction is invalid because the trial judge failed to make specific findings of fact based upon the evidence, and failed to make conclusions of law based upon the findings of fact. We agree with the Court of Appeals that these contentions are without merit.

G.S. 1A-1, Rule 65(d) only requires that an order granting an injunction shall set forth the "reasons for its issuance." This the trial court did. Rule 52 provides, in part, that " . . . findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party." No request was made by defendants for additional findings of fact or additional conclusions of law, and without such request we know of no statute that requires a trial court to make such findings and conclusions in an order granting a preliminary injunction.

Upon this appeal it is not necessary for us to determine whether the road in question is a public road or, if not, whether plaintiffs have the right of ingress and egress over the road by prescription. These and all other issues raised by the pleadings will be determined at the final hearing of the cause. Our ruling dismissing the appeal will have no effect whatever on the rights of the parties when the action is tried on its merits. *Telephone Co. v. Plastics, Inc., supra; Huskins v. Hospital, supra.*

For the reasons stated, the appeal is dismissed and the case is remanded to the Court of Appeals with direction to re-

mand to the Superior Court of Caldwell County for trial on its merits.

Appeal dismissed.

OLA DEESE CALDWELL v. DAVIS W. DEESE

No. 47

(Filed 7 October 1975)

1. **Rules of Civil Procedure § 56— motion for summary judgment — burden of proof**

A party moving for summary judgment under Rule 56 has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court, and his papers are carefully scrutinized while those of the opposing party are on the whole indulgently regarded. G.S. 1A-1, Rule 56.

2. **Rules of Civil Procedure § 56— summary judgment — showing required**

The movant for summary judgment must show (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law.

3. **Rules of Civil Procedure § 56— summary judgment — purpose**

Rule 56 does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists.

4. **Automobiles § 64— striking of dog — summary judgment for defendant**

In an action to recover damages for injuries to plaintiff and her dog received when a bus driven by defendant struck plaintiff's dog, plaintiff attempted to separate the dog and a group of children gathered around the dog, and the dog bit plaintiff on the hand, the trial court properly entered summary judgment in favor of defendant where plaintiff's deposition offered by defendant established a total lack of negligence on defendant's part and plaintiff offered no evidence in opposition thereto.

5. **Negligence § 17— rescue doctrine — negligence of another**

The rescue doctrine does not apply unless it is shown that the peril was caused by the negligence of another.

6. **Rules of Civil Procedure § 56— summary judgment in negligence cases**

While summary judgment is ordinarily not appropriate in negligence cases, it is appropriate where a motion for summary judgment is supported by evidentiary matter showing a total lack of negligence on the movant's part and no evidence is offered in opposition thereto.

DEFENDANT appeals from decision of the Court of Appeals, 26 N.C. App. 435, 216 S.E. 2d 452 (1975), reversing judgment of *Hasty, J.*, entered 12 February 1975 in MECKLENBURG Superior Court.

This is a civil action for damages allegedly caused by defendant's negligent operation of a bus on Stratford Avenue in the City of Charlotte.

In her unverified complaint filed 20 March 1974, plaintiff alleges in pertinent part as follows:

1. At 4 p.m. on 10 February 1974 plaintiff was standing in her front yard near an automobile parked at the curb in front of her house talking to a lady friend who was preparing to leave. Suddenly, twelve neighborhood children came out the front door of plaintiff's house, permitting plaintiff's dog to come out of the house with them, and the entire group, including the dog, began running across the yard toward the street in front of the house.

2. As the children and the dog approached the street, the defendant "came driving along the street in the direction of the plaintiff's home, operating the bus belonging to New Hope Baptist Church, and saw or should have seen the large number of children and the dog approaching the curb as if to enter the street. Notwithstanding the presence of the children and the dog, the defendant continued to drive the bus in the general direction which he was headed along the street, and struck and ran over and injured the dog belonging to the plaintiff, and then continued along the street without stopping, although he knew or should have known that he had struck plaintiff's dog."

3. Plaintiff's dog was severely injured and the group of children immediately gathered around the dog to investigate. Fearing for the safety of the children and for the injured dog, plaintiff "ran over and attempted to separate the dog and the children. Plaintiff's dog, in great pain and in a state of confusion, bit plaintiff on the hand, causing her severe injuries."

4. Defendant was negligent in that: (a) He failed to keep his bus under proper control; (b) he failed to reduce his speed in order to avoid a hazard in violation of G.S. 20-141; (c) he failed to take evasive action when he knew or should have known in the exercise of due care that the group of children and the dog approaching the street were potentially dangerous

and that prudence required him to avoid the hazard; (d) he operated his vehicle at a speed that was greater than reasonable and prudent under the circumstances then existing in violation of G.S. 20-141; (e) he failed to sound his horn when he saw or should have seen the children and the dog; (f) he failed to stop his vehicle after running over plaintiff's dog when he knew or should have known that striking the dog with his bus would create a hazardous condition "by leaving an injured and confused dog in the presence of other people, a dangerous situation he had already created and had a duty to mitigate."

5. Defendant's negligence was the proximate cause of the injuries to plaintiff's dog and the injuries to plaintiff's hand "in that defendant knew or should have known in the exercise of due care that injuring a dog might foreseeably lead to a subsequent injury of other persons."

6. As a result of defendant's negligence, plaintiff was required to take her dog to a veterinary surgeon for treatment, including the caesarean birth of a puppy which would not have been necessary except for the injuries to the dog. The dog sustained other injuries requiring expenditure of substantial sums of money. Plaintiff herself received emergency medical treatment, incurred hospital and doctor bills, lost substantial wages, and endured pain and suffering due to the injury to her hand. The injuries to her hand are permanent in nature. She demands $25,000.00 in damages as a result of defendant's negligence.

In his unverified answer defendant says (1) the complaint fails to state a claim upon which relief may be granted, (2) all allegations of negligence and proximate cause are denied, and (3) he has no knowledge of striking plaintiff's dog and was in no way negligent on said occasion; but in the event he be adjudged negligent in any manner, plaintiff was contributorily negligent in placing herself in a position to be bitten when she knew or should have known, that dogs and other animals, when injured and in physical or mental pain, instinctively bite all persons and things within reach. Her own negligence was the proximate cause of her injury.

Plaintiff pleads the rescue doctrine in her unverified reply. See *Britt v. Mangum*, 261 N.C. 250, 134 S.E. 2d 235 (1964).

On 30 October 1974 defendant moved for summary judgment and supported his motion with a deposition of plaintiff taken on 19 July 1974. Plaintiff filed no counter-affidavits and offered no other evidentiary material in opposition to the motion. Following a hearing on 10 February 1975 Judge Hasty entered an order granting summary judgment in favor of defendant and dismissing the action with prejudice. The Court of Appeals reversed with Brock, C. J., dissenting, and defendant appealed to the Supreme Court pursuant to G.S. 7A-30(2).

*Myers & Collie by George C. Collie for defendant appellant.*

*Mraz, Aycock, Casstevens & Davis by Frank B. Aycock III for plaintiff appellee.*

HUSKINS, Justice.

**[1, 2]** A party moving for summary judgment under Rule 56 has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439-40; *Singleton v. Stewart,* 280 N.C. 460, 186 2d 400 (1972). The movant must show (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. Rule 56(c); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

The movant is held by most courts to a strict standard, and "all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." 6 Moore's Federal Practice (2d ed. 1971) § 56.15[3], at 2337; *accord, United States v. Diebold, Inc.,* 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962).

**[3]** Rule 56 does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists. The rule "is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved." *Kessing v. Mortgage Corp., supra.* The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed. "The device used

is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, North Carolina Practice and Procedure, § 1660.5 (2d ed. Phillip's Supp. 1970).

We now apply these legal principles to the record properly before us to determine the propriety of summary judgment for defendant in this case.

**[4]** Was plaintiff injured and her property (dog) damaged by the negligence of the defendant? This is the paramount overriding issue of fact which plaintiff must establish at trial before any other issue can be reached. To support his motion for summary judgment and establish the nonexistence of negligence on his part, defendant offered plaintiff's sworn testimony contained in her deposition taken on 19 July 1974. In that deposition plaintiff described the occurrence when her dog was struck as follows:

> "Q. If you would, then, go ahead and tell us what occurred as you remember it when you were in the yard there this afternoon?
>
> "A. Well, when the children had come through the house and ran out into the yard and let the dog out and ran to the back of the car where Mrs. Laurent was standing and I was standing. The bus was coming up the hill, well, it's not, say, a hill, it's a grade. So when the children stopped the bus was right on the edge of the road and there was no other traffic there and so it hit the dog and he didn't make no attempt to stop. I ran between the dog and the children, because he was biting at just midair and when I reached down to grab my baby and my grandbaby to push them back, she caught me in the other hand.
>
> ". . . Stratford Drive . . . is a paved street . . . inside the city limits . . . a little over two cars wide. . . . Two trucks can go down it."

Viewing plaintiff's deposition in the light most favorable to her and drawing all inferences of fact against defendant, we conclude that defendant's "evidentiary forecast" was such that, if offered by plaintiff at the trial, without more, would compel a directed verdict in defendant's favor. It established a total lack of negligence on defendant's part and entitled him to judgment as a matter of law unless forestalled by a forecast of evidence by plaintiff sufficient to counter the effect of her deposition by showing some negligent act on defendant's part proximately causing injury to her and her dog. Plaintiff offered nothing—no counter-affidavits, admissions in pleadings, depositions, answers to interrogatories, or any other evidentiary material permitted by Rule 56(c). In that setting, we are constrained to hold that the supporting evidence offered and relied on by defendant establishes that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); Martin B. Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745 (1974).

**[5]** The rescue doctrine, pleaded in plaintiff's unverified reply, is accurately expressed in the following excerpt from *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915 (1953): "The rule is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." Although plaintiff's deposition shows that she "ran between the dog and the children, because he was biting at just midair," and was bitten when she attempted to rescue the children from danger, the rescue doctrine does not apply unless it be shown that the peril was caused *by the negligence* of another, *i.e.,* in this case, the negligence of defendant.

**[6]** We are not unmindful of the general proposition "that issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against claimant, but should be resolved by trial in the ordinary manner." 6 Moore's Federal Practice (2d ed. 1971) § 56.17[42] at 2583; 3 Barron and Holtzolff, Federal Practice and Procedure (Wright ed. 1958) § 1232.1 at 106. We said in *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972): "It is only in exceptional negligence cases

that summary judgment is appropriate. [Citations omitted.] This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969)." Our holding here in no way negates the sound principles there enunciated. Where, as here, a motion for summary judgment is supported by evidentiary matter showing a total lack of negligence on movant's part, and no evidence is offered in opposition thereto, no issue is raised for the jury to consider under appropriate instructions. Such is the posture of this case.

For the reasons stated the decision of the Court of Appeals reversing the entry of summary judgment in favor of defendant is

Reversed.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; NORTH CAROLINA REINSURANCE FACILITY; JOSEPH T. WILLIAMS; AND WILLIAM S. GODFREY, RESPONDENTS

No. 31

*(Filed 7 October 1975)*

**Administrative Law § 5; Appeal and Error § 7; Insurance § 1— Reinsurance Facility — requiring appointment of agent — superior court order — authority of Commissioner of Insurance to appeal**

Where the Board of Governors of the Motor Vehicle Reinsurance Facility required that an insurance company appoint and license a specified person as its agent to write automobile liability insurance, the Commissioner of Insurance affirmed the order of the Board of Governors, and the Superior Court of Wake County reversed and vacated the order, the Commissioner of Insurance was not an aggrieved party so as to permit him to appeal the order of the Wake County Superior Court to the Court of Appeals pursuant to G.S. 58-9.3 or under the common law; nor was the Commissioner of Insurance granted the power to appeal the order of the Wake County Superior Court by G.S. 58-248(g)(6).

ON *certiorari* to review the decision of the North Carolina Court of Appeals reported in 25 N.C. App. 478, 212 S.E. 2d

921 (1975), which dismissed the appeal of the Commissioner of Insurance of the State of North Carolina (hereinafter referred to as "Commissioner") from judgment of *Bailey, J.*, entered 31 October 1974 in WAKE Superior Court.

Article 25A of Chapter 58 of the General Statutes (G.S. 58-248.26 to G.S. 58-248.40) (hereinafter referred to as the "Facility Act") creates the North Carolina Motor Vehicle Reinsurance Facility (hereinafter referred to as the "Facility"). The Facility Act requires that all motor vehicle insurers be members of the Facility and that the profit or loss of otherwise unacceptable business (to the extent permitted in the plan of operation) be transferred from the individual insurer to all insurers. Furthermore, pursuant to G.S. 58-248.33(a)(6), "[the] Facility is authorized to require all companies in a fair and equitable manner who are writers of motor vehicle insurance in this State to appoint and licence any fire and casualty agent duly licensed to write insurance in North Carolina, *in such places where a market need had been demonstrated,* to be their agent to write motor vehicle insurance." (Emphasis supplied.) Purportedly acting pursuant to the above section, the Board of Governors of the Facility required State Farm Mutual Automobile Insurance Company (hereinafter referred to as the "Insurance Company") to appoint and license Joseph T. Williams as its agent to write automobile liability insurance. There was a showing that Williams needed to be appointed to an insurance company, but there was no demonstration that the public had a market need for additional agents in the area involved in order to secure adequate insurance coverage. Insurance Company appealed to the Commissioner pursuant to G.S. 58-248.39(b), and the Commissioner affirmed the Board of Governors. Insurance Company then appealed to Wake County Superior Court as allowed by G.S. 58-248.39(f) whereupon the order below was reversed and vacated. The superior court determined that (1) the order requiring Insurance Company to appoint and license Williams as its agent was unconstitutional under the due process and equal protection of the law clauses of Article I, Section 19, of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution; (2) the Facility did not conduct a review to determine if eligible risks could readily obtain insurance; and (3) no need for additional agents to sell insurance existed. Commissioner alone appealed this decision.

The Court of Appeals allowed Insurance Company's motion to dismiss the appeal. The Court of Appeals did not detail its grounds for dismissal, but apparently the reasons were that the Commissioner was not the real party in interest and not an aggrieved party so as to permit him to appeal pursuant to the provisions set forth in G.S. 58-9.3. This Court granted certiorari to review this decision.

*Attorney General Rufus L. Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for defendant appellant.*

*Young, Moore & Henderson by Charles H. Young and R. M. Strickland for petitioner appellee.*

COPELAND, Justice.

The Commissioner contends that he is a real party in interest or an aggrieved party so as to permit him to appeal the decision of the superior court. He claims that he represents the public interest in this matter and that it has been adversely affected by the judgment of the superior court.

In part, the Facility Act itself provides a guideline to the right to judicial review. G.S. 58-248.39(f) of the Facility Act provides that judicial review of the administrative rulings or orders of hearings before the Board of Governors or the Commissioner shall be made pursuant to G.S. 58-9.3. Similarly, G.S. 58-248.34(d) provides that judicial review of any order of the Commissioner with respect to the plan of operation of the Facility shall be made pursuant to G.S. 58-9.3. G.S. 58-9.3 provides that "Any order or decision . . . by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order [covered by G.S. 58-9.4] . . . shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved. . . ." G.S. 58-9.4 applies only to orders affecting premium rates on any class of risks or the propriety of a given classification or classification assignment. Since this case involves the appointment of an agent to represent an insurance company, neither G.S. 58-9.4 nor the other exceptions to G.S. 58-9.3 are applicable. Also, since this case involves the right of the Commissioner to seek review before the Court of Appeals and not before the superior court, G.S. 58-9.3 is not expressly applicable. However, since by statutory

interpretation and implication G.S. 58-9.3 would extend its application to the analogous, higher appeal to the Court of Appeals, its requirement that the person must be aggrieved in order to appeal still applies. Moreover, in the absence of other statutory provisions, the common law rule would apply that the appellant must be an aggrieved person in order to perfect his appeal. *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 132 S.E. 2d 345 (1963).

The question before this Court is whether the Commissioner is an aggrieved person by statutory construction or under the common law. Under the general rules of statutory construction it appears that the Commissioner was not intended to be the representative of the public or to be deemed an aggrieved person in this matter. First, G.S. 58-248.33(g)(1) makes the Board of Governors of the Facility the public's representative to the exclusion of all others except where the Facility Act expressly provides otherwise. G.S. 58-248.33(g) provides: "Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include, but is not limited to the following: (1) To sue and be sued in the name of the Facility." The only power conferred upon the Commissioner in this context appears in G.S. 58-248.33(g)(6) as follows:

> "Notwithstanding the provisions of this subdivision, the Commissioner may review the market for motor vehicle insurance or any component thereof. After notice to and consultation with the Board of Governors, if the Commissioner finds that reasonable facilities are not being provided to make motor vehicle insurance or any component thereof available in a particular county, then in that event, he may require the Board to provide adequate facilities in such county. If the Board fails to comply with the requirements of the Commissioner, then the Commissioner may exercise all the powers of the facility to provide such adequate facilities. Additionally, the Commissioner may require the company or companies selected to service a particular county to pay or provide for reasonable compensation for the services of the agent appointed to represent said company or companies, and if necessary, the Commissioner may appoint such agent."

In this case there is neither a showing that the Commissioner gave notice to or had consultation with the Board, nor a showing that the Commissioner in his own behalf made the required finding that reasonable facilities were not being provided (although he affirmed the Board's finding in this respect when acting in a judicial capacity). Moreover, the Commissioner did not ever independently require the Board to provide adequate facilities. In fact, all action that was taken to assure adequate facilities was initiated by the Board and not by the Commissioner. Therefore, the Commissioner's contention that he is expressly granted the power to appeal by this statute is without merit.

Moreover, the Facility Act has other language that indicates that the powers of the Commissioner are not to be construed broadly so as to include this right of appeal. In particular, G.S. 58-9.3 omits any grant to the Commissioner of the authority to seek judicial review, whereas G.S. 58-9.4 expressly grants him such authority: "For purposes of the appeal the Insurance Commissioner, who shall be represented by his general counsel shall be deemed an aggrieved party." This omission in an adjacent section of the Facility Act and in a section that expressly excepts the situation provided for in G.S. 58-9.4 indicates a clear legislative intent to differentiate between these two sections.

Since the Commissioner is not deemed to be an aggrieved party or a representative of the public in this matter, it should be noted that the party actually aggrieved by the judgment of the superior court was the Facility or agent Williams, not the Commissioner. Appeal can be taken only by the aggrieved real party in interest. G.S. 1-271; G.S. 1-277. *See also* G.S. 1-57. "A party is aggrieved if his rights are substantially affected by judicial order. G.S. 1-277. If the order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed." *Coburn v. Timber Corporation,* 260 N.C. 173, 175, 132 S.E. 2d 340, 341 (1963). *Accord, Childers v. Seay,* 270 N.C. 721, 155 S.E. 2d 259 (1967). Where, as here, the aggrieved real party in interest is content, an appealing party has at most only an incidental interest in the subject matter of the litigation and will be affected only indirectly by the judgment complained of. *In re Mitchell,* 220 N.C. 65, 67, 16 S.E. 2d 476, 477 (1941). *See* concurring opinion of Justice Barnhill (later Chief Justice) in *Utilities Com. v. Coach Co.,* 234 N.C. 489, 494, 67 S.E. 2d 629, 633 (1951).

*In re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441 (1963), is distinguishable because in that case the effect of the 1955 Act (G.S. 105-241.2 to G.S. 105-241.4) and the Judicial Review Act of 1953 was to grant the Commissioner of Revenue the right to appeal in the matter of taxation before that court. The 1955 Act made the Commissioner of Revenue the representative of the public so that he could appeal from the administrative decision in controversy to the superior court as an aggrieved party under the Judicial Review Act. Justice Clifton Moore, speaking for our Court in *In re Assessment of Sales Tax, supra,* at 596 131 S.E. 2d at 446, said: "The Commissioner serves in a representative capacity, is charged with an important public trust, and is aggrieved by the opinion adverse to what he considers is a fair and correct interpretation of law affecting his duties and affecting the public interest with which he is charged."

Thus, under the 1955 Act, the Commissioner of Revenue was in a position analogous to that of the Board of Governors in this case, and not that of the Commissioner of Insurance. That the Commissioner of Revenue was clearly the representative of the public under the 1955 Act was indicated not only by his broad duties, but also by the express provision that he could appeal from the superior court to the Supreme Court, although the latter factor was not controlling in and of itself. "An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative agency. [Citation omitted.] One may be aggrieved within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. [Citations omitted.]" *In re Assessment of Sales Tax, supra,* at 595, 131 S.E. 2d at 446 (1963).

In *Utilities Com. v. Coach Co.,* 234 N.C. 489, 493, 67 S.E. 2d 629, 632 (1951), the Court stated that the appeal by the Utilities Commission "seems to have been authorized by the General Assembly in the statutes noted." This case affords the Commissioner no assistance, for in our case it was the Board of Governors that was authorized by statute to appeal as the representative of the public in this matter. The Commissioner of Insurance did not have that standing. Thus, the Court of Appeals was correct in dismissing the appeal.

Affirmed.

MARCIA STONE SAULS v. WILLIAM GLENN SAULS

No. 11

(Filed 7 October 1975)

1. **Divorce and Alimony § 8— consent to separation — consent as bar to claim of abandonment**

When the complaining spouse has consented to a separation which was not caused by the other's misconduct, the plaintiff cannot obtain a divorce or alimony on the basis of abandonment; however, where the agreement to separate is induced by the misconduct of one spouse, the other can still maintain the charges of voluntary abandonment. In other words, the consent which will bar a divorce, or a claim for alimony, on the grounds of abandonment is a positive willingness on the part of the complainant—a consent not induced by the misconduct of the other spouse—to cease cohabitation.

2. **Divorce and Alimony § 8— acquiescence to separation — voluntariness of separation**

Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony, nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving.

3. **Appeal and Error § 42; Divorce and Alimony § 8— alimony without divorce — abandonment — insufficient evidence in record — trial de novo**

In an action for alimony without divorce where plaintiff alleged abandonment, evidence in the record on appeal is insufficient to permit a determination as to whether plaintiff or defendant was responsible for the separation or whether they were in equal fault; because counsel for both plaintiff and defendant are equally responsible for the record, both having stipulated "the evidence in the record on appeal," the Supreme Court elects not to strike defendant-appellant's wholly unsatisfactory statement of the evidence from the record on appeal and not to presume that there was sufficient evidence to support the trial judge's findings of fact but instead elects to vacate the judgment awarding plaintiff alimony without divorce and to direct a trial *de novo* of plaintiff's cause of action for alimony without divorce.

4. **Divorce and Alimony § 2— divorce from bed and board — failure to allege residence — no jurisdiction**

Where plaintiff failed to allege that either she or defendant had been a resident of the State for at least six months next preceding the institution of the action, the court is without jurisdiction to award her a divorce from bed and board.

APPEAL by defendant pursuant to 7A-30(2) from the decision of the Court of Appeals (25 N.C. App. 468, 213 S.E. 2d

425 (1975) affirming the judgment of *Winborne, J.*, entered 13 August 1974 in the District Court of WAKE.

Upon allegations of abandonment and specific indignities rendering her life burdensome and condition intolerable, plaintiff-wife instituted this action on 22 March 1974 for divorce from bed and board under G.S. 50-7, custody of the two minor children of the marriage and reasonable child support under G.S. 50-13.1 *et seq.* and G.S. 50-13.5, alimony *pendente lite* and alimony under G.S. 50-16.3 and G.S. 50-16.2, and counsel fees under G.S. 50-16.4. In his answer to the complaint, defendant denied the foregoing allegations and, as a counterclaim, he alleged that specified conduct on the part of plaintiff had rendered his life burdensome and his condition intolerable. He prayed that he be granted a divorce from bed and board and awarded the custody of the minor children.

Stipulations established that the parties were married on 26 October 1968 and separated on 4 January 1974; that two children, Karen Annette, aged 3½, and Michael Glenn, aged 5, were born to the marriage and reside with plaintiff.

Judge Winborne heard the case without a jury on 28 June 1974. His judgment, filed 9 August 1974, recites that all matters were heard for final judgment and orders; that after hearing the evidence and argument of counsel, he "found and concluded," *inter alia,* (1) that defendant abandoned plaintiff without justification and (2) that "plaintiff was a dutiful wife" and did not bring about defendant's departure from the home. Upon these findings he adjudged that plaintiff recover of defendant alimony without divorce. In supplemental and interlocking orders Judge Winborne awarded plaintiff custody of the minor children, with visitation rights to defendant, alimony, child support, and counsel fees. On 19 August 1974 defendant gave notice of appeal from the judgment and orders, and the entries were made.

In a two-to-one decision the Court of Appeals affirmed the judgment and orders of the District Court. *Sauls v. Sauls,* 25 N.C. App. 468, 213 S.E. 2d 425 (1975). Defendant appealed to this Court as a matter of right.

*Purser & Barrett by George E. Barrett for defendant appellant.*

*W. Arnold Smith for plaintiff appellee.*

SHARP, Chief Justice.

Defendant's assignments of error raise only the question whether the judge's finding that defendant abandoned plaintiff without justification is supported by the evidence. He assigns no error in the order awarding plaintiff the custody of the children and fixing the amount which he was directed to pay for their support.

The evidence at the trial of this case was not taken by the court reporter. Consequently, when defendant excepted to the judge's findings and appealed, counsel encountered the difficulty in agreeing upon the record on appeal which both they and the court should have anticipated when the trial was conducted without the presence of an available court reporter. G.S. 7A-146(6) (Supp. 1974); G.S. 7A-198 (1969).

Approximately three months after the trial, on 25 September 1974 counsel signed a "statement of the evidence in the record on appeal," which they made "subject to the approval of the North Carolina Court of Appeals." With reference to the issue of abandonment they were only able to agree upon three short paragraphs containing a total of four sentences. The record disclosed no effort on their part to comply with Rule 19(f) of the Rules of Practice in the Court of Appeals, which sets out the procedure to be followed in the event no stenographic record of the evidence at a trial was made. That rule, in pertinent part, provides that if the parties are unable to agree on the statement of the evidence, they shall both submit proposed statements to the trial tribunal and that court shall settle the statement. This was not done.

The "statement of the evidence in the record on appeal" is summarized as follows: From the very beginning of the marriage in October 1968 plaintiff and defendant had "marital difficulties." The "marital condition" continued to deteriorate and, beginning in November 1973, it worsened rapidlv. The conclusion of the statement is that, at the trial, plaintiff testified that she tried "to make it work"; that "when 'the other woman' became involved she did agree to the defendant leaving on 4 January 1974 and taking with him all his personal belongings. . . ."

Defendant contends that, from the evidence in the record, it cannot be said that plaintiff was without fault in bringing about the separation or that defendant left the home without

lawful excuse. The main thrust of his argument, however, is that plaintiff consented to the separation, and, therefore, defendant did not abandon her. In his brief filed in the Court of Appeals, defendant says, "Perhaps the Plaintiff did not 'bring about' the Defendant's departure from the common residence; however, she did consent to such departure."

**[1]** Abandonment or desertion, as a marital wrong committed by one spouse against the other, does not occur if the parties live apart by mutual agreement. *Panhorst v. Panhorst,* 277 N.C. 664, 670-71, 178 S.E. 2d 387, 392 (1971); H. Clark, *Domestic Relations* 336 (1968). The rule is that when the complaining spouse has consented to a separation which was not caused by the other's misconduct, the plaintiff cannot obtain a divorce or alimony on the basis of abandonment. However, where the agreement to separate is induced by the misconduct of one spouse, the other can still maintain the charge of voluntary abandonment. The consent which will bar a divorce, or a claim for alimony, on the grounds of abandonment is a positive willingness on the part of the complainant—a consent not induced by the misconduct of the other spouse—to cease cohabitation. *Thompson v. Thompson,* 280 Ala. 566, 196 So. 2d 412, 414 (1967); *Mangham v. Mangham,* 264 Ala. 354, 87 So. 2d 818 (1956); *Moran v. Moran,* 219 Md. 399, 149 A. 2d 399 (1959); 24 Am. Jur. 2d *Divorce and Separation* § 107 (1966).

**[2]** Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. *Givner v. Givner,* 201 Md. 333, 93 A. 2d 563 (1953); *Miller v. Miller,* 178 Md. 12, 11 A. 2d 630 (1940); *Marcey v. Marcey,* 130 A. 2d 918, 919 (Mun. C.A., D.C.) (1957). Nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving. *Pempek v. Pempek,* 141 Conn. 602, 109 A. 2d 238 (1954); 24 Am. Jur., *supra.*

**[3]** The rules of law which the parties invoke are not in question. The problem here is that only a minuscule part of the evidence which the judge heard is in the record. From the scintilla which counsel decided should constitute the record on appeal, it is impossible for us to determine whether plaintiff or defendant is responsible for the separation or whether they are in equal fault. We are left to speculate as to the nature

and extent of the defendant's "involvement" with the "other woman." Was she a figment of plaintiff's imagination—as defendant now suggests—or was defendant's "involvement" such that plaintiff had the right to demand that her husband choose between the "other woman" and herself? The determination of this question is material to decision.

It is, of course, the duty of the appellant to see that a proper record is made up and transmitted to the Appellate Division, and *this* defendant-appellant did not do. We would be entirely justified in striking appellant's wholly unsatisfactory statement of the evidence from the record on appeal and deciding the case as if none of the evidence which the trial judge heard had been included in the record. In that situation the long-established rule is that it will be presumed there was sufficient evidence to support the trial judge's findings of fact. *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854 (1967); *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427 (1941). *See* 1 Strong, N. C. Index 2d, Appeal and Error §§ 28, 42 (1967), where the cases are collected.

The Court of Appeals, in effect, applied the presumption that there was sufficient evidence to support the judge's findings. However, we elect not to take that course in this case because counsel for both plaintiff-appellee and defendant-appellant are equally responsible for this record, both having stipulated "the evidence in the record on appeal." We therefore vacate the judgment awarding plaintiff alimony without divorce and direct a trial *de novo* of plaintiff's cause of action for alimony without divorce. The separate order awarding custody and fixing the amount of defendant's payments for the support of the two minor children is supported by the facts found and is not questioned on this appeal. It is, therefore, affirmed.

Actions which determine the right of a wife to permanent alimony are of vital importance to both husband and wife. They can impose a substantial and life-long financial obligation upon one spouse; they can mean the difference between security and penury to the other. Both the rights of the parties and the exigencies of the courts require that trial of these actions be stenographically reported. Appeals should not be discouraged or the court's judgments sabotaged by the absence of a transcript of the evidence at the trial.

**[4]** This cause is remanded to the Court of Appeals with directions that it be returned to the District Court for a trial *de novo* of plaintiff's cause of action for alimony. Since plaintiff failed to allege that either she or defendant had been a resident of the State for at least six months next preceding the institution of the action, the court is without jurisdiction to award her a divorce from bed and board. *Eudy v. Eudy,* 288 N.C. 71, 215 S.E. 2d 782 (1975). The costs in the Appellate Division will be paid personally and equally by counsel for the parties.

As to plaintiff's cause of action for alimony without divorce,

Error and remanded.

As to the order awarding custody and child support,

Affirmed.

BANK v. WALLENS AND SCHAAF v. LONGIOTTI

No. 33 PC.

Case below: 26 N.C. App. 580.

Petition by defendant Longiotti for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

GEORGE v. OPPORTUNITIES, INC.

No. 62 PC.

Case below: 26 N.C. App. 732.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

LAND CO. v. WHITE

No. 36 PC.

Case below: 26 N.C. App. 548.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

LOWDER, INC. v. HIGHWAY COMM.

No. 56 PC.

Case below: 26 N.C. App. 622.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

OVERTON v. BOYCE

No. 52 PC.

Case below: 26 N.C. App. 680.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 October 1975.

SHANKLE v. SHANKLE

No. 45 PC.

Case below: 26 N.C. App. 565.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. DAVIS

No. 64 PC.

Case below: 26 N.C. App. 696.

Petition by Defendant Davis for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. FINK

No. 23 PC.

Case below: 26 N.C. App. 430.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. HELMS

No. 39 PC.

Case below: 26 N.C. App. 601.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975. Motion of Attorney General to dismiss for lack of substantial constitutional question allowed 7 October 1975.

STATE v. LANEY

No. 40 PC.

Case below: 26 N.C. App. 513.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. McCALL

No. 55 PC.

Case below: 27 N.C. App. 13.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. MEDLEY

No. 195 PC.

Case below: 26 N.C. App. 331.

Petition by Defendant Medley for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. MILLER

No. 52.

Case below: 26 N.C. App. 440.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. SAWYER

No. 58 PC.

Case below: 26 N.C. App. 728.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. SEGARRA

No. 47 PC.

Case below: 26 N.C. App. 399.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

STATE v. WOODS

No. 38 PC.

Case below: 26 N.C. App. 584.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1975.

STEVENS v. STEVENS

No. 18 PC.

Case below: 26 N.C. App. 509.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 October 1975.

WILLIS v. POWER CO.

No. 42 PC.

Case below: 26 N.C. App. 598.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 October 1975.

STATE OF NORTH CAROLINA v. CARDELL SPAULDING, JOE LEE COBB AND VERNON RICHARD WALTERS

No. 4

(Filed 5 November 1975)

1. **Criminal Law § 92— consolidation of indictments for trial**

The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. G.S. 15-152.

2. **Criminal Law § 48— implied admissions**

Implied admissions are received with great caution; however, if the statement is made in a person's presence by a person having first-hand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

3. **Constitutional Law § 31; Criminal Law §§ 48, 79— statement made in defendant's presence — failure of defendant to deny — no implied admission**

Where a statement of one defendant implicating a codefendant was made in the presence of the codefendant, but there was no evidence that the codefendant was in a position to hear or understand the statement and make a denial, admission of the evidence as an implied admission violated the codefendant's right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution; however, such evidence was harmless beyond a reasonable doubt where there was plenary competent evidence that the codefendant committed the crime in question.

4. **Homicide § 21— first degree murder of prison inmate — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder where such evidence tended to show that the body of a prison inmate was found in the prison library, the victim had been stabbed many times, two of the defendants were observed by another inmate beating a guy in the library, two inmates observed that defendants' clothes were bloody, trousers and a knife belonging to one defendant were found in a prison trash can along with other items of clothing, two knives and two name tags, a prison maintenance supervisor found a pair of cut-up pants and a tag bearing the name of one of the defendants in a prison sewer line, and a prison inmate testified as to certain incriminating statements made by the various defendants to him or overheard by him.

5. **Homicide § 15— bloody scene of crime — testimony properly admitted**

The trial court in a first degree murder prosecution did not err in allowing a witness to describe the blood he observed on the floor

where the deceased was found, since similar testimony had not previously been elicited and since the evidence was clearly relevant and material, particularly in light of other evidence placing the blood covered defendants near the scene of the killing.

6. **Criminal Law § 78; Homicide § 18— cause of death — willingness to make stipulation — expert testimony admissible**

The trial court in a first degree murder prosecution did not err in allowing the testimony of two physicians as to the cause of decedent's death, though all defendants were willing to stipulate that the victim's death was caused by multiple stab wounds, since a stipulation as to cause of death may not be used to prevent the State from proving all essential elements of its theory of the case, and since the expert testimony had relevance beyond the facts to which defendants were willing to stipulate in that the evidence was competent to show the use of different instruments, thereby supporting an inference that the wounds were inflicted by two or more persons, and was competent to prove premeditation and deliberation.

7. **Homicide § 20— first degree murder — admissibility of photographs**

The trial court in a first degree murder prosecution did not err in admitting photographs illustrating the expert testimony of two physicians as to the cause of the victim's death.

8. **Criminal Law § 71— shorthand statement of fact — admissibility**

The Supreme Court has long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time; such statements are usually referred to as shorthand statements of facts.

9. **Criminal Law § 71— description of bloody defendant — admission as shorthand statement of fact**

Under the "shorthand statement of facts" exception to the opinion evidence rule, the trial court properly allowed a witness to testify that on the day of the crime the witness observed one defendant and "he was bloody like he had been to a slaughter."

10. **Criminal Law § 162— failure to object to question — objection to answer too late**

Defendants could not object to testimony elicited from a witness where defendants failed to object until the witness's answer had been received even though grounds for the objection were obvious after the question had been asked.

11. **Criminal Law § 88— cross-examination of witness**

Defendants were not prejudiced by a witness's original reluctance to answer questions on cross-examination, since the witness subsequently did freely respond to questions and since defense counsel did not attempt to "sift" the witness.

**12. Criminal Law § 96— withdrawal of evidence — repetition of evidence by court — no error**

In granting defendants' motion to strike testimony that shortly after the murder in question one defendant "looked like he had been to a hog killing," the trial court did not err in repeating the statement in the exact words of the witness, since it was necessary to repeat the language objected to so that the jury would clearly understand the portion of the evidence which it should not consider in reaching its verdict.

**13. Criminal Law § 87; Witnesses § 1— list of State's witnesses — testimony by witnesses not listed**

It is within the discretion of the trial judge to decide whether a witness shall testify when his name does not appear on a list of witnesses which the State elects to furnish defense counsel prior to trial, and defendants were not prejudiced in this case where the court allowed three witnesses whose names did not appear on the witness list to testify concerning discovery of and chain of custody as to certain exhibits which defendants must have anticipated would be offered into evidence.

**14. Criminal Law § 88— prior conduct — cross-examination proper**

The trial court did not err in allowing the solicitor to cross-examine a convicted felon concerning his prior misconduct.

**15. Criminal Law § 99— armed prison guards at trial — conduct of trial discretionary matter**

The trial judge in a first degree murder trial did not abuse his discretion by ordering or permitting strong security measures, including the presence of armed prison guards and armed officers in and around the courthouse and in the presence of the jury, since among the witnesses appearing in the case were three men convicted of murder, two men convicted of felonious breaking or entering, one man convicted of felonious larceny, five men convicted of armed robbery, and one man convicted of assault with intent to commit rape, and since the three defendants were inmates of Caledonia Prison Farm.

**16. Constitutional Law § 36; Homicide § 31— first degree murder — death penalty proper**

Imposition of the death penalty upon conviction for first degree murder was not cruel and unusual punishment.

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

APPEAL by defendants from *Rouse, J.*, 11 November 1974 Special Criminal Session of HALIFAX Superior Court. Defendants gave notice of appeal in open court. Each defendant, by petition for writ of certiorari, sought additional time for the perfection of his appeal. We allowed defendants' petition on 10 February 1975.

Defendants Cardell Spaulding (Spaulding), Joe Lee Cobb (Cobb) and Vernon Richard Walters (Walters) were charged in separate bills of indictment with the first-degree murder of James Thomas Griffiths on the 18th day of March 1974. Walters was also referred to in the record as "Buckwheat" and "Walter Vernon." The charges were consolidated for trial upon motion of the State and over the objection of each defendant. After being duly arraigned, each defendant entered a plea of not guilty.

The State's evidence tended to show that on the 18th day of March at about 6:40 p.m., a custodial officer at Caledonia Prison Farm discovered the body of James Thomas Griffiths lying in a pool of blood in the prison library. The officer observed numerous stabs and cuts upon Griffiths' body. Griffiths was carried to the Scotland Neck Community Hospital where Dr. G. V. Byrum conducted an examination. Dr. Byrum testified that his examination disclosed that Griffiths died as a result of multiple stab wounds in the chest and abdomen. He found more than forty different wounds on the body. Dr. Joseph H. Harmon, a pathologist who conducted a post-mortem examination, confirmed Dr. Byrum's conclusion as to the cause of death.

The State relied heavily upon the testimony of Sharif Sarakby and Haywood Lindsay who were prisoners at Caledonia Prison Farm on 18 March 1974.

Sarakby testified that on 18 March 1974 he was in the Prison Farm dormitory when Walters left the dormitory armed with a knife avowing that he was going to "get" Thomas Griffiths because, according to Walters, he had told a prison guard that "they" were connected with a prison robbery. Cobb, also armed with a knife, shortly thereafter left the dormitory after indicating he was going to join Walters. The witness later saw Cobb and Walters and they were both covered with blood. He helped Walters remove and dispose of identifying patches from his bloody clothes. While he was performing this task, defendant Spaulding entered the room. His clothes were "messed up," but the witness did not observe any blood on Spaulding's clothes.

Haywood Lindsay, in essense, testified that shortly after supper he saw Walters and Cobb in the prison library. They were "bent over beating on a guy . . . . " The witness left the

vicinity of the library and a short time thereafter he saw defendant Spaulding who "had blood all over him." He related that Spaulding pushed him over as he went by and that Spaulding was followed by Walters, Cobb and Sarakby in that order. Cobb and Walters were bloody. Walters tried to stab him with a shank (a homemade knife), but made no further efforts after Sarakby pleaded for no further violence.

George Marshall testified that on 18 March 1974, at about 10:30 p.m., he found State's Exhibit 10, identified as trousers belonging to Walters and State's Exhibit 5, a knife identified as belonging to Walters, in a trash can in the hallway near the canteen. He also found other items of clothing, two knives and two name tags and "to the best of his knowledge" one of the name tags bore the name Sarakby. All of these items were given to SBI Agent McMahan.

Ervin Eugene Warrick, a maintenance supervisor at Caledonia Prison during the year 1974, testified that on the 18th, 19th or 20th of March he found a pair of cut-up pants and a name tag bearing the name Spaulding in the sewer line. These items were delivered to SBI Agent McMahan.

The State offered the testimony of FBI Agent McMahan for the purpose of corroborating the testimony of Sarakby and Lindsay and for the purpose of showing chain of custody of certain exhibits.

There was further evidence that Griffiths' blood type was O and that Walters' knife, State's Exhibit 5, had blood on it but there was not a sufficient amount to identify the type. Examination of Vernon Walters' identification patch revealed Type O blood. Tests performed on Walters' pants, shirt and shoes, State's Exhibits 11, 13, and 12, established the presence of Type O blood. Examination of Exhibits 14 and 15, Cobb's shoes and shirt, also disclosed Type O blood.

None of the defendants testified but offered evidence tending to show that each of them was either on the basketball court or in Cell Block 2-A playing poker in the presence of other inmates. Cobb also presented evidence to show that a cut on his left index finger was a result of an accident which occurred in the laundry room on the day of the killing. Walters offered evidence to show that a cut found on his leg occurred while he was working with a shovel on the prison farm.

The jury returned verdicts of guilty as charged in the indictments as to each defendant. Defendants appealed.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General Lester V. Chalmers, Jr., for the State.*

*W. Lunsford Crew for defendant appellant Spaulding.*

*William F. Dickens, Jr. for defendant appellant Cobb.*

*H. P. McCoy, Jr. for defendant appellant Walters.*

BRANCH, Justice.

Defendants assign as error the ruling of the trial judge allowing the cases to be consolidated for trial. Each defendant contends that his constitutional right of confrontation and cross-examination as guaranteed by the Sixth Amendment to the United States Constitution was violated by the reception of evidence of admissions by one of his codefendants which implicated him in the crime charged which evidence was inadmissible against him.

[1] The trial judge may, in his discretion, order the consolidation for trial of two or more indictments in which the defendants are charged with crimes of the same class when the crimes are so connected in time or place that evidence at trial of one of the indictments will be competent and admissible at the trial of the others. G.S. 15-152; *State v. Parker*, 271 N.C. 414, 156 S.E. 2d 677; *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506, cert. denied, 384 U.S. 1020; *State v. Morrow*, 262 N.C. 592, 138 S.E. 2d 245; *State v. White*, 256 N.C. 244, 123 S.E. 2d 483. We are advertent to the repeal of G.S. 15-152, effective 1 July 1975. The repealing act is applicable to all criminal proceedings begun on or after that date. N. C. Sess. Laws ch. 1286 (1973). This trial was held before the effective date of this repealing legislation.

Prior to the decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620, the general rule was that the admission of extrajudicial confessions of one codefendant, even though it implicated another against whom it was inadmissible, was proper when the trial judge instructed the jury that the evidence was admitted only against the defendant making the confession and must not be considered by the jury in any manner in determining the charge against his codefend-

ant(s). *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677; *State v. Taborn,* 268 N.C. 445, 150 S.E. 2d 779; *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229, rev'd on other grounds, 376 U.S. 773, 12 L.Ed. 2d 77, 84 S.Ct. 1032. The decision in *Bruton* complicated joint trials. The essence of the holding in *Bruton* is that the admission of a confession implicating a codefendant violates the non-confessing defendant's Sixth Amendment rights of confrontation and cross-examination unless the confessor takes the stand so as to be subjected to cross-examination.

The landmark North Carolina case interpreting *Bruton* is *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492. There Justice Sharp (now Chief Justice) speaking for the Court stated:

> . . . [I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra),* and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation. See *State v. Kerley, supra* at 160, 97 S.E. 2d at 879.

Accord: *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39. We note parenthetically that the majority of our cases interpreting the *Bruton* rule refer to in-custody *confessions;* however, the rule as stated in *Bruton* and *Fox* applies with equal force to *admissions* by a defendant which implicate another against whom the evidence is inadmissible. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858; *Bruton v. U.S., supra;* 2 Stansbury's N. C. Evidence, § 182, pp. 62-63 (Brandis Rev. 1973).

Obviously some of the statements challenged by defendants offend the *Bruton* rule and constitute prejudicial error unless the statements are competent against the nondeclarants or unless the total evidence is so overwhelming that the erroneous admission is harmless beyond a reasonable doubt. *State v. Davis* and *State v. Fish,* 284 N.C. 701, 202 S.E. 2d 770.

In order to avoid repetition as we consider each respective defendant's contentions under this assignment of error, we summarize the portions of the record containing admitted evidence which defendants contend violated their constitutional rights of confrontation and cross-examination:

Subsection A: In the early portion of the testimony of the witness Sarakby, he related that in the presence of James Cobb and the witness that defendant Walters said, "We are going to get him, that so and so. We are going to get that Son of a Bitch." Whereupon Walters put a knife in his pants and left. Cobb then put a knife in his shirt and said, "I won't let him go alone. Stay there. Don't go anywhere." Only Cobb and Walters were present when these statements were made to Sarakby.

Subsection B: The solicitor inquired whether Walters or Cobb had told the witness why they were going to get James Griffiths. The witness responded that Walters had told him that James Griffiths had "told the man about the robbery they had on the week before." The record does not disclose whether anyone was present other than the witness and Walters on this occasion.

Subsection C: Walters stated to Sarakby "I want you to do me a favor and to do Joe Cobb a favor . . . we don't want you talking to no blacks whatsoever." The record does not show that anyone was present at this time except the witness and Walters; however, shortly thereafter the same admonition was repeated by Walters in the presence of Cobb who did not comment.

Subsection D: The witness Sarakby testified that Cobb, covered with blood, walked quickly back to the dormitory and at that time the witness asked Cobb what happened. Cobb replied, "We got him, he is dead, we killed him." The witness inquired "Where was it?" and Cobb replied "In the library." At the same time, Cobb asked the witness Sarakby to go help Walters. No one was present at this time except Cobb and the witness.

Subsection E: The witness Sarakby further testified:

> After headcount Buckwheat [Walters], Joe Lee Cobb, Cardell Spaulding and me went to the game room and sat at the same table. There were more guys with us. Billy Spaulding told Joe Cobb, "Joe, we got him, he is dead, we

have killed him, so we ain't got to worry about his talking, ain't nobody going to talk."

Q. All right, go ahead.

A. At this time, I turned around and asked Walter Vernon [Walters], who was sitting to my right, if Billy Spaulding had anything to do with the murder. He said, "Yes, he had, just don't say anything about it, you know, we are not supposed to tell anybody about it."

Q. What else did he say?

A. He just said that Billy Spaulding—Billy Spaulding was sitting on my left and he was talking to some other guys sitting at the table over there. He said, "Keep your mouth shut, you ain't seen nothing and you ain't heard nothing. We got him, we killed him, and he is gone, so we ain't going to worry about him no more." That is what he said.

Subsection F: The witness Lindsay, after testifying that he saw Walters and Cobb beating on a man in the library, said that shortly thereafter he observed Walters and Cobb and Spaulding, followed by Sarakby, coming from the direction of the library. He stated that Spaulding, Cobb and Walters were bloody and as they passed by, Walters said, "We just killed a Goddamned man in the library." At that time, all three defendants were together and Cobb and Spaulding remained silent.

We first consider whether the admission into evidence of these various statements and admissions of other codefendants violated defendant Spaulding's constitutional right of confrontation and cross-examination. When read contextually the statements summarized in Subsections A through D do not in any way implicate Spaulding. The "we's" and "they's" seem to refer only to Cobb and Walters. Spaulding is never mentioned by name. See *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858. However, in a later portion of the testimony of the witness Sarakby the record shows that Walters made a statement implicating Spaulding while Spaulding, Cobb and Walters were sitting at a table in the game room. The circumstances under which this statement was made are fully set forth in Subsection E. The State takes the position that the *Bruton* rule does not apply because the evidence was admissible as an implied admission since Spaulding was present and failed to deny any complicity in the murder.

**[2, 3]** Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. 2 Stansbury's N. C. Evidence, § 179, p. 50 (Brandis Rev. 1973). *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812; *State v. Guffey,* 261 N.C. 322, 134 S.E. 619; *State v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186; and *State v. Wilson,* 205 N.C. 376, 171 S.E. 2d 338. It is true that the statement implicating defendant Spaulding was made in his presence, but it was not shown that he was in a position to hear or understand the statement made by Walters. In fact, the State's evidence shows that at the time statement was made, Spaulding was "talking to some other guys sitting at the table over there." A denial could not be expected under these circumstances and this evidence was not admissible as an implied admission. Since the evidence was not admissible as to Spaulding, its admission clearly violated his right of confrontation and cross-examination guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. There remains, nevertheless, the question of whether the erroneous admission of this evidence was harmless error beyond a reasonable doubt.

In *State v. Jones, supra,* Chief Justice Bobbitt wrote:

> . . . [I]n each case the prejudicial impact of testimony of out-of-court declarations of a codefendant, even when the right to confrontation is afforded, must be evaluated in the light of the competent admitted evidence against the nondeclarant defendant referred to in such declarations. We do not foreclose the possibility that the gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. No such gap exists in the present case.

Here the weight of the evidence erroneously admitted against Spaulding must be evaluated in light of the competent evidence admitted against him.

In essence, the competent evidence against Spaulding was as follows: The witness Sarakby stated that he heard Spaulding tell Cobb "Joe, we got him, he is dead, we have killed him, so we ain't got to worry about him talking, ain't nobody going to talk." The witness Lindsay saw Spaulding in the hallway shortly after he saw Cobb and Walters beating a man in the library and at that time Spaulding had blood all over him. Cobb and Walters were behind Spaulding and both of them were covered with blood. The witness Lindsay heard Walters, in the presence of Spaulding, state "We just killed a Goddamned man in the library." Spaulding made no denial or explanation as to this statement. Thereafter Spaulding's name tag was found with some cut-up trousers in a sewer line.

When we evaluate the probative value of the competent evidence admitted against Spaulding as compared to the admissions of other codefendants admitted into evidence which were not competent against him, we conclude that the evidence which violated Spaulding's Sixth Amendment rights of confrontation and cross-examination was rendered harmless beyond a reasonable doubt. *Brown v. United States,* 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565; *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056: *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824.

We next consider whether there was prejudicial error as to defendant Walters in the admission of the statements challenged by this assignment of error.

The record discloses that defendant Walters was present under such circumstances that a denial would be naturally expected if the statement made was untrue when the statements summarized in Subsections A, B, C and E were made. Thus his silence under the circumstances shown by the record amounted to implied admissions and this evidence was competent as to him. Walters was not present when Cobb made the admission set out in Subsection D to the effect that "We got him . . . . We killed him. He's dead." Neither was he present when Cobb told Sarakby "to go help Walter Vernon." These admissions were received in violation of Walters' constitutional rights of confrontation and cross-examination. However, the State presented competent evidence tending to show that: (1) Walters was seen beating a man in the library shortly before Giffiths' bloody body was discovered, (2) he was seen covered with blood near the scene of the killing and at that time declared

"We have just killed a Goddamned man in the library." (3) shortly before the body of Griffiths was discovered Walters declared he "was going to get that S.O.B."

The mass of evidence against defendant Walters was so great that any incrimination by the statements of his codefendants was rendered harmless beyond a reasonable doubt.

Finally, we consider the admission of the challenged statements as to defendant Cobb. The only statements which tend to violate Cobb's constitutional rights to confrontation and cross-examination are contained in Subsections B and C. In connection with the statements made in Subsection B, the record indicates only that *Walters* was mad with Griffiths because he had told the man about the robbery they had on the week before. Cobb was not named as one participating in the robbery or as having a grudge against Griffiths. Nowhere in the record was there anything which connects this statement with Cobb. We do not think that Cobb was incriminated by the statements contained in Subsection B. The remaining statement which might have violated the *Bruton* rule as to Cobb, at most, implied that Cobb and Walters had *some* criminal plans. Even if we concede, which we do not, that these statements did implicate Cobb, the overwhelming evidence against him convinces us that the admission of such evidence was harmless error beyond a reasonable doubt. Competent evidence against Cobb tends to show the following: Cobb was identified by an eyewitness as one of the men he saw beating on a man in the library a short time before Griffiths' bloody body was discovered. Cobb, armed with a knife, stated that he was going to join Walters immediately after Walters left his presence after saying, "We are going to get that S.O.B." Cobb was seen near the library covered with blood a short time before the discovery of Griffiths' body. While washing blood from his person, he told Sarakby "We got him, he is dead. We killed him." He also directed Sarakby to go and help the bloody Walters.

For the reasons stated, we hold that the trial judge did not err when he allowed the State's motion to consolidate the cases for trial.

**[4]** Each defendant contends that the trial judge erred in overruling his motions for judgment as of nonsuit at the conclusion of the State's evidence and at the conclusion of all of the evidence.

The rules governing consideration of the evidence upon a motion for judgment as of nonsuit and the sufficiency of the evidence to withstand such motion are clearly stated by Justice Lake in the case of *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, as follows:

> Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purpose of this motion, they are to be deemed by the court as if resolved in favor of the State. In determining such motion, incompetent evidence which has been admitted must be considered as if it were competent. [Citations omitted.]
>
> The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct, or both. There is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw a reasonable inference of each such fact from the evidence. If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of nonsuit should be allowed. [Citations omitted.]

In view of the detailed recitation of the evidence as to each defendant in our consideration of the preceding assignment of error we do not deem it necessary to again review the State's evidence. Suffice it to say that upon applying the above-stated

rules we conclude that there was ample evidence to carry the case to the jury as to each defendant.

**[5]** Defendants next contend that the court erred in allowing William Bryant to describe the blood he observed on the floor where the deceased was found. Objection to the question eliciting William Bryant's description of the blood surrounding the decedent's body was lodged on the ground that the testimony would be repetitious. Our examination of the record does not reveal any occasion on which similar testimony had been elicited. This evidence was clearly relevant and material, particularly in light of other evidence placing the blood covered defendants near the scene of the killing. This evidence was properly admitted. See *State v. Cumber,* 280 N.C. 127, 185 S.E. 2d 141.

**[6]** Defendants argue that the trial judge erred in allowing the testimony of two physicians as to the cause of decedent's death when all defendants were willing to stipulate that Griffiths' death was caused by multiple stab wounds. Although there is authority for the proposition that evidence of an admitted fact may be properly excluded, a stipulation as to the cause of death may not be used to prevent the State from proving all essential elements of its theory of the case. *State v. Cutshall,* 278 N.C. 334, 347, 180 S.E. 2d 745. The expert testimony had relevance beyond the facts to which defendants were willing to stipulate in that the evidence was competent to show the use of different instruments, thereby supporting an inference that the wounds were inflicted by two or more persons.

The use of grossly excessive force or the delivering of lethal blows after a deceased has been felled are among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation. Therefore, this evidence was also admissible for the purpose of proving premeditation and deliberation.

**[7]** The photographs illustrating these experts' testimony were also properly admitted over defendants' objections. It has long been the rule in this State that "[r]elevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." 1 Stansbury, supra at § 80, p. 242. In *State v. Cutshall, supra,* this Court stated:

> Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under

> instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

This assignment of error is overruled.

**[8, 9]** On direct examination Sarakby testified that he observed defendant Cobb on 18 March 1974, and "he was bloody like he had been to a slaughter." Defendants contend that Cobb's objection should have been sustained and his motion to strike should have been allowed since the witness was giving his opinion of the defendant's appearance. This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts. *State v. Skeen,* 182 N.C. 844, 109 S.E. 71.

In *State v. Sterling,* 200 N.C. 18, 156 S.E. 96, it was held to be proper to allow a witness to state that the defendant's face "appeared to be the face of a man who had taken a hasty shave with a dull razor in cold water." In *Skeen, supra,* this Court held that it was proper to allow testimony that the defendant's shoes were muddy and "[d]idn't look like they had been unlaced in several days."

In our opinion, Sarakby's description of defendant Cobb was a permissible expression of opinion under the "shorthand statement of facts" exception to the opinion evidence rule.

**[10]** Defendants also contend that the rule prohibiting expressions of opinion by lay witnesses was violated when Sarakby was permitted to testify that Walters and Spaulding were referring to Griffiths when they made statements that they had killed "him." Defendants did not object to the district attorney's question until after the witness had responded. This assignment of error is deemed waived since defendants did not object

until after the answer had been received even though grounds for the objection were obvious after the question had been asked.

> . . . [I]t is well settled that an objection must be interposed to an improper question without waiting for the answer and, if the objection is not made in apt time, a motion to strike a responsive answer is addressed to the discretion of the trial court except where the evidence is rendered incompetent by statute. [Citations omitted.]

*State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839. Even had the evidence been improperly admitted, it is evident that the witness must have referred to Griffiths since there is nothing in this record to indicate other murders in which these parties were involved. We cannot perceive how the jury could have been misled or defendant prejudiced by the admission of this evidence.

**[11]** Upon his cross-examination, the State's witness Sarakby at first refused to answer several questions. Defendants contend that they were thereby denied their right to a full and fair cross-examination. They rely on the case of *Bank v. Motor Co.*, 216 N.C. 432, 5 S.E. 2d 318. A cursory examination of the case cited by defendants in support of their contentions reveals significant distinguishing features. In *Bank*, one of the chief witnesses answered several immaterial questions, and then refused to answer any further questions. Conversely, in the present case Sarakby initially refused to answer several questions, but after some hesitation did freely respond to questions. Certainly defendants were not prejudiced by this witness's original reluctance to answer questions on cross-examination. The insignificance of these matters is highlighted by the failure of defense counsel to attempt to "sift" the witness. This assignment of error is overruled.

**[12]** On direct examination, Haywood Lindsay testified that he saw defendant Walters in the vicinity of the library and Walters "looked like he had been to a hog killing." Following a motion to strike this testimony, the trial judge granted the motion to strike and instructed the jury to disregard the statement "looked like he had been to a hog killing." Defendants contend that the trial judge erred by repeating the statement in the exact words of the witness. When a motion to strike is granted, the trial judge should instruct the jury to disregard

the stricken evidence. It is presumed that the jury will follow such instructions. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93; *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *Wilson v. Mfg. Co.,* 120 N.C. 94, 26 S.E. 629. Here the trial judge properly instructed the jury to disregard the objectionable testimony. It was necessary for him to repeat the language objected to so that the jury would clearly understand the portion of the evidence which it should not consider in reaching its verdict. We find no merit in this assignment of error.

**[13]** All defendants contend that the trial court erred in allowing the State to present witnesses whose names had not been furnished to defense counsel prior to jury selection. In this assignment of error, defendants argue that the State's failure to furnish a complete list of the State's witnesses denied them their "inherent right" to examine jurors on *voir dire* as to their relationship to the State's witnesses. Pursuant to defendants' request, the district attorney did give defendants a list of witnesses that the State intended to present, but this list did not include the names of three witnesses, James Goddard, James Walker and Roy Harrison. In *State v. Hoffman,* 281 N.C. 727, 734, 190 S.E. 2d 842, Justice Sharp (now Chief Justice) stated for the Court:

> "The common law recognized no right of discovery in criminal cases." *State v. Goldberg,* 261 N.C. 181, 191, 134 S.E. 2d 334, 340 (1964). *In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. McDaniel v. State,* 191 Miss. 854, 4 So. 2d 355 (1941); *Padgett v. State,* 64 Fla. 389, 59 So. 946 (1912); *State v. Matejousky,* 22 S.D. 30, 115 N.W. 96 (1908); 21 Am. Jur. 2d *Criminal Law* § 328 (1965); 16 C.J.S. *Criminal Law* § 2030 (1938). There is no such statute in this State. [Emphasis ours.]

See also *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106.

We note that a legislative proposal which would have required the State to furnish a list of witnesses the district attorney intended to call at trial was deleted from the Criminal Procedure Act when it was adopted by the General Assembly. See Official Commentary following G.S. 15A-903 (1975).

It is within the discretion of the trial judge to decide whether a witness shall testify when his name does not appear on a list of witnesses which the State elects to furnish defense counsel prior to trial. The Judge's ruling will not be reversed absent a showing of abuse of discretion. *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336. Under such circumstances, we think it to be the better practice before ruling for the Court to interrogate the jurors as to their relationship with the tendered witnesses. Although this procedure was not followed here, we find no prejudice to defendants. The testimony given by these witnesses did not relate to essential elements of the crime charged, but only to the discovery of and chain of custody as to certain exhibits. Defense counsel could not have been misled or surprised by the omission of the names of the witnesses Goddard, Walker and Harrison from the list furnished by the State since they must have anticipated the offer of these exhibits into evidence. This assignment of error is overruled.

**[14]** Defendants contend that the trial judge erred by overruling their objection to a question by the solicitor to the witness Pridgen.

During witness Pridgen's cross-examination, the solicitor asked him, "Listen to me and answer me carefully. If you are the man who concealed the gun in the radio that kidnapped Dr. Edwards down here at Scotland Neck. . . ." The witness answered, "No I did not." Pridgen was a prisoner serving time for conviction of a felony.

A witness may be cross-examined by asking disparaging questions concerning collateral matter relating to his criminal or degrading conduct; however, the questions must be asked by the solicitor in good faith. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 714; *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875, cert. denied, 397 U.S. 1050; *State v. Griffin,* 201 N.C. 541, 160 S.E. 826. The limits of proper cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held to be error in the absence of a showing that the jury verdict was improperly influenced thereby. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50; *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704; *State v. Beal,* 199 N.C. 278, 154 S.E. 604. Since the solicitor's question related to collateral matter the witnesses' negative answer was conclusive and rendered the question harmless. *State v. Ross, supra.* This record does not disclose bad faith on the part of the solicitor in asking the

challenged question. Even assuming, *arguendo,* that the question was asked in bad faith, we cannot conceive that a single question directed to this witness, a convicted felon, concerning his prior misconduct would have affected the jurors in reaching their verdict.

This assignment of error is overruled.

**[15]** Defendants each contend that the trial judge committed prejudicial error by permitting the use of armed prison guards and allowing the presence of armed officers in and around the courthouse and in the presence of the jury during the course of the trial.

It is the duty of the trial judge, in the exercise of his discretion, to regulate the conduct and the course of business during a trial. The exercise of this discretion will not be reviewed absent a showing of abuse of discretion. 75 Am. Jur. 2d TRIAL, § 30, pp. 142, 143; *State v. Kirkman,* 234 N.C. 670, 68 S.E. 2d 315; *State v. Vann,* 162 N.C. 534, 77 S.E. 295.

Among the witnesses appearing in this case were three men convicted of murder, two men convicted of felonious breaking and entering, one man convicted of felonious larceny, five men convicted of armed robbery and one man convicted of assault with intent to commit rape. The three defendants, charged with first-degree murder, were inmates of Caledonia Prison Farm. Under these circumstances, it would seem reasonable for the trial judge to take strong security precautions. Further the trial judge knew the atmosphere and emotional climate which existed in the courtroom. We do not have the benefit of this knowledge. The presence of these armed officers and guards could add little in the way of fear to the courtroom atmosphere produced by the evidence picturing a vicious crime of violence committed upon a prison background.

We hold that the trial judge did not abuse his discretion by ordering or permitting strong security measures during the course of this trial.

**[16]** Finally all defendants contend that the imposition of the death penalty is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. The constitutionality of the death sentence has been uniformly upheld in numerous recent decisions of this Court. *State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607; *State*

*v. Robbins,* 287 N.C. 483, 214 S.E. 2d 756; *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80; *State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51; *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60; *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742; *State v. Burns,* 287 N.C. 102, 214 S.E. 2d 56; *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14; *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. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. We adhere to the holdings in these cases.

Because of the seriousness of these cases, we have carefully examined this entire record. Our examination does not disclose such prejudicial error as would justify the granting of a new trial or that the judgments be disturbed.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The murder for which defendants were convicted occurred on 18 March 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 defendants 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.

STATE OF NORTH CAROLINA v. WILLIE EDWARD McZORN

No. 44

(Filed 5 November 1975)

1. **Searches and Seizures § 1; Arrest and Bail § 3— stop and frisk — discovery of weapon — arrest without warrant**

The stopping of defendant's vehicle and the frisking of his person were constitutional where: an officer had received information less than an hour earlier from a known informant of proven reliability that defendant was at a certain "beer joint," that defendant was driving a '74 green Chevrolet Vega, and that defendant had on his person a .38 revolver used in a robbery and murder; as the officer was cruising the area where defendant was reported to be, he encountered defendant coming toward him in his car; the officer effected a stop by use of his siren and lights; and the officer frisked defendant and found a loaded .38 caliber revolver in his inside pocket; moreover, as soon as the frisk revealed that defendant was carrying a revolver, the officer properly arrested him without a warrant for carrying a concealed weapon in violation of G.S. 14-268, and the revolver was properly admitted into evidence at his subsequent trial for murder and robbery. G.S. 15-41(1) (now G.S. 15A-401(b)).

2. **Criminal Law § 75— volunteered in-custody statement — officer's request for explanation — failure to give further Miranda warnings**

Where defendant's statement to officers that he had shot decedent was volunteered after all police interrogation had ceased, an officer's request that defendant explain what happened did not render defendant's subsequent detailed statement the product of custodial interrogation, and no further *Miranda* warnings were required prior to the statement.

3. **Criminal Law § 75— necessity for repetition of Miranda warnings**

Repetition of the *Miranda* warnings is generally not required where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning; however, the need for the second warning is to be determined by the totality of the circumstances.

4. **Criminal Law § 75— necessity for repetition of Miranda warnings — totality of circumstances — factors considered**

Courts have included the following factors, among others, in the totality of circumstances which determine whether the initial *Miranda* warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation: (1) the length of time between the giving of the first warnings and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the sub-

sequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

5. **Criminal Law § 75— second interrogation — failure to repeat Miranda warnings**

Defendant's confession was not rendered inadmissible by the failure of the officer to repeat the *Miranda* warnings, which had been given prior to the initial interrogation of defendant, where the confession occurred only 20-30 minutes after the initial interrogation terminated, the subsequent interrogation was conducted in the same room and by the same officer who gave the initial warnings, the confession was not inconsistent with any earlier statements by defendant, and there is no indication that defendant was so intellectually deficient or emotionally unstable that he had forgotten his constitutional rights that had been fully explained to him a short time earlier.

6. **Criminal Law § 75— confession — failure to notify family of arrest**

Defendant's confession was not coerced and rendered inadmissible by the failure of officers to notify the 24-year-old defendant's family and girl friend that he was in custody before they began to interrogate him.

7. **Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — different victims — punishment for robbery**

Where the State prosecuted defendant for first degree murder on the theory that he killed decedent while engaged in the perpetration of the felony of armed robbery of decedent's son, the armed robbery was an essential element of the charge of first degree murder, and no separate punishment can be imposed for the robbery.

APPEAL by defendant under G.S. 7A-27(a) from *Gavin, J.*, 3 March 1975 Session of MOORE County Superior Court.

Defendant was tried upon two bills of indictment. One charged him with the armed robbery of Kenneth McAskill on 6 January 1975; the other, drawn under G.S. 15-144, charged him with the murder of John Henry McAskill on the same day. The State offered evidence that tended to show the facts summarized below:

The deceased, John Henry McAskill (Mr. McAskill), owned and operated a grocery and filling station known as Honeycutt's Grocery Store in West End in Moore County. About 6:45 p.m. on 6 January 1975, two black men entered the store. The first man was approximately six feet tall and weighed about 160 pounds. He was dressed in heavy green military fatigues, carried a revolver, and wore a brown and gold ski mask pulled down over his face. The second man, who was shorter and

heavier, carried a sawed-off shotgun. He too wore a fatigue jacket and mask.

When the two men entered, Mr. McAskill was dozing by the store's heater in a chair which faced the doorway. His son, Kenneth McAskill (Kenneth), aged 19, was sitting opposite him. No one else was in the store. Thinking that the men were prospective customers, Kenneth rose to serve them. At that time, the first man pointed the revolver at Kenneth and demanded his money, saying, "This is a hold-up." When Kenneth reached for the billfold in his hip pocket the man ordered him to stop and to turn sideways so that he could see for what he was reaching. Kenneth complied with his demands and, as the man continued to hold the revolver on him, he handed over his billfold containing approximately fifteen dollars.

During this time the other man was holding the shotgun on Mr. McAskill, who had awakened. As he raised himself in the chair, the first man shouted, "Get him." One of the men shot Mr. McAskill, and both then ran from the store. Kenneth went immediately to a nearby trailer and telephoned for the police and for an ambulance. Both responded within minutes, and Mr. McAskill was taken to the hospital, where he died a short time later as the result of the gunshot wound.

Deputy Sheriff Watkins arrived at the scene about 7:00 p.m. After questioning Kenneth, who was still there and "terribly upset," Deputy Watkins began his investigation. When he found two sets of footprints leading from the store in the direction the men had fled, bloodhounds were called, and they followed the tracks to a cemetery. There the officers found automobile tire tracks, and at that point the footprints stopped.

The following morning Dr. R. L. Stuber, Chief Medical Examiner of Moore County, autopsied the body of Mr. McAskill and removed therefrom a bullet which he delivered to Deputy Watkins. This bullet had entered the left side of Mr. McAskill's neck and lodged in his spine. In Dr. Stuber's opinion, this bullet (State's Exhibit 6) had caused Mr. McAskill's death.

On 18 January 1975 at about 11:00 p.m., Deputy Watkins accompanied by SBI Agent Bill Dowdy, stopped a green Vega automobile driven by defendant. Deputy Watkins frisked defendant and found a loaded .38 caliber revolver in his inside coat pocket. Thereupon, defendant was placed under arrest for

carrying a concealed weapon. At trial the judge conducted a *voir dire* to determine the validity of the arrest, which was made without a warrant, and the admissibility of the revolver into evidence. On *voir dire*, the testimony of Deputy Watkins tended to show the following facts.

Approximately two days before defendant was arrested on 18 January 1975, Deputy Watkins received information from a confidential informant that defendant had a .38 caliber revolver. During the six months prior to 18 January 1975, on 20-25 occasions, this informant had given Watkins information which was proven to be reliable. Prior to January 18th Watkins did not know of defendant's existence. On that date, about one hour before defendant was arrested, the same informant told Deputy Watkins that defendant had concealed on his person a .38 revolver; that it was the weapon which had killed Mr. McAskill; and that defendant and another man had committed the armed robbery and murder in West End. He also said that defendant was driving a green 1974 Vega and that he was at a particular bar in Southern Pines. Under the circumstances Watkins felt it would be unwise to take the time to procure a search warrant. Defendant "was out with his automobile" and there was "a good possibility" he would leave town or dispose of the weapon before the officers could get a search warrant and relocate him. Deputy Watkins and SBI Agent Dowdy, therefore, proceeded to the bar where defendant was reported to be. When they arrived, defendant was no longer there. After checking two more bars in the area which the informant had said defendant frequented, the officers were proceeding to still another bar when they passed defendant in his green 1974 Vega. Deputy Watkins stopped the Vega and identified himself to the defendant, who was the sole occupant of the car. After asking for defendant's driver's license, Deputy Watkins asked him to get out of his car which he did. The deputy then instructed defendant to put his hands on the car and told him he had been informed he was carrying a concealed weapon. At that point Watkins "frisked him down" and found the .38 revolver (State's Exhibit 5), loaded with five rounds of ammunition, in defendant's inside coat pocket.

Upon discovering the gun Watkins told him he was under arrest for carrying a concealed weapon. Defendant's reply was, "If I [had known] that was the reason you were stopping me, I would have killed all of you, or you would have had to kill me." He said he would never have been taken alive.

Upon findings supported by the foregoing evidence, the trial judge concluded that the arrest and accompanying search were valid, and he admitted the revolver into evidence. Thereafter, before the jury, Watkins gave substantially the same testimony with reference to this on-the-scene arrest of defendant and the seizure of the pistol.

Immediately after arresting defendant, Deputy Watkins and Agent Dowdy took him to the Southern Pines Police Department. There, about 11:30 p.m., Dowdy told defendant he wanted to talk to him about the murder of John McAskill and the robbery of his son. He then advised defendant of his constitutional rights in strict conformity with the requirements of *Miranda v. Arizona,* 384 U.S. 436 (1966). He informed defendant, *inter alia,* of his right to the advice and presence of counsel before and during police questioning, and defendant was told that if he was indigent and desired an attorney one would be appointed for him. He said he understood his rights and did not desire an attorney; that he was ready to talk to the officers.

At this point in the trial defendant requested a *voir dire* and, in the absence of the jury, Dowdy gave testimony which, in pertinent part, is summarized below.

Defendant is 24 years old. Dowdy questioned him in the presence of Deputy Watkins in the office of the Chief of Police. Defendant was not handcuffed; he did not appear to be ill or under the influence of alcohol or drugs. No threats, promises, or inducements of any kind were made to defendant. During the first 30-40 minutes of the interview defendant was questioned about his family background, education, military service, and where he had lived and worked. Defendant cooperated fully and spoke freely on these subjects, and he said he had purchased the pistol (Exhibit 5) on 3 January 1975 from an unknown black male.

When Dowdy asked defendant if he had bought any .38 ammunition he replied that he had not. Dowdy then informed him that the records of a hardware store in Aberdeen showed that he had purchased such ammunition there prior to 6 January 1975; that the police knew two black males had gone into McAskill's store, robbed the boy, and shot Mr. McAskill; that the two men had parked on a back road and walked around the store before going inside; that the description of one of the men fitted defendant; that the officers had casts of the tire

tracks and of the footprints which led to the tire tracks; and that tests would be made to ascertain if the bullet removed from Mr. McAskill's body was fired from defendant's gun.

Upon receiving the foregoing information defendant said, "I do not want to say anything else at this point." Agent Dowdy terminated the interrogation and asked SBI Agent Inscoe to obtain a description of defendant, his vital statistics, and the other information required for the police records. Dowdy then left the room to make arrangements for the firearms examiner to determine whether the bullet was fired from defendant's pistol.

About 20-30 minutes later, Agent Dowdy came back into the room, and Deputy Sheriff Watkins served upon defendant the murder warrant he had obtained. Dowdy then asked defendant if there was anything he could do for him. Defendant made three requests: that Dowdy call his parents and his brother; that he go "up and talk to his girl friend" and "be discreet"; and that he get him some cherry lifesavers. Dowdy told defendant he would do the three things he requested and, at that point, defendant said to him, "I might as well tell you about it, but I am going to take the blame for all of it. . . . I shot McAskill."

In response to Dowdy's request that he "explain what happened," defendant made the statement which, as related by Dowdy, is summarized below.

On the night of January 6th defendant and his "partner" drove from Southern Pines to West End in defendant's green '74 Vega, parked it on a dirt road on the edge of a cemetery, and walked across a railroad track and a field to the back of McAskill's store. Through a window they saw a boy and an old man, who was sitting in a chair. Defendant and his partner, both wearing ski masks, went into the store. Defendant, carrying the pistol, which the officers subsequently took from him, entered first. Upon demand, the boy gave him his wallet. At that time the old man started going in his back pocket and defendant thought he had a gun. Defendant later changed this to say that the old man pulled a gun and pointed it at his partner. Defendant told his partner "to get him." The partner "would not do anything"; so he shot the old man, who fell to the floor. They ran out the door and back to the car in the same direction from whence they came. There was $15 in the

boy's wallet, which was thrown away somewhere along the road as they returned to Southern Pines. They divided the fifteen dollars between them, but his partner gave him fifty cents more for his gasoline.

Defendant refused to describe the gun his partner was carrying or to name him. He said they had made a pact—if one got caught he would not tell on the other. He told the officers that the ski masks were in the closet in his room at his parents' home and gave them permission to obtain them. He also gave permission to make casts of his automobile tires and of his shoes.

Dowdy's interview with defendant began about 11:30 p.m. and was concluded at 12:20 or 12:30 a.m.

Defendant's testimony on *voir dire,* summarized except when quoted, tended to show the following:

After he was taken to Chief Seawell's office in Southern Pines they began trying to get him to confess to a murder and attempted robbery. He denied everything and kept denying it, but finally he confessed because (he said) "it was my car and my gun used and it's being loyal to some friends." Mr. Dowdy read him his rights and he thought he understood them but evidently he didn't since he had confessed "to something like that." Defendant also said that the officers told him if he "would talk, they would talk to the solicitor and to the judge and he would take that into consideration and go easy on [him]."

On cross-examination defendant stated that he had not been drinking or taking drugs; that when he was arrested he knew the pistol he was carrying had been used in the robbery and shooting; and that the officers did not threaten him during their interrogation but the situation made him scared and nervous. He said anyone would be frightened if his car had been used in an armed robbery and if he were found with the gun that had killed a man. Defendant said he knew who killed Mr. McAskill and robbed Kenneth but he would not tell.

With reference to his actual confession defendant testified:

"At one point I told Mr. Dowdy I did not want to say anything further. Some 20 or 25 minutes later he came back in the room and asked me if he could do anything. That's when I told

him I wanted my parents and my girl friend contacted and for him to get me some cherry Lifesavers. He said he would do those things. I think it was then that I told him that I might as well tell him about it. I told him about it without being asked any questions about the murder or the robbery. He was asking me about the murder. I think it was anywhere from five to ten minutes before I told him that I might as well tell him about it. That he had been asking me about the murder. I told him that I had shot McAskill and that I was going to take all the blame only because they were trying to pick up innocent people. . . . I told them that I had made a pact with others that I wasn't going to tell about them. I told Mr. Dowdy how the crimes had been committed. Because I had been lending my car to other guys to use and they would do these things and tell me about them so I knew just about what was going on. I told Mr. Dowdy how the crime had been committed, where the car was parked, how the building was entered and where Mr. McAskill and his son were in the store at the time of the robbery. I did not necessarily have to be there in order to describe how the crime was committed because I had been by there several times and I knew where the guys had parked the car."

At the conclusion of the *voir dire* the court found that defendant's confession was freely, voluntarily and understandingly made after he had been fully informed and warned of all his constitutional rights and after he had expressly waived the presence of counsel; that no threats or promises had been made to defendant to secure his confession; and that defendant's statement was admissible in evidence. Thereafter, in conformity with his testimony on the *voir dire*, Agent Dowdy then testified before the jury as to the content of defendant's statement to him and the circumstances under which it was made.

F. G. Satterfield, a firearms examiner for the State Bureau of Investigation, whom the court found to be an expert in the identification of firearms, testified that he had test-fired defendant's pistol, Exhibit 5, and compared the test bullets with the bullet, Exhibit 6; that, in his opinion, Exhibit 6 was fired in Exhibit 5 and that it could not have been fired in any other weapon.

Deputy Watkins, recalled, testified that between 12:30 a.m. and 1:00 a.m. on 19 January 1975 he went to defendant's residence, "explained to Mr. and Mrs. McZorn exactly what had

happened," told them defendant had given the officers his permission to look for the masks at the bottom of his closet and secured their permission. He found the masks where defendant said they would be. The two masks were introduced in evidence, and the State rested its case.

At the conclusion of the State's evidence defendant informed the court that he was exercising his right to remain silent and would offer no evidence. Counsel for defendant told the court that he had explained to defendant that, since he had offered no evidence, his counsel was entitled to make the closing argument to the jury; that notwithstanding, defendant wanted his case submitted to the jury without argument. Upon the court's inquiry defendant confirmed counsel's statement. Whereupon the judge charged the jury. Thereafter the jury returned verdicts that "defendant is guilty of robbery with a firearm as charged in the bill of indictment," and that "defendant is guilty of murder in the first degree as charged in the bill of indictment."

Upon the conviction of robbery with a firearm the court adjudged that defendant be imprisoned for the term of 30 years. Upon the conviction of murder in the first degree, the court imposed the sentence of death. From the sentence of death defendant appealed directly to this Court as a matter of right and, under G.S. 7A-31(a), we certified his conviction of armed robbery for initial appellate review at the same time.

*Attorney General Rufus Edmisten, by Assistant Attorney General Ann Reed for the State.*

*William D. Sabiston, Jr., for defendant appellant.*

SHARP, Chief Justice.

[1] Defendant's assignments of error, as brought forward in his brief, pose three questions. We consider first the contention that the stopping of defendant's vehicle and the frisking of his person were unconstitutional; that his subsequent arrest was in violation of G.S. 15-41; and that, in consequence, the revolver taken from his inside coat pocket was erroneously admitted into evidence. We find no merit in these contentions.

In our view, the facts of this case are illustrative of a proper stop and incident frisk, and are encompassed by the rationale of *Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612,

92 S.Ct. 1921 (1972) and *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1967). *See, e.g. Johnson v. Wright,* 509 F. 2d 828 (5th Cir. 1975) (U. S. App. Pending); *United States v. Stevens,* 509 F. 2d 683 (8th Cir. 1975), *cert. denied,* 95 S.Ct. 1993 (1975); *United States v. Jefferson,* 480 F. 2d 1004 (4th Cir. 1973), *cert. denied,* 414 U.S. 1001, 38 L.Ed. 2d 236, 94 S.Ct. 354 (1973); *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973).

In *Terry v. Ohio, supra,* the defendant was arrested for carrying a concealed weapon and subsequently convicted of that charge largely on the basis of the introduction into evidence of the weapon seized from him. The United States Supreme Court affirmed the conviction enunciating in the process a rationale which has been labeled the "stop and frisk" doctrine. In *Terry,* a police officer with thirty-nine years of experience, while patrolling his assigned area, observed defendant Terry and a companion repeatedly walk by a particular store gazing into its window. At one point Terry and his companion conferred with a third man after which they resumed their "measured pacing, peering and conferring." The officer suspected that the two men were "casing" the store in order to rob it either immediately or later. He therefore approached the men, identified himself, and asked their names. Receiving an inadequate response, the officer grabbed the defendant and patted down the outside of his clothing. When he felt what he believed to be a weapon, the officer reached inside the defendant's coat and removed a revolver. At his trial the defendant contended that the weapon was illegally seized because the officer lacked probable cause for both the stop and the frisk that revealed the weapon.

The United States Supreme Court held that, although the policeman's conduct in Terry was subject to Fourth Amendment limitation of reasonableness, the officer's conduct was permissible and the weapon was properly seized even though there was initially no probable cause for the intrusion. The Court held that since the officer could point to articulable facts that led him reasonably to conclude that criminal activity was afoot, he was justified in approaching the defendant for the purpose of investigating his suspicious activity. Although the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure," (392 U.S. at 19, n. 16, 20 L.Ed. 2d 889, 88 S.Ct. 1868), it said that "a

police officer may in appropriate circumstances and in an appropriate manner approach a person for the purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 22, 20 L.Ed. 2d 906, 88 S.Ct. 1880. In addition, since the facts and circumstances showed that the officer was reasonably warranted in believing the defendant was armed and presented a threat to his safety, the officer was justified in conducting a limited frisk which produced the weapon. In this regard, Chief Justice Warren, delivering the opinion of the Court, said: "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27; 20 L.Ed. 2d at 909, 88 S.Ct. at 1883.

The implication of *Terry v. Ohio* was that an officer could stop a person if *upon personal observation* of that individual's conduct the officer could reasonably suspect that criminal activity was afoot. This holding was expanded four years later by *Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972), which held that an officer could, upon the basis of information furnished him by a reliable informant, stop a person if the informant's tip was sufficient to justify a reasonable belief that a crime had been or was being committed.

In *Adams v. Williams, supra,* a person known to Police Sergeant (C) approached his cruiser at 2:15 a.m. and told him that a person seated in a nearby vehicle was carrying narcotics and had a gun at his waist. In consequence C went to the car, tapped on the window and requested the defendant to open the door. When, instead of doing so, the defendant rolled down the window, C reached into the car and removed a fully loaded revolver from his belt. The gun had not been visible to C from outside the car, but it was where the informant had said it would be. C then arrested the defendant for unlawfully possessing a pistol. A search incident to the arrest revealed substantial quantities of heroin on the defendant's person, a machete and a

second revolver hidden in the automobile. In rejecting the defendant's contention that the officer's "stop and frisk" and the initial seizure of his pistol, upon which rested the later search and seizure of other weapons and narcotics, was illegal, Mr. Justice Rehnquist, delivering the opinion of the Court, said:

" . . . The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

. . . .

"Applying these principles [*Terry v. Ohio*] to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. . . . Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e.g., *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

"In reaching this conclusion we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. . . .

"While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon . . . Sgt. Connolly had ample reason to fear for his safety. . . . Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. . . . The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. *Terry v. Ohio,* 392 U.S., at 30, 20 L.Ed. 2d at 911.

"Once Sgt. Connolly had found the gun precisely where the informant had predicted, probable cause existed to arrest Williams for unlawful possession of the weapon." *Adams v. Williams, supra* at 145-48, 32 L.Ed. 2d 616-18, 92 S.Ct. 1923-24.

The principles enunciated in *Terry v. Ohio* and *Adams v. Williams* have been applied often. For example in *United States v. Jefferson,* 480 F. 2d 1004 (4th Cir. 1973), *cert. denied,* 414 U.S. 1001, 38 L.Ed. 2d 236, 94 S.Ct. 354 (1973), the Fourth Circuit affirmed the defendant's conviction of illegal possession of a firearm. The evidence showed that sometime before his arrest, the police had received information from a reliable informant that the defendant was carrying a concealed weapon in a shoulder holster. This information was conveyed to other police officers and subsequently two officers effected a stop of the car by use of a warning siren and flashing lights. As they approached the car, the officers observed that the defendant removed a pistol from his waistline. The officers then placed the defendant under arrest. The Fourth Circuit affirming the conviction said:

"At the time the two officers stopped Jefferson their avowed purpose was not to make an arrest but to question him concerning the tip Powell had received. The Supreme Court recognized in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.' 392 U.S. at 22. [Cites omitted.]

"The investigatory stop executed in the present case constituted a seizure of Jefferson's person, *United States v. Jackson,* 448 F. 2d 963 (9th Cir. 1971), and to be valid must have satisfied the reasonableness requirement of the fourth amendment. *Terry v. Ohio, supra.* In *Terry* the Supreme Court enunciated a standard for evaluating the reasonableness of a police officer's action in effecting a personal seizure which falls short of an arrest, that is '[W]ould the facts available to the officer at the moment of the seizure . . . "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' 392 U.S. at 21-22, 88 S.Ct. at 1880.

"Applying this standard in the present case we conclude that the information supplied by an informant whose tips had been found by [Officer] Powell to have been reliable in previous cases was sufficient to justify the officers' subsequent investigatory stop of Jefferson's vehicle." *United States v. Jefferson* at 1005-06.

The "stop and frisk" doctrine has also been applied in this State. *See State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Stanfield,* 19 N.C. App. 622, 199 S.E. 2d 741 (1973), *appeal dismissed,* 284 N.C. 622, 201 S.E. 2d 692 (1974). These principles must be applied to the facts of the present case.

The State's evidence on *voir dire* showed that within the hour prior to the time Watkins stopped defendant's car he had received information from a known informant of proven reliability that defendant was then at a certain "beer joint" in an area of West Southern Pines where he was accustomed to frequent several bars; that defendant was driving a '74 green Chevrolet Vega; and that defendant had on his person the .38 revolver which had been used to kill Mr. McAskill. As Deputy Watkins was cruising the area where defendant was reported to be, he encountered defendant coming toward him in his car. The deputy effected a stop by use of his siren and lights, approached the car, and identified himself to defendant. After asking defendant to get out of his car, the deputy frisked him, and found a fully loaded .38 caliber revolver in his inside pocket. At that point Deputy Watkins placed defendant under arrest for carrying a concealed weapon. All the evidence shows that defendant was initially arrested for carrying a concealed weapon and that he was subsequently charged with murder and armed robbery.

Defendant concedes in his brief "that the evidence on *voir dire* is sufficient to support the court's findings that Deputy Sheriff Watkins was justified in relying upon the information given him by a confidential informer." Although the officer *may* not have had probable cause on the basis of the informant's tip to arrest defendant for carrying a concealed weapon when he initially stopped defendant's car, see, e.g. *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Ketchie,* 286 N.C. 387, 211 S.E. 2d 207 (1975), we conclude that the informant's tip carried sufficient "indicia of reliability" to justify the officer's stop of defendant's car. *See Johnson v. Wright, supra; United States v. Jefferson, supra.*

Having concluded that the circumstances justified Watkins in forcibly stopping defendant's vehicle to investigate the mur-

der of Mr. McAskill, we must determine whether the subsequent frisk was also permissible. In *Adams*, the Court quoting *Terry*, said: " 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officers or to others,' he may conduct a limited protective search for concealed weapons. 392 U.S. at 24, 20 L.Ed. 2d at 908." *Adams v. Williams, supra* at 146, 32 L.Ed. 2d 617, 92 S.Ct. 1923. The officer need not be absolutely certain that the individual is armed. It is enough if a reasonably prudent man in the circumstances would be justified in concluding that the suspect was armed and dangerous.

Applying the *Terry-Adams* standards to this case, we conclude that Watkins, as a man of reasonable caution, after receiving the informant's tip, was warranted in the belief that defendant was armed with a weapon which could and would be fatally used against him and his companion, Agent Dowdy. The reasonableness and validity of this belief was demonstrated by defendant's remark that had he known the purpose for which the officers had stopped him, he would have killed them before permitting them to take him alive. Clearly the frisk was fully justified.

As soon as the frisk revealed that defendant was carrying a revolver, the officer had probable cause to arrest him for carrying a concealed weapon in violation of G.S. 14-269. Indeed, at that point, the officer had absolute knowledge that defendant was violating the statute and that he was committing a misdemeanor in his presence. Thus, defendant's arrest for carrying a concealed weapon was not in violation of his constitutional rights, and Watkins did not exceed his authority under our State law to arrest without a warrant. G.S. 15-41(1), which was in effect on 18 January 1975 but was superseded by G.S. 15A-401(b) on 1 July 1975, authorized any peace officer to arrest without a warrant any person who had committed a misdemeanor in his presence or whom he had "reasonable ground" to believe had committed a misdemeanor in his presence.

We hold therefore that defendant's warrantless arrest was neither unconstitutional nor violative of State statute and that the pistol, Exhibit 5, was properly admitted in evidence. We note, however, that since the arrest was constitutionally permissible mere statutory illegality would not have rendered

the weapon inadmissible in this case. *State v. Eubanks,* 283 N.C. 556, 196 S.E. 2d 706 (1973). (For arrests made since 1 July 1975 see G.S. 15A-974.)

Appellant's next assignment of error challenges the admissibility of his in-custody statement. As detailed in the preliminary statement, immediately after defendant was taken to the police station the officers told him they wanted to talk with him about the McAskill robbery and murder, and he was given the Miranda warnings. He said he understood them and was ready to talk with the officers then. At that point the officers asked him certain background questions, unrelated to the robbery and murder, and the record indicates he answered fully and truthfully. However, when he first gave an answer the officers knew to be false, Agent Dowdy immediately told defendant all the facts which their investigation of the crime had revealed and advised him that tests would be made to ascertain whether the bullet removed from Mr. McAskill's body had been fired from defendant's gun. Defendant then said he did not wish to say anything else at that point. The interrogation ceased and Dowdy left the room.

Approximately 20-30 minutes later Dowdy returned, and Deputy Watkins read to defendant the warrant charging him with the murder of Mr. McAskill. Dowdy then asked defendant if he could do anything for him, and defendant requested him to inform his parents, his brother and his girl friend of his situation and to get him some cherry Lifesavers (candy). Dowdy told him he would do as requested. At that point, no further questions having been put to him, defendant said, "I might as well tell you about it . . . I shot McAskill." Agent Dowdy then requested that he "explain what happened," and defendant responded with a detailed statement.

**[2]** Defendant now contends that Dowdy's request that he explain his volunteered statement that he killed Mr. McAskill was police interrogation and that his confession was not admissible because Agent Dowdy failed to repeat the *Miranda* warnings when he came back into the room after his 20-30 minute absence.

In our view, defendant's explanation of what happened was a voluntary, spontaneous statement not made in response to police interrogation, and further warnings were not required. In *Miranda* itself the Supreme Court said: "Volunteered statements of any kind are not barred by the Fifth Amendment and

their admissibility is not affected by our holding today." *Miranda v. Arizona,* 384 U.S. 436, 478, 16 L.Ed. 2d 694, 726, 86 S.Ct. 1602, 1630 (1966). Defendant's statement, "I may as well tell you what happened . . . I shot McAskill," was volunteered after all police interrogation had ceased and after he had been officially charged with Mr. McAskill's murder. The fact that Agent Dowdy asked defendant to explain what happened did not convert the conversation into an "interrogation."

As we said in *State v. Haddock,* 281 N.C. 675, 682, 190 S.E. 2d 208, 212 (1972), "[A] voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer, in the course of appellant's narration, asks defendant to explain or clarify something he has already said voluntarily." Since there is no evidence here that defendant's statements were made in response to overbearing police questioning or other police procedures designed to elicit a statement, we conclude that they were the product of free choice and without the slightest compulsion of in-custody interrogation procedures. Therefore they were properly admissible. *See Holloway v. U. S.* 495 F. 2d 835 (10th Cir. 1974); *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973), and cases cited therein; *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973).

Even if we were to construe as police interrogation Agent Dowdy's request that defendant "explain what happened" after he had confessed he killed McAskkill we would nonetheless conclude, under the circumstances of this case, that it was unnecessary for Agent Dowdy to repeat the *Miranda* warnings either when he reentered the room or before he asked defendant to explain.

**[3]** Many courts have considered the question whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given at the initial one. *See* Note, The Need to Repeat Miranda Warnings at Subsequent Interrogations, 12 Washburn Law Journal 222 (1973), where the cases are collected and analyzed. The consensus is that although *Miranda* warnings, once given, are not to be accorded "unlimited efficacy or perpetuity," where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. *United States v. Hopkins,* 433 F. 2d 1041 (5th Cir.

1970); *State v. Sears,* 298 So. 2d 814 (La. 1974). However, the need for a second warning is to be determined by the "totality of the circumstances" in each case. *Commonwealth v. Ferguson,* 444 Pa. 478, 282 A. 2d 378 (1971). "[T]he ultimate question is: Did the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquish them?" *Miller v. United States,* 396 F. 2d 492, 496 (8th Cir. 1968), *cert. denied,* 393 U.S. 1031, 21 L.Ed. 2d 574, 89 S.Ct. 643 (1969); *Brown v. State,* 6 Md. App. 564, 252 A. 2d 272 (1969).

**[4]** Courts have included the following factors, among others, in the totality of circumstances which determine whether the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation: (1) the length of time between the giving of the first warnings and the subsequent interrogation. *See State v. Gilreath,* 107 Ariz. 318, 487 P. 2d 385 (1971) (second and third interrogations occurred 12 and 36 hours respectively after the first; repeated warnings not required) (applying *Escobedo* principles); *Watson v. State,* 227 Ga. 698, 182 S.E. 2d 446 (1971) (7 hour interval held not to require repeated warning); *People v. Hill,* 39 Ill. 2d 125, 233 N.E. 2d 367 (1968); *Commonwealth v. Clark,* 454 Pa. 329, 311 A. 2d 910 (1973) (less than an hour); *Commonwealth v. Bennett,* 445 Pa. 8, 282 A. 2d 276 (1971) (five hours) (applying *Escobedo* principles); 12 Washburn Law Journal 222, 226; (2) whether the warnings and the subsequent interrogation were given in the same or different places, *United States v. Hopkins,* 433 F. 2d 1041 (5th cir. 1970); *Brown v. State,* 6 Md. App. 564, 252 A. 2d 272 (1969); (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, *Id;* (4) the extent to which the subsequent statement differed from any previous statements; *Brown v. State, supra;* (5) the apparent intellectual and emotional state of the suspect. *State v. Magee,* 52 N.J. 352, 245 A. 2d 339 (1968), *cert. denied,* 393 U.S. 1097, 21 L.Ed. 2d 789, 89 S.Ct. 891 (1969).

**[5]** In the present case the subsequent "interrogation" occurred only 20-30 minutes after the initial interrogation terminated. It was conducted in the same room and by the same officer who gave the initial warnings. Furthermore, the confession is not inconsistent with any earlier statements by the appellant. During the first interrogation he said merely that

he did not wish to talk about the murder at that time. In addition, there is no indication that defendant was so intellectually deficient or emotionally unstable that he had forgotten his constitutional rights that had been fully explained to him a short time earlier. Clearly, defendant's statements were not rendered inadmissible by the failure of the officer to repeat the *Miranda* warnings.

**[6]** Here we note the oblique suggestion in defendant's brief that the failure of the officers themselves to notify the 24-year-old defendant's parents, brother, and girl friend that he was in custody before they began to interrogate him "violated the spirit if not the letter of the law laid down in Miranda."

Defendant did not make this contention in the trial court and, on appeal, we find in the record nothing whatever to indicate that defendant's statement was coerced in any way or that his decision "to tell the officers about it" was induced or influenced in any degree by the fact that his family and girl friend had not been notified of his situation. On the contrary, all the evidence, including defendant's own testimony on *voir dire*, clearly and convincingly supports the judge's finding that the statement which defendant volunteered was freely and understandingly made. The clear implication is that, within one hour after he was taken into custody, defendant had realized the officers had the evidence of his guilt and it was futile to deny it further.

**[7]** Defendant's final assignment of error raises the question whether, upon the facts of this case and the charge of the court, he can be sentenced for both the murder of Mr. McAskill and the armed robbery of Kenneth.

The State prosecuted defendant for first degree murder on the theory that he killed Mr. McAskill while engaged in the perpetration of the felony of armed robbery. Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery, the State is not required to prove premeditation and deliberation; G.S. 14-17 pronounces it murder in the first degree. *State v. Bunton*, 247 N.C. 510, 101 S.E. 2d 454 (1958).

The evidence tended to show that when defendant and his companion entered the McAskill store defendant, who had a revolver, said to Kenneth, "This is a hold up; give me your money." Kenneth handed him his wallet containing $15.00 and, at

that point, Mr. McAskill, who had been dozing in his chair, "raised up." Defendant told his companion "to get him," but when the companion did nothing, defendant shot. Mr. McAskill fell to the floor, and the two men fled with Kenneth's money.

The judge charged the jury that in order to convict defendant of first degree murder, "the State must prove beyond a reasonable doubt, first, that the defendant committed murder by committing, or attempting to commit, the act of armed robbery and, second, that the defendant, while committing the act of armed robbery, proximately caused John Henry McAskill's death." The jury returned verdicts that defendant was guilty of the armed robbery of Kenneth McAskill and the first degree murder of John Henry McAskill.

Defendant contends the evidence shows that he attempted to commit, and committed, only one armed robbery—the robbery of Kenneth. He argues further that, under the court's charge, his conviction of felony-murder could only have been based on the jury's finding that he killed Mr. McAskill in perpetrating this armed robbery. Therefore, since the armed robbery was used to prove an essential element of the charge of murder in the first degree, defendant asserts he cannot be sentenced for the robbery. The authorities support this contention, and defendant's third assignment of error is sustained. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975). *See State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972); *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Compare *State v. Alexander*, 284 N.C. 87, 199 S.E. 2d 450 (1973), *cert. denied*, 415 U.S. 927, 39 L.Ed. 2d 484, 94 S.Ct. 1434 (1974).

As to the charge of armed robbery,

Judgment arrested.

As to the murder charge,

No error.

STATE OF NORTH CAROLINA v. ROBERT L. GRIFFIN

No. 53

(Filed 5 November 1975)

1. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty constitutional**

Imposition of the death penalty upon a conviction of first degree murder was constitutional.

2. **Criminal Law § 53, 113— medical expert testimony — defining "intent" as duty of trial judge**

The trial court in a first degree murder prosecution did not err in refusing to allow the defendant's expert medical witness who was a psychiatrist to state his definition of the word "intent," since it was the duty of the trial judge, not the psychiatrist, to explain the law and define legal terms such as "intent."

3. **Criminal Law § 53— medical expert — improper hypothetical question**

The trial court did not err in refusing to allow defendant's expert psychiatrist to answer a hypothetical question which did not relate specifically to defendant and the facts of this case, since any answer might properly have been deemed ambiguous, and since the opinion sought as to defendant under the facts of the case was the opinion expressed in the answer to a subsequent hypothetical question.

4. **Criminal Law § 53— medical expert — hypothetical question based on *prior testimony***

Where the State's expert psychiatric witness gave extensive testimony concerning his examination of the defendant, the trial court did not err in allowing the State to ask if, based on that examination, the witness had an opinion concerning defendant's mental capacity.

5. **Homicide § 25— first degree murder — instructions proper**

The trial court's instruction in a first degree murder prosecution that defendant "contends, Members of the Jury, that he should be acquitted of murder in the first degree and if convicted of anything, not more than murder in the second degree, but that he should in fact, so he contends, be found not guilty," was not prejudicial to defendant.

6. **Homicide § 25— first degree murder — intoxication of defendant — ability to form specific intent**

In a first degree murder prosecution where defendant offered evidence tending to show that he was intoxicated by the drug Valium and by the alcoholic beverage beer, the trial court properly instructed the jury that in order to find that defendant could not form a specific intent to commit a felony (in the felony-murder portion of the charge) or that the defendant was mentally incapable of premeditation and deliberation (in the statutory first degree murder portion of the charge), they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent, and such instruc-

tion did not shift the burden of proof with respect to specific intent to defendant.

7. **Homicide § 25— first degree murder — instructions on premeditation and deliberation — lethal blows after deceased felled**

Where the evidence in a first degree murder prosecution indicated that one shot was fired into the front of deceased's neck and that another was fired into the back of his head, the trial court did not err, in instructing on circumstantial evidence to be considered in determining whether there was premeditation and deliberation, by stating that one of the factors to be considered was "the dealing of lethal blows after the deceased had been felled and rendered helpless."

Justices LAKE and EXUM concur in the result.

APPEAL by defendant from *Fountain, J.*, at the 24 March 1975 Special Session of JONES County Superior Court.

Upon an indictment, proper in form, the defendant was convicted of murder in the first degree in the death of Clayton Jones on 26 November 1974 and sentenced to death.

The State's evidence tended to show the following.

The deceased, Clayton Jones, was a cab driver in Jacksonville, North Carolina. He was on duty about 9:00 p.m. on 26 November 1974 in the area of the Jacksonville Bus Station. On the same night, witnesses William Hargett and Fred Jones, Jr. were at Hargett's Crossroads in Jones County which is north of Jacksonville on Highway 258. About 10:40 p.m. they heard one or more gunshot blasts. These shots came from the north in the direction of a taxi earlier seen parked on the side of the road nearby. Hargett and Jones drove in that direction and observed a taxi drive off towards Kinston, a city to the north. They followed the taxi, got its license number, and observed that there was only one person in the vehicle. When they returned to Hargett's Crossroads, they found that someone had been hurt. This was reported to the sheriff along with the license number of the taxi that they had followed.

The body of Clayton Jones was found beside the road where the taxi had been parked. Medical reports indicated that the immediate cause of death was a bullet wound in the throat. Another bullet entered the back of the head and there was also an entrance and exit gunshot wound in the right wrist. A .25 caliber pistol was found in the deceased's windbreaker.

A deputy sheriff from Lenoir County had a call concerning the incident and proceeded from Kinston towards Jacksonville

on Highway 258 sometime after 10:00 p.m. He met the described taxi about five or six miles from Hargett's Crossroads. He turned around, followed the vehicle for four miles, and called for assistance. The vehicle was being operated normally. State highway patrolmen stopped the vehicle. The defendant was the only occupant and was behind the wheel. They found a .22 caliber pistol with four live rounds and two empty shells in it under the front seat and a paper bag containing $44.30 in the center of the front seat.

Defendant Griffin told the officers he was a cab driver and knew nothing about the Hargett's Crossroads incident. He did not appear under the influence of drugs or alcohol. He was arrested and taken to the county courthouse in Trenton.

Sometime after midnight, the defendant was interrogated by a SBI agent after Miranda warnings were given and a written waiver of rights was executed. Subsequently he made a statement that his name was Robert Griffin, that he was not in the military service, and that he worked for the Howard Johnson Cab Company. He gave an address of 4602 Midway Park. It was determined that there was no Howard Johnson Cab Company and the address was nonexistent.

Later defendant was again advised of his constitutional rights and interrogated by another SBI agent. He was told that his first statement was incorrect and then was permitted to make a telephone call. Thereupon he said that he left Camp Lejeune about 9:30 p.m. to go to Jacksonville, arriving about 10:00 p.m.; that he caught a cab, paying the cab driver $8.00 (this being all the money he had) to take him to Richlands; and that he really wanted to go see his girl friend in Kinston. When they got to Richlands he pretended to be sick and asked the cab driver to stop so he could relieve his tension. He got out, and pulled the .22 caliber pistol that he had gotten from the barracks at Camp Lejeune. The cab driver got out and was coming towards him with a stick. He fired twice at the cab driver and then got in the taxi cab and left, being later picked up by the police. Defendant was asked for identification. He said he had stuffed his ID card behind the seat of the patrol car where it was later found.

The defendant gave a written statement about 3:20 a.m. as follows: "I (the defendant) left Camp Lejeune at 9:20 p.m. on Tuesday on my way to Kinston but I missed the bus and got

into a cab at Camp Lejeune to go to Jacksonville; that there I got into another cab going to Kinston and about seven miles from Kinston asked the cab driver to stop so I could relieve some tension; that he stopped and I pulled out a .22 caliber pistol and told him to get out of the cab and walk down the road; as he was walking he turned and ran at me with something in his hand; I told him that I did not want to shoot him if he would just stay clear of me but that I had no choice but to do what I did."

About two weeks before the trial (some three and one-half months after the killing) the billfold of the deceased, with his driver's license in it, was found on the side of a loop road that runs from Highway 258 some eight miles from Hargett's Crossroads. The billfold appeared to be the same one he had had about 9:00 p.m. on 26 November 1974 when he went to the home of the cab owner to pay him the money he owed from the previous week's operation.

The defendant's evidence tended to show the following.

The defendant, Robert L. Griffin, testified in his own behalf and said that he was in the Marine Corps and had a wreck on 25 November 1974 which resulted in his having pain in his back and head. He reported to the dispensary the next morning. X-rays taken were normal. He was given twelve transquilizer tablets (Valium) and some Tylenol and placed on a no duty status for four days. He continued to feel badly all day and about 8:30 p.m. on the night of 26 November 1974 he took two more Valium tablets and decided to go to Kinston to see his fiancee. He left Camp Lejeune with $56.00 or more and caught a cab to Jacksonville at a cost of $4.00, intending to catch a bus to Kinston. He missed the bus, wandered around Jacksonville for a while and stopped to drink a beer. He ran into a man who offered to sell him a .22 pistol for $25.00, and he bought it for his own protection. He then went back toward the bus station, hailed a cab, and paid $27.00 in advance for a ride to Kinston. After a few miles, defendant felt sick, asked the cab driver to pull over, and he got out. He vomited and got back in the cab. Later he got upset with the driver, but testified that the driver had given him no cause to be angry. He pulled the pistol out and demanded the driver to stop on the side of the road and get out of the vehicle. He told him to start walking and defendant began to climb into the driver's side of the taxi cab. He observed the driver turn around and start coming

towards him with something in his hand. He fired one shot and after a lapse of seconds another shot, but he did not remember whether the driver fell or whether he shot him in the back of the head while he was lying on the ground. Defendant then got in the cab and drove down the highway until he was stopped by the police. He said that he never intended to shoot or rob anybody.

A psychiatrist examined the defendant about one week before the trial and his evidence tended to show that Valium can occasionally have extreme side effects and that defendant was having such a reaction on the night of Jones' death. In his opinion this might have prevented defendant from forming a plan or intent to kill, but he probably knew right from wrong on 26 November 1974.

The State called in rebuttal Dr. Taylor, a psychiatrist from Dorothea Dix Hospital, who gave as his opinion that defendant knew right from wrong and had the ability to form an intent to kill at the time of the killing.

*Attorney General Rufus L. Edmisten by Special Deputy Attorney General Edwin M. Speas, Jr. and Associate Attorney Elizabeth R. Cochrane for the State.*

*William J. Morgan and Grady Mercer, Jr. for defendant appellant.*

COPELAND, Justice.

**[1]** Defendant's first assignment of error relates to the alleged unconstitutionality of the judgment and sentence of death. Our Court has considered this on many occasions and found such argument to be without merit. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *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. 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). This assignment of error is overruled.

**[2]** Next the defendant contends that the court erred in refusing to allow the defendant's expert medical witness to state his definition of the word "intent." The witness was a medical expert in the field of psychiatry. The defendant contends that in order for this witness to express his expert opinion it became necessary for him to be allowed to define the terms that would be used in his testimony. The defendant further contends that even though the judge instructed the jury about "intent," this came long after the testimony of the expert and it was absolutely necessary for this witness to explain what he considered the word "intent" meant in order to relate this to his testimony.

It is the duty of the trial judge, not the psychiatrist, to explain the law and define legal terms such as "intent." G.S. 1-180. "Intent" has a legal meaning somewhat different from a psychiatric definition, particularly the one proffered in this case out of the presence of the jury. As stated in *State v. Bell,* 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974), "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. [Citations omitted.]" The opinion of an expert witness is admissible in either of two situations: "(1) where the facts cannot adequately be presented to the jury, or (2) where the witness is better qualified than the jury to draw appropriate inferences from the facts." 1 Stansbury, N. C. Evidence, § 132 (Brandis Rev. 1973). If the psychiatrist were permitted to give definitions to words that must later be given their legal definitions, this could confuse and possibly mislead the jury. It is within the trial court's discretion to limit such potential confusion. In this case the psychiatrist was permitted to give his opinion of the mental condition of the defendant. It was not necessary that he give a psychiatrist's definition of the term "intent" in order to express his opinion. The trial judge later properly defined "intent." This assignment of error is without merit and is overruled.

**[3]** Next the defendant contends that the court committed prejudicial error in refusing to allow the expert psychiatrist to testify as to his opinion as to whether a person who was unable to conclude a complete thought or whose thoughts have no logical connection would be able to form successfully a specific plan or design to perform an act.

This assignment arose from a hypothetical question. The objection of the State was sustained. Counsel for defendant

then composed a more complete hypothetical question relating specifically to defendant and the facts of this case and the witness was permitted to answer it. "It is customary to incorporate in a hypothetical question the relevant facts in evidence which counsel hopes will be accepted as true by the jury, and to ask the witness his opinion based on such facts *if* the jury shall believe them to be facts." 1 Stansbury, N. C. Evidence, § 137 (Brandis Rev. 1973). The first hypothetical question was deficient because it did not relate specifically to defendant and the facts of this case and any answer might properly have been deemed ambiguous. Furthermore, since the opinion sought as to defendant under the facts of this case was the opinion expressed in the answer to a subsequent hypothetical question, there was absolutely no prejudice in refusing to allow the psychiatrist to answer the first question. This assignment of error is without merit and is overruled.

**[4]** Next the defendant contends it was error to allow the State's expert psychiatrist to testify as a rebuttal witness and answer a purported hypothetical question calling for multiple opinions without the inclusion of the necessary facts within the question.

We have a different situation here from the hypothetical question posed to defendant's witness. The State's witness gave extensive testimony concerning his examination of the defendant. Following this he was asked if, based on that examination, he had an opinion concerning defendant's mental capacity. It is obvious from the record that the facts on which he based his opinion were clear. The question and the answer were proper under these circumstances. 1 Stansbury, N. C. Evidence, § 137 (Brandis Rev. 1973). This assignment is without merit and is overruled.

**[5]** Next, the defendant contends that the court committed prejudicial error in its charge to the jury when they were told that the defendant contended that he should be found "not guilty" of all charges.

The court charged the jury in the following language: "So he contends, Members of the Jury, that he should be acquitted of murder in the first degree and if convicted of anything, not more than murder in the second degree, but that he should in fact, so he contends, be found not guilty."

In this connection the defendant asserts that this was error on the ground that his admission of the shooting amounted to an admission of second-degree murder and that the above statement by the trial judge was a misstatement of the defendant's position. In effect, defendant is contending that the trial judge expressed an opinion in violation of G.S. 1-180.

In North Carolina when a defendant is charged with first-degree murder, he is not permitted to plead guilty to it. Certainly this does not work to the disadvantage of the defendant. The purpose of this rule is for the defendant's protection and thereby requires the State to prove all the elements of the offense beyond a reasonable doubt. It is true, as the defendant contends, that defendant's own testimony shows elements of second-degree murder. This was noted by the trial judge, but it is also significant that defendant did not admit killing deceased. His plea of not guilty put into issue all of the elements of the charges against him and the burden remained on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the lesser offense of second-degree murder. *See State v. Lewis*, 274 N.C. 438, 164 S.E. 2d 177 (1968); *State v. Ramey*, 273 N.C. 325, 160 S.E. 2d 56 (1968). The proper placing of the burden on the State as the law requires was an advantage to the defendant. Certainly it was not to his prejudice. This assignment of error is overruled.

**[6]** Next the defendant contends that the trial court erred in instructing the jury that in order to find that defendant could not form a specific intent to commit a felony (in the felony-murder portion of the charge) or that the defendant was mentally incapable of premeditation and deliberation (in the statutory first-degree murder portion of the charge) that they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. Defendant contends that this was a shifting of the burden of proof and that it placed too heavy a burden upon him.

In the felony-murder instruction, the trial judge told the jury that they could not convict the defendant under this theory if they found "that he was *utterly incapable* of forming the felonious intent" to commit robbery. (Emphasis supplied.) In the alternative instruction on statutory first-degree murder (requiring the proof of the elements of premeditation and deliberation) the court likewise told the jury that they could not

convict the defendant of murder in the first degree if they found "that he was *utterly incapable* of forming the *specific intent* to kill or to plan and design the doing of that act, . . ." (Emphasis supplied.) The court stated that under such circumstances "he would have been mentally incapable of premeditating and deliberating."

In the present case defendant offered evidence tending to show that he was intoxicated by the drug Valium and by the alcoholic beverage beer. It was essentially on this basis the defendant contended that the State had failed to prove he had the requisite intent under the alternative charges.

"The rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases." 8 A.L.R. 3d 1236 at 1240 ("Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge"). In some jurisdictions the jury is not allowed to consider voluntary intoxication even on issues of specific intent. *Id.* at 1241. Another writer concludes, "Of course, intoxication itself does not preclude a finding that the requisite mental element was present, unless it was so extreme as to render the accused *entirely incapable of the state of mind required.* Where the offense is one requiring a specific intent, evidence of voluntary intoxication is admissible and may be considered in determining whether such specific intent was actually present, although it acts as a complete defense only where the degree of intoxication is such as to render the accused *incapable of entertaining the specific intent.*" (Emphasis supplied.) 21 Am. Jur. 2d § 107, 186.

In *State v. Propst,* 274 N.C. 62, 72, 161 S.E. 2d 560, 567 (1968) our Court enunciated the following rule: "[I]f it be shown that an offender, charged with such crime, is so drunk that he is *utterly unable* to form or entertain this essential purpose, he should not be convicted of the higher offense." (Emphasis supplied.) The able trial judge followed the guideline of *Propst* explicitly. The contention of the defendant that the burden of proof was shifted is incorrect. The burden of proving *specific intent* was properly placed upon the State in the instruction. The words used by the court, "utterly incapable," merely related to the degree of intoxication and not to the shifting of the burden. The jury certainly understood that the court meant that the defendant must have lost control of his mind through intoxication in order to be *unable* to form the

*specific intent.* This assignment of error is without merit and is overruled.

**[7]** Finally, defendant contends that the trial court committed error in its instruction on first-degree murder under the premeditation and deliberation theory when it told the jury that they could consider the "dealing of lethal blows after the deceased had been felled and rendered helpless" on the ground that there was no evidence of such blows and to so instruct would be interpreted as an expression of opinion by the presiding judge.

As Justice Sharp (now Chief Justice) said in *State v. Van Landingham,* 283 N.C. 589, 599, 197 S.E. 2d 539, 545 (1973): "Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the defendant before and after the killing; the use of gross excessive force, *or the dealing of lethal blows after the deceased has been felled.*" (Emphasis supplied.) *See State v. Walters* and cases cited therein, 275 N.C. 615, 623-24, 170 S.E. 2d 484, 490 (1969). *See also State v. Buchanan,* 287 N.C. 408, 422, 215 S.E. 2d 80, 88 (1975).

Judge Fountain's instructions on circumstantial evidence to be considered in determining whether there was premeditation and deliberation are almost identical to those used by our Court in *Van Landingham* with the deletion of any reference to gross and excessive force as a factor. Moreover, in this case there was sufficient evidence upon which to base the instructions given. The record bears out a want of provocation. The defendant's own testimony indicated that the deceased had done nothing to make him angry and that in fact he had been nice to him. There was evidence of unusual conduct on the part of defendant before and after the killing. In particular, the purchase of the pistol, the demand to stop the cab, and the flight of the defendant from the scene of the shooting indicated that the defendant had a plan. The firing of two or more shots at close range under the circumstances admitted by defendant would certainly be considered the use of unnecessary force.

The defendant particularly objects to that portion of the charge stating that one of the factors to be considered was "the

dealing of lethal blows after the deceased had been felled and rendered helpless." Defendant contends that there is no evidence of this circumstance. The record is to the contrary. The evidence indicated that one shot was fired into the front of deceased's neck and that another was fired into the back of his head. Defendant testified that the deceased was in front of him when he fired and that there was a lapse of seconds between shots. Certainly one explanation of the bullet wound in the back of the head is that it was fired after the deceased was shot the first time and had fallen to the ground. The defendant testified that he did not remember if he shot the deceased in the back of the head after he fell. *See State v. Buchanan, supra,* for a similar instruction where there was no evidence of a blow after deceased fell. This assignment of error is overruled.

Defendant's court-appointed counsel have with diligence searched the record and made numerous assignments of error. The argument and the brief of the Attorney General's office have ably answered each assignment of error. Because this is a capital case, we have carefully considered all of the assignments and conclude that there is

No error.

Justices LAKE and EXUM concur in the result.

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MANSFIELD M. DENDY v. JAMES P. WATKINS

No. 65

(Filed 5 November 1975)

**Automobiles §§ 62, 83— striking pedestrian — negligence — contributory negligence — summary judgment**

In an action to recover for injuries sustained by plaintiff pedestrian when he was struck by defendant's car, the trial court properly entered summary judgment for defendant on grounds that there was no genuine issue of fact as to negligence by defendant and that plaintiff was contributorily negligent as a matter of law where the evidence at the hearing showed that plaintiff attempted to cross the southbound three lanes of a street in Fayetteville, N. C. at 5:00 p.m. in the middle of the block at a place that was neither a marked nor unmarked crosswalk, that plaintiff walked diagonally at a forty-five degree angle between stopped vehicles in the first two lanes, that before entering the third lane plaintiff looked to the north but saw

no oncoming traffic, that except for vehicles, plaintiff had an unobstructed view to the north for one-half mile, that plaintiff had moved eight to nine feet into the third lane when he was struck by defendant's vehicle, that defendant's car was traveling only thirty mph, that there were thirty-nine feet of skid marks straight down the third lane, and that defendant was able to stop his car almost instantaneously upon striking plaintiff.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 26 N.C. App. 81, 214 S.E. 2d 602 (1975), reversing and remanding judgment of *Lanier, J.*, 22 November 1974 Session of CUMBERLAND County Superior Court.

The uncontradicted evidence of existing facts at 5:00 p.m. on 6 April 1970, the time of the injury is as follows:

Raeford Road, or U. S. 401, in the City of Fayetteville, runs generally north and south. It consists of six lanes, each twelve feet in width, equally divided in the center by a concrete median strip, having three lanes for southbound traffic and three lanes for northbound traffic. An A & P store parking lot occupies the entire block on the west side of Raeford Road between Emerline Avenue and Fairfield Road. Electric traffic signals control traffic at the Raeford-Fairfield Road intersection. The speed limit was forty-five miles an hour. At the point of plaintiff's injury there was unobstructed visibility for one-half of a mile looking north, except for vehicular traffic. Just prior to plaintiff's injury, defendant was proceeding south on Raeford Road at a speed of approximately thirty miles per hour in the third or inside easternmost lane for southbound traffic, some distance south of Emerline Avenue. Traffic in both of the first two lanes for southbound traffic was backed up the entire length of the block from Fairfield Road to Emerline Avenue because the traffic light was red. At this time plaintiff commenced to cross Raeford Road diagonally in a southeasterly (forty-five degree angle) direction from the A & P parking lot at a point where there was neither an intersection nor a marked crosswalk. After the plaintiff walked between two cars in the second lane and entered the third lane, the defendant tried to stop his automobile by applying his brakes. Nevertheless, his right front fender struck and injured the plaintiff. The automobile came to rest almost immediately after impact at a left angle toward the concrete median strip. From that point there were three feet of skid marks north to some debris and the

skid marks continued in a northerly direction in a straight line in the third lane for thirty-nine feet. The impact point was one hundred fifty feet from the Raeford Road-Emerline Avenue intersection.

In his complaint the plaintiff alleged that the defendant was negligent in the following manner:

a. He overtook and passed another motor vehicle which was stopped to permit a pedestrian to cross the roadway, at a marked crosswalk or at an unmarked intersection;

b. He drove in a careless and reckless manner;

c. He drove at an excessive and unlawful rate of speed;

d. He failed to decrease speed when approaching and crossing an intersection, and when a special hazard existed ahead with respect to pedestrians;

e. He failed to keep a proper lookout;

f. He failed to keep said vehicle under control.

The defendant, in his answer, denied all the material allegations of the complaint and pled the affirmative defense of contributory negligence.

In support of his motion for summary judgment, defendant submitted a portion of an adverse examination taken of the plaintiff tending to show the following: When he (plaintiff) approached the curb at the western edge of Raeford Road, some thirty feet from the Raeford Road-Emerline Avenue intersection, he looked both ways and saw that the traffic light to the south was red and that traffic was backed up from Fairfield Road to Emerline Avenue in the first two lanes. The automobiles in the third lane were backed up to within a couple of car lengths of where plaintiff crossed the road. He did not observe any traffic coming from the north. He proceeded to walk across the first lane and stopped. He was walking diagonally in a southeast direction, passing between the stopped vehicles. After he crossed the second or center lane, he looked to the right (at the Fairfield Road intersection) and the traffic light was still red. He looked to the left and saw nothing coming. When he was about three or four feet from the concrete median strip, he looked to the right and the traffic light had turned green. Almost simultaneously he looked to the left and heard pressure on wheels. Defendant's vehicle was then about fifteen feet away.

The plaintiff testified at the adverse hearing: "I could not swear to where he came from, but he flat didn't come straight down the Raeford Road. I guess that is because I did not see him."

The defendant offered an affidavit indicating that he had been on Raeford Road for about one-half of a mile and was traveling in a southwardly direction in the left lane next to the concrete median strip. He continued to proceed in that lane through the Emerline Avenue intersection for a distance of more than one hundred feet beyond it when plaintiff suddenly darted from in front of an automobile on his right into the center lane of southbound traffic a short distance ahead. The plaintiff was two to three car lengths ahead of defendant at the time. Defendant slammed on his brakes, turned his vehicle to the left, but was unable to completely avoid striking plaintiff. At the time, traffic in the two southbound lanes had commenced to move ahead slowly.

The trial court thereupon rendered summary judgment for the defendant "for that there is no genuine issue of liability on the part of the defendant and that it appears that plaintiff is guilty of contributory negligence as a matter of law and the court, after reviewing the pleadings, the adverse examination of plaintiff, the affidavit of defendant and hearing the testimony of the investigating police officer and argument of counsel, finding that the motion for summary judgment in favor of defendant should be allowed for that there is no genuine issue of liability on the part of the defendant and also that plaintiff, on the occasion complained of, was guilty of contributory negligence as a matter of law."

*Doran J. Berry and Kenneth Glusman for plaintiff appellee.*

*Nance, Collier, Singleton, Kirkman & Herndon by Rudolph G. Singleton, Jr., for defendant appellant.*

COPELAND, Justice.

Did the Court of Appeals err in reversing summary judgment entered by the trial court in favor of the defendant? The answer depends upon whether the defendant has carried the "burden of clearly establishing the lack of any triable issue of fact by the record properly before the court." *Singleton v. Stew-*

*art,* 280 N.C. 460, 465, 186 S.E. 2d 400, 403 (1972). 6 Moore's Federal Practice (2d ed. 1975) § 56.15 [3] (hereinafter cited as Moore); *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975).

Rule 56 of Chapter 1A-1 of the General Statutes in part provides:

> "(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> "(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.
>
> "(e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest *upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis supplied.)

Federal Rule 56 is substantially the same as Rule 56 of Chapter 1A-1 of the General Statutes and, therefore, it is proper for us to look at the federal decisions and textbooks as well as our own for guidance in applying the rule.

When the motion for summary judgment comes on to be heard, the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials; and the court may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. Moore, *supra,* § 56.11 [7], [8], [9], [10]; *Singleton v. Stewart, supra.* "The obvious purpose of summary judgment is to save time and expense in cases where there is no 'genuine issue' as to any material fact. It is generally held that the motion should not be granted unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. . . . If there is a factual issue, it must be material as well as genuine to put it beyond the scope of summary judgment." Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. Law Rev. 87, 91. So the motion must be denied if there is any issue of genuine material fact. *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

As indicated above, the burden is upon the moving party to establish the lack of any triable issue of fact. The papers of the moving party are carefully scrutinized and "those of the opposing party are on the whole indulgently regarded." Moore, *supra,* § 56.15 [8] at 2440. Our question is whether there is a material issue of fact concerning actionable negligence on the part of the defendant.

"In determining whether the moving party has satisfied his burden it is helpful to refer to the theory underlying a motion for a directed verdict, for functionally the motion for summary judgment and the motion for a directed verdict are closely akin to each other. . . . In other words, if it is clear that a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted." Moore, *supra,* § 56.15 [3] at 2341.

The plaintiff relies on *Landini v. Steelman,* 243 N.C. 146, 90 S.E. 2d 377 (1955) and *Bass v. Roberson,* 261 N.C. 125, 134 S.E. 2d 157 (1964), to sustain his position that the court erred

in finding there was no genuine issue of liability on the part of the defendant.

In *Landini* the Court reversed a judgment of nonsuit in favor of defendant based on defendant's lack of negligence and plaintiff's contributory negligence. Plaintiff had alighted from a bus in the nighttime and was attempting to cross a highway in the middle of a block. She testified that she looked both ways before attempting to cross and was about two-thirds of the way across the highway when she first saw the lights of defendant's automobile suddenly come on. In addition, there was evidence that defendant's vehicle was going seventy miles per hour in a forty-five mile per hour zone. The Court distinguished this case from two cases analogous to ours, *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589 (1955) and *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 8d 246 (1945). Specifically in *Garmon* it was held that nonsuit should have been allowed for the reason that the plaintiff pedestrian was guilty of contributory negligence as a matter of law. The Court reasoned that the plaintiff had a duty to see the defendant and yield the right-of-way to him since the injury occurred in the daylight, outside a residential or business district and there was no evidence of excessive speed on the part of the defendant. In *Tysinger* the Court held that nonsuit on account of defendant's lack of negligence and plaintiff's contributory negligence was properly granted in favor of defendant for similar reasons where the plaintiff pedestrian had an unobstructed view in the daytime of three hundred yards in the direction of defendant's oncoming truck and then stepped off the edge of the road into the side of the truck.

The *Bass* case, also relied on by the plaintiff, was described by Chief Justice Denny as "a borderline case." *Bass v. Roberson, supra,* 261 N.C. at 127, 134 S.E. 2d at 158. The plaintiff's evidence, which indicated that he was struck in the middle of the northbound lane by defendant's southbound vehicle, was substantially different from that in our case. Also, the court, in holding that the evidence was sufficient to require submission of negligence to the jury, generally refrained from discussing the evidence and awarded a new trial on the basis of the charge of the court.

*Landini* and *Bass* appear to be clearly distinguishable from our case.

Our facts indicate that the plaintiff entered the southbound lanes of Raeford Road thirty feet from the intersection of Raeford Road and Emerline Avenue adjacent to the A & P parking lot when the traffic in the first two lanes was backed up the entire length of the block from the Fairfield traffic signal to Emerline Avenue. The plaintiff did not recall seeing any oncoming traffic from the north. He proceeded in a southeasterly direction (diagonally) across the first two southbound lanes by jaywalking between the cars that stood bumper to bumper. The plaintiff indicated in the adverse examination that before going into the third lane, he looked to the left and saw no oncoming cars. The third lane was only twelve feet wide and plaintiff was about one hundred and fifty feet from the intersection at this time. Except for vehicles, he had an unobstructed view to the left for one-half of a mile. The plaintiff said he was struck when he was three or four feet from the concrete median strip. If this was so, he had only moved eight to nine feet after he had looked to the left and saw nothing coming. The plaintiff further volunteered the information that if defendant's vehicle had been coming straight down the road, there was nothing to prevent him from seeing it.

Our Court, in *Jenkins v. Thomas*, 260 N.C. 768, 133 S.E. 2d 694 (1963), affirmed the judgment of nonsuit upon evidence which disclosed that a pedestrian, instead of crossing at an intersection where he had the right-of-way, elected to cross one hundred feet south of the intersection and was then struck by the defendant motorist who was traveling with his lights on at twenty-five miles per hour in a thirty-five mile per hour zone. There was no showing that the defendant was aware that plaintiff was oblivious of danger. The Court said in part "Plaintiff elected not to cross at a point where he had the right of way, but elected to cross at a point where the motorist had the right of way. Defendants, having the right of way, had the right to assume, until put on notice to the contrary, that the pedestrian would obey the law and yield the right of way. The mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right of way. That duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril. [Citations omitted.]" *Id.* at 769.

The facts of *Jenkins* are strikingly similar to the facts of our case. There is absolutely nothing in our record to indicate that the defendant ever saw the plaintiff or by the exercise of reasonable care could have seen him prior to the time he emerged from between the cars in the first and second lanes. In this kind of situation, a duty rests on the defendant only when he sees, or in the exercise of reasonable care should have seen, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril. From the record there is obviously no way that the defendant could have seen the plaintiff until he appeared in the third lane. Defendant was traveling at a reasonable and prudent speed under the circumstances, which is indicated from the fact that he was able to stop the car almost instantaneously. "[T]he evidence must do more than raise a suspicion, conjecture, guess, possibility or chance; it must reasonably tend to prove the fact in issue, or reasonably conduce to its conclusion as a fairly logical and legitimate deduction." 2 Stansbury, N. C. Evidence § 210 at 153 (Brandis Rev. 1973).

The plaintiff offered no evidence or counter-affidavits to those of defendant. The trial judge was left with only the naked allegations of the plaintiff's complaint and such inferences as could be gathered from his adverse examination offered by the defendant. The uncontroverted and physical facts negate any genuine issues of material facts that arise from the allegations of the complaint. Rule 56(e) of Chapter 1A-1 of the General Statutes provides in part as follows: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Thus, we conclude that there is no genuine issue as to any material fact. As this Court has previously stated, "It is only in exceptional negligence cases that summary judgment is appropriate." *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). *Accord, Caldwell v. Deese, supra.* However, where, as here, there is no genuine issue of material fact and reasonable men could only conclude that defendant was not negligent, then a motion for summary judgment is proper.

The trial court also granted defendant's motion for summary judgment on the ground that the plaintiff was contributorily negligent as a matter of law. Therefore, it is proper for us briefly to consider the merits of this ruling. To support his position, defendant properly relied upon many cases from our Court where a judgment of nonsuit on the basis of the plaintiff's contributory negligence was granted, chiefly *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214 (1964). The facts in *Blake* are that the pedestrian left a clubhouse on the east side of a six-lane highway, some seventy-five feet from an intersection. He proceeded to cross the highway diagonally and was struck on the western edge, some twenty feet north of the intersection. These facts are strikingly similar to our case and indicate that the crossing was not at a place permitted by G.S. 20-174(a) which reads as follows: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." Our decisions hold that a failure to yield the right-of-way is not contributory negligence *per se,* but rather that it is only evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury. *Landini v. Steelman, supra.*

As indicated by Justice Sharp (now Chief Justice) in *Blake v. Mallard, supra,* 262 N.C. at 65, 136 S.E. 2d at 216-17, "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It was plaintiff's duty to look for approaching traffic before she attempted to cross the highway. Having started, it was her duty to keep a lookout for it as she crossed. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499. Having chosen to walk diagonally across a six-lane highway, vigilance commensurate with the danger to which plaintiff had exposed herself was required of her." *Accord, Carter v. R.R.,* 256 N.C. 545, 124 S.E. 2d 561 (1962).

All the evidence indicates that the plaintiff proceeded to cross the southbound three lanes in the middle of the block at 5:00 p.m. in Fayetteville, North Carolina, at a place where the heavy traffic was stopped because of a red light. The plaintiff walked diagonally at a forty-five degree angle between stopped vehicles in the first two lanes. He said that he looked to the north, but saw nothing. The thirty-nine feet of skid marks

straight down the third lane, the undisputed slow speed of approximately thirty miles per hour of defendant's car, and the other evidence in the case clearly indicate that defendant's vehicle was approaching from the north when the plaintiff entered the third lane. If he had looked, he would have seen the vehicle. A pedestrian who crosses the street at a point where he does not have the right-of-way must constantly watch for oncoming traffic before he steps into the street and while he is crossing. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968); *Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967); *Rosser v. Smith*, 260 N.C. 647, 133 S.E. 2d 499 (1963); *Garmon v. Thomas, supra. See also Tysinger v. Dairy Products, supra.*

The trial court correctly concluded that the plaintiff was guilty of contributory negligence as a matter of law. "There are none so blind as those who have eyes and will not see." *Baker v. R.R.*, 205 N.C. 329, 331, 171 S.E. 342, 343 (1933).

The decision of the Court of Appeals is

Reversed.

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STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, MEDFIELD-KINGSBROOK HOMEOWNERS' ASSOCIATION, HIDDEN VALLEY CIVIC ACTION GROUP WATER COMMITTEE, DEVELOPMENT ASSOCIATES, INC., AND JOHN E. ALDRIDGE, JR. v. HEATER UTILITIES, INC., APPLICANT

No. 55

(Filed 5 November 1975)

1. **Utilities Commission § 6— water rates — rate base — contributions by patrons in aid of construction**

   The term, "the public utility's property used and useful in providing the service," appearing in G.S. 62-133(b)(1), does not include that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction; therefore, the Utilities Commission properly excluded from the rate base of a water utility the amount of contributions in aid of construction made directly by patrons of the water utility.

2. **Utilities Commission § 6— water rates — rate base — difference between cost to developer and price paid by utility — contributed plant**

   The Utilities Commission did not err in excluding from the rate base of a water utility an amount representing the difference between the original cost of a water system constructed by the developers of a

real estate subdivision and the price paid to such developers by the water utility where the Commission found that such difference amounted to an indirect payment from the customers to the utility through the purchase of their lots, which allowed the original owners to sell the water system to the utility for less than the probable cost of installation.

3. **Utilities Commission § 6— utility rates — purpose of allowance for depreciation**

The purpose of the annual allowance for depreciation of a public utility's property and the resulting accumulation of a depreciation reserve is not to provide the utility with a fund by which it may purchase a replacement for the property when it is worn out, but is to enable the utility to recover the cost of such property to it.

4. **Utilities Commission § 6— water rates — operating expenses — depreciation of contributed plant**

The Utilities Commission did not err in its refusal to allow a water utility to make an annual charge to operating expenses for the depreciation of properties representing contributions in aid of construction.

APPEAL by Heater Utilities, Inc., from the judgment of the Court of Appeals, reported in 26 N.C. App. 404, 216 S.E. 2d 487, affirming the order of the North Carolina Utilities Commission fixing rates to be charged by Heater Utilities, Inc., for water.

Heater Utilities, Inc., is a public utility supplying water in twenty service areas in North Carolina. It applied to the North Carolina Utilities Commission for approval of revised rate schedules. Intervenors appeared before the Commission in opposition. Following a hearing, the Commission made findings of fact and entered its order fixing rates designed to yield to the applicant a return of 11 per cent on its rate base, as determined by the Commission.

At the hearing the applicant, pursuant to G.S. 62-133.1(a), elected to have its rates for service fixed by the Commission in accordance with G.S. 62-133(b); i.e., by determining the fair value of its property, used and useful in providing water service, and fixing rates such as will enable it to earn thereon, in addition to reasonable operating expenses, including a proper allowance for depreciation, a fair profit as defined by that statute.

At the time of the hearing the company's operations in thirteen of its twenty service areas had been so recently begun that the Commission concluded that the rates to be charged

by the company should be "fixed on the basis of the operating results for seven (7) dominant systems which were in operation during the entire test year and that the thirteen (13) other systems, which were operated at far less than capacity, should be excluded for the purposes of fixing rates in this case." The appeal presents no objection to this procedure.

The Commission found that the reasonable original cost of the company's utility plant serving the seven areas was $579,045. The appeal presents no objection to this finding. There being no evidence in the record as to the replacement cost of such properties, the Commission determined the fair value of the properties to be the original cost less the accumulated depreciation reserve. This appeal presents no objection to that determination. To the fair value so determined the Commission added an allowance for working capital. This appeal presents no objection to the determination of that allowance.

From the total thus reached the Commission then subtracted two amounts, $175,591 and $242,164, on the ground that these amounts represented contributions to construction made by the patrons of the company and thus determined that the rate base of the company was $124,472. This appeal presents no objection to the computation of any of these amounts or to the Commission's determination that a rate of return of 11 per cent is fair, its determination of the company's gross revenues for the test period under the existing rates, its determination of the company's operating expenses for the test period (other than depreciation allowance) or its determination of the revenues which will be produced by the approved rates for service.

The only questions presented by this appeal are these:

(1) Did the Commission exceed its authority in determining the rate base by subtracting from the "fair value" of the properties constituting the company's plant in service the two above mentioned amounts designated "contributions in aid of construction"?

(2) Did the Commission exceed its authority in fixing the annual charge for depreciation by excluding from the depreciable properties these "contributions in aid of construction"?

The record on appeal does not contain the evidence introduced at the hearing before the Commission. The nature of the

properties treated as "contributions in aid of construction" and the source from which the company derived these properties are not clearly set forth in the record. From the meager discussion of these items in the order of the Commission, the briefs of the parties and the agreed "Statement of Fact" in the record on appeal, it appears that the $175,591 represents items such as water lines constructed by patrons of the company and conveyed by them to the company without charge, or constructed by the company with funds supplied to it by such patrons without charge or obligation of repayment, title to all such properties being now vested in the company. It further appears, from the same sources, that the item of $242,164 represents the excess of the cost of construction of water mains and other plant items, constructed by developers of real estate subdivisions, for the purpose of making possible a supply of water to lots in such subdivisions, over the price at which the developers sold these facilities to Heater Utilities, Inc., after the sale of such lots to the present patrons of the company, or their predecessors in title. The Commission took the view that "the only logical and reasonable inference which can be drawn from the evidence herein is that the $242,164 amounts to an indirect payment from the customers to Heater through the purchase price of their lots, which allowed the original owners of the systems to sell them to Heater for amounts far less than the probable cost of installation."

The agreed "Statement of Fact" in the record on appeal asserts that the Uniform System of Accounts for Class A and B Water Utilities, as issued by the National Association of Regulatory Utility Commissioners, defines contributions in aid of construction as "donations or contributions in cash, services or property from states, municipalities or other governmental agencies, individuals and others for construction purposes." Nothing in the record indicates that any of the properties in question, or the funds with which they were acquired, were derived by the company from any governmental agency.

*Parker, Sink & Powers by Henry H. Sink for applicant appellant.*

*Robert F. Page, Assistant Commission Attorney, for North Carolina Utilities Commission.*

*Weaver, Noland & Anderson by William Anderson for appellees.*

LAKE, Justice.

A typical "contribution in aid of construction" occurs under the following circumstances: An individual or group of individuals desiring service from a water, gas, electric, telephone or other public utility company is located so far from the company's existing main or line that the company is unwilling to bear the expense of constructing the necessary extension of its facilities and the regulatory commission is unwilling or unable to compel it to do so. The company agrees to render service if the person or persons desiring it will pay all or part of such cost of construction. This they do, title to the newly constructed facility passing to the company which, expressly or impliedly, agrees to use such facility in supplying service to such patrons and their successors in interest. The facility so constructed is thereafter used and maintained by the company just as are similar facilities constructed entirely with company funds, the cost of such maintenance being a proper operating expense of the company. The amount so paid by the patron or patrons for the construction of the facility is entered on the books of the company under the caption, "Contributions In Aid Of Construction," or some similar designation.

Heater Utilities, Inc., now contends that since such facilities are owned by it and are used by it in rendering its service the fair value thereof should be included in its rate base by virtue of G.S. 62-133(b)(1) which provides that in fixing rates the Utilities Commission shall "ascertain the fair value of the public utility's property use and useful in providing the service rendered to the public within this State." The overwhelming majority of the regulatory commissions throughout the country have taken the contrary view.

In 1 Priest, Principles of Public Utility Regulation, p. 177, it is said, "court and commission decisions holding that contributions in aid of utility construction must be excluded from rate base have been so uniform as probably not to require detailed citation." A representative sampling of such commission opinion is found in the following commission decisions: *Re Southern California Edison Co.* (California), 6 P.U.R. (3d) 161; *Re Peoples Gas System* (Florida), 45 P.U.R. (3d) 449; *Re Peoples Gas Light & Coke Co.* (Illinois), 27 P.U.R. (3d) 209; *Re Indiana Gas & Water Co.* (Indiana), 35 P.U.R. (3d) 32; *Public Utilities Commission v. Portland Water District* (Maine), 76 P.U.R. (N.S.) 135; *Re Pittsfield Coal Gas Co.* (Massachu-

setts), 3 P.U.R. (3d) 1; *Re Northern Power Co.* (Michigan), P.U.R. 1933C 128; *Re Hungry Horse Water Co.* (Montana), 79 P.U.R. (N.S.) 172; *Re Princeton Water Co.* (New Jersey), 90 P.U.R. (N.S.) 181; *Public Utility Commission v. Pennsylvania Power & Light Co.* (Pennsylvania), 14 P.U.R. (3d) 438; *Re Citizens Utilities Co.* (Vermont), 90 P.U.R. (N.S.) 46; *Re Commonwealth ex rel. Rosslyn Gas Co.* (Virginia), 3 P.U.R. (N.S.) 61; *Re Village of Mount Horeb* (Wisconsin), 14 P.U.R. (N.S.) 181; *Re Northern Natural Gas Co.* (Federal Power Commission), 30 P.U.R. (3d) 123. In most of these commission orders there has been little or no discussion of the basis for the subtraction of contributions in aid of construction from the original cost of the total plant in service in determining the utility's rate base, the several commissions tending to treat the matter as axiomatic.

There have been relatively few decisions by the courts of the states relating to this question, due perhaps to the fact that, in most cases, contributions in aid of construction are relatively small in proportion to the total value of the plant in service. However, substantially all of the cases which have been brought to our attention have affirmed such action by the regulatory commissions. *Pichotta v. Skagway,* 78 F. Supp. 999 (D. Ct. Alaska); *DuPage Utility Co. v. Illinois Commerce Commission,* 47 Ill. 2d 550, 267 N.E. 2d 662, cert. den., 404 U.S. 832; *City of Hagerstown v. Maryland Public Service Commission,* 217 Md. 101, 141 A. 2d 699; *United Gas Corp. v. Miss. Public Service Commission,* 240 Miss. 405, 127 So. 2d 404; *Princess Anne Utilities Corporation v. Commonwealth of Virginia ex rel. State Corporation Commission,* 211 Va. 620, 179 S.E. 2d 714; *City of St. Francis v. Public Service Commission,* 270 Wis. 91, 70 N.W. 2d 221. See also, *Langan v. West Keansburg Water Co.,* 51 N.J. Super. 41, 143 A. 2d 185.

In the case of the City of Hagerstown, supra, the Maryland Court explained the basis for its decision as follows:

> "The rationale of the Commission's exclusion from the rate base of contributions in aid of construction in the instant case * * * and the rationale of the many decisions of Commissions of other States reaching a like result is, in essence, that it is inequitable to require consumers to pay to the utility a return on property which they, not the utility, have paid for. Such a result may be supported, not only as a matter of rather obvious fairness, but also as a

matter of perhaps somewhat technical theory, in spite of the fact that the utility holds legal title to the contributed property, on the ground that the contributed property is subject to contractual rights in favor of those who furnished it * * * which place the beneficial use of the property in those who, from time to time, own the lots, houses, factories or lands which the water company (in this case the City) has agreed to serve, so that the value of the water company's bare legal title is nothing. In other words, the water company (here the City) is simply in the position of a trustee, holding legal title to the contributed property for the benefit of those with whom it has contracted, or their successors in interest."

In the case of the Princess Anne Utilities Corporation, supra, the Virginia Court said:

"In excluding contributions in aid of construction from rate base, the Commission followed, and we think properly so, what is the near-universal rule in public utility rate cases. * * *

"But aside from the fact that the just-cited rule is the one generally followed, there is another consideration prompting its adoption. The rule is based on principles of fairness. It is inequitable to require utility customers to pay a return on property for which they, not the utility, have paid."

**[1]** The question is one of first impression in this Court. We are persuaded by the reasoning of the Maryland and Virginia Courts and the obviously widespread acquiescence of public utility companies throughout the nation in this long established administrative application of rate making statutes similar to G.S. 62-133. We, therefore, hold that the term, "the public utility's property used and useful in providing the service," appearing in G.S. 62-133(b)(1), was not intended by the Legislature to include that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction.

Heater Utilities, Inc., relies upon the statement by Mr. Justice Butler in *Board of Commissioners v. New York Telephone Co.*, 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808, that "constitutional protection against confiscation does not depend on the source of the money used to purchase the property." We agree

with the Maryland Court in the case of the City of Hagerstown, supra, that the New York Telephone Company case, supra, is distinguishable from the one now before us. There the question for the Supreme Court of the United States was the right of a regulatory commission to exclude from the utility's rate base property acquired through the expenditure of excessive earnings in former years. Such earnings, though excessive, clearly belong to the utility with no strings attached, and may be used by it for the payment of dividends or any other corporate purpose. They are not supplied by the utility patrons pursuant to any contract, express or implied, for the extension of the utility's service. Property acquired by the use of such funds, therefore, is not analogous to property affected by a trust for the benefit of the patrons from whom the excess profits were derived, nor is it analogous to property acquired by an outright, unrestricted gift.

Heater Utilities, Inc., also relies upon *City of Covington v. Public Service Commission of Kentucky*, 313 S.W. 2d 391. There the Kentucky Court held that the regulatory commission could not exclude from the rate base of a city, furnishing water outside the city limits, property purchased with the proceeds of a P.W.A. grant from the Federal Government. In that case, however, the Kentucky Court said, "The question of whether *consumer* contributions may be included in a rate base is not before us, and we do not decide it."

In 1 Priest, Principles of Public Utility Regulation, p. 177, it is said:

> "The Maine public utilities commission has distinguished between (1) contributions made by customers and (2) grants from the Federal Government, saying that the former should be eliminated from rate base, but that ' * * * government grants are in a different category and should not be deducted.' Much would seem to depend on the purpose of governmental contributions. If they are made to induce investors to put their money into utility securities, which must have been true of grants made when such enterprises were pioneer developments, they plainly should *not* be deducted from rate base."

We do not have before us, and express no opinion as to the authority of the North Carolina Utilities Commission to exclude from the rate base of a public utility property repre-

sented by a grant from a governmental agency to aid the construction of the utility plant. We hold that the exclusion by the Commission in the present case of the item of $175,591 from the rate base on account of contributions in aid of construction made directly by patrons of the utility company was not in excess of the authority of the Utilities Commission.

**[2]** Heater Utilities, Inc., contends that, nevertheless, the deletion from the rate base of the item of $242,164 was improper for the reason that this amount was not contributed to it by the patrons of the company but represents the difference between the original cost of the water system constructed by the developers of the real estate subdivision and the price paid to such developers by Heater Utilities, Inc.

This question was decided adversely to the company by the Maryland Court in the City of Hagerstown case, supra, by the Illinois Court in the DuPage case, supra, and by the Virginia Court in the Princess Anne Utilities Corporation case, supra. The Maryland Court said:

> "In the instant case, as we understand the facts, much of the property involved in this dispute was acquired by the City pursuant to agreements between the City and developers of real estate subdivisions, under which the developers paid all or part of the cost of mains and hydrants and of their installation and the City agreed to furnish water to the subdivisions. We think that it makes no difference, so far as this case is concerned, whether these payments were made in the first instance by the developers or by the purchasers of lots. We may observe in passing that we have no doubt that any such costs originally paid by the developers were passed on to the Purchasers in the form of increased prices for lots, and that the purchasers or other successors in interest are the persons who must pay the water rates."

The Virginia Court said:

> "It makes no difference * * * in the view we take of the case, whether the contributions to the utility company were made initially by the customers or by the land development companies, or whether some of the latter were closely related to the utility company. The controlling factor is whether the utility company's customers ultimately bore the cost of such contributions.

> "It is true that there was no actual testimony before the Commission relating to what items made up the prices of the homes purchased by those who became customers of the utility company. But it would be wholly unrealistic to say that the costs of the sewerage facilities contributed by the land development companies were not passed on to those customers."

In the present case the North Carolina Utilities Commission said in its order, "The only logical and reasonable inference which can be drawn from the evidence herein is that the $242,164 amounts to an indirect payment from the customers to Heater through the purchase price of their lots, which allowed the original owners of the systems to sell them to Heater for amounts far less than the probable cost of installation." This being true, we find no basis for making a distinction between the typical contribution in aid of construction, made directly by the patron of the utility, and the contribution made to the utility by the real estate developers through their sale to it of the facilities in question at a price substantially less than the installation cost of such facilities. We, therefore, hold that the Commission did not exceed its authority in excluding from the rate base this item of $242,164.

**[3, 4]** The remaining question presented by this appeal is whether the Commission erred in its refusal to allow the utility company to make an annual charge to operating expenses for the depreciation of the properties representing such contributions in aid of construction. We hold that it did not err in so doing. The purpose of the annual allowance for depreciation and the resulting accumulation of a depreciation reserve is not, as is sometimes erroneously supposed, to provide the utility with a fund by which it may purchase a replacement for the property when it is worn out. The purpose of the allowance is to enable the utility to recover the cost of such property to it. In *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 346, 80 S.E. 2d 133, this Court said:

> "For rate-making purposes a public utility is allowed to deduct annually as an operating expense so much of its capital investment as is actually consumed during the current year in rendering the service required of it. But the cost represents the amount of the investment, and it is the actual cost, not theretofore recouped by depreciation deductions, that must constitute the base for this allowance."

The wearing out or obsolescence of a machine or pipeline is an expense of operation as truly as is the consumption of fuel or other supplies instantly consumed in the operation of the utility plant. The cost of a ton of coal is charged to the operating expense of the company in the year in which such coal is used. The cost of more durable equipment must be spread over the life of the equipment, but the annual charge for its depreciation is the proportionate part of the company's investment in that property.

G.S. 62-133(b)(3) directs the Commission, in fixing utility rates, to "ascertain such public utility's reasonable operating expenses, including *actual investment* currently consumed through reasonable actual depreciation." (Emphasis added.) The statute clearly directs that the annual allowance for depreciation of durable properties, such as a pipeline, be based upon the original cost of the property to the utility and not upon either its current fair value or the cost of installation borne by a former owner, such as the real estate developers in the present case. There was, therefore, no error in the ruling of the Utilities Commission in the matter of the annual allowance for depreciation.

Affirmed.

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STATE OF NORTH CAROLINA v. ROGER ALLEN CARON

No. 68

(Filed 5 November 1975)

1. **Arson § 4— setting fire to paint and body shop — sufficiency of evidence**

In a prosecution for setting fire to a building used as a business, in violation of G.S. 14-62, evidence was sufficient to be submitted to the jury where it tended to show that the building burned housed a body and paint shop, substantial evidence showed that the origin of the fire was incendiary or felonious in nature, defendant admitted that he was in the body shop shortly before the fire began, when defendant arrived at the shop after the fire he had soot on his face and clothes but could not explain how the soot got there, and approximately three weeks before the fire defendant increased the amount of the insurance on the shop from $8,000 to $20,000.

2. **Criminal Law § 116— failure of defendant to testify — instructions not required**

   Under G.S. 8-54, the trial judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant so requests.

3. **Criminal Law § 116— failure of defendant to testify — instructions not prejudicial**

   The trial court's lengthy and unduly repetitious instruction concerning defendant's failure to testify was not prejudicial to defendant since, stripped of unnecessary verbiage, it instructed the jury that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent.

Chief Justice Sharp dissenting.

Justice EXUM joins in the dissenting opinion.

ON *certiorari* to review the decision of the Court of Appeals, reported in 26 N.C. App. 456, 215 S.E. 2d 878 (1975), which found no error in the trial before *Godwin, S.J.*, at the 18 November 1974 Session, WAKE Superior Court.

Defendant was tried and convicted on a charge of feloniously setting fire to a building used as a business, in violation of G.S. 14-62. The building housed a body and paint shop operated by defendant and was unoccupied at the time of the fire. From judgment imposing an active prison sentence, defendant appealed. The Court of Appeals found no error in the trial. We allowed *certiorari* on 25 August 1975.

Facts necessary to decision are fully set out in the opinion.

*Attorney General Rufus L. Edmisten by Special Deputy Attorney General William F. O'Connell and Associate Attorney Robert R. Reilly, for the State.*

*William A. Smith, Jr., for defendant appellant.*

MOORE, Justice.

[1] Defendant first assigns as error the denial of his motions for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. It is elementary that a motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d

469 (1968), and cases cited therein. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Goines, supra.*

The evidence for the State tends to show: On 22 January 1974 at approximately 4:00 a.m., the Raleigh Fire Department responded to a fire at Caron Body Shop located at 705 North Person Street. Upon extinguishing the blaze, Raleigh Fire Chief S. J. Talton entered the building and immediately sensed the heavy odor of lacquer thinner. From his examination of the building, he estimated that the fire began forty-five minutes to an hour before his arrival. He termed the blaze a "flash over" fire, that is, a very hot fire that will not burn long because it lacks the necessary oxygen for the amount of fuel in the building.

Further testimony by Chief Talton tends to show the following: The fire started in the northeast corner of the building and flashed across the southwest corner. The second window from the northeast corner of the building had been broken and glass had fallen on the inside of the building. The floor sloped downward from the northeast corner to the southwest corner with a drop of three to four inches from the center of the building to the southwest corner. A fifty-five gallon drum of lacquer thinner was found on a stand in the center of the building, approximately one-third full. The right leg of the stand was broken and marks were on the leg. The drum was on its side with the spout on the face of the drum so situated that it did not touch the floor. The spout was ruptured where it screwed into the barrel and was dented on the left side. There was so much lacquer thinner on the floor that it had to be washed out.

The floor was dirty except for a clean swath about a foot and a half wide where there had been a swirling fire, apparently as a result of burned-off lacquer thinner. This clean trail led from the door back to the drum and from the door over to the window. It circled around the window, went between the cars in the shop and came back to the door. The floor area around the fifty-five gallon drum was also clean.

Chief Talton further testified that "a person would be dead if he stood inside and set the fire. He could not have survived the explosion."

Defendant arrived at the scene approximately thirty minutes after being called at his home and informed of the fire. Chief Talton testified:

> " . . . When I saw him, I had reason to believe that the fire had been intentionally set. When Mr. Caron drove up, he was dirty which is natural for a working man, but he was smutty looking and had soot coming out of the corner of his nose and up and around about a half inch over his nose. I noticed smut on his clothes, on his face and hands. He was dressed in work clothes. It was not a clean uniform. I am sure that I saw the smut and not grease or oil."

Officer R. B. Tant took a statement from defendant on the afternoon of 23 January 1974 as part of his normal investigation of the fire. Defendant was not a suspect at this time, but was interviewed because he owned the body shop. Defendant told Tant that on the night of the fire he left the building at approximately 7:10 p.m., naming several persons who were at the building when he left. He added that he had two insurance policies on his business—a $20,000 policy on the contents of the building and a $5,000 policy covering up to five vehicles in the building. Defendant admitted, "I can't explain why there was soot on my face when I got back to the fire."

On the evening of 23 January, defendant called Officer Tant, informed him that his earlier statement was not correct and that he wanted to change it. Thereafter, on 25 January 1975, defendant told Tant that he returned to the body shop after the late movie on television for the purpose of working on a car there but only stayed twenty to thirty minutes, that he left the shop around 2:30 a.m., stopped for a doughnut and coffee, and returned home at approximately 3:00 a.m.

The State's evidence concerning the prior business history of the body shop tends to show that on 9 August 1973 defendant formed a partnership with Charles Edward Caudle and an $8,000 fire insurance policy was placed in the name of both men, doing business as "C and C Body Shop." On 3 January 1974, following some disagreement between Caron and Caudle, the policies were placed back in defendant's name, doing busi-

ness as "Caron Body Shop." At this time the amount of fire insurance was increased from $8,000 to $20,000 without Caudle's knowledge. Caudle's personal boat was in the building at the time of the fire and was destroyed.

Caudle testified that Caron purchased a fifty-five gallon drum of lacquer thinner on the day before the fire. He built a stand for it which Caudle believed needed bracing but the defendant said the drum would not fall. At that time there was another fifty-five gallon drum of lacquer thinner in the building which had approximately thirty gallons left in it after three or four months use.

Defendant offered evidence that his wife had loaned him the money to finance his business. Further evidence for the defendant tended to show that he was habitually dirty because of the nature of his job in the body shop, that a shortage of lacquer thinner existed at the time he bought the fifty-five gallon drum, and that the increase in insurance coverage had been initiated through a recommendation of his accountant. Defendant did not testify.

Taking this evidence in the light most favorable to the State, it was sufficient to take the case to the jury on all elements of the crime charged. The building falls within the definition of the statute. Substantial evidence shows that the origin of the fire was incendiary or felonious in nature. Defendant's own admission as to his presence in the body shop shortly before the fire began, his lack of an explanation for the soot on his face and clothes, and the totality of the circumstances surrounding the fire, inexorably connects defendant with the crime. *See State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300 (1955); *State v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549 (1951); *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1 (1948). The motions for nonsuit were properly denied.

**[2, 3]** Defendant's remaining assignment of error challenges the court's instruction to the jury concerning defendant's failure to testify. The court charged as follows:

> " . . . I recall that the defendant, even though he offered evidence, he did not take the stand and testify in his own behalf. Now, I make mention of that fact for this purpose. I have told you that he had no responsibility to offer any evidence, had a right to but no responsibility to; that he owed you no duty to offer any evidence; that the

State had the whole burden and has the whole burden of proof throughout this case. Now that being so, he had an absolute right under the law to try his lawsuit in the fashion that he decided that it ought to be tried. He had a right to offer no evidence. If he offered any, he had a right to remain off the stand. You can't punish any man for exercising a lawful right. So I give emphasis to this fact: The fact that the defendant did not testify does not permit you to speculate about why he did not. I have told you why he did not. He has exercised a lawful right. You may not take the position during your deliberations did he have something he didn't want us to know. He has exercised the lawful right and you may not hold it against him to any extent the fact that he did not testify. You must deal with what you have before you in this evidence and you may not hold against the defendant a'tall the fact that he did not testify."

The question is: Did the court violate G.S. 8-54 in so charging the jury, no request for such charge having been made by defendant? G.S. 8-54 provides, in part:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. . . . "

Under this statute, the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant so requests. *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Bryant,* 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39 (1953); 3 Strong, N. C. Index 2d, Criminal Law § 116. *See* Annot., 18 A.L.R. 3d 1335, 1337 (1968).

Chief Justice Bobbitt, speaking for the Court in *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. den.,* 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699 (1972), said:

> "Defendant assigns as error the court's instructions to the effect that defendant's failure to testify was not to be considered against him. Although the instruction is meager and is not commended, we are constrained to hold that it meets minimum requirements. Ordinarily, it would

seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by defendant. [Citation omitted.]"

Our cases do not prescribe any mandatory formula but instead look to see if the spirit of G.S. 8-54 has been complied with. *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975); *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948); *State v. Proctor,* 213 N.C. 221, 195 S.E. 816 (1938).

Justice Lake, speaking for the Court in *State v. Baxter, supra,* stated the general rule that " . . . any instruction thereon is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. . . . "

In this connection we emphasize what we said in *State v. McNeill, supra:*

> " . . . [T]he failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' G.S. 8-54."

In fact, some jurisdictions, contrary to our decisions, hold that unless the defendant so requests, such an instruction tends to accentuate the significance of his silence and thus impinges upon defendant's unfettered right to testify or not to testify at his option. *See* Annot., 18 A.L.R. 3d 1335 (1968); *Griffin v. California,* 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965).

We do not commend the instruction given in the present case as it was unduly repetitious. However, we hold that the instruction was not prejudicial. Stripped of unnecessary verbiage, the court instructed the jury that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent. We think that this instruction meets the requirements of G.S. 8-54. This assignment is overruled.

Defendant having failed to show prejudicial error, the decision of the Court of Appeals is affirmed.

Affirmed.

Chief Justice SHARP dissenting:

In my view the trial judge's instructions to the jury on defendant's failure to testify thwarted the purpose of G.S. 8-54, and entitle defendant to a new trial. The instructions disregard this Court's repeated admonition that "it is better to give *no instruction* concerning failure of defendant to testify unless he requests it." *State v. Bryant,* 283 N.C. 227, 195 S.E. 2d 509 (1973); *see, inter alia, State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156 (1939). The instruction also ignored and violated the Court's warning to the trial judges that "the failure of a defendant to go upon the witneses stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify 'shall not create any presumption against him.' G.S. 8-54." *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948).

The majority concede the challenged instruction was unduly repetitious and not to be commended but hold that its repetitiveness was not prejudicial. This conclusion ignores the fact that certain medicines taken in small doses may effect a cure while a large dose of the same medicine, or a small one indiscriminately repeated, can be fatal. I also believe the majority discounts the effect of the judge's gratuitous instruction that the jury must not speculate why defendant did not take the stand or take the position that because he did not testify he had something to hide. To prohibit this thought was to suggest it. In addition, it would appear that the majority attaches no significance to the manner in which the judge prefaced the instruction, that is, " . . . *I recall* that the defendant, even though he offered no evidence, he did not take the stand and testify in his own behalf." (Emphasis added.)

I believe the judge did defendant a disfavor by emphasizing his failure to testify and that it deepened "an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong

natural inference." *State v. Jordan, supra* at 366, 5 S.E. 2d at 161. For the reasons stated I vote for a new trial.

Justice EXUM joins in this dissent.

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LOUISE MILLER v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 64

(Filed 5 November 1975)

**Municipal Corporations § 42— claim against city — notice to city manager — requirement of notice to council — substantial compliance**

City charter requirement that written notice of a claim for damages against the city be given to the city council within 90 days after the date of the injury was substantially and reasonably met where written notice of plaintiff's claim was filed with the city manager within the 90 days prescribed by the charter, referred by him to the city attorney, and subsequently presented to the city council by the city attorney; therefore, the trial court erred in dismissing plaintiff's claim on the ground that notice had been given to the city manager rather than to the city council.

ON *certiorari* to review the decision of the Court of Appeals, reported in 25 N.C. App. 584, 214 S.E. 2d 313 (1975), affirming the judgment of *Falls, J.*, 25 November 1974 Schedule B Jury Session of MECKLENBURG Superior Court.

On 3 June 1973, plaintiff, Mrs. Louise Miller, commenced this action against the City of Charlotte to recover damages in the sum of $15,000 for injuries sustained in a fall on a city street. The complaint alleges, in summary, that on 7 July 1970, as plaintiff stepped out of her car onto a city street, a recently paved portion of the street caved in, causing her to fall and sustain serious hip, knee and back injuries. The complaint further alleges that the city was negligent in failing to make proper repairs to the street and in failing to properly inspect the repaired street and discover the defective area.

Defendant answered, denying negligence and raising the further defense of lack of notice to the city as required by Section 9.01 of the Charter of the City of Charlotte. That section provides:

> "*Notice of damages.* No action for damages against the City of Charlotte of any character whatever, to either per-

son or property, shall be instituted against the city unless within ninety (90) days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the City Council of such injury in writing, stating in such notice the date, time and place of happening or infliction of such injury, the manner of such infliction, the character of the injury and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running."

Thereafter, by leave of the court, plaintiff amended her complaint to allege notice to the city of her injury through correspondence between her attorney and city officials. The following is the most pertinent:

I. A letter dated 30 July 1970 from plaintiff's attorney to the city manager, indicating carbon copy to the city attorney:

"Re: Mrs. Louise G. Miller
D/A 7/7/70

Dear Mr. Veeder:

This letter is to advise that I represent Mrs. Miller and she advises me that she was injured at 1210 Oaklawn Ave. in the City of Charlotte when the street pavement gave way beneath her causing her to fall. I have personally looked at this hole which was left after her fall and the same is located in the westbound travel portion of Oaklawn Avenue adjacent to the address 1210 Oaklawn Avenue.

In view of the fact that Mrs. Miller was rather seriously injured in the fall and has required medical attention, I feel compelled to assist her in her claim for damages against the City. I called this condition to the attention of the City Attorney several days ago, but I am not sure that the street has been repaired.

If the appropriate representative of the city would like to discuss Mrs. Miller's claim, I will be happy to discuss the same with him. If I do not hear from you, I will assume that you are not interested and file the appropriate lawsuit to protect Mrs. Millers' [sic] interest.

Thank you for your cooperation."

II. A letter dated 3 August 1970 from the city manager to plaintiff's attorney, indicating carbon copy to the city attorney:

"Dear Mr. Liles:

This will acknowledge your letter of July 30, 1970 making claim against the City of Charlotte on behalf of Mrs. Louise G. Miller for injuries she reportedly received in a fall at 1210 Oaklawn Avenue on July 7, 1970.

Your claim has been forwarded to our City Attorney for his study and recommendation."

III. A letter dated 4 August 1970 from the assistant city attorney to plaintiff's attorney:

"Re: Claim of Mrs. Louise G. Miller

Dear Mr. Liles:

Your claim against the City of Charlotte on behalf of Mrs. Louise G. Miller for injuries she reportedly received in a fall at 1210 Oaklawn Avenue on July 7, 1970 has been forwarded to this office for consideration.

As part of the notice required by the City Charter, the amount of injury is to be included. Therefore, if you would submit to this office the monetary amount for which you are claiming, the investigation could then proceed further. It would also be most helpful if you could submit a copy of the medical bills incurred as a result of this incident."

IV. A letter dated 6 August 1970 from plaintiff's attorney to the assistant city attorney:

"Re: Miller v. City

Dear Mr. Buckley:

In reply to your letter of August 4, 1970, Mrs. Miller sustained severe injuries to her foot, ankle, and leg in this fall and is still under the care and treatment of her physician. I would evaluate her claim at this time in the sum of $5,000.00.

I do not have her Doctor's report at this time, but upon receipt of same, I will be happy to discuss its contents with you or any other representative of the City towards some mutually acceptable settlement of her claim.

I understand that an employee of the city, when the hole on Oaklawn was repaired, found a part of Mrs. Millers [sic] shoe and she is interested in recovering the same.

Thank you."

On 17 October 1974, the City of Charlotte moved to dismiss on the grounds that, because plaintiff's notice went to the city manager rather than to the city council as required under Section 9.01 of the Charlotte City Charter, requisite notice was not given. On 6 November 1974, defendant's motion was allowed and an order was entered dismissing the action. From that order plaintiff appealed. The Court of Appeals affirmed the order of dismissal. We allowed *certiorari* on 25 August 1975.

*Casey, Daly and Bennett by Walter H. Bennett, Jr., for plaintiff appellant.*

*Office of the City Attorney by H. Michael Boyd for defendant appellee.*

MOORE, Justice.

The sole question presented by this appeal is: Did the trial court err in dismissing plaintiff's action on the ground that plaintiff filed notice of claim with the city manager rather than the city council, as required by the Charlotte City Charter? The Court of Appeals held not. We disagree.

The general rule in North Carolina on municipal tort notice requirements is stated in *Carter v. Greensboro,* 249 N.C. 328, 106 S.E. 2d 564 (1959), as follows: "Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. [Citations omitted.] . . . "

Special notice requirements have been justified on the following grounds: (1) To give municipal authorities an early opportunity to investigate such claims while the evidence is fresh, so as to prevent fraud and imposition; (2) to inform defendant of all the facts upon which plaintiff's claim for damages was founded; (3) to enable defendant, after an investigation of the claim within the time fixed by statute to determine whether it should admit liability and undertake to adjust and settle said claim; (4) to prevent additional accidents by allowing the public entity a chance to take precautionary and correc-

tive measures; and (5) to aid in establishing fiscal planning and budgeting based on potential liabilities. *Perry v. High Point,* 218 N.C. 714, 12 S.E. 2d 275 (1940); *Peacock v. Greensboro,* 196 N.C. 412, 146 S.E. 3 (1928); *Pender v. Salisbury,* 160 N.C. 363, 76 S.E. 228 (1912); 56 Am. Jur. 2d, Municipal Corporations § 686, p. 730; 52 N.C. L. Rev. 930 (1974).

We have held, however, that substantial compliance with pre-suit notice requirements is all that is required. In *Graham v. Charlotte,* 186 N.C. 649, 120 S.E. 466 (1923), the Court, citing 6 McQuillin, Municipal Corporations § 2718 [now 16 McQuillin, § 53.163], stated: " ' . . . [A] substantial compliance with the statute is all that is required, and the notice need not be drawn with the technical nicety necessary in pleading.' " This statement was approved in *Webster v. Charlotte,* 222 N.C. 321, 22 S.E. 2d 900 (1942), and *Peacock v. Greensboro, supra. See also Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561 (1955); 56 Am. Jur. 2d, Municipal Corporations § 687, pp. 731-32.

In *Perry v. High Point, supra,* a notice of a claim against the city, addressed to the mayor and city council, the statutorily designated recipients, was delivered to the city manager. Since no notice of claim for damages had been given the mayor or the city council, the council refused to recognize or consider the claim. This Court held that delivery of notice to the city manager was sufficient. Justice Schenck, speaking for the Court, stated:

> "This Court has held that statutory provisions that written notice be given to City Councils or Boards of Aldermen of cities or towns as a condition precedent to the institution of certain actions against such cities and towns require only a substantial compliance, without the technical nicety necessary to pleadings, since the provisions are in derogation of the common law. *Graham v. Charlotte,* 186 N.C., 649; *Ivester v. Winston-Salem,* 215 N.C., 1.
>
> " 'Such statutory requirements being for the benefit of the municipality in order to put its officers in possession of the facts upon which the claim for damages is predicated and the place where the injuries are alleged to have occurred, in order that they may investigate them and adjust the claim without the expense of litigation, a reasonable or substantial compliance with the terms of the statute is all that is required; and where an effort to comply with such

requirements has been made and the notice, statement, or presentation when reasonably construed is such as to accomplish the object of the statute, it should be regarded as sufficient.' 43 C. J., p. 1192, par. 1962.

" 'Where the board or committee is not in session at the time of service, it is sufficient to direct the notice to the council or other governing body, and then deliver it to the officer having the care and custody of the records and files of such body, within the time fixed by statute. *Kelly v. Minneapolis,* 77 Minn., 76, 79 N.W., 653.' 43 C. J., note p. 1206.

" 'Delivery of notice in the City Clerk's office, to an assistant clerk, in the absence of the Clerk, is properly served. *McCabe v. Cambridge,* 134 Mass., 484; *Kelly v. Minneapolis,* 77 Minn., 76, 79 N.W., 653.' 43 C. J., note p. 1207."

*Accord, Penix v. City of St. Johns,* 354 Mich. 259, 92 N.W. 2d 332 (1958). Other jurisdictions are in accord, requiring only substantial compliance with municipal tort notice statutes. *E.g., Heller v. City of Virginia Beach,* 213 Va. 683, 194 S.E. 2d 696 (1973); *Vermeer v. Sneller,* 190 N.W. 2d 389 (Iowa 1971); *Meredith v. City of Melvindale,* 381 Mich. 572, 165 N.W. 2d 7 (1969).

Two courts have specifically addressed the issue of whether substantial compliance should be required only as relates to the form and content of the notice itself or also as it relates to the manner of service on proper officials. *Seifert v. City of Minneapolis,* 298 Minn. 35, 213 N.W. 2d 605 (1973); *Galbreath v. City of Indianapolis,* 253 Ind. 472, 255 N.E. 2d 225 (1970). Both courts found no logical distinction between the two categories. The Indiana tribunal continued:

"The purpose of the notice statute being to advise the city of the accidents so that it may promptly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary *where such purpose has in fact been satisfied." Galbreath, supra.*

The substantial compliance doctrine and other issues concerning municipal tort notice statutes are discussed in 60 Cornell L. Rev. 417 (1975); 23 Drake L. Rev. 670 (1974); and 46 Ind. L. J. 428 (1970-71).

In the present case, the contents of the notice are clearly sufficient to meet the requirements of the charter. Only the giving of notice to the city manager rather than the city council is questioned.

The city manager is the operating head of the city.

Section 4.21 of the Charlotte City Charter, in part provides:

> "The City Council shall appoint a City Manager who shall be the administrative head of the city government and shall be responsible for the administration of all departments. . . .
>
> "The City Manager shall: (1) see that within the city the laws of the State and the ordinances, resolutions, and regulations of the City Council are faithfully executed; (2) *attend, at the request of the council, all meetings of the council, and recommend for adoption such measures as he may deem expedient; (3) make reports to the council from time to time upon the affairs of the city and keep the council fully advised of the city's financial condition and its future financial needs;* (4) appoint and remove all department heads and employees of the city except those herein provided to be appointed by the City Council. . . ." (Emphasis added.)

Section 4.23 of the Charlotte City Charter provides:

> "The City Council shall hold the City Manager responsible for the proper management of the affairs of the city and he shall keep the City Council informed of the conditions and needs of the city, and shall make such reports and recommendations as may be requested by the City Council or as he may deem necessary. Neither the mayor, the City Council nor any member thereof shall direct the conduct or activities of any city employee, directly or indirectly, except through the City Manager."

Here, the city manager, well within the time required by the charter, received notice of plaintiff's injury, in writing, stating the date, time and place of the happening of such injury and the manner in which the injury was received. The city manager acknowledged receipt of the notice of this claim and advised plaintiff's attorney that it was being forwarded to the city attorney for his study and recommendation. On 4 August 1970, the assistant city attorney wrote the plaintiff's attorney

requesting additional information as to the monetary value of plaintiff's claim and copies of the medical bills incurred.

On 6 August 1970, plaintiff's attorney answered the assistant city attorney, again outlining the injuries to Mrs. Miller, together with his evaluation of the monetary value of the claim, and stating that he would supply the medical bills at a later date. Thus, long before the ninety-day period in which a notice of claim was required to be filed under the city charter, the city manager, the chief administrative officer of the city, and the city attorney had full and complete information concerning plaintiff's injury and claim. Later, the plaintiff's lawyer furnished the city attorney the statement of medical expenses incurred by reason of the plaintiff's injuries. Thereafter, the assistant city attorney advised plaintiff's attorney:

> " . . . I recommend that you not file a lawsuit until after the City Council has made a decision whether to approve or deny the said claim. Of course, Council's action should they approve the claim would avert a lawsuit; and further should they deny the claim, it would in no way prejudice your right to legal action. . . . "

On 6 April 1971, plaintiff's attorney was advised by the assistant city attorney that upon his recommendation the council had denied payment of the claim for lack of notice. The city relies upon *Johnson v. City of Winston-Salem,* 282 N.C. 518, 193 S.E. 2d 717 (1973). In that case, the ordinance of Winston-Salem required that:

> " . . . All claims or demands against the City of Winston-Salem arising in tort shall be *presented* to the board of aldermen of said city or to the mayor, *in writing,* signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues; . . . and, unless the claim is so presented within ninety (90) days after the cause of action accrued and unless suit is brought within twelve (12) months thereafter, any action thereon shall be barred." (Emphasis added.)

The evidence in that case disclosed that employees of the city sewer department and of the city's claim department had immediate notice of the plaintiffs' damages and the cause of such damages. Such notice was acquired by observation of these city employees and discussion between them, the city attorney and

the plaintiff. No written notice was filed until 8 October 1970, more than nine months after the damage was incurred. On that date, the plaintiff wrote the mayor as follows:

> "Dear Mayor. This is to notify that on January fourth and fifth, I experienced a great deal of difficulty with the sewer system of Winston-Salem, North Carolina. A back up in the sewer line caused a great deal of damage to my home and personal property. I have been in contact with some of the City's agents but have received no satisfaction. I thought it might be of help to write to you concerning this matter. I will appreciate all you can do for me."

The Winston-Salem ordinance required that the claim or demand be presented to the board of aldermen or the mayor, in writing, within ninety days. No written notice was given to any city employee or official that the plaintiff in that case had sustained any damage for nearly nine months after the damage was incurred. Even then, no claim or demand was presented to the board of aldermen or mayor. As one law review article has pointed out, " . . . actual notice by the city of circumstances surrounding an injury is not notice that the injured person intends to present a claim for damages," and therefore the city is not afforded an opportunity to properly investigate and prepare its course of action. 46 Ind. L. J., *supra,* at 438.

In the case under review, the city manager and the city attorney had written, formal notice within thirty days after plaintiff was injured that she expected the city to compensate her for her injuries. Thus, on the facts, the case at bar is distinguishable from *Johnson v. City of Winston-Salem, supra.*

We note that Chapter 58 of the 1975 Session Laws amended the Charter of the City of Charlotte to allow notice of claim to be given "to the City Council or mayor, City Manager and/or City Attorney . . . , " and that Chapter 361 of the 1975 Session Laws enacted a new Statewide statute, G.S. 1-55.1, to provide, " . . . A person with a claim against a city arising in tort or contract must give written notice of the claim to the council or its designee within six months, and commence his action within two years, after the claim is due or the cause of action arises. . . ." Thus, it is clear that the General Assembly recognizes that notice of a claim filed with a responsible official of a city, such as the city manager or the city attorney, or other designee of the council, is sufficient. Admittedly, these statutes

are not applicable to the present case, but they do indicate the legislative intent to broaden rather than further restrict the officials to whom notice of claim may be given.

In the present case had the notice of plaintiff's claim gone directly to the city council, undoubtedly it would have been referred by the council to the city manager for investigation and recommendation. The city manager, in turn, would have referred it to the city attorney. Hence, we hold that when written notice of plaintiff's claim was filed with the city manager within the time prescribed by the city charter, referred by him to the city attorney, and subsequently presented to the city council by the city attorney, the requirements of notice under Section 9.01 of the Charter of the City of Charlotte were substantially and reasonably met and that the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's action.

The decision of the Court of Appeals is reversed and the cause is remanded to that court with direction that it be remanded to the Superior Court of Mecklenburg County for trial in accordance with this opinion.

Reversed and remanded.

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JAMES B. ADDER v. HOLMAN & MOODY, INCORPORATED

No. 26

(Filed 5 November 1975)

1. **Mechanics' Liens § 1— relinquishment of possession of car — voluntariness — worthless check**

Defendant's claim of lien under G.S. 44A-2(d) for work done on plaintiff's car was not extinguished when plaintiff obtained possession of the car by giving defendant a worthless check since the car was not "voluntarily" relinquished by defendant within the meaning of G.S. 44A-3.

2. **Duress— regaining possession of car — signing note and release — duress of goods**

Where defendant rebuilt plaintiff's car into a dragstrip racer, plaintiff acquired possession of the car by giving defendant a worthless check for the balance due, the engine thereafter blew up, plaintiff returned the car to defendant's place of business, and defendant refused to allow plaintiff to regain possession of the car until he signed a purported release from liability and a promissory note for the bal-

ance due for the original work on the car, the release and note were not obtained by duress of goods since defendant did not wrongfully hold the car because it still had a lien on the vehicle for the original work, and since there was no showing that plaintiff was not on an equal footing with defendant.

3. **Torts § 7— release defined**

A release is the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised.

4. **Waiver § 2— waiver defined**

A waiver is a voluntary and intentional relinquishment of a known right or benefit.

5. **Contracts § 12— construction of contracts**

The heart of a contract is the intention of the parties, and that intention must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed.

6. **Torts § 7— agreement not release from liability**

An agreement acknowledging plaintiff's indebtedness to defendant for the balance due for work performed in rebuilding plaintiff's car and stating that plaintiff has "no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections" did not constitute a release of plaintiff's claims against defendant based on negligence and breach of implied warranty in rebuilding the car, the language of the agreement being restricted to a defense or a set-off in the event defendant resorted to a suit on a contemporaneously executed note for the balance due.

Chief Justice SHARP dissenting.

Justice COPELAND joins in the dissenting opinion.

APPEAL as of right by defendant pursuant to G.S. 7A-30(2) to review decision of the Court of Appeals reported in 25 N.C. App. 588, 214 S.E. 2d 227 (opinion by *Martin, Judge,* with *Brock, Chief Judge,* concurring and *Vaughn, Judge,* dissenting), reversing judgment of *McConnell, J.,* 9 September 1974 Session of DAVIDSON Superior Court.

Plaintiff instituted action to recover damages for injuries allegedly resulting from defendant's negligence and breach of implied warranty in rebuilding plaintiff's 1971 Maverick automobile. Defendant answered denying the material allegations of the complaint and affirmatively alleging a release by plaintiff. Defendant also counterclaimed for recovery on a promissory note allegedly executed by plaintiff in the amount of $1,538.03. Plaintiff by way of reply asserted that defendant unlawfully

held his automobile and that he signed the note and another paper writing under duress. The case came on for trial before Judge McConnell, sitting without a jury. By consent Judge McConnell directed that the issue of damage growing out of the actions based on negligence and warranty be tried at a later date.

Plaintiff offered evidence tending to show that he contracted with defendant to rebuild his 1971 Maverick automobile into a drag strip racer. Upon completion of the work, plaintiff borrowed $2,500 from a bank upon defendant's endorsement which was paid to defendant on the amount due for its work. At this time, including the $2,500 borrowed, plaintiff had paid to defendant approximately $10,000. Upon delivery of the automobile, plaintiff gave defendant a check in the amount of $1,538.03, representing balance due to defendant for the rebuilding of plaintiff's automobile. The check was not honored because of insufficient funds in plaintiff's account. Several weeks later and after the Maverick automobile had made "one run" the engine "blew" as plaintiff warmed it up for a race. He took the automobile back to defendant and requested that defendant see what was wrong. Several weeks later he attempted to get his automobile and he was told it would not be released until he paid the balance due, including the amount due on the note which defendant had endorsed. Plaintiff consulted an attorney and pursuant to a telephone discussion between his attorney and defendant's attorney, plaintiff returned to defendant's establishment with a certified check in the amount of $2,500 to pay off the note endorsed by defendant. It was plaintiff's understanding that his automobile would be released and that he and defendant would discuss and work out the remaining $1,538.03 due to defendant. At this time defendant refused to deliver the automobile unless arrangements were made to pay the $1,538.03. Plaintiff agreed to pay the balance within a few weeks. Defendant then contacted its attorney and thereafter prepared two instruments, defendant's Exhibits "A" and "B," which plaintiff read and signed. As a part of this transaction, he also delivered to defendant the check in the amount of $2,500. Plaintiff testified that he did not contact his attorney because his attorney was in court on that day. He further stated that he read the instruments and knew what he was signing. In explanation of his actions he testified:

> . . . I wanted the car because it had been sitting there a good while and I needed it. I had $10,000.00 tied up in it.

I couldn't see losing it for $1500.00 or a signature. I had to have the car, so I signed the release and came back. I gave them the $2500.00. (Objection overruled.) The only way I could get the car was to sign it—I was really forced into it. I was over a barrel because I had a $10,000.00 car sitting there. I needed it; I just felt that was the only way I was going to get the car. . . .

The instruments which plaintiff signed are as follows:

EXHIBIT A

A & W Radiator Service
501 South Main Street
Lexington, North Carolina

Holman Moody, Inc.
Post Office Box 27065
Charlotte, North Carolina 28208

Gentlemen:

This will acknowledge my indebtedness of $1,538.03 representing the balance due for labor and parts to finish my drag race car and that I have no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections.

In consideration for an extension of time until August 10, 1972, I agree to execute and deliver to you my promissory note in the amount of $1,538.03 and further agree that should I fail to pay by August 10, 1972, and you are required to turn this note over to an attorney for collection, I will pay reasonable attorney fees.

I further agree that in the event that you should undertake suit against me on the note, I will not plead any defenses against payment of same.

Signed: JAMES B. ADDER

EXHIBIT B

$1,538.03 July 21, 1972

For value received and with interest at 7% per annum from May 4, 1972, the undersigned promises to pay Holman and Moody, Inc.

One Thousand Five Hundred Thirty Eight and 03/100 Dollars

payable at Charlotte, North Carolina on or before August 10, 1972.

In the event the indebtedness evidenced hereby be collected through an attorney at law after maturity, the holder shall be entitled to collect reasonable attorney fees. Demand, presentment, protest, notice of protest and notice of dishonor waived by all parties bound hereon. In the event that payment of this note is made before August 10, 1972, the undersigned shall not be liable for payment of the interest provided for herein above.

Witness my hand and seal

JAMES B. ADDER (SEAL)

Address:
JAMES B. ADDER, A & W Radiator Serv.
501 South Main St., Lextington, N. C.

Due August 10, 1972

At the close of the testimony Judge McConnell ruled that the release was binding and that plaintiff was estopped from further action. Defendant thereupon moved for a directed verdict on its counterclaim and ruling on this motion was reserved. Judge McConnell filed judgment in the cause on 11 September 1974. After finding facts consistent with those therein set forth he, *inter alia,* further concluded and decreed:

IV. [That the execution of the release was supported by consideration passing from the defendant to the plaintiff in that the defendant extended time for the plaintiff to pay his indebtedness to the defendant, the defendant agreed to waive the interest if said indebtedness was paid before August 10, 1972 and the defendant released the plaintiff's automobile to the plaintiff.]

V. That the plaintiff admitted signing and delivering said promissory note in the amount of $1,538.03 to the defendant and admitted that such amount was the balance due on the contract.

VI. That there was no evidence of fraud or fraudulent misrepresentation on the part of the defendant in its procurement of the release which was signed by the plaintiff.

VII. That at the close of the evidence the defendant moved for judgment on its counterclaim.

Based upon the foregoing findings of fact

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. [That the release which the defendant set up in his pleadings as an affirmative defense and as a plea in bar is valid and binding and defendant's plea in bar is sustained and the plaintiff's action is hereby dismissed.]

2. [That the defendant have and recover from the plaintiff on its counterclaim the sum of $1,538.03 together with interest on said sum at the rate of seven percent per annum from May 4, 1972 until the date of this judgment.]

3. That the costs of this action be taxed to the plaintiff.

THIS the 11th day of September, 1974.

JOHN D. MCCONNELL
Judge Presiding at the September Third 1974 Term of the Superior Court Division of the General Court of Justice of Davidson County, North Carolina

Plaintiff appealed.

*Wilson & Biesecker, by Roger S. Tripp and Joe E. Biesecker, for plaintiff appellant.*

*Grubb and Penry, by Robert L. Grubb, for defendant appellee.*

BRANCH, Justice.

The rationale of the opinion of the Court of Appeals is that defendant *wrongfully* held plaintiff's automobile and thereby obtained the execution of a note and "release" from him, by duress of goods. In reaching its decision, the majority of the panel relied on *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714, and *Smithwick v. Whitley*, 152 N.C. 369, 67 S.E. 913.

In *Smithwick* plaintiff offered evidence that he bought a certain parcel of land from defendant at an agreed price of $35 per acre and executed notes secured by a deed of trust for the purchase price; that defendant, in turn, executed a deed con-

veying the land to him and the deed was left with defendant for recording. Plaintiff went into possession of the land and began clearing it. Defendant denied that the sale was consummated or that the deed was left with him. The remaining evidence (apparently uncontradicted) shows that plaintiff went to defendant about the deed and defendant said that if plaintiff would pay him $50 per acre he would give him the deed. After considerable discussion, plaintiff agreed to pay the price demanded rather than lose the land which he had cleared, fenced and brought to tillable condition. Upon receiving the deed, plaintiff brought suit for $280, the alleged difference between the purchase price contracted for and that actually paid, contending that this difference was paid under duress. Upon intimation by the trial judge as to his intended charge, plaintiff submitted to a nonsuit and appealed. This Court in finding no error in the trial below stated:

> The payment of the $280 in order to get a deed for the land was voluntary. The plaintiff had a right to stand on his legal rights in the land, if he had any, and assert his equities in the courts of the State.
>
> Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. 14 Cyc., 1123, and cases cited. *Bank v. Logan,* 99 Ga., 291; *Mathews v. Smith,* 67 N.C., 374; *Miller v. Miller,* 68 Pa. St., 486.
>
> Duress is commonly said to be of the person where it is manifested by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Or it may be of the goods, when one is obliged to submit to an illegal exaction in order to obtain possession of his goods and chattels from one who has *wrongfully* taken them into possession. *Astley v. Reynolds,* 2 Strange, 915, is a leading case on this subject. *Hackley v. Hackley,* 45 Mich., 573.
>
> There is neither duress of the person nor goods here. The plaintiff was in actual possession of the land and the defendant denied his title, claiming that the "deal had not been consummated." In order to get a deed plaintiff acceded to defendant's demand and paid the advanced price. Upon all the authorities it was a voluntary payment, an adjustment of dispute. **(Emphasis ours.)**

The rule of law above stated was quoted with approval in the case of *Joyner v. Joyner, supra.* See also *Hartsville Oil Mill v. United States,* 271 U.S. 43, 70 L.Ed. 822, 46 S.Ct. 389; *Silliman v. United States,* 101 U.S. 465, 25 L.Ed. 987; *Rosenfeld v. Boston Mut. L. Ins. Co.,* 222 Mass. 284, 110 N.E. 304; *Goebel v. Linn,* 47 Mich. 489, 11 N.W. 284; *Hackley v. Headley,* 45 Mich. 569, 8 N.W. 511; *Cable v. Foley,* 45 Minn. 421, 47 N.W. 1135.

We are advertent to the cases collected in 70 A.L.R. p. 711, Annotation—Duress in Insisting upon Release Before Delivery of Property Where Parties are not on Equal Footing. These cases relate to wrongful withholding by persons in such relationship as trustee with *cestui que trust,* attorney with client, majority stockholder with minority stockholder and other fiduciary relationships. The property withheld in these cases was generally held without legal claim of right. In this context see also 25 Am. Jur. 2d, Duress and Undue Influence § 5, p. 360.

**[1]** In instant case, before the automobile was originally delivered to plaintiff, defendant had a lien on the vehicle for the entire amount due to it for repairs and services pursuant to G.S. 44A-2(d) (1974). In order to obtain the vehicle, plaintiff gave defendant a check for the balance due. The check was returned uncashed because of insufficient funds. Under these circumstances, defendant's lien was not extinguished and the property was subject to redelivery to defendant through the remedy of claim and delivery. *Reich v. Triplett,* 199 N.C. 678, 155 S.E. 573; *Maxton Auto Co., Inc. v. E. S. Rudd,* 176 N.C. 497, 97 S.E. 477. The Court of Appeals reasoned that defendant had lost its claim of lien because of the provision in G.S. 44A-3 that "the reacquisition of property voluntarily relinquished shall not reinstate the lien." Under the circumstances above recounted, we do not think that the property was *voluntarily* relinquished by defendant when plaintiff obtained its delivery by giving to defendant a worthless check.

**[2]** Plaintiff's automobile was not wrongfully taken into possession nor was it wrongfully held since defendant's lien under G.S. 44A-2(d) was not extinguished. Further there is no showing that plaintiff was not on equal footing with defendant. Rather this evidence discloses that plaintiff merely chose to enter into further negotiations with defendant without advice of his counsel who was temporarily in court. As a result of these negotiations, plaintiff acceded to defendant's requirements concerning

the balance due. Plaintiff stated that he knew what he was doing when he signed the written instruments. This was a voluntary adjustment of a dispute. The facts of this case place it squarely within the holding of *Smithwick v. Whitley, supra.* Thus the Court of Appeals erred in holding that the release was obtained by duress of goods; however, there remains the crucial question as to the effect of the execution of the note and the paper writing, defendant's Exhibit "A," referred to by the parties as a release.

**[3, 4]** A release is the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised. In order for there to be an immediate release, the instrument must contain words of present discharge. *State Ex. Rel. McClure v. Northrop,* 93 Conn. 558, 106 Atl. 504; 66 Am. Jur. 2d, Release § 28 at 704. A waiver is a voluntary and intentional relinquishment of a known right or benefit. It is usually a question of intent. *Green v. P.O.S. of A., Inc.,* 242 N.C. 78, 87 S.E. 2d 14. Whether this agreement be called a release, a waiver or be given some other designation is not important to our decision. Obviously defendant's Exhibit "A" is a contract and is therefore subject to the recognized rules of construction of contracts.

**[5]** The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed. *Lane v. Scarborough,* 284 N.C. 407, 200 S.E. 2d 622; *State Highway Commission v. L. A. Reynolds Co.,* 272 N.C. 618, 159 S.E. 2d 198. Any ambiguity in a written contract is construed against the party who prepared the writing. *Wood-Hopkins Contracting Co. v. N. C. State Ports Authority,* 284 N.C. 732, 202 S.E. 2d 473; *Root v. Allstate Ins. Co.,* 272 N.C. 580, 158 S.E. 2d 829; *Wachovia Bank & Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141; *Salem Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744.

The only ambiguity in the contract before us is contained in the following paragraph of the contract:

> This will acknowledge my indebtedness of $1,538.03 representing the balance due for labor and parts to finish my drag race car and that I have no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections.

**[6]** This language appears to be restricted to a *defense* or a *set-off* in the event defendant resorted to a suit on the contemporaneously executed note. The agreement reached by the attorneys for the parties was that the automobile was to be delivered to plaintiff when he delivered the certified check for $2,500. The sole objection interposed to this agreement by defendant was that there be arrangements made for the payment of the $1,538.03. Nowhere in the contract is there any reference to a release of plaintiff's pending claims based on negligence or implied warranty. Defendant prepared the contract after a telephone consultation with his lawyer and therefore any ambiguity in the contract must be resolved against defendant. Defendant could have easily used words of release to dispose of plaintiff's pending claims based on negligence and warranty had this been the intent of the parties. This it did not do. Therefore, upon consideration of the language of the contract, the apparent purpose of the contract and the situation of the parties at the time of its execution, we hold that the trial judge erred in dismissing plaintiff's action on the ground that there was a valid release operating as a plea in bar. We further hold that the trial judge correctly entered judgment on defendant's counterclaim in the amount of $1,538.03. All the evidence shows that plaintiff knowingly, understandingly and for a valuable consideration executed the note in the amount of $1,538.03 and that plaintiff had refused or neglected to pay the sum due on the note.

This cause is remanded to the Court of Appeals with direction that it be remanded to Davidson Superior Court with order that judgment be entered against plaintiff on defendant's counterclaim and that there be a new trial on plaintiff's causes of action based upon negligence and implied warranty.

For the reasons stated, the decision of the Court of Appeals is

Modified and affirmed.

Chief Justice SHARP dissenting.

I am in accord with the majority's decision (1) that on 21 July 1972 defendant had a mechanics' lien upon plaintiff's automobile for work done prior to 4 May 1972, and therefore the right to retain possession of it, until plaintiff paid the dishonored check of 4 May 1972 in the amount of $1,530.03; and

(2) that defendant did not obtain by duress of goods the contract and note which plaintiff executed on 21 July 1972 (introduced in evidence as Exhibits A and B respectively). I am also in accord with the statement in the majority opinion that when plaintiff signed the note and contract "[t]his was a voluntary adjudgment of a dispute." This dispute was whether the automobile's mechanical failure, which plaintiff alleges developed in the car on a test run, was caused by defendant's negligent work in reconstructing the vehicle or by plaintiff's over-revving the engine thereafter.

My dissent is to the majority's holding that Exhibit A is not a release. Although the contract bears no label, plaintiff himself testified that it was a release and that defendant's representative told him before he signed it on July 21st that "the only way [he] could get the car that day was to sign a release that [he] wouldn't hold them responsible for anything. . . ." I can perceive no ambiguity in Exhibit A but, were it possible to construe one into it, the interpretation which the parties put on their contract would eliminate the ambiguity. Plaintiff says it was a release and his testimony establishes that defendant certainly regarded it as a release, given in consideration of its waiver of a valid lien on the automobile.

The record discloses no compelling reason why plaintiff had to have the automobile on July 21st. It had been sitting on defendant's lot "for a good while." Apparently on that day plaintiff just decided he wanted the car and defendant had had it long enough. He also seems to have been under the impression that defendant's lawyer had agreed with his lawyer that defendant would surrender possession of the car if plaintiff paid the bank note in the amount of $2,500.00, which defendant had endorsed for plaintiff and the proceeds of which paid a part of the bill plaintiff owed defendant. However, as plaintiff testified, when he tendered the certified check for $2,500.00 and demanded the car, defendant's representatives told him there was no way he could get the car that day without also paying the dishonored check in the amount of $1,530.03 unless he "went to the sheriff and got a court order making them release the automobile without payment of the money." However, after "they had called their lawyer," defendant's representatives agreed that he could get the car that day *if* he signed "a release that he wouldn't hold them responsible for anything" and executed a note for the $1,530.03.

On cross-examination plaintiff said, "It was my idea to sign the note for the money; the note for $1,500.00 I signed when I signed the release." Thereafter, on redirect examination, he said, "I did not suggest that I sign the note for $1,500.00." However, he never retracted his statement that he "read the release" and knew what he was signing. He also said he knew that his lawyer was not available to him on that day and he made no effort to contact him. In other words he deliberately went ahead on his own without the advice of his counsel, and made his own arrangements. In consideration of defendant's waiver of its lien, a twenty-day extension of time to pay the dishonored check in the amount of $1,530.03 (which he did not have on July 21st), and the waiver of all interest if the indebtedness was paid before August 10th, plaintiff acknowledged *that he had "no defense or set-off against such indebtedness grounded upon poor workmanship or other objections."* (Emphasis added.) Other objections could only have referred to the manner in which the car was rebuilt.

If defendant had first filed an action seeking to recover on its note plaintiff could have preserved his warranty claim only by pleading them in his answer. They would have been compulsory set-offs and counterclaims under G.S. 1A-1, Rule 13(a), since they arise out of the same transaction. However, as the majority correctly holds, by the execution of Exhibit A, plaintiff precluded himself from making any defense to the note grounded upon poor workmanship. As I see it he did that and more. He also renounced his claims against negligence and breach of warranty when he said in Exhibit A: "This will acknowledge by indebtedness of $1,530.03 representing the balance due for labor and parts to finish any drag race car and that I have no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections."

In the face of the foregoing acknowledgment—which we hold to be valid—and in the face of plaintiff's testimony that defendant's representative told him he couldn't get the car unless he signed "a release that [*he*] *wouldn't hold them responsible for anything,"* (emphasis added) how can we now hold that plaintiff has released his claims against defendant as a defense to its note but retained them to be used offensively as the basis for a separate cause of action against defendant? Such a holding, in my view, is impermissible and totally illogical.

My vote is to reverse the Court of Appeals and affirm the judgment of the Superior Court.

Justice COPELAND joins in this dissent.

STATE OF NORTH CAROLINA v. ALFRED LEE COOPER

No. 10

(Filed 5 November 1975)

1. **Criminal Law § 161— appeal as exception to judgment**

The appeal, itself, is an exception to the judgment and, even in the absence of an assignment of error, presents for review by the Supreme Court the question of whether there is any error appearing on the face of the record proper.

2. **Burglary and Unlawful Breakings §§ 1, 3— burglary defined — necessity of specifying felony in indictment**

Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein, and the indictment for burglary must specify the felony which the defendant is alleged to have intended to commit at the time of the breaking and entering.

3. **Burglary and Unlawful Breakings §3— indictment charging burglary — sexually assaulting a female — no felony specified**

An indictment which alleged that defendant broke and entered an apartment, with the intent to commit a felony therein, to wit: "by sexually assaulting a female," was insufficient to charge defendant with first degree burglary, since, under the law of this State, there is no felony known as "sexually assaulting a female," but such phrase is broad enough to include both felonious and misdemeanor assaults against a female.

4. **Burglary and Unlawful Breakings § 3— indictment insufficient to support burglary conviction — sufficiency for wrongful breaking and entering conviction**

Though the indictment under which defendant was tried was insufficient as an indictment for burglary, it was sufficient to support a conviction under G.S. 14-54(b) for wrongfully breaking and entering a building.

APPEAL by defendant from *McLelland, J.*, at the 3 February 1975 Criminal Session of WAKE.

Upon separate indictments, consolidated for trial, the defendant was brought to trial on charges of burglary in the first degree and rape in the second degree. He was found guilty of

each of these offenses. On the charge of rape, he was sentenced to imprisonment for a term of 30 years, subject to credit for time spent in custody awaiting trial. On the charge of burglary, he was sentenced to imprisonment for life, this sentence to commence at the expiration of the sentence imposed on the charge of rape. He appealed to this Court, as a matter of right, from the life sentence imposed on the charge of burglary and to the Court of Appeals from the sentence imposed on the charge of rape. Thereupon, the latter appeal was ordered to be heard and determined in the Supreme Court prior to determination thereof in the Court of Appeals.

The indictment charging rape was in proper form. The indictment on the charge of burglary read as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 1 day of October, 1974, in Wake County Alfred Lee Cooper unlawfully and wilfully did feloniously during the nighttime between the hours of 1:00 a.m., October 1, 1974, and 3:00 a.m., October 1, 1974, break and enter the dwelling house of Martha Dianne James located at 519 East Jones Street, Raleigh, N. C. This dwelling at the time of the breaking and entering was actually occupied by Martha Dianne James. The defendant broke and entered with the intent to commit a felony therein, to wit: *by sexually assaulting a female*. G.S. 14-51." (Emphasis added.)

The evidence for the State is ample to show that on 1 October 1974, Miss James retired for the night in her apartment, in which she lived alone, at approximately 11:00 p.m. and went to sleep. When she retired the window to the bathroom was closed and the door to the apartment was locked with a chain lock on the inside. She was awakened by a noise in the apartment. A Negro man opened the closed door of her bedroom and entered the room, telling her to be quiet or he would shoot her. Despite her plea that he take her money and leave, the intruder, by force and against her will, proceeded to have sexual intercourse with her. Other than his above mentioned threat to shoot her if she did not remain quiet, there was no evidence that he had a gun or other weapon. After completing the act of intercourse, the intruder left the apartment. Immediately thereafter, Miss James discovered that the chain lock on the inside of the door to her apartment was no longer fastened, indicating that the intruder had thus departed from the apartment; the

bathroom window was open; the screen, previously in place at that window, was lying on the ground and a ladder was in place beneath the window. She promptly summoned the occupant of a neighboring apartment who called the police.

The ladder was not under the window nor was the screen on the ground at 1:00 a.m. at which time Miss James' neighbor entered the building. This condition was discovered at 3:00 a.m., following the departure of the intruder. A fingerprint, identified as that of the defendant, was found on the inside sill of the bathroom window. Neither Miss James nor her neighbor had ever seen the defendant in the apartment or about the building prior to this occurrence. On cross-examination, Miss James testified that the defendant's build, hair and lips were those of her assailant. When arrested, pursuant to a warrant, at the home of a friend, later in the morning of 1 October 1974, the defendant was found by the officers behind the door of an upstairs room, he having spent the latter part of the preceding night in a room on the first floor of the friend's home.

The defendant elected to offer no evidence.

*Attorney General Rufus L. Edmisten by Associate Attorney General Wilton E. Ragland, Jr., and Assistant Attorney General William F. Briley for the State.*

*W. Arnold Smith for defendant-appellant.*

LAKE, Justice.

The defendant made 17 assignments of error, of which 16 relate to rulings upon the admission of evidence and one relates to the denial of the defendant's motion for a directed verdict of not guilty. In his brief the defendant states:

> "Counsel for Defendant-Appellant respectfully submits to the Court that he has pursued and examined the record in the case at bar as fully as possible, that he has researched relevant law with the respect to all objections made at trial and that he is unable to find any ruling of the Court which constitutes a clear or reasonable basis for arguing reversible error. * * * Counsel, therefore, respectfully requests the Court to examine the record proper and all other relevant material *ab initio* for the purpose of determining whether any right of Defendant-Appellant has been violated at trial."

Because of the gravity of the crimes of which the defendant has been found guilty, we have, notwithstanding the foregoing statement of his counsel, carefully examined the entire record. We also find no merit in any of the defendant's assignments of error, nor do we find any error, except as noted below, in any ruling of the trial court or in any other phase of the defendant's trial and conviction.

**[1]** The appeal, itself, is an exception to the judgment and, even in the absence of an assignment of error, presents for review by this Court the question of whether there is any error appearing on the face of the record proper. *State v. Carthens,* 284 N.C. 111, 199 S.E. 2d 456, cert. den., 415 U.S. 979; *State v. Sutton,* 268 N.C. 165, 150 S.E. 2d 50; *State v. Cox,* 265 N.C. 344, 144 S.E. 2d 63; Strong, N. C. Index 2d, Criminal Law, § 161.

As to the charge of second degree rape, we find no error upon the face of the record, or otherwise. The indictment charging the offense of rape was in proper form, after a trial free from error the jury returned a verdict finding the defendant guilty of second degree rape and the sentence imposed is not in excess of that authorized by the statute. G.S. 14-21(b). The judgment of the Superior Court sentencing the defendant to imprisonment for the term of 30 years in the State's Prison, with a credit of 128 days spent in custody awaiting trial, for the offense of second degree rape, entered in Case No. 74CR61242, is, therefore, affirmed.

We find error upon the face of the record proper with reference to the judgment entered in Case No. 74CR61243 sentencing the defendant to imprisonment for the term of his natural life in the State's Prison for the offense of first degree burglary. The error arises from the failure of the bill of indictment to charge the offense of burglary.

**[2]** Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269; *State v. Allen,* 186 N.C. 302, 119 S.E. 504; Strong, N. C. Index 2d, Burglary and Unlawful Breakings, § 1. The indictment for burglary must specify the felony which the defendant is alleged to have intended to commit at the time of the breaking and entering. *State v. Tippett, supra; State v. Allen, supra.*

The indictment here in question alleges the defendant broke and entered, with the intent to commit a felony therein, to wit: "by sexually assaulting a female." The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. *State v. Allen, supra.* It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling.

**[3]** Under the law of this State there is no felony known as "sexually assaulting a female." In his charge to the jury the trial judge equated this term to rape or an assault with intent to commit rape. The term is not, however, limited to either or both of these felonies as a matter of law. It is broad enough to include other types of assaults upon females. An assault upon a female without intent to have sexual intercourse with her, even though it be sexually motivated, is a misdemeanor. G.S. 14-33(b)(2). The phrase used in this indictment, "sexually assaulting a female," is broad enough to include such an assault. Consequently, the indictment does not allege that at the time this defendant broke and entered the apartment of Miss James he intended to commit a specifically designated felony therein. It follows that the indictment in Case No. 74CR61243 does not charge the defendant with the crime of burglary and will not support the imposition of a sentence to life imprisonment for first degree burglary. In determining the sufficiency of the indictment, it is immaterial that the evidence at the trial was sufficient to show that at the time of breaking and entering the apartment the defendant had the intent to rape its occupant.

By reason of this error by the draftsman of the bill of indictment in Case No. 74CR61243, the judgment entered therein must be arrested and that case must be remanded to the Superior Court for the entry of proper judgment.

**[4]** Though not sufficient as an indictment for burglary, the indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleges that the defendant, at the specified time, broke and entered the dwelling house therein described. It is sufficient to support a conviction under G.S. 14-54(b) for wrongfully breaking and entering a building, a misdemeanor punishable under G.S. 14-3(a). The jury, having found him guilty of first degree burglary, necessarily found

him guilty of breaking and entering a building. The indictment and verdict will, therefore, support a sentence pursuant to G.S. 14-3(a). Case No. 74CR61243 is, therefore, remanded to the Superior Court of Wake County for the imposition of such sentence therein.

Case No. 74CR61242 (second degree rape): No error.

Case No. 74CR61243 (first degree burglary): Judgment arrested and case remanded for the imposition of a proper sentence.

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STATE OF NORTH CAROLINA ON RELATION OF GEORGE JOHNNIE WILLIAMS, JR., ADMINISTRATOR OF GEORGE JOHNNIE WILLIAMS, DECEASED v. W. I. ADAMS, L. R. COBB, GEORGE PEELE, C. BOLTINHOUSE AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, INC.

No. 32

(Filed 5 November 1975)

1. **Public Officers § 9— action against officers — acts which should have been done**

G.S. 109-34 giving a plaintiff a cause of action against officers and their sureties has been broadly construed over its long history to cover not only acts done by the officers but also acts that should have been done.

2. **Death § 4; Public Officers § 9; Sheriffs and Constables § 4— death of prison inmate — wrongful death action against officers — statute of limitations**

Although a cause of action was available to plaintiff under G.S. 109-34 with its attendant six year statute of limitations, plaintiff chose to bring an action for wrongful death allegedly caused by the negligence of the defendant officers in not providing medical attention for plaintiff's jailed intestate, and the two year statute of limitations provided for in G.S. 1-53(4) was applicable; therefore, plaintiff is entitled to his day in court on his wrongful death action where plaintiff's intestate was imprisoned on 13 September 1971 and died on the next day, and the action was commenced on 12 September 1973.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 25 N.C. App. 475, 213 S.E. 2d 584 (1975), affirming the judgment of *Snepp, J.*, entered 18 November 1974, WAYNE Superior Court, dismissing the action against the defendant.

This action was instituted on 12 September 1973 against the arresting officer, deputy sheriffs, sheriff, and surety on the sheriff's bond, seeking to recover damages in the sum of $100,000 for the wrongful death of the plaintiff's intestate, due to the negligence of the defendant officers. The complaint alleges that plaintiff's intestate was arrested on a traffic violation on 13 September 1971 in front of the Wayne County Courthouse. Upon his arrest, plaintiff's intestate informed the arresting officer, and later the deputy sheriffs, that he was a former mental patient and was severely ill. Nevertheless, he was incarcerated in the county jail. While in jail he, with the aid of other inmates, tried to attract the attention of those in charge of the jail so that he might obtain medical treatment. No one responded, and early the next morning, 14 September 1971, plaintiff's intestate was found dead in his cell. An autopsy revealed that death resulted from "[a]cute bronchial asthma with acute pulmonary edema [accumulation of fluids in the lungs]."

Defendant Fidelity and Deposit Company of Maryland, Inc. (Fidelity), surety on the official bond of defendant Sheriff Adams, answered, pleading in bar of the action the one-year statute of limitations under G.S. 1-54(1) and (2). The trial court, upon Fidelity's motion, entered judgment dismissing the action against Fidelity. The plaintiff appealed, and the Court of Appeals affirmed. That court held that plaintiff's cause of action arose under G.S. 1-54(1), which required that actions against a public officer for a trespass under color of his office be commenced within one year after the cause of action accrues, and since this suit was started more than a year after the incarceration of the plaintiff's intestate, Fidelity's motion for judgment on the pleadings was properly granted.

Plaintiff petitioned for *certiorari*, which we allowed on 6 June 1975.

*Turner and Harrison by Fred W. Harrison for plaintiff appellant.*

*Smith, Anderson, Blount and Mitchell by R. Daniel Rizzo for defendant appellee.*

MOORE, Justice.

The sole question presented for determination by this Court is whether the Court of Appeals correctly affirmed the trial

court's entry of judgment on the pleadings in favor of defendant Fidelity.

Fidelity contends that plaintiff's cause of action is barred by the one-year statute of limitations set out in G.S. 1-54(1) and G.S. 1-54(2), which are as follows:

> "*One year.*—Within one year an action or proceeding—
>
> (1) Against a public officer, for a trespass under color of his office.
>
> (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation."

(G.S. 1-54(1) repealed by Session Laws of 1975, c. 252, s. 5, effective January 1, 1976.)

Fidelity maintains, and the Court of Appeals agreed, that the actions of the sheriff here constitute a trespass under G.S. 1-54(1). Fidelity further contends that plaintiff relies on G.S. 109-34 to recover on the sheriff's bond, that G.S. 109-34 does not contain a limitation period, and therefore the one-year limitation period of G.S. 1-54(2) prevails.

G.S. 109-34 gives plaintiff a cause of action against the officers and the surety. Pertinent portions of that statute are as follows:

> "*Liability and right of action on official bonds.*—Every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . or other officer, may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office . . . and every such officer and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office."

G.S. 1-50(1) allows a party aggrieved under G.S. 109-34 to institute suit on the official bond of the officer within six years from the breach of the bond.

**[1]** G.S. 109-34 has been broadly construed over its long history to cover not only acts done by the officer but also acts

that should have been done. *Daniel v. Grizzard,* 117 N.C. 105, 23 S.E. 93 (1895). The last clause of the statute has been held to enlarge the conditions of the official bond to extend to all official duties of the office. *Price v. Honeycutt,* 216 N.C. 270, 4 S.E. 2d 611 (1939); *Kivett v. Young,* 106 N.C. 567, 10 S.E. 1019 (1890). This Court, in *Dunn v. Swanson,* 217 N.C. 279, 7 S.E. 2d 563 (1940), specifically held that under this statute the sheriff and the surety on his official bond are liable for the wrongful death of a prisoner resulting from the negligence of the jailer in locking the prisoner, in a weakened condition, in a cell with a person whom the sheriff and jailer knew to be violently insane and who assaulted the prisoner, causing his death. There, Justice Seawell, speaking for the Court, said:

> " . . . [T]he statute [C.S. 354, now G.S. 109-34] itself, in so many words, provides for the prosecution of a cause of action based on negligence. [Citation omitted.]
>
> * * *
>
> "The courts have frequently acted upon the principle that a public statute relating to the subject must be considered as in contemplation of the parties in making a contract, and when it relates to the liability of the parties to the public it becomes an enforceable part of the contract made for their benefit. See cases cited in *Price v. Honeycutt, supra.*
>
> "Under this law, conduct for which the defendants might otherwise have been only personally liable would render both them and their surety liable on the official bond. Only by color of his office could the jailer or sheriff have imprisoned the intestate in the county jail and in the cell where he received the injury resulting in his death."

In commenting on this decision, the author of a note in 19 N.C. L. Rev. 101 (1940-1941) states that *Dunn v. Swanson, supra,* is in accord with the general rule that "a prison official is liable when he knows of, or in the exercise of reasonable care should anticipate, danger to the prisoner, and with such knowledge or anticipation fails to take the proper precautions to safeguard his prisoners."

Other jurisdictions have upheld wrongful death actions against a sheriff and his surety for negligent failure to provide medical care to a prisoner known to be in need of such care. *State of Mississippi v. Durham,* 444 F. 2d 152 (5th Cir. 1971);

*LaVigne v. Allen,* 36 AD 2d 981, 321 N.Y.S. 2d 179 (1971); *Farmer v. State,* 224 Mis. 96, 79 So. 2d 528 (1955); *Magenheimer v. State,* 120 In. A. 128, 90 N.E. 2d 813 (1950); *Smith v. Slack,* 125 W. Va. 812, 26 S.E. 2d 387 (1943); *State v. National Surety Co.,* 162 Tenn. 547, 39 S.W. 2d 581 (1931); 14 A.L.R. 2d 353.

Plaintiff's complaint is clearly a claim for wrongful death caused by the negligence of the defendant officers in not providing medical attention for the plaintiff's intestate, in breach of their duty under G.S. 153-52 and G.S. 153-53.2 (repealed by Session Laws of 1973, c. 822, effective February 1, 1974, now codified as G.S. 153A-221 and G.S. 153A-225).

**[2]** Although a cause of action was available to the plaintiff under G.S. 109-34, with its attendant six-year statute of limitations, plaintiff chose to bring a wrongful death action. In North Carolina, a right of action to recover damages for wrongful death is purely statutory and exists only by virtue of the statutes. *Stetson v. Easterling,* 274 N.C. 152, 161 S.E. 2d 531 (1968); *In re Miles,* 262 N.C. 647, 138 S.E. 2d 487 (1964); *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761 (1963). Such an action is barred by G.S. 1-53(4), the two-year statute of limitations. The record shows that plaintiff's intestate was imprisoned on 13 September 1971 and died the following day. This action was commenced on 12 September 1973, within the two-year period. Therefore, plaintiff is entitled to his day in court on his wrongful death action and the Court of Appeals erred in affirming the trial court's entry of judgment on the pleadings.

The case is remanded to the Court of Appeals with direction to remand to Wayne County Superior Court for trial in accordance with this opinion.

Reversed and remanded.

CHARLES WILLIFORD v. HELEN MARIE WILLIFORD, ADMINISTRATRIX OF THE ESTATE OF ANTHONY CRAIG WILLIFORD, DECEASED

No. 66

(Filed 5 November 1975)

**Death § 9— abandonment of child — right to proceeds for wrongful death of child**

When the Legislature, in G.S. 28-173, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," it meant the Intestate Succession Act as modified by G.S. Ch. 31A entitled "Acts Barring Property Rights"; therefore, a father who abandoned his child when the child was a minor is precluded by G.S. 31A-2 from sharing in the proceeds of the settlement of a claim for wrongful death of the child.

ON *certiorari* to the Court of Appeals to review its decision, reported in 26 N.C. App. 61, 214 S.E. 2d 787, in which the Court of Appeals found no error in the judgment entered by *Lyon, D.J.*, in the District Court of HARNETT County, in favor of the defendant.

Anthony Craig Williford died unmarried and without surviving issue. The plaintiff is his father; the defendant, the administratrix of his estate, is his mother. The administratrix settled her claim against a third person, not a party to the present proceeding, for damages for the wrongful death of Anthony Craig Williford and, as a result, she now holds approximately $6,000, the proceeds of such settlement. The plaintiff instituted this action against the administratrix alleging that, he, being the father of the deceased, is entitled to one-half of the said proceeds. The defendant filed answer, alleging as a defense that the plaintiff abandoned his then minor son, Anthony Craig Williford, and, by reason of such abandonment, is not entitled to share in the proceeds of the settlement of the said claim for the wrongful death of Anthony Craig Williford. The plaintiff filed a reply denying that he abandoned Anthony Craig Williford and renewed his prayer for relief as set forth in the complaint.

The plaintiff moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. This motion was denied. The matter was then tried before a jury and the following issues were submitted to the jury and answered as indicated:

"1. Did the plaintiff abandon his minor son, Anthony Craig Williford, as alleged in the Answer?

ANSWER: Yes.

"2. If so, did the plaintiff resume his care for his said son for at least one year before his death and continuing until his death, as alleged in the Complaint?

ANSWER: No."

The plaintiff moved for judgment notwithstanding the verdict. This motion was denied and judgment was entered upon the verdict that the plaintiff take nothing by this action and that the costs of the action be taxed against him.

The plaintiff appealed to the Court of Appeals, assigning as error the denial of his motion for judgment on the pleadings and the denial of his motion for judgment notwithstanding the verdict. The Court of Appeals found no error.

It is stipulated that the testimony of witnesses was in all respects sufficient to support the verdict of the jury on the issues submitted to it. It was further stipulated that the charge of the court to the jury is not relevant to this appeal.

In their briefs filed in the Supreme Court, both parties agree that "upon this appeal, the sole question is whether or not a parent who abandons a child is precluded from sharing in funds received from the wrongful death of said child by G.S. 31(a)-2, [the plaintiff's two assignments of error raising] the question as to whether or not Plaintiff-Appellant is entitled to share in the proceeds of wrongful death recovery as a matter of law."

*McLeod & McLeod by Max E. McLeod and J. Michael McLeod for plaintiff-appellant.*

*Bowen & Lytch by R. Allen Lytch for defendant-appellee.*

LAKE, Justice.

G.S. 31A-2 provides:

"*Acts barring rights of parents.*—Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part

of the child's estate and all right to administer the estate of the child, except—

(1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or

(2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child."

It being established by the jury's verdict, which the plaintiff concedes to be supported by the evidence, that the plaintiff abandoned his then minor child, the deceased, and neither of the foregoing exceptions being applicable, it is obvious that the plaintiff is not entitled to a distributive share of the child's estate.

It is well established that the proceeds of an action brought for wrongful death are not assets of the estate of the deceased and are not "any part of" his estate. Such proceeds are distributable pursuant to G.S. 28-173, the act authorizing the institution of an action to recover damages for wrongful death.

That statute provides:

"The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death * * * *but shall be disposed of as provided in the Intestate Succession Act.*" (Emphasis added.)

The Intestate Succession Act is Chapter 29 of the General Statutes. G.S. 29-15(3) provides that if there is, as here, no surviving spouse, and if the intestate, as here, is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, "they shall take in equal shares."

However, G.S. 31A-2, above quoted, which was enacted in 1961, two years after the enactment of the Intestate Succession Act, must be deemed a part of the Intestate Succession Act and

a modification of G.S. 29-15(3), as fully as if it had been written thereinto or specifically designated as an amendment thereto. We think it clear that in the enactment of G.S. 28-173, above quoted, the Legislature intended that the proceeds of a recovery, or settlement, in an action for wrongful death shall be distributed to the same persons, and in the same proportionate shares, as the personal property of the decedent, remaining after the payment of all debts and other claims and expenses of administration, would be distributed if the decedent died intestate.

The case of *Avery v. Brantley,* 191 N.C. 396, 131 S.E. 721, relied upon by the plaintiff, is factually on all fours with the present case. There this Court held that the father's abandonment of the minor child did not bar him from the right he would have otherwise had to share in the proceeds of a recovery for the wrongful death of the child. However, at that time there was no provision in the law comparable to G.S. 31A-2. This Court correctly held that the statute then in effect, providing that an abandoning parent forfeited "all rights and privileges with the respect to the care, custody and services of such child," did not apply to the right of such parent to share in the proceeds of recovery for the child's wrongful death. G.S. 31A-2 having been enacted in the meantime, *Avery v. Brantley, supra,* may no longer be deemed authoritative.

In *Smith v. Exterminators,* 279 N.C. 583, 184 S.E. 2d 296, we held that a father who had abandoned his minor child may not share in the death benefits payable under the Workmen's Compensation Act for the death of such child. That case turned upon the construction of G.S. 97-40 (part of the Workmen's Compensation Act), which provided that where the deceased employee left no dependents, whole or partial, the compensation would be payable to his next of kin "as herein defined" and provided that the order of priority among such next of kin "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate." We deemed G.S. 31A-2, above quoted, to be part of such "general law" applicable to the distribution of the personal estate of one dying intestate. Thus, the father, who had abandoned the deceased during the minority of the latter, was held not entitled to share in the death benefits payable under the Workmen's Compensation Act.

While *Smith v. Exterminators, supra,* is not squarely in point upon the question now before us, it is our opinion, and

we so hold, that when the Legislature, in G.S. 28-173, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," and when it provided in G.S. 97-40 that the order of priority among claimants to death benefits payable under the Workmen's Compensation Act "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate," it had in mind the same law; i.e., the Intestate Succession Act as modified by G.S. Ch. 31A, entitled, "Acts Barring Property Rights." It follows that the plaintiff father, having abandoned the deceased when the latter was a minor child, may not now share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix.

No error.

BEALL v. BEALL

No. 59 PC.

Case below: 26 N.C. App. 752.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 November 1975.

ERVIN CO. v. HUNT

No. 63 PC.

Case below: 26 N.C. App. 755.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975.

GAS HOUSE, INC. v. TELEPHONE CO.

No. 74.

Case below: 26 N.C. App. 672.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 November 1975.

NEWTON v. INSURANCE CO.

No. 94 PC.

Case below: 27 N.C. App. 168.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 5 November 1975.

SIMS v. MOBILE HOMES

No. 71 PC.

Case below: 27 N.C. App. 25.

Petition by defendant Virginia Homes Mfg. Corp. for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975.

STATE v. HARRIS

No. 101.

Case below: 27 N.C. App. 15.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 November 1975.

STATE v. LITTLE

No. 78 PC.

Case below: 27 N.C. App. 54.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975.

STATE v. NEELY

No. 60 PC.

Case below: 26 N.C. App. 707.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 5 November 1975.

STATE v. STRICKLAND

No. 105.

Case below: 27 N.C. App. 40.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 November 1975.

STATE v. TEACHEY

No. 68 PC.

Case below: 26 N.C. App. 338.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 November 1975.

STATE v. TOMLIN

No. 81 PC.

Case below: 27 N.C. App. 68.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975.

WRIGHT v. GANN

No. 72 PC.

Case below: 27 N.C. App. 45.

Petition for writ of certiorari to North Carolina Court of Appeals denied 5 November 1975.

STATE OF NORTH CAROLINA v. CONNIE HARDEE BRANCH AND ROY LEE SULLIVAN

No. 1

(Filed 17 December 1975)

1. **Criminal Law § 92— consolidation of charges against two defendants**

The trial court properly consolidated for trial charges against the two defendants for being accessories before the fact to the murder of the femme defendant's husband and for conspiracy to murder the femme defendant's husband.

2. **Criminal Law § 66— suggestive photographic identifications — effect on in-court identification**

Although the witness twice failed to identify the femme defendant during the trial and the photographic procedures before trial and during a noon recess were impermissibly suggestive since five photographs of only the femme defendant were shown to the witness, the photographic procedures did not give rise to a very substantial likelihood of irreparable misidentification and thus taint the witness's subsequent in-court identification of the femme defendant as the woman with whom he had talked about killing her husband where the witness had a substantial opportunity to observe and converse with the femme defendant in the front seat of his car, the witness had identified no other person prior to the pretrial photographic identification, the femme defendant had changed her appearance from the time the witness first saw her, and before viewing the photographs during the noon recess the witness had already privately identified the femme defendant from viewing her profile in the courtroom.

3. **Criminal Law § 87; Witnesses § 9— redirect testimony — subject not covered on cross-examination**

The trial court did not err in permitting a State's witness to testify on redirect examination concerning his identification of the femme defendant although no questions concerning her identity had been asked on cross-examination.

4. **Criminal Law § 66— in-court identification — motion to reopen voir dire**

The trial court did not abuse its discretion in the denial of defendant's motion made at the end of her cross-examination of a State's witness to reopen the *voir dire* examination concerning the in-court identification of her by the witness since ample evidence was presented during the *voir dire*, no new evidence was brought out on cross-examination of the witness, and there was ample opportunity originally to cross-examine all of the State's witnesses and offer independent evidence.

5. **Criminal Law § 77— admissions — necessity for voir dire**

In a prosecution for accessory before the fact to the murder of femme defendant's husband and conspiracy to murder him, the trial court did not err in the denial of the femme defendant's motion to conduct a *voir dire* on the admissibility of testimony by a witness as

to admissions made to him over the telephone by the male defendant that the victim was killed by a State's witness for $5000 and that he and the femme defendant were in love and to be married where there was no indication that the male defendant's constitutional rights were violated before he made the admissions.

**6. Conspiracy § 5— testimony by co-conspirator prior to identification of defendant**

In a prosecution of two defendants for conspiracy to murder the femme defendant's husband, the trial court did not err in the admission against the femme defendant of testimony by a co-conspirator before his in-court identification of the femme defendant since wide latitude is allowed in the order of proof in a conspiracy case, and a *prima facie* case of conspiracy was developed against the femme defendant prior to the close of the evidence.

**7. Criminal Law §§ 73, 80— telephone calls — business records — hearsay**

Testimony by the revenue accounting manager of a telephone company as to the number of calls made between various telephone numbers was admissible under the business records exception to the hearsay rule since the actual records were duly authenticated and introduced into evidence; however, testimony by the accounting manager as to the number of calls between other numbers was inadmissible hearsay where no records were introduced into evidence, but error in the admission of such testimony was harmless beyond a reasonable doubt since there was plenary competent evidence concerning calls between those numbers and the inadmissible calls were only corroborative of testimony of the State's witnesses.

**8. Conspiracy § 5— telephone calls — relevancy**

In a prosecution for conspiracy to murder the femme defendant's husband, testimony concerning telephone calls made between telephones to which defendants and the killer had access was relevant to corroborate testimony of the State's witnesses and to show the close contact between the male defendant, the femme defendant and the killer during the course of the crime.

**9. Conspiracy § 5; Criminal Law § 79— acts of co-conspirator — admission against defendant**

In a prosecution for conspiracy to murder the femme defendant's husband, evidence that a $6,526.61 loan was made to the male defendant shortly before defendants paid a third person $5000 to commit the murder was admissible against the femme defendant since acts of a conspirator in furtherance of the conspiracy while the conspiracy was active are admissible against a co-conspirator when a *prima facie* case against the co-conspirator has been shown.

**10. Conspiracy § 5; Criminal Law § 79— declarations of co-conspirator — admission against defendant**

In a prosecution for conspiracy to murder the femme defendant's husband, testimony as to telephone calls between two witnesses and the male defendant concerning the male defendant's search for a person to commit the murder was properly admitted against the femme

defendant as declarations of a co-conspirator in furtherance of the conspiracy while the conspiracy was active.

11. **Conspiracy § 5; Criminal Law § 79— declarations of co-conspirator after conspiracy ended — inadmissibility against defendant**

In a prosecution for conspiracy to murder the femme defendant's husband, testimony as to the male defendant's telephone call to the killer following the killing to find out whether "the heat was on" the killer was improperly admitted against the femme defendant since declarations of a conspirator made after the conspiracy has ended are not admissible against the other conspirators; however, the admission of such testimony against the femme defendant was harmless error since the testimony did not implicate the femme defendant and there was plenary competent evidence to show that the two defendants conspired to kill the femme defendant's husband.

12. **Conspiracy § 5; Criminal Law § 79— declarations of co-conspirator after conspiracy ended — inadmissibility against defendant — harmless error**

Testimony that the male defendant told the witness by telephone that a third person had killed the femme defendant's husband for $5000 and that defendants were in love and to be married was improperly admitted against the femme defendant since the testimony involved declarations made outside the presence of the femme defendant after the conspiracy to kill the femme defendant's husband had ended; however, the admission of such testimony was harmless error since the facts related in the telephone conversation about the femme defendant were established by plenary competent evidence and there was overwhelming evidence showing the femme defendant's participation in the crime.

13. **Criminal Law § 81— best evidence rule — tape recording of telephone conversation**

The best evidence rule did not require the exclusion of testimony as to a telephone conversation by one of the participants in the conversation on the ground that a tape recording of the conversation was available.

14. **Conspiracy § 5— telephone call between conspirators — competency**

In a prosecution for conspiracy to murder the femme defendant's husband, evidence of a telephone call allegedly made by the femme defendant to the male defendant from a hospital after the femme defendant's husband was shot but before his death was competent as circumstantial evidence of a continuing conspiracy.

15. **Criminal Law § 95— illustrative exhibits — no limiting instruction when admitted**

The trial court did not err in refusing to give an instruction at the time exhibits were admitted that they were being admitted only for the limited purpose of illustrating the witness's testimony where the court instructed the jury in the first portion of its charge that the exhibits were admitted only for such purpose.

16. **Conspiracy § 6— conspiracy to murder — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of the femme defendant's guilt of conspiracy to murder her husband where it tended to show that the femme defendant expressed to the killer her desire, both privately and in concurrence with the male defendant, to have her husband killed and that she participated in planning the killing.

17. **Criminal Law § 10— accessory before the fact**

An accessory before the fact is one who counseled, procured, commanded or encouraged the principal to commit the crime but who was not present when the crime was committed.

18. **Criminal Law § 10; Homicide § 21 —accessory before fact to murder — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of femme defendant's guilt as an accessory before the fact to the murder of her husband.

19. **Criminal Law § 99— conduct of trial — impartiality — no expression of opinion**

The trial judge did not conduct a trial in a partial manner or express an opinion in violation of G.S. 1-180 when he suggested that defense attorneys object in a certain order, stated reasons for sustaining some defense objections, sustained his own objection on one occasion and stated the reason therefor, and asked witnesses various clarifying questions and gave numerous instructions to facilitate the jury's role and maintain order in the court.

20. **Conspiracy § 5; Criminal Law § 128— erroneous admission of evidence — violation of sequestration order — unavailability of tape recording — motions for mistrial**

In a prosecution for conspiracy to murder the femme defendant's husband, the trial court did not err in the denial of the femme defendant's motions for mistrial made when the court erroneously admitted evidence of declarations of the male defendant which were merely narrative of what the femme defendant had done or wanted done and erroneously admitted hearsay testimony, or when the prosecutor, after soliciting from the killer the testimony that he was a married man, stated, "I just want to let it all come out, Mr. Whealton," since the testimony and statement were insignificant in context with the plenary competent evidence offered by the State, and the court allowed defendant's motion to strike them and instructed the jury to disregard them; nor did the court err in failing to declare a mistrial when two deputy sheriffs violated a sequestration order by showing photographs of the femme defendant to a State's witness during a recess, or when a tape recording of a telephone conversation became unavailable to defendant because the officer in possession of it had gone to South Carolina to testify in another case and had become ill.

21. **Criminal Law § 114— necessity for charging on circumstantial evidence — statements by court — reference to direct evidence — no expression of opinion**

The trial court did not express an opinion in instructing the jury that the court did not have to charge the jury on circumstantial

evidence since there was direct or eyewitness evidence that defendants committed the crimes charged, but that the court was charging on circumstantial evidence because there was some circumstantial evidence.

22. **Criminal Law § 112— charge on circumstantial evidence**

In the absence of a specific request, the trial court did not err in failing to charge concerning circumstantial evidence that "before any circumstance upon which the State relies may be considered by you as tending to prove the guilt of either defendant, the State must prove that circumstance beyond a reasonable doubt."

23. **Criminal Law § 113— failure to recapitulate certain evidence**

The trial court did not err in failing to include in its recapitulation of the evidence that a witness on two occasions during direct examination failed to identify the femme defendant where the jury was reminded of the witness's initial failures when the court instructed the jury as to the circumstances enabling the witness to identify the femme defendant during redirect examination, and defendant failed to request such instruction.

24. **Criminal Law § 114— instructions — reference to defendants in the conjunctive**

The trial court did not express an opinion on the evidence in a portion of the charge referring to defendants in the conjunctive where the charge, when considered contextually, made it clear that the guilt or innocence of each defendant was to be judged separately.

25. **Criminal Law § 10; Homicide § 12— accessory before fact — sufficiency of indictment**

A bill of indictment was sufficient to charge the offense of accessory before the fact to murder although it did not specifically allege that defendant was not present at the time the offense was committed.

26. **Criminal Law § 84— fruit of poisonous tree — tape recording of telephone call — legality**

The testimony of a State's witness was not inadmissible as fruit of the poisonous tree on the ground that defendant's telephone conversation with a third person was recorded on tape where the recording was made with the third person's consent and was thus legal, and the testimony of the State's witness was obtained by means sufficiently distinguishable from the tape recording that it was purged of any primary taint.

27. **Criminal Law § 87— admission of testimony — necessity for voir dire**

The trial court did not err in the admission of the testimony of a State's witness without allowing a *voir dire* examination of him where there was nothing in the record to indicate any viable basis for excluding the witness's testimony.

28. **Criminal Law § 21— necessity for preliminary hearing**

At the time of defendant's trial, a defendant could properly be tried on a bill of indictment without the benefit of a preliminary hearing.

**29. Criminal Law § 80; Constitutional Law § 31— denial of motion for pretrial discovery**

The trial court did not err in the denial of defendant's motion for pretrial discovery of a tape recording and photographs since there was nothing to indicate the tape recording was to be used in the trial, there was no right to pretrial discovery of photographs, and the photographs would have been of little benefit to defendant; nor did the court err in the denial of the remainder of defendant's motion for pretrial discovery since it failed to specify the information sought and amounted to a fishing expedition for information. Former G.S. 15-155.4.

**30. Constitutional Law § 31— access to exculpatory evidence — denial of motion for pretrial discovery**

Defendant was not denied the right to have access to exculpatory evidence by the denial of his pretrial motion for discovery where defendant failed to show that any evidence favorable to him was suppressed.

**31. Criminal Law § 100— permitting private prosecutor**

The trial court did not err in allowing a private prosecutor to assist in the prosecution of defendant on charges of accessory before the fact of murder and conspiracy to commit murder.

**32. Criminal Law § 91— motion for continuance — employment of additional counsel**

The trial court did not err in the denial of defendant's motion for a continuance to allow defendant to employ additional counsel or in the failure to advise defendant of his right to proceed without counsel.

**33. Criminal Law § 22— counsel's misstatement of plea — no instruction to disregard**

Where counsel for defendant stated that defendant entered a plea of guilty to both charges, defendant thereupon stated, "Not guilty," and defendant's counsel replied, "I beg your pardon. Not guilty," the court did not err in failing to instruct the jury to disregard counsel's misstatement concerning the plea since the jurors present could not have misunderstood what occurred.

**34. Conspiracy § 5— telephone calls between conspirators — statements of conspirators — admissibility**

In a prosecution for conspiracy to murder the femme defendant's husband, testimony of a mobile telephone operator that defendants had told her that they were going to get married and that she had heard defendants conversing over the telephone fifteen or twenty times during the three months preceding the murder was competent on the question of the existence of a conspiracy.

**35. Conspiracy § 3; Criminal Law § 10— conspiracy to murder — accessory before the fact — no merger of crimes**

The crime of conspiracy to commit murder does not merge into the crime of accessory before the fact of murder, and defendant was properly convicted of both crimes.

**36. Conspiracy § 5; Criminal Law § 10; Homicide § 21— conspiracy to murder — accessory before fact to murder — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of the male defendant's guilt of accessory before the fact to the murder of the femme defendant's husband and conspiracy to murder the femme defendant's husband.

Chief Justice SHARP and Justice BRANCH concur in the result.

APPEAL by defendant pursuant to G.S. 7A-27(a) and G.S. 7A-31(a) from *Judge Perry Martin*, 14 October 1974 Criminal Session of PITT Superior Court.

Each defendant was indicted and convicted upon separate bills for accessory before the fact to the murder of Linwood Branch on 29 March 1974 and for conspiracy to commit murder. The cases were consolidated for trial over objection of defendant Branch. Each defendant received sentences of life imprisonment and ten years imprisonment on the respective charges.

The State offered evidence which tended to show the facts summarized below.

Matthew Jack Whealton, the principal witness against the defendants, admitted shooting a man whom he thought was the victim, Linwood Branch. Defendant Connie Hardee Branch was the wife of the deceased and she was apparently having an affair with defendant Roy Lee Sullivan. Whealton testified that in exchange for his turning State's evidence, the prosecution agreed not to seek the death penalty for his part in the death of Mr. Branch.

Whealton's further testimony was substantially as follows. His first contact with Sullivan was by telephone in December, 1973. Later they arranged to meet at an airport terminal in Norfolk, Virginia, in February, 1974. They met as planned and drove to a motel at Virginia Beach where Sullivan offered Whealton $4,000 to find someone to kill Mr. Branch. Whealton replied that he might be able to find such a person. Subsequently he told Sullivan by telephone that he had found someone, but the price would be $5,000.

Around 1 March 1974 Whealton met a woman who introduced herself as Connie Branch at the Fass Seafood House in Washington, North Carolina. She sat in the front seat of his car in the restaurant parking lot and told him that she wanted her husband killed because they would lose the child they were try-

ing to adopt if she got a divorce. She indicated that she would not mind if an innocent man were convicted if Whealton killed her husband. Sullivan soon joined them. He kissed Mrs. Branch on arrival. They proceeded to discuss their plans for the killing. Both Sullivan and Mrs. Branch wanted it "to look like a robbery" and suggested it take place by the carport of the Branch home which was in or near Greenville, North Carolina. Sullivan gave Whealton some pictures of Mr. Branch and offered him a $5,000 check. Whealton refused to take the check and insisted on cash. Following this meeting, Whealton received numerous telephone calls from Sullivan inquiring about the progress of the plans.

At a meeting in mid-March Sullivan gave Whealton $5,000 in cash. Whealton returned to his home in Chesapeake, Virginia, and called one Harold Wiseman who agreed to help him with the planned killing. Whealton bought a .38 caliber pistol and a .32 caliber pistol, giving the .32 caliber pistol to Wiseman along with $2,500.

On 19 March 1974 Whealton and Wiseman came to North Carolina to kill Branch. When he was located, they were unable to kill him because someone was with him, whereupon they went back to Virginia. They returned to North Carolina on 21 March 1974, but were too intoxicated to do anything and drove back to Virginia.

On 27 March 1974 Sullivan and Mrs. Branch contacted Whealton by telephone at Earl's Market in Chesapeake, Virginia, and inquired as to when he would kill Branch. On Friday, 29 March 1974, Whealton and Wiseman returned to North Carolina. Sullivan advised them that Branch had a different car, a 1968 Buick Skylark, and told them Branch was expected to arrive at his home around 10:00 that evening. Whealton drove Wiseman to the Branch home around 8:30 or 9:00 p.m., and Wiseman got out of the car to await Branch's arrival. However, Wiseman apparently lost his nerve, and in ten or fifteen minutes Whealton saw him walking away from the Branch home. Soon thereafter Whealton saw Branch drive into his driveway. He followed him in his vehicle and called to him by name, "Linwood." Branch walked toward the car in which Whealton was seated. When he was about fifteen feet away, Whealton shot him. Branch continued walking toward the Whealton car, stumbled, and fell against the car. Whealton pushed Branch away and left the scene. On the way back to Virginia, Whealton threw the

.38 caliber pistol he had used into the Albemarle Sound. The next day, Saturday, Sullivan called Whealton to say Branch had not died and then on Monday called to say he was dead.

Whealton identified Sullivan in the courtroom without hesitation. However, he twice was unable to identify Mrs. Branch during the first part of his testimony. After the two-hour noon recess of the first day of court, during which Whealton saw five pictures of Mrs. Branch taken at different times, he was able to make an in-court identification of her as the woman he had met at the Fass Seafood Restaurant about 1 March 1974. Mrs. Branch had changed the style and color of her hair and put on glasses since her meeting with Whealton. He said that he was able to recognize her after she turned and he saw her profile. He also stated that he first made a positive identification of her some time after the first two requests for an identification in court and before he saw the five pictures during the noon recess. A subsequent examination of Deputy Sheriff Dalton Respass, who had spoken with Whealton and shown him the pictures during the noon recess in violation of the court's sequestration order, verified Whealton's testimony that Mrs. Branch's appearance was changed. Cross-examination of Respass revealed that he had shown the same pictures of her to Whealton about two weeks before the trial and that he had identified her then. Other witnesses substantially corroborated the testimony of Whealton.

Further evidence of the State tended to show: that deceased died as a result of a pistol wound to the head; that Whealton, in the company of Gloria Allsbrook and Wiseman, was at the Lemon Tree Inn in Chocowinity (about twenty miles from Greenville) on at least three occasions, including 29 March 1974; that Sullivan borrowed $6,526.61 from a loan company on 11 March 1974 to buy a crop dusting plane, but no plane was bought; that within one day of the loan the check was cashed and $1,025.00 of it was deposited; that Sullivan in the presence of Mrs. Branch said he was going to marry her and exhibited wedding rings; that Sullivan and Mrs. Branch were frequently seen together in the first three months of 1974 and particularly were seen alone together at the Kinston Stock Yard for thirty minutes on 24 March 1974; that Sullivan had telephone conversations with two men in South Carolina and asked them if they could find a killer, telling one of them that the intended victim was the husband of his girl friend.

Additionally, the State introduced into evidence numerous telephone records. These records showed the following telephone calls: (1) a call on 8 March 1974 between the Cline Chevrolet dealership in Virginia where Whealton and Wiseman worked, and Sullivan's telephone in Kinston; (2) a call on 9 March 1974 from another Cline Chevrolet location in Virginia and Sullivan's telephone in Kinston; (3) numerous calls (one in April, eighteen in March, seventeen in February, and six in January) from the telephone of Better Homes Realty Company, Greenville, which listed defendant Connie Branch as the owner, to Sullivan's telephone in Kinston; (4) numerous calls (twenty-five in March, six in February, and one in January) from the telephone for Branch's General Store in Greenville listed in the name of L. N. Branch (the deceased) to the telephone of Sullivan; (5) three calls on 19 March 1974 from the Lemon Tree Inn, Chocowinity, where other records indicated Whealton registered on 19, 20 and 29 of March 1974, to Sullivan's telephone; (6) one four-minute call at 8:07 a.m. on 30 March 1974 from a Pitt Memorial Hospital pay telephone (the name "Connie" was noted on the record) to Sullivan's telephone; and (7) numerous other calls noted in the body of the opinion. Many of these telephone calls corroborated testimony of Whealton as to the calls he made or received and the close contact between Sullivan and Mrs. Branch.

Defendants presented no evidence.

*Attorney General Rufus L. Edmisten by Special Deputy Attorney General Sidney S. Eagles, Jr., for the State.*

*Paul, Keenan, Rowan & Galloway by James V. Rowan for Roy Lee Sullivan and James, Hite, Cavendish & Blount by Dallas Clark, Jr., for Connie Hardee Branch, for defendant appellants.*

COPELAND, Justice.

Defendant Branch raises 42 assignments of error covering 1144 exceptions. Defendant Sullivan raises 38 assignments of error covering 478 exceptions.

The questions raised by defendant Branch (hereinafter referred to as "Mrs. Branch") will be considered first.

MRS. BRANCH'S APPEAL

[1] Mrs. Branch contends that it was error for the court to consolidate the cases of defendants for trial. G.S. 15-152 (formerly C.S., 4622) has been consistently interpreted as follows: "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of others. C.S. 4622. [Citations omitted.]" *State v. Combs*, 200 N.C. 671, 674, 158 S.E. 252, 254 (1931).

Our case clearly falls within the above guidelines. The defendants were charged with being accessories before the fact to the murder of Mr. Branch and with conspiracy to murder him. The defendants were so connected in time and place that the evidence at the trial of one would be competent and admissible at the trial of the other. The assignment of error is without merit and is overruled.

[2] Mrs. Branch next contends that the in-court identification of her by Whealton was improper and tainted on account of the five pictures shown to him during the noon recess. Actually, there was a photographic identification about two weeks before the trial as well as the one (attempted) during the noon recess. On both occasions Deputy Sheriff Dalton Respass showed five isolated pictures of Mrs. Branch to Whealton. Mrs. Branch moved to strike, and requested and received a voir dire examination as to Whealton's in-court identification. However, when Respass subsequently testified and for the first time informed the court that he had shown the same pictures to Whealton two weeks before the trial, Mrs. Branch failed to object, move to strike, or request to reopen the voir dire examination as to Whealton's in-court identification. She neither contended that new evidence had been discovered, nor that she had been surprised. Nonetheless, on account of the serious nature of this case and the fact that a general objection to the in-court identification was made, the effect of this related identification two weeks before the trial will be considered by our Court *ex mero motu* under this assignment of error.

"[E]ach 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, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968). "Factors to consider in applying the *Simmons* test are: '(1) the manner in which the pretrial identification was conducted; (2) the witness's prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification.' [Citations omitted.]" *State v. Knight,* 282 N.C. 220, 225, 192 S.E. 2d 283, 287 (1972).

An analysis of this case in the light of these factors indicates that both identification procedures were impermissibly suggestive since in each instance Deputy Sheriff Respass showed pictures of only one woman, Mrs. Branch, to Whealton. However, an examination of the other factors involved shows that these photographic identification procedures did not give rise to a "very substantial likelihood of irreparable misidentification." Whealton had a substantial prior opportunity to observe and converse with Mrs. Branch in the front seat of his car during the early afternoon around 1 March 1974. He observed her get out of her car and walk over to his car. He had made no prior description of her. Therefore, the factor relating to prior descriptions is inapplicable. Before seeing and identifying the pictures of her about two weeks in advance of the trial, he apparently neither made nor attemped to make an identification of her or some other person as the woman he met around 1 March 1974. Moreover, by the time he saw the pictures during the noon recess, he had *already* privately *identified* Mrs. Branch from a profile view of her in the courtroom and reported this to Respass. Thus, the second showing of the pictures could not properly be deemed to have affected his subsequent in-court identification. Whealton did twice fail to identify her on the witness stand, but this was understandable considering the circumstances. Both Whealton and Respass stated that the color of her hair had been changed and she was wearing glasses now, whereas they had not previously seen her wearing glasses. Also, Respass indicated

that the style of her hair had been changed since he saw her on 30 March 1974. The two pictures which were presented with the record on appeal and had been taken on 26 April 1974 and five or six days thereafter show a dramatic difference in the appearance of Mrs. Branch. An additional circumstance is that over seven months had passed since Whealton had seen her around 1 March 1974. Additionally, Whealton stated he was able to identify her *when he saw her profile.* Apparently, he had not seen or examined her profile when the first two requests for an in-court identification were made. Thus, on the basis of these facts the photographic identification some two weeks before the trial did not give rise to a "very substantial likelihood of irreparable misidentification" and taint Whealton's in-court identification. Moreover, the trial court's finding that the in-court identification was not tainted or influenced by the pictures shown during the noon recess was fully supported by the evidence and must be upheld. *State v. Knight, supra; State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971) ; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). This assignment of error is overruled.

**[3]** Mrs. Branch also challenges the in-court identification because the court allowed the State during redirect examination to examine Whealton on the identity of the woman he met around 1 March 1974 even though no questions concerning her identity had been asked on cross-examination. As indicated in 1 Stansbury, North Carolina Evidence, § 36 (Brandis Rev. 1973), and cases cited thereunder, "The trial judge may, however, in his discretion vary the regular order and permit counsel to elicit on redirect examination *new evidence* which was *inadvertently omitted* on the examination in chief." (Emphasis supplied.) Since Whealton had not seen the woman he met around 1 March 1974 for over seven months, since her appearance was changed considerably, and since there is nothing to indicate that Mrs. Branch presented a profile view when Whealton failed to identify her, the trial judge clearly did not abuse his discretion. This assignment of error is overruled.

**[4]** Mrs. Branch also contends that the court erred in denying her motion at the end of her cross-examination of Whealton to reopen voir dire examination concerning the in-court identification of her by Whealton. This is discretionary with the court and it appears there was no abuse of discretion since, (1) there was a right to confront her with adverse witnesses during the voir

dire; (2) ample evidence was produced during the voir dire; (3) no new evidence had been brought out on her cross-examination of Whealton; and (4) there was ample opportunity originally to cross-examine all of the State's witnesses and offer independent evidence. Where no voir dire was conducted, our Court has said: "Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent. Where, as here, the pretrial viewing of photographs was free of impermissible suggestiveness, and the evidence is clear and convincing that defendant's in-court identification originated with observation of defendant at the time of the robbery and not with the photographs, the failure of the trial court to conduct a voir dire and make findings of fact, as he should have done, must be deemed harmless error. [Citation omitted.]" *State v. Stepney*, 280 N.C. 306, 314, 185 S.E. 2d 844, 850 (1972). A similar rationale applies here with respect to reopening voir dire, and, if there was error, it was harmless beyond a reasonable doubt since the photographic identification did not give rise to a "very substantial likelihood of misidentification" based upon the considerable evidence presented. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970). Thus, all assignments of error pertaining to identification are overruled.

**[5]** Defendant next assigns as error denial of her motion to conduct a voir dire of witness Bennett (from South Carolina) who testified that Sullivan told him on the telephone that Branch was killed by Whealton for $5,000 and that he and Connie Branch were in love and to be married. Defendant cites no cases and we have searched and found no cases supporting the proposition that a voir dire is mandatory in such a situation. Rather, the general rule is that the conduct of the trial is within the discretion of the trial judge, and he will be upheld on appeal in the absence of an abuse of discretion. *See* 7 Strong, N. C. Index 2d, Trial, §§ 5 and 9. The rule is that it is within the trial court's discretion to decide whether a voir dire will be held as to testimony concerning admissions by a defendant when neither defendant nor the facts indicate there is a possible violation of the Constitution of North Carolina or of the Constitution of the United States on account of duress, coercion or a violation under *Miranda v. State of Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The admissions of Sullivan to Bennett did not arise from force or on account of a custodial interrogation. We will consider the hearsay nature of the admission

of the actual evidence presented and its effect in subsequent assignments of error. There was no abuse of discretion in denying the voir dire motion, and this assignment of error is overruled.

**[6]** In separate assignments of error Mrs. Branch contends that the testimony of Whealton occurring before his in-court identification of her should have been stricken and that as to Mrs. Branch, the jury should have been instructed to disregard this testimony. "The general rule is that when evidence of a *prima facie* case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. [Citations omitted.]" *State v. Conrad,* 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969). "Because of the nature of the offense [of conspiracy] courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence. '[A]nd if at the close of the evidence every constituent of the offense charged is proved the verdict rested thereon will not be disturbed. . . . ' [Citations omitted.]" *State v. Conrad, supra,* at 347, 168 S.E. 2d at 43. Defendant's primary contention is that the in-court identification of Mrs. Branch by Whealton was tainted and, consequently, there was no *prima facie* case of a conspiracy with Mrs. Branch. However, this Court has determined that the in-court identification was proper. Thus, there was plenary direct evidence as well as circumstantial evidence connecting her with the conspiracy and establishing a *prima facie* case of her conspiracy. This assignment of error is overruled.

We have carefully considered Mrs. Branch's additional assignments of error with respect to the testimony of Whealton and find them to be without merit.

**[7]** Next, Mrs. Branch contends that it was prejudicial error to allow into evidence the testimony of Moodie H. Ward, Bonnie Daniels, and Susan Bishop as to various telephone calls and service.

Mr. Ward, Revenue Accounting Manager for Carolina Telephone and Telegraph Company, testified as to the following: (1) 334 calls from the telephone of William I. Sullivan where defendant Roy Lee Sullivan was living with his parents in Kinston, N. C., to the telephone of Branch's General Store in

Greenville, N. C., listed in the name of L. N. Branch (the deceased) (December 1973 to 29 March 1974); (2) 73 calls from the telephone of William I. Sullivan in Kinston to the telephone of the Better Homes Realty Co., Greenville, which listed Connie Branch as the owner (20 December 1973 to 29 March 1974); (3) 17 calls from the telephone of William I. Sullivan in Kinston to the telephone of Cline Chevrolet in Virginia where Whealton worked (19 March 1974 to 22 March 1974); (4) 30 calls from William I. Sullivan's telephone in Kinston to the telephone of M. J. Whealton in Hickory, Virginia, (4 March 1974 to 30 March 1974); (5) 26 calls from William I. Sullivan's telephone in Kinston to the telephone of Noah T. Hardee, the father of Connie Branch (and with whom she had been living), in Greenville (11 January 1974 to 11 April 1974); (6) the telephone numbers and kinds of service for the first months of 1974 for Pitt Memorial Hospital, Greenville; Willie Nelson Stables, Greenville; Lemon Tree Inns of America, Inc., Washington; (7) 42 calls from the Better Homes Realty Co., Greenville, to the telephone of William I. Sullivan in Kinston (18 January 1974 to 25 March 1974); (8) 25 calls from the telephone of Branch's General Store in Greenville to the telephone of William I. Sullivan in Kinston (21 January 1974 to 29 March 1974); (9) 1 twenty-one minute call from the telephone of Noah T. Hardee in Greenville to the telephone of William I. Sullivan (6:29 p.m., 29 March 1974); (10) 3 calls from the telephone of the Lemon Tree Inn, Chocowinity, N. C., to the telephone of William I. Sullivan in Kinston (19 March 1974). These ten groupings of telephone service and 551 calls will be referred to by number.

"Evidence, oral or written is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Robbins,* 275 N.C. 537, 547, 169 S.E. 2d 858, 864-865 (1969). 1 Stansbury, *supra,* § 138 at 458.

Since Mr. Ward did not have firsthand knowledge of the telephone service and telephone calls to which he testified, his testimony was hearsay and inadmissible absent an exception to the hearsay rule.

The telephone calls in Groups (7) through (10) were admissible under the business records exception to the hearsay rule since the actual records were duly authenticated and introduced into evidence by a qualified official. However, as to

Groups (1) through (5) no actual records were introduced into evidence and, therefore, the testimony in those groups was not admissible under any exception to the hearsay rule. *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895 (1950); 1 Stansbury, *supra,* § 155; McCormick, Evidence, Chapter 31 (2d ed. 1972). Nonetheless, a careful examination of the entire record indicates that there was plenary admissible evidence of telephone calls made between the same telephones in Groups (1) through (5) when the transmitting and receiving ends were reversed. (See the first six groups of calls in the initial discussion of the facts for this case and the calls in Groups (7) through (10) of this section of the opinion.) Also, the State produced substantial other evidence implicating defendants. Furthermore, these inadmissible telephone calls were essentially only corroborative of the testimony of Whealton and other witnesses and did not even reveal the substance of the conversations. Therefore, when Mr. Ward, who was duly qualified as a custodian of these business records, testified as to his recollection of the information recited in Groups (1) through (5), it was harmless error beyond a reasonable doubt. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972); *Chapman v. California, supra.* A similar rationale applies as to the testimony given in Group (6) as to telephone numbers and service. This assignment of error is overruled.

**[8]** Mrs. Branch additionally contends these telephone calls were irrelevant or solely intended to arouse the prejudice of the jury. However, these telephone calls were properly shown to be related to telephones to which defendants had access and were relevant to corroborate the testimony of the State's witnesses and to show the close contact between Sullivan, Mrs. Branch, and Whealton throughout the course of the crime. This was further circumstantial evidence of the conspiracy. Defendant's assignments of error as to these numerous telephone calls are overruled.

**[9]** Mrs. Branch next contends that it was error to deny her motion that the jury be instructed that the testimony concerning a check and loan for $6,526.61 made to Sullivan on 11 March 1974 be limited to defendant Sullivan. This evidence was relevant and material as circumstantial evidence of acts of a co-conspirator in furtherance of the objectives of the conspiracy while the conspiracy was active. In particular, this evidence showed that, shortly before the alleged mid-March payment of

$5,000 in cash to Whealton, Sullivan had $5,501.26 in cash and that this money was not used to buy a plane for crop dusting as he represented to the loan company. Under these circumstances, this evidence was properly admitted against Mrs. Branch since a *prima facie* case of conspiracy between Mrs. Branch and Sullivan had already been established by the State. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Conrad, supra;* 2 Stansbury, N. C. Evidence, § 173 (Brandis Rev. 1973).

**[10]** Our next question is whether the trial court erred in admitting into evidence as against Mrs. Branch the testimony of witnesses Lucarelli and Bennett concerning telephone conversations which each witness had with defendant Sullivan. The purpose of the telephone conversations concerned Sullivan's search for a killer. In fact, Sullivan told Lucarelli that the husband of his girl friend was the intended victim. These conversations were clearly in furtherance of the plan to kill Branch. Whealton's testimony as to Mrs. Branch's desire to have her husband killed was circumstantial evidence that she might have originated the plan to find somebody to kill her husband. Since the testimony of numerous witnesses revealed that Mrs. Branch and Sullivan were having an affair and further indicated that they had been acting in concert from the inception of this plan, a *prima facie* case of conspiracy between Mrs. Branch and Sullivan was established before these telephone conversations took place. Testimony as to these conversations with Sullivan was properly admitted against Mrs. Branch under the same "co-conspirator rule" that was applicable in the previous assignment of error. Specifically, when a *prima facie* case of conspiracy has been introduced, the declarations and acts of any one of the conspirators, made or done while the conspiracy is in existence and in furtherance of the common illegal design, are admissible against other conspirators. 2 Stansbury, *supra,* § 173 and cases cited therein. The assignment of error is overruled.

**[11]** Mrs. Branch assigns as error the admission of the testimony of Bennett concerning Sullivan's telephone call to him in April immediately following the killing to find out whether or not "the heat was on" Whealton. "[T]he declaration or act of one is not admissible in evidence as against other members of the conspiracy if it was made after the termination of the conspiracy. . . . This is true whether the conspiracy is terminated by the achievement of its purpose or by the failure to achieve

it." 16 Am. Jur. 2d, Conspiracy, § 40, at 148; *State v. Littlejohn,* 264 N.C. 571, 142 S.E. 2d 132 (1965). "[D]eclarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design. *S. v. Dean,* 35 N.C., 63." *State v. Ritter,* 197 N.C. 113, 116, 147 S.E. 733, 734 (1929). Thus, it was error to admit this testimony as to Sullivan's conversations after Branch had been killed and the objective of the conspiracy had been achieved. However, the error committed was harmless beyond a reasonable doubt since this evidence standing alone in no way implicated Mrs. Branch and since there was plenary other evidence showing that Mrs. Branch and Sullivan conspired to kill Branch. *Chapman v. California, supra; State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). The assignment of error is overruled.

**[12]** Next, Mrs. Branch assigns as error the admission of the testimony of Bennett concerning a subsequent telephone call in April from Bennett to Sullivan to find out more information about the killing. In this subsequent call, Sullivan related that Whealton killed Branch for $5,000 and that he (Sullivan) and Mrs. Branch were in love and to be married as soon as possible. Since this testimony involved declarations made outside the presence of Mrs. Branch and after the conspiracy to kill Mr. Branch had been terminated by the achievement of its purpose, it was error to admit this testimony against Mrs. Branch. *State v. Ritter, supra.* However, an examination of the record shows that Mrs. Branch was not prejudiced by the admission of this testimony. Although reference was made to Mrs. Branch in this conversation, the very facts related about her were established by plenary other evidence. In brief, Sullivan and Mrs. Branch had been seen alone together on several occasions for extended periods. They were frequently in contact with each other and had been seen kissing each other. Also, Sullivan, in the presence of Mrs. Branch, had stated that they were to be married and had displayed wedding rings. Furthermore, the fact that Sullivan and Mrs. Branch were in love and to be married did not *directly* implicate her in the crimes charged. Moreover, there was overwhelming evidence, especially considering Whealton's testimony and identification of Mrs. Branch, showing her involvement in the crime charged. Thus, the error committed was harmless beyond a reasonable doubt. *Chapman v. California,*

*supra; State v. Brinson, supra.* The assignment of error is overruled.

**[13]** Mrs. Branch also claims that it was error to admit the testimony concerning the above subsequent telephone call from Bennett to Sullivan because a tape recording of the conversation was available and in possession of the prosecuting attorneys. She contends that the tape recording was the best evidence of that conversation. The best evidence rule requires the production of the original writing if it is available in preference to other species of evidence *where the contents or terms of that writing are in question. State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Ray,* 209 N.C. 772, 184 S.E. 836 (1936); 2 Stansbury, *supra,* §§ 190, 191. This case is clearly distinguishable from the situation where the terms of an agreement are embodied in a document so that the document itself constitutes the contract of the parties and, therefore, is the best evidence of that contract. *See* 2 Stansbury, *supra,* § 191, and cases cited in footnote 27. In this case, the substance of the *conversation,* not the contents or terms of the recording, was directly in question. In a legal sense Bennett's recollection of the conversation was qualitatively as good as the recording. In a related situation in *Fox* the trial court admitted the testimony of the sheriff as to what defendant had confessed while allowing the production of a recording for corroboration. Our Court stated, "The fact that there was a recording of it did not prevent the sheriff from testifying as to what was said." *State v. Fox, supra,* at 26, 175 S.E. 2d at 576. Defendant's assignment of error is without merit and overruled.

**[14]** Mrs. Branch next contends that the court erred in allowing into evidence the testimony of Mr. Ward concerning a four-minute call made at 8:07 a.m. on 30 March 1974 from a pay telephone at Pitt Memorial Hospital in Greenville to the telephone of Sullivan in Kinston. When the call was placed, the telephone operator noted the name "Connie" in her records. There was other evidence indicating that late in the evening of 29 March 1974 Connie Branch was at the Pitt Memorial Hospital where Mr. Branch had been taken following the shooting. Her husband was in critical condition until his death at 5:30 a.m. on 31 March 1974. These facts taken in context with other State's evidence were relevant to show the continued close contact between Mrs. Branch and Sullivan. *See Bank v. Stack,* 179 N.C. 514, 103 S.E. 6 (1920). It was admissible as circum-

stantial evidence of a continuing conspiracy. Defendant's assignment of error has no merit and is overruled.

**[15]** The question is raised whether the court erred in denying Mrs. Branch's request that the jury be instructed that State's Exhibits Nos. 16 and 17, which summarized evidence as to certain telephone numbers and calls, were being admitted for the limited purpose of illustrating the testimony of the witness. The exhibits were admitted during the course of the brief testimony of the last witness who testified before the charge to the jury was given. Although a preferable procedure would have been for the court to give the requested instruction at the time the request was made and in conjunction with the admission of this evidence, no prejudicial error was committed since (1) the judge gave the following complete instruction the next morning during the first part of his charge to the jury, "The photographs and diagrams are to be considered by you for no other purpose other than illustrating and explaining their [the witnesses'] testimony, if you find as a fact that it does illustrate and explain their testimony in this case," and (2) these blackboard diagrams summarizing certain telephone numbers and calls would not have the potential impact on the jury that other kinds of illustrative evidence would. For instance, the introduction of moving pictures of defendant's actions would have a much greater potential impact on the jury and might mandate an immediate instruction in order to avoid prejudicial error. *See State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129 (1970). For the reasons stated, defendant's assignment of error is without merit and is overruled.

**[16]** Mrs. Branch argues that the court erred in failing to grant her motion for judgment as of nonsuit as to the charges of conspiracy to commit murder and accessory before the fact to murder. "It is well settled with us that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State; and when so considered, if there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the duty of the court to overrule the motion and to submit the case to the jury. Moreover, on such motion, the State is entitled to the benefit of every reasonable inference which may be fairly drawn from the evidence." *State v. Davenport,* 227 N.C. 475, 492-93, 42 S.E. 2d 686, 699 (1947).

"A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. . . . *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737. No overt act is necessary to complete the crime of conspiracy. *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. 'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.' *S. v. Knotts,* 168 N.C. 173, 83 S.E. 972." *State v. Goldberg,* 261 N.C. 181, 202, 134 S.E. 2d 334, 348 (1964). *See also State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969). A criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred. *State v. Horton, supra.* Since Whealton's in-court identification of Mrs. Branch as the woman who met with him around 1 March 1974 and expressed her desire, both privately and in concurrence with Sullivan, to have her husband killed was properly admissible, the charge of conspiracy to commit murder, when considered in the light of all the other evidence, was fully supported and the motion as of nonsuit was properly overruled.

**[17, 18]** The three elements that must concur in order to justify the conviction of one as an accessory before the fact are as follows: (1) he counseled, procured, commanded, or encouraged the principal to commit the crime, (2) he was not present when the crime was committed, and (3) the principal committed the crime. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 (1961); G.S. 14-5. The State's evidence as to Mrs. Branch's meeting with Whealton around 1 March 1974, her telephone conversation with him on 27 March 1974, her close contact with Sullivan, and the actions of Whealton and Sullivan, fully support the allegation of accessory before the fact to murder, and the motion as of nonsuit was properly overruled.

**[19]** Mrs. Branch contends that the court erred in failing to maintain an impartial role throughout the course of the trial. The record indicates the following. After it became apparent that both defense attorneys were objecting to virtually every question and moving to strike all answers, the court suggested that they object in a certain order. The court occasionally stated its reasons for sustaining the defendants' objections. Once the court sustained its own objection and stated its reason for so

doing. Additionally, the court asked witnesses various clarifying questions and gave numerous instructions to facilitate the jury's role and maintain order in the court. Although the phraseology of the trial judge was not always ideal or such that it should serve as a model, it is clear from a careful examination of the record that the court did not conduct the trial in a partial manner or express an opinion in violation of G.S. 1-180. The conduct of a trial generally rests in the sound discretion of the trial judge. 7 Strong, *supra,* §§ 5 and 9. *See, e.g., State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971); 1 Stansbury, *supra,* §§ 37 and 39, and cases cited therein. Defendant is "entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 619, 97 L.Ed. 593, 605, 73 S.Ct. 481, 490 (1953). Defendant's assignment of error is without merit and overruled.

**[20]** Mrs. Branch asserts that the court erred in denying various motions for mistrial. Her first five motions for mistrial related to the following five statements. First, Whealton testified that Sullivan told him that Mrs. Branch registered him at the Lemon Tree Inn. Second, Whealton testified that Sullivan told him that Mrs. Branch wanted the killing done by the carport. Since both of these statements involved what Sullivan had said out of the presence of Mrs. Branch and directly implicated her, they were apparently inadmissible under the rationale of *State v. Wells,* 219 N.C. 354, 13 S.E. 2d 613 (1941). In a third statement, Whealton testified in apparent violation of the hearsay rule that Wiseman told him that he (Wiseman) could not kill Mr. Branch. A fourth statement was a voice identification by Whealton of Mrs. Branch as the woman with whom he had a telephone conversation on 27 March 1974. A proper foundation for such an identification was made shortly thereafter, and this same testimony was then properly admitted. In the fifth of these five statements, the prosecutor made the following remark immediately after he solicited from Whealton his testimony that he was a married man: "I just want to let it all come out, Mr. Whealton." In addition to the fact that these above five isolated statements were insignificant in context with the plenary competent evidence admitted in support of the State's case, it should further be noted that following each of the above statements the court allowed defendant's motion to strike and properly instructed the jury not to consider the statements made. Presumably the jury followed the court's in-

structions. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966).

Mrs. Branch's sixth motion for mistrial was based on Deputy Sheriff Stocks' and Deputy Sheriff Respass's violation of the court's sequestration order when they showed photographs of Mrs. Branch to Whealton during the noon recess. Deputy Sheriff Stocks did not testify. Deputy Sheriff Respass's testimony concerned the appearance of Mrs. Branch and the showing of photographs of Mrs. Branch to Whealton. It might be noted that we have previously determined and stated the reasons why the violation of this sequestration order did not taint Whealton's in-court identification of Mrs. Branch.

A seventh motion for mistrial was based on the admission of the testimony of Bennett as to his conversation with Sullivan when a recording, which had been made with the consent of Bennett, existed. As we previously stated, the best evidence rule was not violated and there was no prejudicial error in the admission of this testimony.

An eighth motion for mistrial was grounded on the fact that defendant stated that the above recording was not available for his examination. The recording was apparently in the possession of a South Carolina law enforcement officer who had been recalled to testify in South Carolina and had become ill. The State's suggestion that the court allow a one-day continuance was denied. Defendant made no motion for a continuance.

Mrs. Branch additionally made a general motion for mistrial after all the evidence was presented. The allowance or refusal of a motion for mistrial in cases less than capital rests in the trial judge's sound discretion and is not reviewable absent a showing of gross abuse of discretion. *State v. Foster,* 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972). We have carefully examined defendant's contentions and conclude that there has been no showing of a gross abuse of discretion. The necessity of doing justice did not require the trial judge to declare a mistrial. *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954); *State v. Wiseman,* 68 N.C. 203 (1873). The assignment of error is overruled.

**[21]** Mrs. Branch assigns as error the following portion of the court's charge to the jury:

> "Counsel for defendants . . . have requested me to charge you in regard to circumstantial evidence. There is direct evidence in this case. Therefore, in the Court's opinion it is not necessary to charge on circumstantial evidence. However, I am charging on circumstantial evidence in this case because there is some circumstantial evidence, it appears to the Court. There is direct evidence, or eyewitness evidence, too, that the defendants committed the crimes that they are charged with. . . ."

Although this charge could by no means serve as a model, in substance it informed the jury that the court did not have to charge on circumstantial evidence since the jury could decide this case on the basis of direct or eyewitness evidence if it found such to be credible. The court was charging the jury on circumstantial evidence since the jury also could rely on that if the jury found that to be credible. Since the court had in unmistakable language previously informed the jury that it was the sole judge of truth and the credibility of the witnesses, it was evident that the above instruction was limited to the jury's finding such evidence to be credible. After the court gave a proper instruction on circumstantial evidence, it further clarified its above instruction:

> "However, as I indicated earlier, you do not have to rely entirely upon circumstantial evidence in this case, because the State contends that there is direct evidence in this case. And if you believe the evidence, there is direct evidence in the case."

By this instruction, the court indicated that the jury had to believe the direct evidence introduced by the State for it actually to be considered by the jury as direct evidence against defendant. When the court said there was "direct evidence," the court merely classified the evidence presented according to type for purposes of giving instructions on the law and by no means expressed an opinion as to the credibility of any of the evidence or the guilt or innocence of defendant.

Other portions of the charge fully delineate the roles of the judge and the jury and show that the judge did not express an opinion in violation of G.S. 1-180. For instance, the court explained its duty to summarize the evidence introduced, *giving*

*equal emphasis* to the evidence on both sides *without expressing an opinion.* Also, the court stated that the jury's recollection of the evidence was controlling in case of any conflict with the court's recapitulation of the evidence.

When the portion of the charge which is assigned as error is read in context with the rest of the charge, it is clear that the court in no way expressed an opinion in violation of G.S. 1-180. "A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. McWilliams,* 277 N.C. 680, 684-85, 178 S.E. 2d 476, 479 (1971). *Accord, State v. Lee, supra.* This assignment of error is without merit and overruled.

**[22]** Mrs. Branch contends the court erred when it failed to charge concerning circumstantial evidence that "before any circumstance upon which the State relies may be considered by you as tending to prove the guilt of either defendant, the State must prove that circumstance beyond a reasonable doubt." The defendant did not specifically request the court to so charge.

The court charged as follows with respect to circumstantial evidence:

> "The State contends in addition to the direct evidence, and the defendants deny it, that the circumstances in evidence, taken together, establish the guilt of the defendant. In other words, the State relies in part on what is known as circumstantial evidence. The State relies, furthermore, on what they consider to be direct evidence.
>
> "Circumstantial evidence is evidence recognized and accepted as a manner of proof of a fact in a court of law. However, you must find the defendants not guilty unless the *circumstances considered together exclude every reasonable possibility of innocence and point conclusively to guilt* when you rely upon the circumstantial evidence." (Emphasis supplied.)

Although the above instruction is not sufficiently clear and exact to be approved as a model, it is manifest that the assignment of error made by defendant is untenable. This Court has on numerous occasions stated that there is no specific formula that must be used in charging the jury as to the degree of proof so long as the jury is clearly instructed that it must acquit unless it is fully satisfied, entirely convinced, or satisfied be-

yond a reasonable doubt of defendant's guilt. *State v. Shook*, 224 N.C. 728, 32 S.E. 2d 329 (1944). In this case the court had initially charged the jury, "The State must prove that a defendant is guilty beyond a reasonable doubt." When the court gave the above charge on circumstantial evidence, it was amplifying on this same concept and telling the jury in essence that it must be entirely convinced in order to convict defendant on the basis of circumstantial evidence. By giving the above charge, the court clearly informed the jury of the proper intensity of proof required to convict defendant. In the absence of a prior specific request for the charge now submitted by defendant, it is manifest that no reversible error was committed. *See also State v. Willoughby*, 180 N.C. 676, 103 S.E. 903 (1920). This assignment of error is overruled.

**[23]** Mrs. Branch assigns as error the failure of the court to include in its recapitulation of the evidence that Whealton on two occasions during direct examination failed to identify Mrs. Branch. G.S. 1-180 requires the court in its recapitulation of the evidence to state the evidence presented in a plain and correct manner *without expressing any opinion of the facts. Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967). "The recapitulation of all the evidence is not required under G.S. 1-180. . . ." *State v. Sanders*, 276 N.C. 598, 617, 174 S.E. 2d 487, 500 (1970). A careful examination of the charge as a whole indicates that the recapitulation of the evidence was fair and fully complied with these standards. In fact, the jury was clearly reminded of Whealton's initial failures to identify Mrs. Branch when the court instructed the jury as to the circumstances enabling Whealton to identify Mrs. Branch during redirect examination. Furthermore, "[i]f defendant desired fuller instructions as to the evidence or contentions, he should have so requested. His failure to do so now precludes him from assigning this as error. [Citations omitted.]" *State v. Sanders, supra*, at 617, 174 S.E. 2d at 500. This assignment of error is without merit and is overruled.

**[24]** Mrs. Branch also assigns as error the portion of the court's charge referring to the defendant in the conjunctive. She contends that the court expressed an opinion in violation of G.S. 1-180 by linking the cases of defendants and, thus, causing the jury to believe that the evidence against each defendant was the same. Although the trial judge could have given a more explicit instruction as to each defendant, a careful examination

of the entire charge leads us to the conclusion that the charge was sufficient and fair. When the trial judge referred to defendants in the conjunctive, he almost always simultaneously cautioned the jury to remember that separate indictments were involved. He also charged that "a reasonable doubt as to the guilt of defendants, *or either one of them*" (emphasis supplied) mandated a verdict of not guilty as to the conspiracy charge. Finally, the court concluded its instructions by stating that the jury could find Mrs. Branch guilty or not guilty as to either or both of the indictments against her and that likewise they could find Sullivan guilty or not guilty as to either or both of the indictments against him. Thus, when the charge is read contextually, it is clear that the jury was properly informed that each defendant's guilt was to be judged separately as required by law. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). The court did not express an opinion in violation of G.S. 1-180 and this assignment of error is overruled.

**[25]** Mrs. Branch contends that her motion in arrest of judgment on the charge of being an accessory before the fact to first-degree murder should have been granted for the reason that the indictment did not expressly state that Mrs. Branch was not present when the murder was committed.

The indictment charged as follows: ". . . Connie Hardee Branch unlawfully and wilfully did feloniously be and became an accessory before the fact to the murder of Linwood N. Branch by counselling, procuring or commanding Matthew Jack Whealton and Harold Payne Wiseman to commit the felony of killing and murdering Linwood N. Branch; and in confirmation of said counselling, procuring or commanding of the said Connie Hardee Branch, they, the said Matthew Jack Whealton and the said Harold Payne Wiseman, on the 29th day of March 1974, did unlawfully, wilfully, and feloniously and with her malice aforethought, kill and murder the said Linwood N. Branch."

In interpreting G.S. 14-5 and G.S. 14-6 (accessories before the fact) this Court has stated that one of the elements for the conviction of a defendant as an accessory before the fact is that defendant was not present when the offense was committed. *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969); *State v. Bass, supra.*

Our Court has held that the crime of accessory before the fact is included in the charge of the principal crime. *State v.*

*Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961); *State v. Simons,* 179 N.C. 700, 103 S.E. 5 (1920); *State v. Bryson,* 173 N.C. 803, 92 S.E. 698 (1917). Since accessory before the fact is a lesser included offense of the principal crime, all the essential elements of accessory before the fact are present in the principal offense. As a general rule, the only distinction between a principal and an accessory before the fact is that in the latter case the defendant was not present when the crime was committed. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970). In a number of states the distinction between a principal and an accessory before the fact has been abolished. 22 C.J.S., Criminal Law, § 90 (1961); 1 Anderson, Wharton's Criminal Law and Procedure, § 110 (1957); 40 Am. Jur. 2d, Homicide, § 28 (1968); 41 N. C. Law Rev. 118 (1962).

Thus we conclude that the allegations contained in this bill of indictment properly charge the offense of accessory before the fact to murder and are tantamount to alleging that the defendant was not present at the time the crime was committed. The indicment would "[L]eave no doubt in the mind of the accused and the court as to the offense intended to be charged." *State v. Cox,* 244 N.C. 57, 59-60, 92 S.E. 2d 413, 415 (1956). *Accord, State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967).

SULLIVAN'S APPEAL

The questions raised by defendant Sullivan will be next considered.

Sullivan first contends that the trial court violated G.S. 1-180 and failed to maintain the "cold neutrality" mandated by the statute and by this failure denied him the right to a fair trial and the effective assistance of counsel. We have carefully examined the conduct of the trial judge and its effect on the jury as to Sullivan and have concluded for reasons similar to those given in our discussion of Mrs. Branch's related assignment of error that this assignment of error is without merit and is, therefore, overruled.

**[26]** Sullivan next contends that the testimony of Whealton was inadmissible for the reason that it was the fruit of the poisonous tree under the rationale of *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). In *Wong Sun* an out-of-court statement of one co-defendant and some tangible evidence were held inadmissible against a second co-defendant because that evidence had been obtained by exploita-

tion of a primary illegality committed against the second co-defendant and not by means sufficiently distinguishable to be purged of the primary taint. Although it is not clear that the poisonous tree doctrine of *Wong Sun* would be applicable to evidence as reliable and inherently independent as the in-court testimony of a witness such as Whealton, it will be assumed *arguendo* that the *Wong Sun* doctrine extends that far.

An examination of the record indicates that the only possible illegality committed against Sullivan that might have led to Whealton's testimony against him was the fact that one telephone call that he had with Bennett was recorded on tape. Since the recording was made with the knowledge and consent of Bennett, there was clearly no violation of the federal wire tap law, 18 USC 2511 2(c) and (d). Moreover, there is apparently no Fourth Amendment search and seizure problem involved. As in *Lopez v. United States,* 373 U.S. 427, 10 L.Ed. 2d 462, 83 S.Ct. 1381 (1963), it was certainly proper for Bennett to report his conversation with Sullivan. Although in our case the tape recording was not introduced into evidence as it was in *Lopez v. United States,* whatever use might have been made of it to insure the accuracy of Bennett's report was proper. The language of the U. S. Supreme Court in *Lopez* is appropriate: "[T]he device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Lopez v. United States, supra,* at 439, 10 L.Ed. 2d at 470, 83 S.Ct. at 1388. The legality of the recording in our case is further supported by the following language of the U. S. Supreme Court: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States,* 385 U.S. 293, 302, 17 L.Ed. 2d 374, 382, 87 S.Ct. 408, 413 (1966). Furthermore, assuming *arguendo* that the recording was illegal, the recording was not necessary for the location and interrogation of Whealton since Bennett and others were fully cooperating with the State. Thus, there was clearly no violation of *Wong Sun* since there was apparently no primary illegality and the testimony of Whealton was obtained by means sufficiently distinguishable from the tape recording that it was purged of any primary taint. The assignment of error is overruled.

**[27]** Sullivan also contends that the court erred in admitting the testimony of Whealton without allowing a voir dire examination of him. It seems to us that the proposed voir dire was of an exploratory nature. There is absolutely nothing in the record to indicate that the witness Whealton's rights had been violated or that he had complained about his treatment. He was a co-operative witness who became so because of a plea bargain. Whealton had indicated that "it was bothering me" and that he had told the truth to the officers in Virginia and was telling the same thing in this court.

To require the court to grant a voir dire for every witness would just mean that each case would be tried twice, once without a jury and once before the jury. This would unnecessarily complicate and lengthen the trial of already complex criminal cases. No voir dire is required, for the record as a whole demonstrates clearly the absence of any viable basis for excluding the witness's testimony. As we held in our discussion of Mrs. Branch's assignment of error as to the voir dire requested with respect to Bennett, the trial judge did not abuse his discretion. Sullivan's contention is without merit and overruled.

**[28]** Next, Sullivan contends that the court erred in failing to provide a preliminary hearing. Without doubt, when this case was tried a defendant could properly be tried on a bill of indictment without the benefit of a preliminary hearing. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967); *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967).

Since the Pretrial Criminal Procedure Act (G.S. 15A-606(a)) was not effective until 1 September 1975, a preliminary hearing was not required under our law at the time of the trial. There is no showing of prejudice and the assignment of error is overruled.

**[29]** Sullivan contends he was prejudiced by being forced to go to trial without adequate disclosure of certain evidence by the prosecution.

The record indicates that on 12 July 1974 Sullivan filed a discovery motion with the court in which he asked for, among other things, copies of reports of special tests made for the State, copies of all taped or otherwise recorded statements, in-

cluding the recordings of any taped or recorded confessions, or admissions of the defendant himself, all photographs made on behalf of the State to be used at trial, all photographs or other visual aids shown to witnesses for the purpose of the identification of defendant, all information which the State had in its possession favorable to the defendant, and all tapes of telephone conversations between the defendant and his alleged co-conspirators. The trial judge considered the motion on 9 October 1974 and allowed the defendant to discover some items requested, but did not allow the discovery of any of the evidence listed above.

G.S. 15-155.4 provides as follows:

> "*In general.*—In all criminal cases before the superior court, the superior court judge assigned to hold the courts of the district wherein the case is pending, or the resident superior court judge of the district, shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense; and such judge shall for good cause shown and regardless of any objection of the solictor or other counsel for the State, direct that the accused or his counsel be permitted to examine before any clerk of superior court, or any other person designated by the judge for the purpose, any expert witnesses to be offered by the State in the trial of the case regarding the proposed testimony of such expert witnesses.
>
> "Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit or the examination of any expert witness under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one or more specifically identified exhibits or the examination of a specific expert witness and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days."
>
> [This was repealed by the 1973 Session Laws; replaced by §§ 15A-901 through 15A-910, effective 1 July 1975, later made effective 1 September 1975 by the 1975 Session Laws.]

This statute providing for limited discovery is to protect defense and counsel against documentary evidence and the reports of experts being offered in evidence against them by surprise. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972).

With regard to the tape recording, the only discovery admitted under our law is that provided by the law above cited. It is limited to documents and reports of experts "to be used in the trial." There is nothing here to indicate that the tape recording was to be used in the trial.

There was nothing here, more or less, than a fishing expedition sought by Sullivan, and the trial court was correct in disallowing the motion.

Defendant further contends under this assignment that he has been denied the right to have access to exculpatory materials as provided in *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). But when you examine the motion, except for photographs alleged to have been used in pretrial identification of the co-defendant, Mrs. Branch, and the tape recording discussed above, there is absolutely no specificity to Sullivan's claims for information. There is nothing under our law that permits the discovery of photographs. As a matter of fact, the witness Whealton identified Mrs. Branch before any photographs were offered into evidence. There seems to be no prejudice to the defendant because of the State's alleged retention of these photographs for there is little benefit that they would have afforded the defendant in any event. As a matter of fact, it appears that the photographs of Mrs. Branch, taken from Sullivan's wallet, were made available to counsel for Sullivan.

As to the tape recording, the State did not attempt to offer it into evidence and there is nothing to indicate that it could have been authenticated sufficiently to permit its introduction. There is absolutely nothing here to indicate that the court could conclude there was anything exculpatory in the tape to which Sullivan was denied access.

**[30]** With regard to a similar type motion, our Court in *State v. Gaines,* 283 N.C. 33, 45, 194 S.E. 2d 839, 847 (1973) in an opinion by Justice Huskins said: "The standards enunciated in *Brady* by which the solicitor's conduct in this case is to be

measured require us to determine whether there was (a) suppression by the prosecution after a request by the defense (b) of material evidence (c) favorable to the defense. Obviously, under *Brady* a refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him *was suppressed.* In order to do so, he must certainly show what that evidence was." Sullivan failed to meet the guidelines laid down by Justice Huskins in *Gaines*. The assignment of error is without merit and overruled.

**[31]** Next, Sullivan contends the court erred in allowing a private prosecutor to assist in prosecuting him. The defendant in his brief concedes that it is clear that the trial judge in North Carolina may permit private counsel to appear with the solicitor to aid in the prosecution of a case. *State v. Best,* 280 N.C. 413, 186 S.E. 2d 1 (1972); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971).

However, the defendant contends that the use of a private prosecutor in this case created an atmosphere in which it was impossible for the defendant to receive a trial consistent with the requirements of due process. But this was not a case where several seasoned prosecutors rode roughshod over defendants defended by inexperienced lawyers. The defendants were ably represented by counsel and it was certainly proper for the trial judge to permit Mr. L. W. Gaylord, a distinguished and respected attorney in Pitt County, to assist in the prosecution. This assignment is without any merit and is overruled.

**[32]** Next, defendant contends that the trial court was in error (1) when it denied Sullivan's request for a continuance when he indicated that he wished to employ another attorney, (2) in failing to inquire of defendant the reason and circumstances underlying his request to employ other counsel, and (3) in failing to inform the defendant of his right to proceed without counsel.

The record indicates that upon the motion being made, proper inquiry was made by the court of Sullivan's attorney, who advised the court that Sullivan told him he wanted an additional lawyer and named the attorney. Mr. Harrison (Sullivan's attorney) told the court that he had made inquiry and determined that no other lawyer had been employed. Nevertheless, Mr. Harrison said he felt compelled to make the motion since his client had so requested.

At the time this motion was made the matter had been in the court some six months. Defendant had never made any com-

plaint about counsel before and never had made a motion for continuance before.

In *State v. Cradle,* 281 N.C. 198, 207, 188 S.E. 2d 296, 302 (1972), Justice Huskins speaking for the court stated:

> "A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion. *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). However, 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. *State v. Phillips,* 261 N.C. 263, 134 S.E. 2d 386 (1964).
>
> "The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. [Citations omitted.]"

Certainly defendant was ably represented by counsel. There is no abuse of discretion here, and no violation of defendant's constitutional rights by the court's refusal to continue the case.

The defendant cites *Faretta v. California,* 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), as authority for his position that the court should have advised defendant of his right to proceed without counsel. This case stands for the proposition that a defendant has a right to proceed without a lawyer and not have counsel forced upon him against his wishes. Such is not the situation here. The assignment of error is overruled.

**[33]** Next, defendant contends that the court erred in failing to instruct the jury to disregard the misstatement of Sullivan's counsel concerning Sullivan's plea. The record indicated that when first called upon to plead, counsel for defendant said, "To both charges, the defendant enters a plea of guilty." Thereupon, defendant Sullivan stated, "Not guilty." And his counsel replied, "I beg your pardon. Not guilty."

Defendant contends that the court should have told the jury not to consider this and that the failure to so do prejudiced the defendant. Certainly there was no prejudice here. The jurors present could not have misunderstood what was going on. It was just a *lapsus linguae* on the part of counsel. The record does not even indicate that any jurors heard what was said. *See State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). There is no merit in this assignment and it is overruled.

Next, the defendant contends that the court committed error in not declaring a mistrial when the witness Whealton testified that Wiseman told him that he (Wiseman) could not kill Mr. Branch. For reasons similar to those stated in the appeal of Mrs. Branch, the assignment of error is overruled.

In addition, the defendant says the court was in error for failing to declare a mistrial when it developed that two deputy sheriffs had violated the court's order requiring sequestration of witnesses. For reasons similar to those stated with respect to Mrs. Branch's related assignment of error, this assignment is overruled.

Next, the defendant assigns as error the admission into evidence of certain miscellaneous, irrelevant, immaterial and incompetent evidence hereinafter discussed. The defendant contends that the State offered a number of witnesses who testified over objection about many transactions which were never shown to have much connection with the crimes charged against the defendant. Defendant contends this just confused the jury.

It must be understood that where a conspiracy is charged, the element of secrecy makes proof difficult at the very best. Usually it is shown by circumstantial evidence, although in our case there was direct evidence from Whealton plus supportive circumstantial evidence.

One of the transactions that Sullivan particularly complains about concerns the testimony of Taylor, a loan officer, to the effect that he made a loan to Sullivan in March, 1974, to purchase a crop dusting plane. Sullivan says this had no connection with the offense and was irrelevant.

This evidence is obviouslv relevant to the factual issue of the $5,000 cash payment to Whealton to kill Mr. Branch. For reasons similar to those stated with reference to Mrs. Branch's related contention, this assignment of error is without merit and overruled.

Sullivan also contends the numerous telephone calls discussed in Mrs. Branch's appeal were not admissible on the ground they were irrelevant or were hearsay. Some of these calls were clearly relevant and admissible under the hearsay rule for the reason they involved admissions by Sullivan during or after the termination of the conspiracy and implicated him in the criminal acts charged. 2 Stansbury, *supra,* § 167. Sullivan's remaining contentions are without merit for reasons similar to those stated in our discussion of similar assignments of error of Mrs. Branch. This assignment is overruled.

**[34]** Defendant Sullivan next assigns as error the admission of testimony by the witness Susan Bishop relative to the relationship between defendants Sullivan and Branch. Susan Bishop, a mobile telephone operator, testified over objection that the defendants came to her place of business in March, 1974, and stayed there ten or fifteen minutes. While they were there, they showed her an automobile they had just bought, and they also showed her two wedding rings and said they were going to get married. The witness said she recognized Connie Branch's voice and that she had heard the two defendants conversing over the telephone fifteen or twenty times in January, February, and March of 1974. The defendant contends that this evidence was inflammatory, irrelevant, and prejudicial to him. We concede that it was prejudicial to him, but the mere fact of prejudice alone is no reason for exclusion of evidence otherwise proper. 1 Stansbury, *supra,* §§ 8 and 80.

We are involved here with a conspiracy and this may be proved by circumstantial evidence. *State v. Martin,* 191 N.C. 404, 132 S.E. 16 (1926). As a matter of fact, direct proof of a conspiracy is rarely obtainable and it usually must be shown by a number of small acts, such as these, each of which standing alone might have little weight, but when taken together they point unerringly to the existence of the conspiracy. *State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932); *State v. Wrenn,* 198 N.C. 260, 151 S.E. 261 (1930). This assignment of error is overruled.

**[35]** Next, Sullivan says it was error for the court to enter judgment for conspiracy to commit murder from the facts of this case since the crime of conspiracy was subsumed under the crime of accessory before the fact to murder.

In this connection, Sullivan relies upon what has come to be known as "Wharton's Rule." The rule has been adopted in

certain state and federal courts "as an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter." *Iannelli v. United States,* 420 U.S. 770, 781-782, 43 L.Ed. 2d 616, 625, 95 S.Ct. 1284, 1292 (1975). Although "Wharton's Rule" was adopted in some jurisdictions more than a century ago, we find no reference to it in our case law. We have consistently enunciated the general principle that a conspiracy and the substantive offense do not merge upon proof of the latter. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262 (1963), appeal dismissed, 375 U.S. 9, 11 L.Ed. 2d 40, 84 S.Ct. 72 (1963); *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594, cert. denied, 320 U.S. 749, 88 L.Ed. 445, 64 S.Ct. 52 (1943); *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556 (1940).

Assuming *arguendo* that Wharton's Rule would apply in any appropriate case in North Carolina, the facts of this case lead us to the conclusion that there can be no merger in this case. In the classic Wharton's Rule offenses—adultery, incest, bigamy, duelling—the harm attendant upon the commission of the substantive offense was restricted to the parties to the agreement. *Iannelli v. United States, supra.* Such is clearly not the case with murder.

Also, the question of merger is one of statutory interpretation. 1 Anderson, Wharton's Criminal Law and Procedure, Section 89, 90 (1957). In *Iannelli* the Supreme Court said the rule supports a presumption of merger absent legislative intent to the contrary. The Court then held that the legislative intent was clear and there was no merger. Our consistent construction of conspiracy to commit murder and the actual murder as separate offenses is supported by our Legislature's silent approval over the years and the inherent difference in the elements of these crimes. "Conspiracy is a completed crime when it is formed, without any overt act designed to carry it into effect. *State v. Carey, supra,* at 513, 206 S.E. 2d at 225. Accessory before the fact to murder is a lesser included offense of murder and has similarly never been interpreted as negating the separate offense of conspiracy. Our law as to accessory before the fact to murder primarily provides a different punishment from that accorded to the principal. It was not intended to relieve the party to murder who was an accessory before the fact from the penalty provided for conspiring with others. The assignment of error is overruled.

For reasons similar to those stated in the appeal of Mrs. Branch, Sullivan's assignment of error on the ground that there was a conjunctive charge is overruled.

**[36]** Finally, Sullivan contends that the court was in error in not allowing his motion for judgment as of nonsuit. Our Court has held that "Upon the defendant's motion for judgment of nonsuit in a criminal action, the question . . . is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offenses. If so, the motion is properly denied." *State v. Vestal,* 278 N.C. 561, 567, 180 S.E. 2d 755, 759-760 (1971).

We have here ample evidence of the involvement of Connie Branch and Roy Lee Sullivan in a conspiracy to murder Linwood Branch and in being accessories before the fact to that murder. The evidence tended to show that Whealton shot Linwood Branch with a pistol late in the evening of 29 March 1974; that Linwood Branch was admitted to the Pitt Memorial Hospital shortly thereafter and died about 5:30 a.m. on 31 March 1974; that an autopsy revealed that the cause of death was "penetrating wounds to the head consistent with a wound caused by a missile fired by a pistol." The defendant says this is not sufficient to show these injuries were the proximate cause of the death of Linwood Branch.

"On motion to nonsuit, the evidence must be considered in the light most favorable to the state and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom." 2 Strong, *supra,* § 104.

It is certainly a reasonable inference that the victim was shot by a pistol in the hand of Whealton and that the wounds inflicted therefrom caused Linwood Branch's death shortly thereafter. Other than the evidence of Whealton, there is evidence, both direct and circumstantial, that is overpowering. There was an abundance of evidence to take this case to the jury against Sullivan on both charges. The assignment of error is overruled.

In summary, as to both defendants, this trial consumed seven days. Each of the defendants was ably represented. The record consumed 483 pages. It seems to us that the volume of it could have been reduced substantially if the repetitious objections and exceptions had been by stipulation reduced for the purpose of the record. It would have made our job much easier.

Justice Moore, speaking for our Court in *State v. Cross*, 284 N.C. 174, 178, 200 S.E. 2d 27, 30 (1973), said: " 'This Court has repeatedly held that in order to obtain an award for a new trial on appeal for error committed in a trial of the lower court, the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued.' *State v. Cogdale*, 227 N.C. 59, 40 S.E. 2d 467 (1946). See also *State v. Beal*, 199 N.C. 278, 154 S.E. 2d 604 (1930); 1 Stansbury's N. C. Evidence, Brandis Rev. § 9 (1973)." There is no such showing here.

The defendants are "entitled to a fair trial, but not a perfect one." *Lutwak v. United States, supra.* A fair trial the defendants have had and we find

No error.

Chief Justice SHARP and Justice BRANCH concur in the result.

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STATE OF NORTH CAROLINA v. GEORGE JAMES PATTERSON, JR.

No. 76

(Filed 17 December 1975)

1. **Homicide § 21— first degree murder — brutality of killing — sufficiency of evidence of premeditation and deliberation**

   In a first degree murder prosecution, evidence as to premeditation and deliberation was sufficient to carry the case to the jury where such evidence tended to show that there were previously existing hostile feelings between defendant and his deceased daughter, defendant had previously assaulted deceased, defendant was angry with his daughter because of her prosecution of him in district court, on the same day as the district court proceedings, defendant and deceased argued, defendant gave deceased fifteen minutes to leave the house, defendant went into the kitchen and got a meat cleaver, at the expiration of fifteen minutes defendant struck deceased numerous blows so that she was partially decapitated, and there were lacerations about deceased's neck, chin and face.

2. **Constitutional Law § 37; Criminal Law § 75— refusal to sign written waiver — existence of oral waiver**

   Refusal to sign a written waiver of rights is a fact which may tend to show that no waiver occurred, but it is not conclusive in the

face of other evidence tending to show waiver; moreover, there is no constitutional requirement that the waiver be in writing, and N. C. statute expressly permits oral waiver. G.S. 7A-457(c).

3. **Constitutional Law § 37; Criminal Law § 75— acts constituting oral waiver of rights**

Where defendant on 15 June told officers that he would tell them what they wanted to know, but not then, defendant was asked on 17 June if he wanted to tell officers what happened, defendant replied affirmatively and then stated that he didn't want an attorney but he wanted to call his daughter, defendant used the telephone, then sat back down and told officers he was ready to talk to them, such actions constituted an oral waiver of his constitutional rights.

4. **Constitutional Law § 37— refusal to sign waiver — oral waiver not precluded**

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver.

5. **Criminal Law § 76— defendant's understanding of rights — opinion evidence inadmissible**

A witness may not give an opinion as to whether a defendant in a criminal case *understood* his rights but must instead detail the facts upon which the opinion rests.

6. **Constitutional Law § 37; Criminal Law § 76—defendant's understanding of rights — opinion evidence — no prejudicial error**

Although the trial court erred in allowing two officers to testify "in their opinion" defendant understood his rights, such error was not prejudicial to defendant since there was other competent evidence of defendant's understanding, including the fact that defendant attempted to exercise his right to counsel on two occasions, did in fact exercise his right to remain silent on one occasion, and at one time said that he understood his rights.

7. **Criminal Law §§ 34, 75— confession — disclosure of separate offense — admissibility of confession**

Though a part of defendant's confession disclosed the commission of another offense by defendant, the confession was nevertheless admissible since it tended to establish a motive for the murder for which defendant was on trial.

8. **Constitutional Law §§ 32, 37— waiver of counsel**

A defendant may waive the presence of an attorney in a case under investigation when the attorney represents him on an unrelated charge.

9. **Criminal Law § 29— indigent defendant — no right to third psychiatric examination paid for by State**

An indigent defendant who has been criminally accused and who has already been provided with two psychiatric experts at State expense, whose findings do not suggest that defendant is or has been legally insane or that he is incompetent to stand trial, and whose competency and standing in their profession have not been challenged, is

not entitled by reason of constitutional due process or equal protection to have the State furnish him still another psychiatrist selected by him.

10. **Homicide § 20— stipulated cause of death — photographs of deceased admissible**

Two photographs of deceased were admissible in this homicide prosecution, even though defendant had stipulated the cause of death, since testimony as to the use of grossly excessive force or the brutal manner of the killing was admissible on the issues of premeditation and deliberation, and the photographs were admissible to illustrate that testimony.

11. **Criminal Law § 89— prior consistent statement — admissibility for corroboration**

It was not prejudicial error for the trial judge to refuse to strike a witness's testimony offered to corroborate the testimony of defendant's mother, though there was a slight variance between the testimonies, since prior consistent statements are admissible to strengthen the witness's credibility, and slight variances between the statements will not render them inadmissible.

Chief Justice SHARP and Justice COPELAND dissenting as to death penalty.

Justice EXUM dissenting.

APPEAL by defendant from *McConnell, J.*, at the 4 February 1974 Criminal Session, FORSYTH Superior Court.

Upon an indictment proper in form, defendant was convicted of murder in the first degree of his daughter, Mae Ruth Patterson (Mae Ruth), and sentenced to death. This case was docketed and argued as No. 31 at the Spring Term 1975.

Mae Ruth was found murdered in the residence of defendant and his mother (Mrs. Patterson) in Winston-Salem, North Carolina, on 14 June 1973 by Mrs. Patterson and a neighbor, Viola Suber. Defendant was charged with the crime and arrested on 14 June 1973. Sergeant D. B. Parker of the Winston-Salem Police Department, on Friday, 15 June 1973, tried to get a statement from him; but after being advised of his rights, defendant refused to make a statement. Sergeant Parker and Sergeant Brown, also of the Winston-Salem Police Department, again questioned defendant on Sunday, 17 June 1973, and obtained a signed confession.

On 26 July 1973, the Forsyth District Court, finding that the court "has cause to believe that the defendant may not be competent to stand trial," ordered defendant committed to

Cherry Hospital, Goldsboro, North Carolina, for observation. There, Dr. E. V. Maynard, Regional Director of Forensic Psychiatry, reported defendant to be "Without Psychosis (Not Insane)" and further reported, in pertinent part, as follows:

> "The examinations, observation and testing performed in his hospital have revealed no evidence of insanity, nor any serious mental disorder which might interfere with this defendant's competency to stand trial. He does, however, suffer from an organic brain syndrome, non-psychotic, (not insane) with epilepsy, brain trauma, and circulatory disturbance. This condition does impair the defendant's ability to control the involuntary movements of his body but in no way should it interfere with his ability to stand trial to the charge of murder.
>
> "Mr. Patterson has demonstrated to this staff the capacity to comprehend his position and to understand the nature and object of the proceedings against him . . . [and] the capacity to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. . . . "

Defendant was discharged on 12 September 1973 and returned to Forsyth County for trial.

On 16 October 1973, defendant's court-appointed counsel, Mr. Mitchell, moved pursuant to G.S. 7A-454 for an order approving a fee to employ a private psychiatrist of defendant's choice for the purpose of further inquiry into defendant's sanity on "June 19 [sic], 1973," and his mental competency to stand trial. Although this motion was denied by Judge Wood on 25 October 1973, a similar motion by defendant was again filed on 15 November 1973. Judge Armstrong, then presiding, after finding "that one of the crucial questions involved in the action is whether the defendant was competent or sane on the day of the alleged crime and whether the defendant is presently competent to stand trial," ordered that defendant be examined by Dr. Richard Proctor, a psychiatrist at the Bowman Gray School of Medicine. Dr. Proctor, in a written report dated 23 November 1973, found defendant did have evidence of "organic brain damage and has had epileptic type seizures in the past," but also found that:

> "There was no evidence of any psychotic thinking. He was controlled and his responses in the main were appropriate except for evasion.

* * *

" . . . [T]his individual is able to understand the charges preferred against him and to participate in his own defense. He is competent and capable . . . of standing trial."

The case was first called for trial before Judge Armstrong on 8 January 1974. During this trial, the State attempted to offer in evidence defendant's signed confession. Judge Armstrong believed that the admissibility of this confession depended upon whether defendant was in fact represented by counsel, a Mr. Braddy, at the time the statement was made and that defendant should have the benefit of the testimony of Braddy on this question. Upon learning that Braddy was confined to a hospital in Elizabethtown, North Carolina, and unable to testify, Judge Armstrong, with defendant's consent, declared a mistrial and remanded defendant to jail.

The case again came on for trial before Judge McConnell on 5 February 1974. Other than defendant's signed confession, the evidence against him was essentially the testimony of Mrs. Patterson and the investigating police officers. Mrs. Patterson's testimony tended to show the following: On 14 June 1973, Mae Ruth appeared in the Forsyth County District Court to prosecute a warrant against defendant alleging that he earlier had assaulted her. Defendant told Mrs. Patterson that he had recently shot a gun through a door to Mrs. Patterson's bedroom which Mae Ruth and a man were occupying at the time. (Her testimony does not make clear whether the shooting or some other incident was the basis for the assault charge.) After court, Mae Ruth returned to the residence and went to the bedroom of defendant. When defendant and Mae Ruth began arguing, Mrs. Patterson left the house. Later, defendant came out of the house and told Mrs. Patterson to "[g]o in there and see about Princess [referring to Mae Ruth]." Mrs. Patterson got her neighbor, Mrs. Suber, to go with her into the house. They found Mae Ruth lying on Mrs. Patterson's bed apparently dead. Winston-Salem police officer T. L. Reavis testified that after being called to the scene and learning what had happened, he searched the neighborhood for defendant and found him about 1:00 p.m. drunk and drinking wine in an alley near his residence.

Defendant's signed confession, admitted into evidence, was reproduced in the record as follows:

> "He left court about 10:30 Thursday morning. The judge had sentenced him to eighteen months for protecting his house against Mae Ruth. He had Attorney Braddy appeal the case. He stopped at the AID Drugstore and bought two packs of cigarettes, went to Cherry Street and caught a taxi home. When he paid the taxi driver, his mother was on the front porch worried. She told him Mae Ruth was in the bedroom. He told Mae Ruth to open the door and she told him she was in bed. He told her to open the door and she did. . . . He told her to get out and never come back in so she went and got in bed in her grandmother's bed. He said he was so confused about the lies she told in court that he went in her grandmother's bedroom. Mae Ruth started talking back to him and his mother told them to lower their voices. Mae Ruth was backtalking and cursing him. He told her to leave the house, and she wouldn't. He told her he would give her fifteen minutes to get out. He said he had a watch on and when the fifteen minutes were up, she was still arguing. He took the meat cleaver. He said, 'Just say I killed her.' "

With regard to the meat cleaver, Sergeant Parker testified: "He said he got it out of the kitchen. We never found it. He said he washed it off after killing Mae Ruth, stuck it under his coat and threw it in some vines off of King Street Alley. There are thick weeds and vines that grow five or six feet high in that area."

It was stipulated that the deceased died from "massive blood loss from deep lacerations of the face, neck, and head caused by a sharp, heavy instrument."

Defendant offered no evidence.

*Attorney General Robert Morgan and Assistant Attorney General Ralf F. Haskell, for the State.*

*Eddie C. Mitchell, for defendant appellant.*

MOORE, Justice.

**[1]** Defendant strenuously urges there was insufficient evidence to carry the case to the jury on the issues of premeditation and deliberation and the trial court erred in not allowing

his motion for a nonsuit on the first degree murder charge. Taking the evidence in the light most favorable to the State, we find sufficient evidence to permit a jury to find premeditation and deliberation. These elements of first degree murder are not usually susceptible to direct proof, but must be established, if at all, from the circumstances surrounding the homicide. *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970), *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961), *cert. den.,* 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). Previously existing hostile feelings between defendant and deceased, *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); a prior assault upon the deceased by defendant, *State v. Gales,* 240 N.C. 319, 82 S.E. 2d 80 (1954); the use of grossly excessive force, *State v. Buchanan, supra;* and killing in an unusually brutal way, *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540 (1943), have all been held to be circumstances tending to show premeditation and deliberation. There was evidence here of these circumstances and, in addition, evidence of revenge as a probable motive.

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. *State v. Moore, supra; State v. Faust, supra.* If defendant resolved in his mind a fixed purpose to kill his daughter and thereafter, because of that previously formed intent and not because of any legal provocation on her part, deliberately and intentionally killed her with a meat cleaver, a deadly weapon, the three essential elements of murder in the first degree—premeditation, deliberation, and malice—occurred. "Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Benson,* 183 N.C. 795, 799, 111 S.E. 869, 871 (1922). Malice exists as a matter of law "whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance." *State v. Baldwin,* 152 N.C. 822, 829, 68 S.E. 148, 151 (1910).

The record here contains plenary evidence from which the jury could find that defendant, motivated by ill will and express malice toward his daughter because of her prosecution of him in district court, intentionally killed her. All of the following evidence—that he gave her fifteen minutes to leave the house, that

he went into the kitchen and got the meat cleaver, and that at the expiration of fifteen minutes struck her numerous blows so that her head was "partially off. There was a very deep laceration about her neck . . . others under her chin and about her face"—tended to show premeditation and deliberation as well as malice. Hence, defendant's motions for nonsuit were properly overruled.

Defendant next contends it was error to admit into evidence his 17 June confession. Pertinent evidence on this question was as follows:

Sergeant Parker first attempted to question defendant at the Forsyth County Jail on 15 June 1973. He advised defendant fully of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Before the jury, Sergeant Parker testified that defendant "indicated" that he understood his rights. Parker said:

> " . . . After we advised him, he wanted to call his attorney, Mr. Braddy. He talked with someone on the phone and told us he would tell us what we wanted to know, but not then. The next time we attempted to question him was on the seventeenth at the county jail, then at the detective office."

Sergeant Parker and Sergeant Brown at the jail on 17 June 1973 again asked defendant if he wanted to talk. Parker testified:

> "He said he wanted to talk to us, so we took him across the street. We again advised him of his Constitutional Rights on June 17, 1973."

In response to a question as to whether in his opinion defendant then understood his rights, Sergeant Parker testified over objection:

> "In my opinion, he understood them. He indicated that he did. We did not threaten him. We simply asked him if he wanted to tell us what happened, and he said he did. He said he wanted to call his daughter. He used the phone."

At this point the jury was excused and a *voir dire* hearing conducted to determine the admissibility of the confession. During this hearing Sergeant Parker again testified that in his opinion defendant understood his rights. With regard to the statement itself, Sergeant Parker said:

> " . . . We wrote it down, read it back to him, had him read it, and he signed it. He made two corrections; one on page two adding 'in my room' and on page three adding 'my,' my house, then he signed it. Sergeant Brown and myself witnessed his signature on each page. When he corrected it, I read it to him—he read it himself. There were no promises made or threats made while we took the statement by anyone."

Sergeant Parker, on cross-examination, admitted that on 17 June defendant "refused to sign the waiver of rights after we had advised him of his rights. . . . He said he did not want a lawyer, but wanted to call his daughter. He then made a voluntary statement, and didn't ask us to stop at any time." When asked whether defendant refused to sign the waiver because he didn't understand it, Sergeant Parker said he would not deny this but that he did not remember exactly defendant's reason for refusing. He testified that they read and reread the written waiver to defendant and "when we asked him did he understand it, he said, 'Yes.' We asked him to sign it, and he refused."

Sergeant G. D. Brown also testified on *voir dire* that on 17 June 1973 Sergeant Parker advised defendant of all of his rights as required by *Miranda,* fully detailing them. When asked on direct examination whether in his opinion defendant understood his rights, Sergeant Brown testified:

> "I believe he understood. He didn't want an attorney, but he wanted to call his daughter. He said he understood the rights. I was present while Sergeant Parker did the interrogating and wrote it down. After it was completed, Sergeant Parker read the statement back to Mr. Patterson, then Mr. Patterson read it and made a couple of corrections. Then he signed it. We witnessed his signature. There were no threats or promises made at any time.
>
> * * *
>
> "The interrogation lasted about an hour. It does not contain everything that Mr. Patterson said, just the general basis of it."

During cross-examination the court asked Sergeant Brown, "Did he say he wanted to go ahead and make a statement?" Brown replied, "Yes, sir, he did. He made the phone call and after he did, he sat back down and said he was ready to talk to us."

Defendant's evidence on *voir dire* was to this effect: Jim Moore, a deputy clerk of court, testified that he was present at defendant's preliminary hearing on 26 July 1973, and that Mr. George Braddy appeared then on behalf of the defendant as his attorney and presented an order to send defendant for a mental examination. Mr. Reginald Moore, official court reporter in Forsyth County, testified that he reported defendant's trial before Judge Armstrong in January 1974. His official record of the trial proceeding indicated that Sergeant D. B. Parker had testified as follows:

"Q. Mr. Patterson didn't sign a waiver of rights, did he?

"A. No, sir. He refused to sign one.

"Q. Isn't the reason he refused to sign it because you refused to give him the attorney he wanted?

"A. No, sir. He said he just wouldn't sign anything.

"Q. He wouldn't sign anything?

"A. Not unless he knew what it was."

Mr. Curtis Todd, an attorney practicing in Winston-Salem, testified that he had represented defendant in the past and that he talked with defendant "shortly after the alleged occurrence by telephone from City Hall or the jail. He wanted me to come down there and talk to him but I told him I could not."

Defendant testified essentially that after being "questioned" about his constitutional rights he did not make a statement because he wanted an attorney present. He asked for lawyer George W. Braddy "but Sergeant Parker said he didn't know him, so I asked for another lawyer." Sergeant Parker wouldn't let him call another one because Parker wanted him to sign the rights waiver. Two or three days later, the officers took him across the street where he then refused to sign the waiver because he didn't have a lawyer present, stating, "I wanted Attorney Braddy present before I signed anything." Braddy had represented him in his assault trial on 14 June and visited him at the jail on 18 June for the purpose of collecting a balance due on Braddy's fee. On Sunday morning, 17 June, Sergeant Parker asked him if he wanted any other lawyer and he replied that he would like to call Curtis Todd who had handled a civil matter for him earlier and whose number he knew.

Sergeant Parker called and talked with Todd, and then allowed defendant to talk with Todd. Defendant testified, "They forced a statement out of me," and that he, in fact, did not sign the statement.

Curtis Todd, being recalled, testified defendant called him twice and one time could have been on a Sunday when defendant was in custody. Todd said, "I know he was in custody because the officer did get me and put him on the phone."

Defendant offered the visitor's log of the Forsyth County Jail which showed that Mr. George W. Braddy, an attorney practicing at 608 O'Hanlon Building, Winston-Salem, visited defendant at 3:15 p.m. on 17 June 1973 and at 10:30 a.m. on 29 June 1973.

It was stipulated that the signed confession was obtained at 11:30 a.m. on 17 June 1973.

Upon this evidence Judge McConnell found, in pertinent part:

(1) On 15 June, when first questioned by Sergeant Parker, defendant asked to call his lawyer, Mr. Braddy, used the telephone, and then stated "he would talk to them later, but did not wish to make any statement at the time."

(2) On 17 June, after being duly advised of his rights pursuant to *Miranda,* defendant "stated that he did not want an attorney, but would like to talk to his daughter and that he was given the phone and talked to someone . . . and . . . thereafter, he . . . freely and voluntarily made a statement which has been identified by Officers Parker and Brown."

(3) On 17 June, "the defendant said he did not want to sign a waiver of his rights, but did make a statement freely and voluntarily after being advised of his rights and after stating that he did not want an attorney present."

(4) "That the defendant . . . appears to be intelligent, above average intelligence . . . and that he was coherent and appeared to understand what he was saying and, after the statement was written down . . . it was read to him and he himself appeared to read it and made certain corrections. . . . "

Upon these findings, Judge McConnell concluded:

> " . . . [T]he statement made by the defendant . . . was made voluntarily, knowingly, and independently and that

the defendant was in full understanding of his Constitutional Rights to remain silent and the rights to counsel and all other rights and, in fact, stated that he did not want a lawyer . . . that he purposely, freely, knowingly, and voluntarily waived each of the rights which had been read to him on several occasions by the two officers and thereupon made a statement to the officers which shall be introduced into evidence over the objection of the defendant."

Judge McConnell's findings are amply supported by competent evidence. His conclusions and determination of admissibility are, likewise, supported by his findings. His ruling, consequently, that the confession is admissible will not be disturbed on appeal notwithstanding that there may be evidence from which a different conclusion could be reached. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. den.,* 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967).

Nevertheless, defendant contends, with regard to the confession: first, his refusal to sign a written waiver precluded a finding of waiver; second, it was error to permit the investigating officers to testify as to their "opinion" of defendant's understanding of his rights; third, at least that portion of the confession relating to the district court proceedings resulting in an eighteen months' sentence being imposed upon defendant was inadmissible inasmuch as it tended to show the commission of another criminal act; and fourth, defendant was in fact represented by counsel at the time his confession was taken which, itself, precluded its admissibility.

To support his first contention defendant relies strongly on *United States v. Nielsen,* 392 F. 2d 849 (7th Cir. 1968). In this case the defendant was warned of his rights before questioning by an FBI agent. He read a statement of his rights contained in a waiver form and said, "I am not going to sign this document. I have an attorney . . . and I am not signing anything, including this form, until I have occasion to talk to [the attorney]." The defendant told the agent, however, that questioning could continue. Holding that defendant's negative responses to certain questions then asked him by the agent were not admissible, the Seventh Circuit said:

"Here the defendant's refusal to sign the waiver form, followed by an apparent willingness to allow further ques-

> tioning, should have alerted the agents that he was assuming seemingly contradictory positions with respect to his submission to interrogation. Instead of accepting the defendant's equivocal invitation, the agents should have inquired further of him before continuing the questioning to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance and confusion." *Id.* at 853.

Thus, defendant argues that his refusal to sign the waiver form makes his confession the product of "ignorance and confusion," inadmissible under the rationale of *Nielsen.*

**[2, 3]** Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred. It is not conclusive in the face of other evidence tending to show waiver. There is no constitutional requirement that the waiver be in writing. "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." *Miranda v. Arizona, supra,* at 475. Our statute expressly permits oral waiver. G.S. 7A-457(c). Sergeant Parker testified that defendant said on 15 June that "he would tell us what we wanted to know, but not then." On 17 June, Sergeant Parker testified that defendant replied affirmatively when asked "if he wanted to tell us what happened," and stated then that "[h]e didn't want an attorney, but he wanted to call his daughter." Sergeant Brown testified that after defendant used the telephone on 17 June "he sat back down and said he was ready to talk to us." This is sufficient to constitute an oral waiver.

**[4]** A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. *State v. Simmons, supra; State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968); *United States v. Johnson,* 455 F. 2d 311 (5th Cir. 1972); *United States v. Hopkins,* 433 F. 2d 1041 (5th Cir. 1970), *cert. den.,* 401 U.S. 1013, 28 L.Ed. 2d 550, 91 S.Ct. 1252 (1971); *United States v. Crisp,* 435 F. 2d 354 (7th Cir. 1970), *cert. den.,* 402 U.S. 947, 29 L.Ed. 2d 116, 91 S.Ct. 1640 (1971); *United States v. Thompson,* 417 F. 2d 196 (4th Cir. 1969), *cert. den.,* 396 U.S. 1047, 24 L.Ed. 2d 692, 90 S.Ct. 699 (1970); *Hodge v. United States,* 392 F. 2d 552 (5th Cir. 1968). In *Thompson,* the Court of Appeals for the Fourth Circuit said:

> ". . . In view of Thompson's intelligence, his affirmative statement that he understood the explanation of his

> rights, and the voluntariness of his confession, we hold that his refusal to sign a written waiver did not render the confession inadmissible. [Citations omitted.]" *Id.* at 197.

In short, Judge McConnell has found defendant's confession voluntary and his waiver of constitutional rights the product of intelligence and understanding. These findings, supported by competent evidence, are, as we have said, conclusive on appeal.

**[5]** It was, we believe, error to permit interrogating officers Parker and Brown to testify "in their opinion" defendant understood his rights. Whether defendant understood is a question of fact which is capable of being proved and therefore must be proved if at all by his actual responses, verbal or otherwise, to the explanations given him of his rights. The officers are no better qualified to assess the understanding, or lack thereof, of a defendant than is the trier of fact. Therefore, the general rule prohibiting "opinion" testimony applies. "[O]pinion is inadmissible whenever the witness can relate the facts so that the jury [or trier of fact] will have an adequate understanding of them and . . . is as well qualified as the witness to draw inferences and conclusions from the facts." 1 Stansbury's N. C. Evidence § 124 (Brandis Rev. 1973), and cases cited at n.16. While lay opinion of the mental capacity of another is admissible in many instances, *id.* § 127, "[g]enerally . . . a witness may not give his opinion of another person's *intention* on a particular occasion." *Id.* § 129, and cases cited at n.15. Similarly, we hold that a witness may not give an opinion as to whether a defendant in a criminal case *understood* his rights but must instead detail the facts upon which the opinion rests.

**[6]** There was, nevertheless, other competent evidence of defendant's understanding. The most telling is that defendant *attempted to exercise* his right to counsel on 15 June and, according to his evidence, again on 17 June. He also *exercised* his right to remain silent on 15 June. Also, Sergeant Brown testified that on 17 June defendant "*said* he understood the rights." (Emphasis added.) The question of defendant's understanding was for the trial court. We must presume the court based its finding on the competent evidence and ignored that which was incompetent. Where the court is the trier of facts, "in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence." *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E. 2d 111, 114-15 (1971). "[T]he court's findings of fact will not be reversed

unless based only on incompetent evidence." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 320, 182 S.E. 2d 373, 377 (1971). Beyond a reasonable doubt this error was not prejudicial to defendant.

Defendant further contends that error occurred when the trial court admitted that portion of his confession which states:

> "He left court about 10:30 Thursday morning. The judge had sentenced him to eighteen months for protecting his house against Mae Ruth. He had attorney Braddy appeal the case. . . ."

Defendant's exception to this portion of the confession is not properly supported by a specific objection. "[W]here only a portion of a witness' testimony is incompetent, the party moving to strike should specify the objectionable part and move to strike it alone." *State v. Pope,* 287 N.C. 505, 511, 215 S.E. 2d 139, 144 (1975). *See also* 1 Stansbury's N. C. Evidence § 27 (Brandis Rev. 1973).

**[7]** Since this is a capital case, we will, nevertheless, consider the contention. *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83 (1967); *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952). Later in the confession, defendant states that "[h]e was so confused about the lies she told in court that he went in her grandmother's bedroom," where shortly the killing took place. This was evidence from which a jury could find that in defendant's mind he had been sentenced to eighteen months on account of lies told in court by the deceased. "Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused." *State v. McClain,* 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954), citing *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5 (1952). In *Birchfield,* evidence was held to be properly admitted that the victim of the assault being tried had, on a recent occasion, prosecuted the defendant for an earlier assault because "[t]his evidence had a logical tendency to show intent and motive on the part of the defendants." *Id.* at 415, 70 S.E. 2d at 8. There was no error in admitting this portion of the confession.

Defendant next contends that the trial court erred in admitting his confession since it was taken at a time when he was represented by counsel, Mr. Braddy, whose presence he had not waived. Although again the record is not entirely clear, Mr.

Braddy apparently represented defendant on 14 June in district court on the assault charge. On 15 June, defendant requested a chance to call Mr. Braddy. The police officers knew that defendant talked to someone but did not know whether it was Mr. Braddy or whether Mr. Braddy had agreed to represent defendant. According to defendant himself, testifying on *voir dire:* he did not call Mr. Braddy from the county jail but after his confession was made, Mr. Braddy came to see him in jail for the purpose of collecting a balance due on his fee for his representation on the assault charge. There was testimony that Mr. Braddy appeared for the defendant on 26 July 1973 to secure an order to have the defendant sent for a mental examination. Because of the time and nature of this appearance it would have little significance in determining whether Mr. Braddy represented the defendant on 17 June 1973.

**[8]** Assuming that Mr. Braddy's representation of the defendant on the assault charge continued through 17 June, there was no denial of defendant's right to counsel in the murder case. A defendant may waive the presence of an attorney in a case under investigation when the attorney represents him on an unrelated charge. *United States v. Crook,* 502 F. 2d 1378 (3rd Cir. 1974), *cert. den.,* 419 U.S. 1123, 42 L.Ed. 2d 823, 95 S.Ct. 808 (1975); *United States v. Dority,* 487 F. 2d 846 (6th Cir. 1973). *See also People v. Taylor,* 27 N.Y. 2d 327, 266 N.E. 2d 630, 318 N.Y.S. 2d 1 (1971), which held that the New York rule that an accused, after indictment and arraignment, may not be questioned by police on those charges in the absence of counsel, applied only when the police or prosecutor knew that an attorney had been secured to assist the accused *"in defending against the specific charges for which he is held."*

Defendant relies on *United States v. Hedgeman,* 368 F. Supp. 585 (N.D. Ill. 1973). In that case, however, the officers misled the defendant into thinking that making a statement would help him and they also had actual knowledge that defendant was represented by counsel in the very case under investigation. There is no suggestion of clever misleading in this case, and as we have said, nothing in the record would support a finding that defendant was actually represented on the charges under investigation.

Judge McConnell has found upon competent evidence that defendant intelligently waived his right to counsel. Such a finding was not precluded even if defendant was represented

by counsel on a charge unrelated to that under investigation. There is no showing of a denial of defendant's right to counsel under these circumstances.

Defendant next argues that his constitutional rights were violated by the denial of his petition filed pursuant to G.S. 7A-454 for an order approving a fee to employ the services of a psychiatrist of his own choice to assist him in preparing for trial. It is not clear from the record whether in fact his motion was allowed by Judge Armstrong's order of 20 November 1973. It does not affirmatively appear who selected Dr. Proctor. Assuming the trial court and not defendant chose Dr. Proctor, defendant's constitutional rights were not thereby infringed. We are not called upon to address the question of whether an indigent defendant is constitutionally entitled, on a proper showing, to have the State provide him psychiatric assistance in the preparation of his defense. Defendant had that. G.S. 7A-454 provides only that "[t]he court in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person. . . ." The statute permits but does not compel providing an expert to a criminally accused at State expense.

**[9]** The question presented then is whether an indigent who has been criminally accused and who has already been provided with two psychiatric experts at State expense, whose findings do not suggest that defendant is or has been legally insane or that he is incompetent to stand trial, and whose competency and standing in their profession have not been challenged, is entitled by reason of constitutional due process or equal protection to have the State furnish him still another psychiatrist selected by him. We have found no case that stretches the constitutional mandates this far and defendant has cited none. A number of decisions uphold the denial of an indigent defendant's request for an additional psychiatric expert of his own selection at state expense when the state has already provided competent psychiatric assistance from either state-designated physicians, *Utsler v. Erickson*, 315 F. Supp. 480 (D.S.D. 1970), *aff'd*, 440 F. 2d 140 (8th Cir. 1971), *cert. den.*, 404 U.S. 956, 30 L.Ed. 2d 272, 92 S.Ct. 319 (1971); *McGarty v. O'Brien*, 188 F. 2d 151 (1st Cir. 1951), *cert. den.*, 341 U.S. 928, 95 L.Ed. 1359, 71 S.Ct. 794 (1951); *Taylor v. State*, 229 Ga. 536, 192 S.E. 2d 249 (1972); *Utsler v. State*, 84 S.D. 360, 171 N.W. 2d 739 (1969); *Commonwealth v. Belenski*, 276

Mass. 35, 176 N.E. 501 (1931); or physicians practicing privately and selected by the trial court, *Barber v. State,* 248 Ark. 64, 450 S.W. 2d 291 (1970); *Commonwealth v. Medeiros,* 354 Mass. 193, 236 N.E. 2d 642 (1968), *cert. den.,* 393 U.S. 1058, 21 L.Ed. 2d 699, 89 S.Ct. 699 (1969); *State v. Greenwood,* 197 Kan. 676, 421 P. 2d 24 (1966); *People v. Richardson,* 192 Cal. App. 2d 166, 13 Cal. Rptr. 321 (1961). Concerning an indigent's entitlement to expert assistance generally, see "Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert." Annot., 34 A.L.R. 3d 1256 (1970).

We do not think defendant has been denied due process.

Neither has defendant here, under the circumstances, been denied equal protection of the law. We held in *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972), *death sentence vacated,* 409 U.S. 1004, 34 L.Ed. 2d 295, 93 S.Ct. 453 (1972), that an indigent defendant while entitled to competent counsel at State expense was "not entitled to have the court appoint counsel of his own choosing." *Id.* at 198, 185 S.E. 2d at 663. If *Frazier* is sound constitutionally, and we believe it is, then *a fortiori,* an indigent defendant on a proper showing of reasonable need is entitled by reason of constitutional equal protection to no more than having the State furnish competent psychiatric assistance.

Defendant, having been psychiatrically examined by a medical expert specializing in psychiatry at Cherry Hospital and by a privately practicing psychiatrist who we assume was selected by the trial court, has been assured an adequate opportunity to present his claims fairly. He has not been denied due process or equal protection by failure of the trial court to provide him without charge an additional psychiatrist of his own choosing. *See Ross v. Moffitt,* 417 U.S. 600, 41 L.Ed. 2d 341, 94 S.Ct. 2437 (1974).

**[10]** Defendant's next contention is that the court erred in allowing into evidence two photographs of deceased inasmuch as defendant stipulated the cause of death. This contention is without merit. The actual photographs were not made part of defendant's case on appeal. He argues, simply, that where the cause of death is stipulated in a homicide case, photographs of deceased are inadmissible since their only purpose would be to inflame and prejudice the jury. This argument misses the point that in a first degree murder case premeditation and de-

liberation may be proved circumstantially by showing the use of grossly excessive force, *State v. Buchanan, supra,* or by proof of the brutal manner of killing, *State v. Watson, supra.* A mere stipulation as to the cause of death may not necessarily convey to the jury full information as to the actual manner of killing. In such a case it is legitimate and often necessary to use testimony describing in detail the manner of killing, and photographs, properly authenticated, may be offered to illustrate this testimony. Defendant relies on *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). The basis for decision there was that "ten gory photographs in color" of the deceased were introduced and each one explained in detail. This seemed to us to be "an excessive use" of photographs in a case where the defense was that an accident occurred when the defendant and deceased began playing with a gun. *Foust* represents an exception to the general rule that photographs of a victim in a criminal case, when properly authenticated, may be offered to illustrate relevant testimony of witnesses even though the scenes portrayed are unpleasant or even gruesome to behold. *State v. Boyd,* 287 N.C. 131, 141, 214 S.E. 2d 14, 20 (1975); *State v. Duncan,* 282 N.C. 412, 418, 193 S.E. 2d 65, 69 (1972); *State v. Atkinson,* 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969), *death sentence vacated,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). The two photographs in question were properly authenticated by Officer Hicks who testified that they accurately depicted the deceased as he observed her when he arrived at the scene of the killing. They were properly admitted into evidence to illustrate the testimony of the witness.

**[11]** By his next assignment of error, defendant contends that the trial court erred in refusing to strike the testimony of State's witness Viola Suber, offered for the purpose of corroborating the testimony of Mrs. Lillian Patterson, when, in fact, Mrs. Suber's testimony did not corroborate that of Mrs. Patterson.

"The admissibility of prior consistent statements of the witness to strengthen his credibility has been challenged by counsel and reaffirmed by the Court in scores of cases. Such evidence is admitted not only to rebut the implications arising from testimony as to prior inconsistent statements, but also where the witness's veracity has been impugned in any way." 1 Stansbury's N. C. Evidence § 51, pp. 146-47 (Brandis Rev. 1973), and cases cited therein. *See* Section 52, *id.,* and cases

therein cited for criticism of the North Carolina rule and the reasons for it. In *Lorbacher v. Talley*, 256 N.C. 258, 123 S.E. 2d 477 (1962), Justice Bobbitt, later C.J., quoted with approval:

> "As stated by *Smith, C.J.*, in *Jones v. Jones*, 80 N.C. 246, 250: 'In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.' *Bowman v. Blankenship*, 165 N.C. 519, 81 S.E. 2d 746; *Brown v. Loftis*, 226 N.C. 762, 764, 40 S.E. 2d 421; Stansbury, *op. cit.* § 50. . . ."

*See Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953). Such previously consistent statements, however, are admissible only when they are in fact consistent with the witness's testimony. *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949); *State v. Melvin*, 194 N.C. 394, 139 S.E. 762 (1927); 1 Stansbury's N. C. Evidence § 52, pp. 150-51 (Brandis Rev. 1973).

If the previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960).

Applying these principles to the evidence in this case, we hold that it was not prejudicial error for the trial judge to refuse to strike Mrs. Suber's testimony offered to corroborate the testimony of Mrs. Patterson. Mrs. Suber's testimony, in the context of all the evidence, was not inconsistent with and not contradictory to the testimony of Mrs. Patterson. At most there was a slight variance which, when considered with all the evidence, could not possibly have prejudiced defendant. Mrs. Patterson testified, in summary, as follows: She, the deceased, and defendant were in her and defendant's residence on the morning of the killing when defendant and deceased began arguing. This argument was apparently a continuation of some previously existing controversy between deceased and defendant, which ended when deceased successfully prosecuted defendant that very morning in Forsyth District Court for an earlier assault upon her. While Mrs. Patterson was equivocal when asked if anyone else was in the house, she stated, "I

couldn't tell who was in there because I couldn't swear because I didn't look under the bed." However, she never identified anyone else as being there. The clear import of her testimony was that no one else was present. She warned deceased and defendant that if they did not stop arguing she would leave. When the argument continued, she did leave the house. She then testified, "I wasn't out there no time." When defendant came out of the house she asked him, "What you done to Mae Ruth?" and he said, "Go in there and see about her, Mama." This testimony indicates that whatever had been done to Mae Ruth, defendant had done it. Consequently, Mrs. Suber's testimony that Mrs. Patterson told her that "George had told her to go in and see about her granddaughter; that he had hurt her, she was either hurt or dead," was not materially different in import from that of Mrs. Patterson.

Defendant never took the position at trial that he was not his daughter's assailant. On *voir dire* he simply said that he did not sign the confession and that it was forced out of him. He never, even on *voir dire,* denied the truth of it. All the testimony pointed unerringly to defendant as the killer. This assignment is overruled.

This Court on an appeal in a criminal action only reviews matters of law of legal inference, it not being the function of this Court to pass upon the credibility of witnesses or to weigh their testimony. North Carolina Constitution, Article IV, Section 12(1); *State v. Hanes,* 268 N.C. 335, 150 S.E. 2d 489 (1966); *State v. Neill,* 244 N.C. 252, 93 S.E. 2d 155 (1956). The verdict in this case is fully supported by the evidence. However, since the record discloses that the trial judge agreed to accept a plea of guilty of manslaughter, which defendant refused to enter, we commend the case to the Parole Commission for consideration of a recommendation for executive clemency.

An examination of the entire record discloses no error in law sufficient to constitute a basis for awarding a new trial.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 14 June 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 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 dissenting:

I concur in the majority's resolution of every issue addressed so ably in the opinion by Justice Moore. There is, however, a fundamental error in the trial judge's instructions to the jury, not addressed by the majority and not excepted to or assigned as error by the defendant, which, nevertheless, in my opinion, goes to the heart of this case and because of which I vote for a new trial. Since this is a capital case and the error as I perceive it highly prejudicial we should, under our long standing rule, take it up *sua sponte. State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83 (1967); *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952).

While the majority correctly concludes there was sufficient evidence for the jury to find premeditation and deliberation, there is also evidence from which the jury could find the intent to kill, even if formed sometime before the act of killing and therefore premeditated, was not deliberated but was instead provoked by the deceased's refusal to leave the house as defendant ordered her to do, her incessant arguing, "talking back" to and cursing defendant. Indeed, this seems to be the essence of the contest at trial.

The only evidence of the manner of the killing and the events which immediately preceded it comes from the defend-

ant's pre-trial confession offered by the State against him at trial. This confession, it seems clear to me, is susceptible to two interpretations, either of which could have been reasonably adopted by the jury. One is that when defendant told deceased that "he would give her fifteen minutes to get out" of the house, he *at that time* determined that he would kill her if she didn't, got the meat cleaver from the kitchen, and deliberated the killing while he waited for the fifteen minutes to elapse. When deceased thereafter refused to leave he executed his previously formed and deliberated intent by killing her with the meat cleaver. Under this interpretation of his confession all of the elements of first degree murder are amply satisfied. It can also reasonably be inferred from his confession that defendant had no intent to kill the deceased when he demanded that she leave the house in fifteen minutes but that this intent was formed suddenly at the conclusion of the fifteen minute period and was provoked by deceased's fifteen minutes of argument and "back talking and cursing." The defendant could then have gotten the meat cleaver and killed the deceased in a fit of rage. Thus the crucial question for the jury in this case was whether defendant did indeed deliberate, as distinguished from premeditate, the killing or did he form the intent to kill during a sudden passion provoked by the deceased herself which precluded any such deliberation.

Regarding the element of deliberation the trial judge told the jury only that "the State must satisfy you . . . beyond a reasonable doubt . . . that the defendant acted with deliberation *which means that he acted while he was in a cool state of mind.*" (Emphasis supplied.) This bare bones definition of deliberation in the context of the evidence in this case was not sufficient. General Statute 1-180 requires the trial judge to "declare and explain the law arising on the evidence. . . ." How much the law needs to be explained depends on what evidence is presented. *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506 (1967). Merely to define an element of a criminal offense may be an insufficiency which prejudices the defendant when that element is the very nub of the case. *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595 (1964); *State v. Lunsford and Sawyer,* 229 N.C. 229, 49 S.E. 2d 410 (1948). *See also State v. Thomas,* 118 N.C. 1113, 24 S.E. 431 (1896). Premeditation is a comparatively easy concept for the jury meaning simply some thought beforehand. Deliberation, however, in the context of this case, needs more careful elucidation.

Prior to 1893 there were no degrees of murder in North Carolina. In 1893 murder was divided into two degrees: first degree murder, punishable by death, consisted only of murder committed in the perpetration of another felony and murder which was premeditated and deliberated. All other murder was murder in the second degree. N. C. Pub. Laws 1893, ch. 85; *State v. Benton,* 276 N.C. 641, 657, 174 S.E. 2d 793, 803, 804 (1970). In the very first case construing the new murder statute, *State v. Fuller,* 114 N.C. 885, 902, 19 S.E. 797, 802 (1894), this Court said:

> The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts *one who is provoked by insulting words* (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. (Emphasis supplied.)

Two years later in *State v. Thomas, supra,* the issue raised in the case now before us was squarely presented. In *Thomas,* defendant was convicted of first degree murder of his wife and sentenced to death. Testimony tended to show that he and his wife were in a fishing boat near Mason's Point on Bay River in Pamlico County. Witnesses heard screaming and sounds like a beating from the direction of the boat. They also heard defendant say, "If you don't hush I will take something and kill you" after which a "heavy lick" was heard. One witness saw defendant strike his wife and throw her overboard. Defendant returned in the boat alone. The next day her dead body was removed from the water in the area where she and her husband had been. A physician who did the post-mortem examination testified that she died of a broken neck, that she could not have drowned, and that she was dead before she went into the water. This Court held that it was error entitling defendant to a new trial for the trial judge to have charged the jury "in such a way as might well have produced the impression on their minds that they must convict of either murder [in the first degree] or manslaughter," *Id.* at 1124, 24 S.E. at 434, and "in omitting to explain to the jury the application of the testimony to the

theory of murder in the second degree. . . ." *Id.* at 1127, 24 S.E. at 436. This Court said, *Id.* at 1124, 24 S.E. at 435:

> If [the jury] concluded that there was a quarrel or argument, and in the heat of sudden passion, engendered by disagreeable language, which would not have been provocation sufficient to bring the offense within the definition of manslaughter, the crime . . . was murder in the second degree.

In reaching this conclusion this Court analyzed the reason for the division of murder into two degrees and said, 118 N.C. at 1122, 24 S.E. at 434:

> The innate sense of justice implanted in the breast of every good man demanded that *a distinction should be drawn between cases where there was actual though not legal provocation and those where a fixed purpose was shown,* whether from malignity or a mercenary desire for money. (Emphasis supplied.)

Thus *Thomas* added flesh to the concepts of premeditation and deliberation by pointing to the kind of provocation that might negate them.

Nine years later in *State v. Exum,* 138 N.C. 599, 617-18, 50 S.E. 283, 289 (1905) the two terms were separately analyzed:

> The two terms, "deliberate" and "premeditate," while frequently used in this connection as interchangeable, because perhaps the facts do not always require that they should be spoken of separately, have not exactly the same meaning. "Premeditate" involves the idea of prior consideration, while "deliberation" rather indicates *reflection, a weighing of the consequences of the act in more or less calmness.* (Emphasis supplied.)

Although the trial judge explained the meaning only of premeditation, this Court found no error in *Exum* since in his definition of premeditation, he included concepts applicable to deliberation and specifically excluded "all idea of a killing from passion suddenly aroused," and directed the jury that before it could convict of a higher crime it must find that the killing was *"from a fixed determination previously formed after weighing the matter."* *Id.* (Emphasis supplied.)

Two years later this Court retreated slightly from its position in *Thomas* that any actual provocation could preclude deliberation. *State v. McDowell,* 145 N.C. 563, 59 S.E. 690 (1907). In *McDowell* an argument was provoked by defendant's companion with a train flagman. Defendant, sympathizing with his companion, prepared to do his part and readied his pistol. The Court characterized the fancied wrong to defendant as trivial in nature and refused to hold that if the defendant killed in revenge for the treatment his companion was receiving, it would only be murder in the second degree.

Two subsequent cases applied the *McDowell* limitation on provocation to situations where, objectively, the deceased did nothing to provoke the defendant to anger but instead tried to placate him. *State v. Coffey,* 174 N.C. 814, 94 S.E. 416 (1917); *State v. Benson,* 183 N.C. 795, 111 S.E. 869 (1922). In *Benson* prior definitions of deliberations were expanded, 183 N.C. at 798, 111 S.E. at 871:

> 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. *S. v. Coffey,* 174 N.C. 814.

Although this definition of deliberation has been subsequently quoted by this Court many times, portions of it are only dictum in *Benson* and seem to me defective in two respects. First, the issue is not whether the intention to kill was *executed* while in a cool state of blood. To be sure a killing so executed has undoubtedly been deliberated. However, "[i]f the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect." 40 C.J.S. Homicide § 33(d) (1944). See *State v. Britt,* 285 N.C. 256, 262, 204 S.E. 2d 817, 822 (1974). The true test is whether the intent to kill was at any time *considered,* or formed, in a cool, or deliberative, state of mind. Second, the provocation need not be "legal" nor the passion aroused by some "lawful or just cause." "Legal" provocation is what is required to reduce murder to manslaughter

and a lawful or just cause for the killing would require an acquittal. The holding of *Thomas, Benson* and *Coffey* is that any actual provocation can preclude deliberation and reduce the crime to second degree murder provided it is more than trivial and directed toward defendant himself. I can find no case which holds to the contrary. That the true test of whether deliberation exists was not really changed by *Benson* is shown by *State v. Evans,* 198 N.C. 82, 85, 150 S.E. 678, 680 (1929) where this Court said, "The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment."

In *State v. French,* 225 N.C. 276, 34 S.E. 2d 157 (1945), this Court split on the meaning of the prior cases on deliberation. In *French* the killing occurred during an argument between the defendant and the deceased. Both majority and dissenting opinions agreed that the trial judge (Judge Bobbitt, later Chief Justice of this Court) was required to explain deliberation as distinguished from premeditation. Judge Bobbitt's instructions under consideration were:

> [T]he Court charges you that if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant unlawfully killed Duck LeGrand with malice, and has further satisfied you from the evidence beyond a reasonable doubt that prior to the time the defendant inflicted upon Duck LeGrand the fatal wound, the defendant had formed a fixed purpose in his mind to kill her, and that, pursuant to that purpose he did kill Duck LeGrand because of the purpose in his mind, and not because of any legal provocation given him, then the Court charges you that if the State has so satisfied you from the evidence beyond a reasonable doubt, the defendant would be guilty of murder in the first degree, and it would be your duty to so find.

The majority approved these instructions and said they compared favorably to those approved in *State v. McClure,* 166 N.C. 321, 81 S.E. 458 (1914), which the Court quoted as follows:

> "Deliberation means to think about, to revolve over in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he had deliberated upon the act, gentlemen. Premeditation means

> to think beforehand, think over a matter beforehand; and where a person forms a purpose to kill another, and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree. And the court charges you if you should find beyond a reasonable doubt, gentlemen, that prior to the time he killed the deceased he formed the fixed purpose in his mind to kill him, and that pursuant to that purpose he did kill the deceased because of the purpose in his mind, and not because of any legal provocation that was given by the deceased, then the court charges you that the prisoner would be guilty of murder in the first degree, and it would be your duty to so find."

Stacy, C.J., dissenting, was of the opinion that the instructions did not adequately deal with the concept of deliberation. He said:

> This charge as applied to the facts of the instant record fails to draw any distinction between a fixed purpose "deliberately formed" and one engendered from passion suddenly aroused. *S. v. Thomas,* 118 N.C., 1113, 24 S.E., 431; *S. v. Walker,* 173 N.C., 780, 92 S.E., 327. It sufficiently defines premeditation, but makes no reference to deliberation. *S. v. Fuller,* 114 N.C., 885, 19 S.E., 797. "Premeditation" imports prior consideration, "thought of beforehand," while "deliberation" signifies reflection, "in a cool state of blood." *S. v. Exum,* 138 N.C., 601, 50 S.E., 283; *S. v. Evans,* 198 N.C., 82, 150 S.E., 678. It may not be necessary in every case to refer to the two terms separately, but both ideas are essential to a complete definition of the capital offense. *S. v. Exum, supra; S. v. Spivey,* 132 N.C., 989, 43 S.E., 475.

Four years after *French* was decided the legislature added the proviso to our murder statute (and all other capital crimes statutes) permitting juries in their discretion to fix the punishment at life imprisonment for first degree murder. N. C. Sess. Laws 1949, ch. 299, §§ 1-4. This proviso remained in effect until this Court in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973) held that the decision of the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972)

required that the proviso be nullified. After 1949 until our post-*Waddell* decision in *State v. Watson, infra,* my research reveals no significant discussion by this Court of the element of deliberation as distinguished from premeditation in first degree murder cases. Undoubtedly the ability of the jury in such cases to fix the punishment at life imprisonment reduced the significance of careful distinction between first and second degree murder in most cases. Since *Waddell,* however, first degree murder in North Carolina has been punishable only by death. Since the ratification on April 8, 1974, of Section 1, Chapter 1201 of the 1973 Session Laws, codified as N. C. Gen. Stat. 14-17 (1974 Cum. Supp.), murder in the second degree has been punishable by a maximum of life imprisonment.

Punishment for murder in North Carolina is now nearly the same as it was before 1949, first degree murder being punishable only by death and second degree murder by a term of years up to life imprisonment. (Prior to April 8, 1974, second degree murder was punishable by a maximum of thirty years imprisonment. N. C. Gen. Stat. 14-17 (1969)). Consequently the maintenance of a clear distinction between the two crimes has returned to its pre-1949 significance. Since *Waddell,* moreover, this Court has intimated that it would closely scrutinize the principal distinguishing feature—deliberation—both in terms of whether the evidence was sufficient to support a jury finding of its existence, *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975), and whether the concept was properly explained to the jury. *State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975). *State v. Thomas, supra,* was, in fact, quoted and analyzed at length in *Buchanan* and characterized as placing a "sound interpretation . . . upon the Act of 1893." 287 N.C. at 418, 215 S.E. 2d at 86.

This case presents a close question as to the degree of defendant's culpability. The jury might well have returned a verdict of second degree murder had it been fully and properly instructed on the concept of deliberation and told specifically that if defendant's intent to kill was formed and executed during a passion suddenly aroused by the deceased's verbal abuse and not thereby deliberated he could not be convicted of first degree murder. I believe it was prejudicial error for the trial judge to fail first, to give a definition of deliberation which included this principle and second, to apply the principle to the facts in the case. I vote for a new trial.

STATE OF NORTH CAROLINA v. CARL MILLER, ARTIS PARNELL McCLAIN, LARRY CAMPANELLA CLARK

No. 79

(*Filed 17 December 1975*)

1. **Criminal Law § 91— motion to continue — time for attorney to prepare — denial of motion proper**

The trial court did not abuse its discretion nor were defendant Clark's constitutional rights violated by the trial court's refusal to continue the case where defense counsel Bender represented all three defendants for over two months, both he and defense counsel Talman represented them throughout the trial, Talman was employed by defendant Clark on 21 October and conferred with him for two hours on 25 October, Talman intended to interview witnesses in Statesville on 26 October but was unable to do so by reason of the disappearance of his daughter, Bender knew the case would be called for trial on 28 October, Bender had requested permission to withdraw as counsel for defendant Clark but permission was denied, Bender made no contention that he was not ready for trial in Clark's case, the record did not show who defendant Clark's Statesville witnesses were or what their testimony would be, and the oral motion for continuance was not supported by affidavit or other proof.

2. **Criminal Law § 27— plea in abatement — county in which crime occurred — indictment and proof not at variance**

The trial court properly overruled defendants' plea in abatement which alleged that the offense in question occurred in Iredell County rather than in Catawba County as charged in the bills of indictment, since evidence presented by the State tended to show that a witness who observed defendants and their victim at the crime scene testified that he observed them on the west side of the Catawba River and in Catawba County.

3. **Constitutional Law § 32— photographic identification — no right to presence of counsel**

An accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time.

4. **Criminal Law § 66— in-court identification of defendants — pretrial photographic identification proper**

In-court identification of defendants by three witnesses was not tainted by pretrial photographic identification procedures where the photographic identification took place only a few hours after the crime, each witness viewing the photographs was advised by the investigating officer that he was not to conclude or guess that the photographs contained the picture of the person who committed the crime, nor was he obligated to identify anyone, two of the witnesses were in the presence of defendants for the better part of an hour, neither of them ever identified anyone else, and all three witnesses were positive in their in-court identification.

5. **Criminal Law § 42— derringer used in crime — admissibility**

The trial court in a rape case did not err in admitting into evidence a .38 caliber derringer pistol where the evidence tended to show that the pistol was held on a male hitchhiker by one of the defendants while the others were raping the hitchhiker's female companion.

6. **Criminal Law § 169— objections to questions — failure to show what answers would have been — no prejudice shown**

Where the record fails to show what the answer would have been had the witness been permitted to answer, the exclusion of such testimony cannot be held prejudicial, and this rule applies not only to direct examination but to questions on cross-examination as well.

7. **Criminal Law § 80— copy of DMV record — admissibility — reading by district attorney — no error**

The trial court did not err in allowing into evidence a properly certified copy of a record of the Department of Motor Vehicles, nor did it err in allowing the same to be read into evidence by the district attorney.

8. **Criminal Law § 89— prior consistent statements — admissibility for corroboration**

Statements made by three witnesses on the day of the alleged rape to a sheriff's detective were competent for the limited purpose of corroborating the witnesses who made them.

9. **Criminal Law § 102— district attorney's argument — reference to race — no error**

The district attorney's argument which referred to defendants as three black males or three black men, which contended that the victim's hysteria following the alleged rape was genuine, and which suggested that ". . . the average white woman abhors anything of this type in nature that had to do with a black man" did not deprive defendants of a fair trial or violate their due process rights under the Fourteenth Amendment by injecting racial prejudice and inflaming the minds of the jurors against defendant.

10. **Criminal Law § 102— district attorney's argument — reference to capital punishment — no error**

The district attorney's jury argument suggesting that the only thing wrong with capital punishment was that it was not used, and that capital punishment was not a deterrent when people were convicted of capital crimes but never executed was well within the bounds of legitimate debate.

Chief Justice SHARP concurring.

Justices COPELAND and EXUM join in this concurring opinion.

Justice LAKE concurring in result.

DEFENDANTS appeal from judgment of *Thornburg, J.*, 28 October 1974 Session, CATAWBA Superior Court. This case was docketed and argued as No. 52 at the Spring Term 1975.

Defendants were tried upon bills of indictment, proper in form, charging them with the first degree rape of Deborah Darlene Case on 10 August 1974 in Catawba County.

The State's evidence tends to show that Deborah Darlene Case (Deborah) and Michael Stumphey (Michael) left their homes in Hollywood, Florida, on 29 July 1974 in company with another couple and hitchhiked to North Carolina for the purpose of attending a rock festival in Charlotte on the weekend of 10 August. Deborah and Michael were not married at this time but subsequently married on 23 August 1974, after the date on which Deborah was allegedly raped by defendants.

The two couples arrived in Charlotte prior to the commencement of the rock festival and decided to hitchhike to Chimney Rock. They left Chimney Rock and hitchhiked to Atlanta, Georgia. At this point the other couple returned to Florida, and Deborah and Michael hitchhiked back to Charlotte, North Carolina. They arrived in Charlotte on Friday evening, 9 August 1974, spent the night in a parking lot near the site of the rock festival, and decided to leave Charlotte and hitchhike to the State of Colorado for the purpose of getting married. Accordingly, on the morning of 10 August 1974 they hitchhiked west on I-77. Deborah was wearing a pair of Michael's blue jeans and they were carrying a back-pack, a duffel bag and a fishing pole. About 10 a.m., at a point near the intersection of I-77 and I-40 at Statesville, they were offered a ride by three black males in a red vehicle traveling west on I-40 toward Hickory. They accepted the offer and entered the car.

As the red vehicle proceeded west it stopped at a service station where the driver (defendant Clark) purchased gasoline. Then, according to the testimony of Deborah and Michael, the vehicle continued in a westerly direction for a short distance and the driver stated he was going to see a friend for a minute. The vehicle exited from I-40, traveled a short distance on a paved road, then entered a dirt road and eventually passed a house. At this point defendant Clark stated that his friend was not at home. The vehicle was then driven around for approximately one mile, returned to and crossed over I-40, and continued on a dirt road for approximately one mile to an area known locally as "V. O. Sipes Fish Pond." This pond is located in the general vicinity of Lookout Dam and Catawba River. Defendant Clark stopped at a point where a cable was stretched across the dirt road, turned the vehicle around, and all five

occupants got out and walked 50-75 yards down to the fish pond. At this time a man named James Franklin drove up in a blue vehicle. Franklin was looking for his stray coon dogs. He inquired whether anyone had seen the dogs. After a brief discussion he returned to his vehicle and left the immediate area.

At this point defendant Clark walked out of sight down a nearby path and shortly reappeared with a pistol in his hand. He said he intended to use the pistol to signal a friend who was in a boat out on the Catawba River. However, Clark never fired the pistol. At this time, defendant McClain, referred to as the "skinny one," asked Deborah to walk with him back to the car so he could talk with her. When they reached the parked vehicle defendant asked her to get in the car and she refused. McClain then pulled a knife and held it close to her stomach. She was afraid and called out to Michael who was coming back up the path. Michael told her to "cool it, babe, there's nothing we can do." Deborah testified that she was then thrown into the back seat of the car.

While Deborah was crouched in the back seat, defendant Clark approached the vehicle and ask her if she had removed her clothes. Deborah replied that she was in her menstrual cycle and Clark told her that did not make any difference. Thereafter, McClain, holding a knife in one hand, removed Deborah's blue jeans with the other and had sexual intercourse with her. When he had finished, defendant Clark returned to the car and engaged in sexual intercourse with her. Throughout this second engagement, Clark held a knife in his right hand. After Clark had finished, defendant Miller came up and asked Deborah if she could take a third one. She replied that she would not be lying there if she didn't have to. Defendant Miller then took the knife from Clark, entered the vehicle, and had sexual intercourse with Deborah. During all this time Michael was held at gunpoint some distance away and out of sight of the red vehicle.

Following the third engagement and while Deborah was getting dressed, James Franklin returned to the scene, still looking for his dogs. Deborah and Michael were told to "act natural." Everyone then got into the red vehicle. Defendant Clark and Michael were seated in the front; Deborah and the other two defendants were in the back. Franklin wrote down the license tag number as the red vehicle departed.

The car stopped at an I-40 overpass, Michael and Deborah got out, and they retrieved their belongings from the trunk. Clark then shook hands with Michael and wished him a nice day. Clark got back into the red car and the three defendants drove away. In a few minutes State Trooper Dennis Dillard came up the nearby exit ramp and Michael flagged him down. Trooper Dillard testified that Deborah was hysterical but said she did not want to go to the hospital. Michael told Trooper Dillard what had occurred, and the officer immediately issued a general alert over his police radio and commenced an unsuccessful search for a red vehicle occupied by three black males.

A short time thereafter, James Franklin emerged from the pond area and came upon Deputy Sheriff Ketchie of the Iredell County Sheriff's Department who had responded to the general alert. In the ensuing conversation, Franklin provided Deputy Ketchie with the license number of the red vehicle he had previously encountered near the fish pond.

In the meantime, Deborah was taken to Catawba Memorial Hospital where she was examined by Dr. James Wotring. Dr. Wotring testified that his examination of Deborah revealed the presence of immotile and motile sperm. Dr. Wotring said the only evidence of trauma was a very small abrasion on Deborah's right breast.

Following the medical examination, Deborah and Michael were questioned by Sgt. Price of the Catawba County Sheriff's Department, warrants were obtained for the three defendants, and they were arrested. After their incarceration, both Deborah and Michael identified all three defendants from photographs. The following morning, James Franklin identified defendants Carl Miller and Larry Campanella Clark from photographs furnished by Sgt. Price.

Defendants offered no evidence. On cross-examination of the State's witnesses, however, they elicited testimony tending to show that Deborah and Michael were hitchhikers, entered the red vehicle willingly and made no request to get out; that Deborah had previously engaged in acts of sexual intercourse; that Michael had been convicted of drug possession and of breaking and entering; that both Deborah and Michael had taken drugs (marijuana and THC) on the night before the incident; that Deborah had no injuries other than a small bruise on her

breast; and that she offered no physical resistance during the various acts of intercourse with defendants.

Following the arguments of counsel and the charge of the court, the jury convicted each defendant of first degree rape and each was sentenced to death. Defendants appealed directly to the Supreme Court pursuant to G.S. 7A-27(a) assigning errors discussed in the opinion.

*Rufus L. Edmisten, Attorney General; William B. Ray and William W. Melvin, Assistant Attorneys General, for the State of North Carolina.*

*Harold J. Bender and Wesley F. Talman, Jr., Attorneys for defendant appellants.*

HUSKINS, Justice.

**[1]** Prior to introduction of evidence defendant Clark moved for a continuance to enable his newly employed counsel to properly prepare his defense. Denial of the motion constitutes Clark's first assignment of error.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review absent abuse of discretion. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). However, if the motion is based on a right guaranteed by the federal or state constitution, the question presented is one of law and not of discretion and the decision of the court below is reviewable. *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). The constitutional right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321 (1940); *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

The record discloses that Mr. Bender had represented all three defendants for over two months, and both he and Mr. Talman represented them throughout the trial. Attorney Talman was notified by defendant Clark on 21 October 1974 that he desired to retain him. Mr. Talman conferred with Clark for two hours on 25 October 1974 and stated that he intended to go to Statesville on 26 October 1974 to locate and interview wit-

nesses but was unable to do so by reason of the disappearance of his daughter, a fact not made known to the court until the morning of the trial. Mr. Bender was fully apprised of the fact that the case would be called for trial at the 28 October 1974 Session. He had previously filed a motion requesting permission to withdraw as counsel for defendant Clark by reason of ill feelings between Clark and McClain over the alleged theft of certain articles from Clark's home by McClain while McClain was free on bond. Permission to withdraw as counsel for Clark was denied, first by Judge Ervin and later by Judge Thornburg, the presiding judge. Mr. Bender made no contention that he was not ready for trial in Clark's case but merely stated that he felt he was placed in a position of conflict when Clark and McClain seemed to be turning against each another.

We think defense counsel Bender had ample opportunity from 12 August 1974, the second day after the commission of the alleged offense, until the day of the trial to confer with defendant Clark and all possible witnesses. During that time he had ample opportunity to prepare Clark's defense. No names of witnesses are shown. What defendant Clark expected to prove by possible witnesses in the Statesville area must be surmised. The oral motion for continuance is not supported by affidavit or other proof. This state of the record suggests only a natural reluctance to go to trial and affords no basis to conclude that Clark was denied the right to effective representation for lack of time within which to prepare and present his defense. The facts show no abuse of discretion and no violation of Clark's constitutional rights by the court's refusal to continue the case. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). The first assignment of error is therefore overruled.

**[2]** Before pleading to the bill of indictment, defendants entered a plea in abatement, contending that the alleged offense occurred in Iredell County. Denial of that motion constitutes defendants' second assignment of error.

Former G.S. 15-134 (repealed effective 1 July 1975) provided that all offenses are deemed to have been committed in the county alleged in the indictment unless defendant denies same by plea in abatement. The statute did not state which party had the burden of proof if such plea is filed. "At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. *State v. Oliver*, 186 N.C. 329, 119 S.E. 370 [1923]." *State v.*

*Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). Thus defendants' plea in abatement placed the burden on the State to show that Catawba County was the proper venue. The State carried its burden by offering the testimony of James Franklin, the man who was searching for his coon dogs when he chanced upon defendants and their captives at the Sipes fish pond. Mr. Franklin testified under oath that the spot where he saw a car "with three black men in it and a white woman and a white man" was on the west side of the Catawba River and in Catawba County. He testified that the Catawba River is the dividing line between Catawba County and Iredell County. No evidence to the contrary was produced by defendants. Hence there was no evidence to support the plea in abatement, while the evidence offered by the State supports the conclusion reached by the trial judge that the offense occurred in Catawba County as charged in the bills of indictment. There was no error in overruling the plea in abatement. This assignment is overruled.

Defendants challenged their in-court identification by Deborah Case, Michael Stumphey and James Franklin. The jury was excused and a voir dire conducted.

Deborah and Michael testified on voir dire that at 9:25 p.m. on 10 August 1974, the same day of the crime, they were shown three sets of six photographs—a set for each defendant. The first set contained one photo of defendant Miller; the second set contained one photo of defendant McClain; and the third set contained one photo of defendant Clark. Each set was composed of photographs of persons having the same general appearance with respect to race, age, hair type, hair color, and complexion of the defendant for whom that set was arranged. The witnesses were then instructed to look at the series of photographs and told they were not obligated to identify anyone. They were told they should not conclude or guess that the series of photographs contained the picture of the person or persons who committed the crime. They were told that it was just as important to free innocent persons from suspicion as to identify guilty parties. After viewing the photographs both Deborah and Michael identified each of the defendants. This took place after defendants had been arrested and were in custody. Each witness stated that identification of defendants was based upon the memory of them at the time of the crime and not on the photographs displayed by the officer.

The witness James Franklin viewed nine photographs on Sunday morning, 11 August 1974. The nine photographs included one photo of each defendant. Mr. Franklin identified defendants Miller and Clark but failed to recognize defendant McClain's picture. This witness stated that his in-court identification was based on his observation of defendants at the time of the crime and not on the photographs. He said: "I identify them by what I saw at the river."

Defendants offered no evidence on voir dire. The court found facts in substantial accord with the testimony of the State's witnesses and concluded that their in-court identification of defendants was of independent origin and in no way tainted by the photographic display. Thereupon, over objection, the witnesses were permitted to identify the three defendants in open court before the jury. This is the basis for defendants' third, eighth and fourteenth assignments of error.

Defendants contend their in-court identification was tainted by the pretrial photographic identification in that (1) they were not represented by counsel and (2) the circumstances surrounding the photographic identification were unnecessarily suggestive and conducive to irreparable mistaken identity.

**[3]** We find no merit in either prong of this contention. The law is firmly established that an accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

Identification by photograph was expressly approved in *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). It was there held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall v. Denno*, 388 U.S. 293, 301-302, 18 L.Ed. 2d 1199, 1206, 87 S.Ct. 1967, and with decisions of other courts on the question of identification by photograph."

**[4]** Applying the *Simmons* standard we find no impermissible suggestiveness in the photographic identification procedure used

in this case. Each witness viewing photographs was advised by the investigative officer that "the fact that the photographs are shown to you should not influence your judgment, you should not conclude nor guess the photographs contain the picture of the person or persons who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties." Furthermore, Deborah Case and Michael Stumphey were in the presence of the defendants for the better part of an hour, and it may be inferred that they obtained an indelible impression of defendants' appearance. The photographic viewing took place only a few hours after the crime. Neither witness has ever identified anyone else. Both of these witnesses, and the witness James Franklin as well, were positive in their in-court identification. In light of the total circumstances, there is little chance that defendants were incorrectly identified. The whole of the evidence indicates that the in-court identification by these witnesses was independent in origin and based upon what the witnesses observed down "by the river." Impermissible suggestiveness amounting to a denial of due process has not been shown. The testimony meets the test of admissibility. The trial court so found, and when such findings are supported by competent evidence, as here, they are conclusive on appellate courts. *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971). *See State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied* 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967). Defendants' third, eighth and fourteenth assignments are overruled.

**[5]** A .38 caliber derringer pistol was identified as State's Exhibit 1 and admitted into evidence over defendants' objection. Defendants contend the pistol was never identified as the weapon allegedly used in connection with the commission of the crime charged and was therefore improperly admitted. This constitutes defendants' fourth and twentieth assignments of error.

Michael Stumphey testified the gun used by one of the defendants was a .38 caliber small derringer. "It had pearl or white handles and the rest of it was silver. I believe that it was a 2-shot derringer." Referring to State's Exhibit 1, he said: "That is the gun. . . . This gun right here seems to be the one that was used and held on me. That looks like the gun that they held on me; it is the same type; it is the same model that they had; well, it's the same kind; it looks like it. It is a .38 derringer.

I know it is a .38 derringer because I had one similar to it that was a .38. I knew it was a .38 when it was pointed at me. I could tell because the driver of the car showed me the shells. He showed me some shells. He had the shells in his hand."

As a general rule weapons are admissible "where there is evidence tending to show that they were used in the commission of a crime." *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972). In fact, any article shown by the evidence to have been used in connection with the commission of the crime charged is competent evidence and properly admitted. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968). "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. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime or in defense against an assault." 1 Stansbury's North Carolina Evidence § 118 (Brandis rev. 1973).

Whether defendants are guilty or innocent of raping Deborah Case does not depend upon the absolute unmistakable identity of the pistol used to intimidate the victim and her companion. *State v. Patterson,* 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936). All the evidence tends to show a relevant connection between the pistol identified as State's Exhibit 1 and the crime charged. Hence we hold the pistol was properly admitted. But if it be conceded, *arguendo,* that State's Exhibit 1 had not been sufficiently identified so as to render its admission erroneous, in view of the testimony that a gun of the same type and model and which looked like State's Exhibit 1 was held on Michael Stumphey by one of the defendants while the others were raping Deborah Case, its admission was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Patterson, supra; State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). Defendants' fourth and twentieth assignments of error are overruled.

Defendants' fifth assignment of error is abandoned.

Deborah Case, the prosecuting witness, testified on cross-examination that prior to this occasion she had engaged in sexual intercourse. She was then asked: "On how many occasions?" "Have you ever had any experience with narcotics?" "Do you

smoke marijuana?" The State's objection to each of these questions was sustained.

Michael Stumphey testified on cross-examination: "I have been convicted of or pleaded guilty to possession of marijuana, OPA, LSD, B and E, breaking and entering." The following questions were then put to Michael Stumphey in the course of the cross-examination:

1. "Were you after drugs [by breaking and entering]?"
2. "You were convicted of possession and did you have these drugs for resale or for your own use?"
3. "Have you on any occasion used these drugs?"
4. "How long did you live in Texas?"
5. "When did you move to Florida?"
6. "Were you working at that time?"
7. "Do you believe in God?"
8. "How did you get back to Florida following this incident?"

The State's objection to each of these questions was sustained. These rulings of the court constitute defendants' sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth assignments of error.

**[6]** While a wide latitude is allowed in cross-examination, the scope of it rests largely within the trial judge's discretion. *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944); 7 Strong's N. C. Index 2d, Witnesses § 8, p. 703 and cases there cited. However, the record before us fails to show what the witnesses would have answered had they been permitted to do so. Thus it is impossible for us to know whether the rulings were prejudicial or not. Where the record fails to show what the answer would have been had the witness been permitted to answer, the exclusion of such testimony cannot be held prejudicial. *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381 (1967); *State v. Brewer,* 202 N.C. 187, 162 S.E. 363 (1932). This rule applies not only to direct examination but to questions on cross-examination as well. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398 (1960); *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513 (1958); *State v. Maynard,*

247 N.C. 462, 101 S.E. 2d 340 (1958); *State v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657 (1941).

Even so, we note that defendants were allowed to bring out on cross-examination that Deborah Case and Michael Stumphey were not married to each other; that Michael had marijuana in his possession and both he and Deborah used some of the drug the night before she was allegedly raped the following day; that they had hitchhiked together from Florida to Charlotte to Chimney Rock to Atlanta and back to Charlotte; that both of them used drugs; that they camped beside the road for a couple of nights, stayed in a camp ground one night, and at a motel for two nights; that sexual intercourse was not a new experience for Deborah; that Michael had no religious background; and that Michael had been convicted of various offenses involving drugs and breaking and entering. With all this impeaching evidence before the jury, it would strain credulity to conclude that the credibility of these two witnesses might have been further impaired by their answers to the questions hereinabove set out. Many of the questions referred to in these assignments of error, answers to which were excluded, were repetitious or immaterial. In our view the exclusion was harmless. Exclusion of evidence which could not have affected the result may not be held prejudicial. Exceptions to the exclusion of such testimony will not be sustained. *State v. Maynard, supra; State v. Wall,* 218 N.C. 566, 11 S.E. 2d 880 (1940); *State v. Coleman,* 215 N.C. 716, 2 S.E. 2d 865 (1939). Defendants' sixth, seventh, ninth, tenth, eleventh, twelfth, and thirteenth assignments of error are overruled.

**[7]** Defendants contend the court erred by permitting the witness Joe Ketchie to identify a certified copy of a record of the Department of Motor Vehicles showing that license number BWS-181 was issued to Artis Parnell McClain of Statesville for a 1966 two-door Chevrolet, identification number 164376Y248946, and then allowing same to be read into evidence by the district attorney. This is defendants' fifteenth assignment of error.

G.S. 20-42(b) provides in pertinent part as follows:

> "The Commissioner and such officers of the Department as he may designate are hereby authorized to prepare under the seal of the Department and deliver upon request a certified copy of any record of the Department, . . . and

every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification."

G.S. 8-35 provides, among other things, that copies of the records of any public office of the State shall be received in evidence and entitled to full faith and credit in any of the courts in this State when certified under seal of the office by the chief officer or agent in charge thereof.

These statutes, when construed *in pari materia,* clearly provide for the admission in evidence of the certificate here in question.

Defendants apparently concede that properly certified copies of records kept by the Department of Motor Vehicles are admissible in evidence but contend there was error in allowing the district attorney to read the certificate before the jury. Defendants say in their brief: "The proper procedure, it would appear, would be to allow the document to speak for itself and to have the document passed among the jurors. The reading of the document by the district attorney added an extra dimension to the document which was highly prejudicial to the defendants. The defendants were unable to cross-examine the district attorney concerning the document, and, therefore, were denied their right of confrontation." No further argument is made and no authorities are cited.

This assignment is without merit. In *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26 (1957), a highway patrolman was permitted to identify a similar certificate and read it into evidence. The statute expressly provides that such certified copy is admissible in any proceeding in any court in like manner as the original. We think it immaterial whether the certificate is read to the jury or passed among the jurors for their inspection. Obviously, defendants could not cross-examine the paper writing any better than they could cross-examine the district attorney. This assignment is overruled.

**[8]** On 10 August 1974, the day of the alleged rape, Deborah Case, Michael Stumphey, and James Franklin each made a statement to Sgt. Roy Price, a detective with the Catawba County Sheriff's Department. Following the testimony of these witnesses at trial, the statements were offered in evidence for the purpose of corroborating the witnesses. Officer Price related from the witness stand what the witnesses had told him

and the statement of each witness was in substantial accord with the testimony of the witness who made it. Admission of these statements through the testimony of Officer Price constitutes defendants' sixteenth assignment of error.

Each of these statements was competent for the limited purpose of corroborating the witness who made it. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated for other reasons,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960); *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594, *cert. denied* 320 U.S. 749, 88 L.Ed. 445, 64 S.Ct. 52 (1943); 7 Strong's N. C. Index 2d, Witnesses, § 5. This assignment is overruled.

**[9]** Defendants' nineteenth assignment of error is based on nine exceptions to portions of the district attorney's argument to the jury. Seven of these exceptions relate to statements which defendants contend injected racial prejudice and inflamed the minds of the jurors against them. The following statements are under attack:

> "Now she testified that they were going out to Colorado to get married there because it was beautiful out there. She told you that they ended up by some fish lake there around the river somewhere and I argue to you that all of them were standing by the fish pond and then Mr. Franklin, the coon hunter here, said he came up and saw them there. That the white woman was up close or hugged up to the white boy. Why? Why? Because as a woman she was apprehensive about being there in the company of three black males without somebody to hold on to. . . . "
>
> EXCEPTION NO. 34
>
> "Now, members of the jury, I do not believe for one minute that Deborah Stumphey made up such a story as that including what each one of these men said to her. The language that was used to her by each one of these three black men . . . . "
>
> EXCEPTION NO. 35
>
> " . . . She told you that a deadly weapon, a knife was put to her waist and one time during the intercourse at one time it was put against her neck. No, she did not make that up and if she was a mind to consent to intercourse,

don't you know as reasonable men and women, she was not going to consent whenever she was having her menstrual cycle. I argue to you that a person, white or black or yellow or any other color under the sun that would have intercourse with a woman during the time of her menstrual cycle is on the level of an animal, and only a person that would have such a deep desire to carry out the sex desire that he would do a thing like that. She told you that each one of these black men had intercourse with her and that they passed the knife from one to another."

EXCEPTIONS NOS. 36 and 37

". . . One woman may make the statement that this could not happen to me and they would kill her first and another may say I would resist if it meant my life but this may not be my wife or yours, but this woman in this case told you that she was afraid of these three black men and that they did display a gun and a knife there."

EXCEPTION NO. 39

"I want to tell you the evidence that this is believable and gives credence to the fact that these three black men raped Deborah Stumphey as she testified that they did and that is this. Her husband testified that whenever this car went on off down the road that she went to pieces, . . . said she was crying and upset there at the Oxford School Road. This is shown by an independent witness and I tell you that along with the testimony of Mr. James Franklin, that is the strongest testimony and evidence in the case."

EXCEPTION NO. 40

"Dennis Dillard came up he said and she was very excited and very upset and crying. Why in the world would want to be crying if she had gone voluntarily and consented to having sexual relations with these three men or sixteen or twenty. Don't you know and I argue if that was the case she could not come in this courtroom and relate the story that she has from this stand to you good people, because I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us, but she reported it and her boyfriend reported this rape within five minutes after they were let out on the highway up there."

EXCEPTION NO. 41

The substantive and procedural due process requirements of the Fourteenth Amendment mandate that every person charged with a crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury. *Rogers v. Richmond,* 365 U.S. 534, 5 L.Ed. 2d 760, 81 S.Ct. 735 (1961); *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (1941); *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620 (1965); *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951).

It is the duty of both the court and the prosecuting attorney to see that this right is protected. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954).

It is the duty of the district attorney to present the State's case with zeal and vigor and to use every legitimate means to bring about a just conviction. *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975). In the performance of his duties the district attorney owes honesty and fervor to the State and fairness to the defendant. "The public interests demanded that a prosecution be conducted with energy and skill, but the prosecuing officer should see that no unfair advantage is taken of the accused. It is as much his duty to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged. Nonetheless, zeal in the prosecution of criminal cases is to be commended and not condemned. If convinced of the defendant's guilt, the prosecuting attorney should, in an honorable way, use every power that he has to secure the defendant's conviction. At the same time, it is his duty to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled, and it is as much his duty to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one." 63 Am. Jur. 2d, Prosecuting Attorneys, § 27.

Ordinarily, the argument of counsel is left largely to the control and discretion of the presiding judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated for other reasons,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873

(1972); *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot, supra; State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947). Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom and the law relevant thereto. *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668 (1956); *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899 (1954). Language *consistent with the facts in evidence* may be used to present each side of the case. *State v. Monk, supra.*

On the other hand, counsel may not travel outside the record and place before the jury incompetent and prejudicial matters by injecting into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Phillips, supra; State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953). Nor may counsel argue principles of law not relevant to the case. *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402 (1956).

It is the duty of the trial court, upon objection, to censure remarks not warranted by either the evidence or the law, or remarks calculated to mislead and prejudice the jury. When the impropriety is gross it is proper for the court to correct the abuse *ex mero motu. State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954); *accord State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967).

When the foregoing principles of law are applied to the challenged portions of the district attorney's argument, we conclude that the alleged improprieties, considered in context, were insufficient to deprive defendants of a fair trial or violate their due process rights under the Fourteenth Amendment.

When the remarks embraced in Exceptions Nos. 34, 35, 36, 37, 39 and 40 are analyzed, it is apparent that they contain no objectionable reference to defendants. In each instance they were simply referred to as "three black males" or "three black men." It was obvious to the jury throughout the trial that defendants were members of the black race. The statements complained of gave the jury no information it had not already acquired by personal observation. Not every reference to race, nationality, or religion of a defendant, even when objectionable, requires a new trial. See Annot., Counsel's Appeal to Prejudice, 45 A.L.R. 2d 303 (1956). Certainly where, as here, the references to race are wholly innocuous, such remarks may not be held prejudicial.

This brings us to the question whether the district attorney's argument embraced in Exception No. 41 was so prejudicial as to constitute reversible error. We think not. The argument challenged here must be considered and appraised in light of the context and circumstances under which it was made. These circumstances reveal that defendants had the opening and closing argument to the jury, and the opening argument had already been made by Attorney Bender. While the arguments of defense counsel are not contained in the record on appeal, as they should be when the district attorney's argument is challenged, it is quite apparent that in his opening argument Mr. Bender strongly contended that Deborah Case had voluntarily consented to sexual intercourse with the three defendants; that she had hitchhiked from Florida with a man who was not her husband, sleeping beside the road, in camp grounds, and at motels; that she and her companion were drug users; and that Deborah had admittedly engaged in acts of sexual intercourse with other men. In that setting, counsel undoubtedly argued with vigor and conviction that Deborah was essentially a hippie prostitute who offered no resistance when approached by defendants seeking sexual favors. In reply to those arguments, the prosecutor was contending, not without justification, that had Deborah consented she would not have been crying when Officer Dillard arrived and that her hysteria was genuine, not feigned. Among the reasons advanced to support the logic of his contention about the matter, he said: "I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us, but she reported it and her boyfriend reported this rape within five minutes after they were let out on the highway up there." It was an *argument*, not an assertion.

It further appears that Exception No. 41 represents only an isolated incident in a lengthy argument to which no objections were interposed at trial. Although the record reveals that the trial judge, for reasons not disclosed, had left the bench and gone to his chambers during the district attorney's argument, this is of no legal significance. If summoned, the judge would have returned to the bench on a moment's notice and objections could have been timely lodged. Ordinarily, an objection and exception to argument comes too late after verdict. *E.g.*, *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev. on other grounds* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971). When improper argument is made to the jury it is the duty of

opposing counsel "to make timely objection so that the judge may correct the transgression by instructing the jury." *State v. White,* 286 N.C. 395, 211 S.E. 2d 445 (1975) ; *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35 (1948). However, if argument of counsel in a capital case is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt, the general rule requiring objection before verdict does not apply. *State v. White, supra; State v. Williams, supra; State v. Miller, supra; State v. Dockery, supra; State v. Hawley, supra.* Here, the alleged impropriety challenged by Exception No. 41 is not of such magnitude. A curative instruction from the judge, had he been afforded an opportunity to give it, would have removed any prejudice possibly engendered by the argument. Silence of defense counsel when the argument was made is some indication that, at the time, they thought defendants were suffering little or no harm.

While we do not approve the language used by the district attorney, we do not think its use, in light of the facts and circumstances disclosed by the record, constitutes prejudicial error requiring a new trial. *See, e.g., State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466 (1949). Moreover, the evidence of guilt is overwhelming and there is no reasonable basis upon which to conclude that a different result would likely have ensued had the challenged argument been entirely omitted.

**[10]** The district attorney made the following argument with respect to capital punishment: "I argue to you that the only thing wrong with capital punishment is that it has not been used and certainly there is no deterrent to crime when a person is convicted of a capital crime and never executed. We have not had an execution in the State of North Carolina close to twelve years now, . . . " Defendants' objection and exception to this argument was not interposed at trial and appears for the first time in the record on appeal as Exception No. 42 embraced by their nineteenth assignment of error. Defendants contend these remarks constitute reversible error on authority of *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975).

We find no merit in this contention. In *Hines* a prospective juror under interrogation stated she was "not comfortable with capital punishment." The district attorney, in the presence of all the jurors, replied: "Well, everybody feels that way but this is the punishment that is provided at this point. *And to ease your feelings, I might say to you that no one has been put to death*

*in North Carolina since 1961.*" (Emphasis added.) We held that the statement was improper and prejudicial in that it tended to dilute the solemn obligation imposed upon jurors in capital cases by leading them to believe that Hines and his codefendants would not or might not be executed even if convicted. Such is not the import of the district attorney's remarks in this case. Here, the temper, tone and meaning of the district attorney's remarks were not likely to ease the feelings of the jury, or anyone else, regarding capital punishment. To the contrary, the prosecutor was scolding all persons connected with the administration of the criminal laws for their failure to execute those convicted of a capital crime. Rather than easing the feelings of the jury, the argument tended to emphasize the deadly seriousness of its duty. We think the challenged remarks were well within the bounds of legitimate debate.

For the reasons stated we hold that the portions of the district attorney's argument challenged by the nineteenth assignment of error do not represent an impropriety of such gravity as to constitute prejudicial error. Assignment nineteen is therefore overruled.

Defendants' motions to strike and for a mistrial are based on the introduction into evidence of the gun (S-1). These motions were properly overruled. Defendants' motion for a new trial was addressed to the sound discretion of the trial court whose action is not reviewable absent abuse of discretion. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960). No abuse has been shown. There was plenary evidence to carry the case to the jury and support the verdicts. Hence no error appears from denial of motion to nonsuit. We have examined the charge and find no merit in the assignment of error addressed to it. We therefore overrule without discussion defendants' seventeenth, eighteenth, twenty-first and twenty-second assignments of error.

Prejudicial error not having been shown, the verdicts and judgments must be upheld.

No error.

Chief Justice SHARP concurring:

Had this been a close case on the facts I would have dissented and voted for a new trial on the ground that the solici-

tor's argument as set out in the opinion of the Court was both improper and prejudicial. Because the evidence of the defendants' guilt is so decisive and overwhelming that I am entirely convinced there was no way for the State to have lost this case, I concur in the Court's opinion that the solicitor's argument did not affect the verdict. However, I am constrained to express my view that the Court's treatment of defendants' exceptions to this argument is not commensurate with the solicitor's infraction of the rules it reiterates in the opinion.

The only suggestion in the Court's opinion that it has any criticism of the challenged portions of the solicitor's argument is the statement, "While we do not approve the language used by the district attorney, we do not think its use, in light of the facts and circumstances disclosed by the record, constitutes prejudical error requiring a new trial." This mild disparagement, read in connection with the Court's characterization of the challenged argument as "alleged improprieties," and its comment that "zeal in the prosecution of criminal cases is to be commended and not condemned," is not likely to emphasize the Court's statement that it is the solicitor's duty "to hold himself under proper restraint . . . and avoid misconduct which may tend to deprive the defendant of the fair trial to which he is entitled. . . . "

The solicitor's argument added nothing to the State's case. It merely created a totally unnecessary situation to be dealt with on appeal. Under all the circumstances the argument can only be characterized as an egregious blunder which, in a case involving less conclusive evidence of defendants' guilt, would have resulted in all the expense, delay, and other strains upon the administration of justice which are inherent in retrials. In my view, the argument in this case deserves censure and should not be dismissed with only the comment, "We do not approve."

Justices COPELAND and EXUM join in this concurring opinion.

Justice LAKE concurring in result.

I concur in all parts of the opinion of Justice Huskins except in the suggestion therein that the argument of the prosecuting attorney was improper. I see no impropriety in it.

In *State v. Westbrook,* 279 N.C. 18, 39, 181 S.E. 2d 572, this Court said:

> "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. Brown, supra.*
>
> * * *
>
> "In 53 AM. JUR., Trial, § 504, note 8, it is said, 'The line between denunciation and abuse which will reverse a conviction, and that which will not, * * * seems to rest on the distinction between mere personal abuse and invective called forth by the character of the crime shown by the evidence.' * * *
>
> "Applying these principles to the present case, we find in the vigorous argument of the prosecuting attorney and his urging that the jury return a verdict of guilty of murder in the first degree without a recommendation as to punishment, which, in effect, fixes the punishment at death by asphyxiation, no departure from the evidence and legitimate inferences to be drawn therefrom."

*State v. Westbrook, supra,* was the unanimous opinion of this Court. The death sentence therein sustained was vacated on an entirely different point by the Supreme Court of the United States. See, *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68. The Supreme Court of the United States did not note any

error whatsoever in our decision so far as argument of counsel is concerned. Had the rule so adopted by us, approving the prosecuting attorney's argument, been deemed erroneous Westbrook would have been entitled to a complete new trial, not simply a vacating of the death sentence.

The tidal wave of civil rights fanaticism, which has swept over this nation, has washed into judicial opinions many errors which hamper the administration of criminal justice. In the slushy quagmire which has resulted, the rate of incidence of vicious crimes continues to rise in this State as it does elsewhere. Two of these errors are (1) the false idea that a prosecuting attorney must present the State's case in a calm, detached, neutral manner while defense counsel is free to employ any tactics and arguments his ingenuity can suggest, and (2) race is a fact which can never be mentioned in a criminal trial.

The prosecuting attorney is an officer of the court. So is the defense counsel. Both are members of the Bar and both are obligated to represent their clients pursuant to the high standards set in its Code of Ethics. It is not proper for either knowingly to misstate the law, distort the evidence, draw unwarranted inferences therefrom, inject irrelevancies or appeal to prejudice in his argument to the court or the jury, but neither is required to present his argument with the impartiality and calmness of voice expected of the judge in delivering his charge to the jury.

The prosecutor, like the defense counsel, is an advocate. Prior to trial he has examined the State's evidence and interviewed witnesses. As a result, he has satisfied himself of the defendant's guilt to the extent of drawing the bill of indictment and determining to place the defendant on trial and seek his just conviction and punishment. The grand jury, in his absence, has heard some or all of the State's witnesses and has found probable cause. It is the prosecutor's duty to present the State's case in its strongest, fair light. The defense counsel owes a similar duty to the defendant. This is our adversary system of justice—zealous, fair advocacy before an impartial judge and jury.

It is well for the trial judge to remain on the bench throughout arguments, both by the prosecuting attorney and by the defense counsel, in order to avoid improper remarks by counsel in their zeal and in the heat of their battle for the

jury's verdict. It would also seem advisable for all arguments to the jury to be taken by the court reporter and to be included in the record on appeal in the event the defendant assigns as error the remarks of the prosecutor.

Zeal, oratory and emphatic presentation by counsel in presenting evidence or argument thereon, be he prosecutor or defense counsel, is to be commended, so long as it does not tend to divert the jury's attention from the evidence in the case. The prosecutor, like the defense counsel, should be left free to strike hard blows, so long as they are fair. The test is thus stated by Justice Huskins, speaking for a unanimous Court in *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125, wherein we allowed a new trial for the prosecuting attorney's "departure from the evidence and the legitimate inferences to be drawn therefrom":

> "Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668 (1956); *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899 (1954); *State v. Campo,* 233 N.C. 79, 62 S.E. 2d 500 (1950). Language may be used *consistent with the facts in evidence* to present each side of the case."

Again, in *State v. Stegmann,* 286 N.C. 638, 654, 213 S.E. 2d 262, this Court said:

> "It is the duty of the prosecuting attorney in all phases of the trial to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction."

Thus, the test of proper argument is whether it is relevant to the issue to be decided by the jury and a fair statement of the evidence and of legitimate inferences and conclusions to be drawn therefrom. It is not required that all fair minded persons will agree with counsel's inferences and deductions from the evidence. As we said in *State v. Monk, supra,* it is enough that they be *reasonable* and *relevant* to the issue.

The argument of the prosecuting attorney in this case that "the average white woman abhors anything of this type in nature that had to do with a black man," meets this test and was legitimate, proper argument.

The very nature of the crime of rape raises for the jury's determination the question of whether the alleged victim con-

sented to the sexual intercourse. The burden rests upon the State in every rape case to prove beyond a reasonable doubt that she did not so consent. The determination of whether she did or did not consent is not a matter in which the jury is limited to her denial of consent in her testimony. Consent, or lack of it, is also a matter of inference or conclusion from the surrounding circumstances. Both the State and the defense are entitled to call to the jury's attention, in argument, matters in evidence from which may be drawn the inference or conclusion it urges the jury to draw. The appearance of the defendants, identified in the courtroom by the alleged victim as her assailants, is a matter before the jury. Furthermore, in the testimony of the State's witness, Mr. Franklin, they are referred to as "colored." Obviously, the jury knew, before the argument by the prosecuting attorney that this is a case in which the State charges three Negro men with the rape of a white woman.

Is it then a legitimate inference that, because of this racial difference between the participants, the alleged victim did not consent to the intercourse? Of course it is. Every boy and girl of junior high school age knows that personal appearance is a factor in the desire for and willingness to accept sexual relations. No principle of law requires members of this Court to pretend to be ignorant of a truth we have all known since before we first began dating members of the opposite sex. Personal attractiveness to members of the other sex is affected by many things—race, cleanliness, facial features, size, shape, manner, clothing and many others. One who doubts it need only look at television and other commercial advertising. Of course, every person is not affected in the same way by the race of another or by other aspects of his or her personal appearance, but to say that the race of a man proposing sexual intercourse to a woman is not a legitimate factor in determining her consent to his advances is utterly unrealistic.

No provision of the State or Federal Constitution requires that racial difference be ignored in the trial of an action in which it is relevant to an issue to be determined. As Benjamin Disraeli, a member of a minority, said: "No man will treat with indifference the principle of race, for it is the key to history." Certainly, common experience and observation lead to the conclusion that racial difference is relevant to the question of a woman's consent to acceptance of a man as her partner in sexual relations.

It is important to remember that the prosecuting attorney mentioned race only on the question of consent. This injects no prejudice into the case. He did not argue that these defendants are Negroes and, therefore, more likely to commit rape than three white defendants would be. Race of the defendant would not be relevant to a prosecution for robbery, burglary, larceny, murder or reckless driving, just as personal uncleaniness, filthy dress or facial expression would not be. Race would be completely irrelevant to the determination of the punishment to be inflicted upon the convicted rapist or a defendant convicted of any other crime. Obviously, it would be improper argument for a prosecuting attorney to ask a jury to infer that because a defendant is a member of the Negro race, or of any other race or group, he committed one of these other offenses, or to argue his race as a basis for inferring any other element of the crime of rape, but, on the issue of consent in a charge of rape, for a court to say that racial difference between the man and the woman is not relevant and, therefore, not a proper matter for argument, is simply contrary to human experience. The State's argument was not that rape of a white woman by a Negro man is a worse crime than her rape by a white man. The argument was that the prosecutrix did not consent to the intercourse. In my opinion, the argument was entirely proper.

## STATE OF NORTH CAROLINA v. DONALD PAUL BINDYKE

No. 34

(Filed 17 December 1975)

1. **Conspiracy § 3— criminal conspiracy defined**

   A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, but to constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

2. **Conspiracy § 3— agreement as crime — necessity of action**

   The conspiracy is the crime and not its execution; therefore, no overt act is necessary to complete the crime of conspiracy.

3. **Conspiracy § 5— acts and declarations of conspirator — admissibility against co-conspirators**

   Once a conspiracy has been shown to exist, the acts and declarations of each conspirator, done or uttered in furtherance of a common illegal design, are admissible in evidence against all.

4. **Conspiracy § 6— unsupported testimony of co-conspirator — sufficiency of evidence**

The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution.

5. **Conspiracy § 6; Property § 4— conspiracy to damage bushes and fence — sufficiency of evidence**

Evidence was sufficient to establish a conspiracy among defendant, Montgomery and Moon to set fire to the town mayor's bushes or fence where the evidence tended to show that the board of aldermen were considering whether to dismiss defendant as the town chief of police, the mayor favored dismissal, defendant and Montgomery, a police sergeant, were good friends, defendant discussed with Montgomery his uncertain tenure as police chief, he told Montgomery he might need help in retaining his position and later told Montgomery to send Moon to his home, the three men met at defendant's house and talked, defendant discussed with Montgomery and Moon various scare tactics which he had used in Pennsylvania including threatening phone calls, throwing rocks through windows, sending "the target" a coffin, and hanging dummies in his yard, defendant later told Moon that the mayor and the board needed pressure put on them and that he had in mind a bomb, Moon said he would help and would keep in touch with defendant through Montgomery, Moon thereafter began to harass the mayor, defendant promised Moon that those involved in the activities against the mayor would "be given amnesty," defendant told Montgomery later that the mayor was not scared enough and "needed a fire in his bushes or on his fences," Montgomery related this information to Moon, and Moon acted on it.

6. **Conspiracy § 6; Property § 4— attempted firebombing of car — responsibility of conspirator without knowledge of attempt**

Where the attempted firebombing of the mayor's automobile in the driveway beside his house was done in furtherance of the basic purpose of the conspiracy among defendant and two others, which was to intimidate the mayor and mayor pro tem by damaging their real and personal property and by general threats of fire, defendant was criminally responsible for the attempted firebombing, even if there were no evidence to indicate that he knew about the firebombing or participated in it, since it was a natural and foreseeable consequence of the conspiracy which he had entered.

7. **Indictment and Warrant § 9; Property § 4— variance between indictment and proof not fatal — no principals and accessories in misdemeanors — malicious damage to property**

Where the information charged defendant feloniously aided and abetted in the malicious damage to real property by use of incendiary material—allegations sufficient to support a felony conviction under G.S. 14-49 or a misdemeanor conviction under G.S. 14-127—and the evidence tended to show defendant was an accessory before the fact, nonsuit on the ground of fatal variance was not required since the court submitted only the charge that defendant's conduct amounted to a violation of G.S. 14-127, there being no distinction between principals and accessories in misdemeanors.

8. **Jury § 3— twelve jurors — presence of alternate — error**

The jury contemplated by the N. C. Constitution is a body of twelve persons who reach their decision in the privacy and confidentiality of the jury room, and the presence of an alternate juror in the jury room after a criminal case has been submitted to the regular panel of twelve is always error.

9. **Jury § 3; Constitutional Law § 29— right to trial by twelve jurors — alternate in jury room — procedure**

The requirements of G.S. 9-18 and N. C. Constitution Art. I, § 24, and similar statutes and constitutional provisions in other jurisdictions, are mandatory, and a violation of the statutes and provisions by the presence of an alternate juror in the jury room during the jury's deliberations constitutes reversible error *per se;* however, if an alternate juror inadvertently enters the jury room and the trial judge believes it probable that the jury has not begun its consideration of the evidence, he may recall the jury and alternate and, in open court, inquire of them whether there had been *any* discussion of the case. If the answer is YES, the judge must declare a mistrial; if the answer is NO, the jury will retire to begin its deliberation.

Justice HUSKINS dissenting.

Justices COPELAND and EXUM join in the dissenting opinion.

ON *writ of certiorari* to review the decision of the Court of Appeals, reported in 25 N.C. App. 273, 212 S.E. 2d 666 (1975), affirming the judgments entered by *Chess, J.*, at the 19 August 1974 Session of ALAMANCE Superior Court.

Defendant was tried upon an information which charged: (1) that on 10 June 1974 he feloniously conspired with Stephen Montgomery and Gregory Moon to wilfully and maliciously damage the real and personal property of Harold Younger by planning and agreeing "to set fire to the bushes or fence located on the said Younger's property"; (2) that on 10 June 1974 he feloniously and maliciously attempted to damage Harold Younger's personal property, a 1967 Buick automobile, by the use of an incendiary device, a jar containing gasoline and ignited rag; and (3) that on 11 June 1974 he feloniously aided and abetted Moon, Moore, Glenn, and Montgomery in maliciously damaging the real property of W. H. Laughlin by use of incendiary material. "Said damage . . . was in the nature of setting fire to the front yard lawn after gasoline had been set on it."

The State's evidence consisted primarily of the testimony of Stephen Montgomery and Gregory Moon, self-confessed con-

spirators of defendant. Their testimony and that of others tended to show the facts summarized below:

For several months prior to 24 June 1974 defendant was Chief of Police of the town of Gibsonville. In late May, defendant was called to the scene of an automobile accident. While attempting to aid one of the victims he got into an argument with some of the spectators who had gathered at the scene, and he placed one "subject" under arrest. In consequence, a petition was circulated calling for defendant's resignation.

In early June the town's Board of Aldermen met three times to discuss defendant's continuance as Chief of Police. At these meetings Mayor Harold Younger and the Mayor Pro Tem, Alderman W. H. Laughlin, expressed the opinion that Chief Bindyke should resign. During this time defendant had a number of conversations with Stephen Montgomery, a sergeant in the Gibsonville Police Department, who was defendant's trusted friend. The two talked about defendant's position as Chief of Police and defendant "stated that he might need some help on his future position with the department."

On the morning of 3 June, Montgomery went to defendant's home, and defendant directed Montgomery to send Gregory Moon by to talk with him. That afternoon Montgomery and Moon talked with defendant at his residence. Defendant was upset with the Board of Aldermen and the Mayor. He talked about using against them scare tactics and other methods of coercion which he had employed while working in Pittsburgh. These included making threatening telephone calls and hanging dummies in people's yards, sending coffins and other bizarre materials to the victim's residence. Defendant stated at that time that maybe he would make some telephone calls.

On 4 June, pursuant to Montgomery's directive, Moon telephoned defendant at his residence. Defendant told Moon he was tired of being maligned by the Mayor and the Board of Aldermen and that some pressure needed to be put upon them. He indicated that he had in mind a bomb. Moon agreed to help and told defendant he would keep in touch with him through Steve Montgomery.

On 5 June, Moon telephoned the Alamance County Rescue Squad and falsely reported that someone had taken an overdose of barbiturates at Mayor Younger's house. He requested that an ambulance be sent to that address. Defendant came to Mont-

gomery's apartment and laughed when he learned the call had been made. Later that night Moon threw two socks containing several rocks through the picture window of the Mayor's home.

On 6 June, Moon went to defendant's office to talk with him alone. At that point defendant asked why Moon had used the socks, and Moon indicated that by using them he could throw the rocks a greater distance. Defendant laughed and thought it amusing. Later that day Moon ordered a load of concrete to be delivered to the Mayor's house.

Sometime prior to 10 June, Moon had a conversation with defendant in which defendant promised amnesty to all those involved in the scare tactics directed at the Mayor and Aldermen. He said that they could "more or less run the town of Gibsonville" without fear of arrest or prosecution.

Around 8 June, Montgomery talked with defendant who said he did not believe the Mayor was sufficiently frightened and that maybe the Mayor needed a fire in the bushes or fences in his yard. On 9 June, Montgomery related this information to Moon. On 10 June, Montgomery drove Moon by the Mayor's house to show him its location. At that time Moon observed the Mayor's 1967 Buick and stated that he was going to throw a Molotov cocktail at it.

At this point in the trial Moon's testimony differs from that of Montgomery. Montgomery testified he told Moon that defendant had wondered how the Mayor would like a fire in his bushes or in his yard. According to Montgomery the idea to bomb the car originated with Moon. On the other hand Moon testified that Montgomery told him at this 8 June meeting that defendant wanted him (Moon) to firebomb the Mayor's car. According to Moon's testimony, the plan to bomb the car had its genesis with defendant. In either event Montgomery agreed to drive by that night to see if the car was still there and to inform Moon if it was. At approximately 9:00 p.m. Montgomery informed Moon that the car was still parked in the driveway and shortly thereafter Montgomery received a call to go by defendant's house. He went there and they talked.

Meanwhile, Moon and his friend, Bobby Glenn, prepared a Molotov cocktail and went to the Mayor's house. Once there, Moon lighted the fuse and threw the makeshift firebomb at the Mayor's car. Moon and Glenn quickly sped away. The fire went out, and neither the car nor the bushes or fences were burned.

Later Moon and Glenn went to defendant's residence where defendant gave them a "stiff drink." Glenn mentioned that the price of gasoline had certainly gone up in Gibsonville. Defendant then said, "Oh, my God, what have you boys gotten me into tonight?"

Later that night Montgomery took Moon to Burlington where Moon telephoned the Mayor telling him that he was Satan, the god of fire, and that he would be back to see him.

The next day, 11 June, Alderman Laughlin made a radio speech which was adverse to defendant. Later that day Montgomery, who had not heard the broadcast, went by to see defendant whom he found to be "upset" because of the broadcast. Defendant told Montgomery that "he wondered how Laughlin would like some fire in his front yard." Montgomery told defendant "that that could be arranged." Montgomery then found Moon and told him the Chief needed a fire on the lawn of Hal Laughlin. Montgomery then took Moon in his car and showed him where Laughlin lived. Later that evening Montgomery went to defendant's residence and defendant told Montgomery that Moon was going to need some gas. Defendant gave him six quarts of gas in several plastic jugs, told him to put them in his patrol car and deliver them to Moon at 10:00 p.m. at the Gibsonville High School. Defendant also gave him directions to be followed that night. In order to create a diversion, and to deflect suspicion, defendant said that at approximately 10:15 he would take a shot at himself and he would then radio Montgomery that someone had fired upon him. At that point Montgomery was to turn on his blue light and siren which would be a signal to Moon and his cohorts to set the fire in Alderman Laughlin's yard.

Montgomery delivered the gas to Moon and explained the plan to him. At approximately 10:18 p.m. Montgomery received a call from defendant calling for assistance. Montgomery turned on his siren and he and another officer proceeded to defendant's house. When they arrived defendant said he had gone out to investigate his dogs' barking and someone had fired upon him. He said that he returned the fire and saw a large dark car drive away.

Meanwhile, upon hearing the sirens, Moon and others had gone to Alderman Laughlin's and poured the gasoline on the lawn spelling out the word "Satan" in four feet letters. They

ran out of gas before completing the word and had to leave in order to obtain more. As they were returning to Alderman Laughlin's defendant drove up behind them in an unmarked police car. He followed them a short distance and then turned off. Moon continued to Alderman Laughlin's and once there poured out the additional gas, lighted the fire, and left.

Alderman Laughlin immediately reported the fire, and Montgomery and another officer came by and helped extinguish it. Later that night Moon telephoned Laughlin and Mayor Younger, "generally speaking of Satan."

The next morning defendant met with Montgomery and Moon and told them that federal and state officers were in town investigating the recent incidents. Defendant said that tracers had been put on the telephone, and he directed Moon and the others to take no further action.

Defendant was dismissed from the Gibsonville police force on 24 June. He then went to Morehead City, where he stayed until 5 July, when Montgomery was arrested. After Montgomery's arrest he gave the officers a statement which led to defendant's arrest. Moon was arrested on 3 July.

At the conclusion of the State's evidence defendant moved for a nonsuit as to all the charges against him. The motions were denied. Defendant elected to offer no evidence, and the judge charged the jury with regard to the three counts in the information. As to the third count he submitted the charge of "aiding and abetting wilful and wanton damage to real property," a misdemeanor.

At the conclusion of the instructions the jury retired to the jury room to begin their deliberations. The court inadvertently failed to dismiss the alternate juror, who accompanied the jury into the jury room. The matter was called to the judge's attention and, after the jury had been out of the courtroom approximately three or four minutes, it was recalled. "The thirteenth juror" was then summarily dismissed, and the twelve were instructed to go back and resume their deliberations "without the alternate."

Defendant was found guilty on each of the three counts as submitted. On the first count, conspiracy to damage real and personal property, he was sentenced to two years (G.S. 14-127); on the second count, attempt to damage personal property by

the use of an incendiary device (G.S. 14-49(b), (c)), to not less than two nor more than three years; on the third count, aiding and abetting wilful and wanton damage to real property (G.S. 14-127), twelve months. All sentences were made to run concurrently. Defendant appealed; the Court of Appeals affirmed, and we allowed certiorari to consider the questions presented.

(Here we note that the record contains the information that at the conclusion of defendant's trial Gregory Z. Moon, Stephen D. Montgomery, and Bobby H. Glenn, Jr., each pled guilty to a charge of malicious damage to personal property by the use of an incendiary device, charges which grew out of the events for which defendant Bindyke was tried in this case. Each received a prison sentence of from two to three years.)

*Rufus L. Edmisten, Attorney General; Archie W. Anders, Associate Attorney, for the State.*

*Harris & McEntire and Loflin & Loflin for defendant appellant.*

SHARP, Chief Justice.

The first assignment of error which defendant brings forward on appeal to this Court is that the trial judge erred in overruling his motion for judgment of nonsuit on all counts in the "Information and Waiver of Indictment." We consider first his contention that the evidence was insufficient to establish a conspiracy among him, Montgomery and Moon to set fire to the Mayor's bushes or fence as charged in the first count. Upon a motion for nonsuit in a criminal action, the court considers the evidence in the light most favorable to the State, resolves all contradictions and discrepancies therein in its favor, and gives it the benefit of every reasonable inference which can be drawn from the evidence. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). The State contends that when the evidence is evaluated under the foregoing rule it survives the motion, and we agree.

**[1, 2]** A criminal conspiracy is an agreement between two or more persons to do an unlawul act or to do a lawful act in an unlawful way or by unlawful means. *State v. Littlejohn,* 264 N.C. 571, 142 S.E. 2d 132 (1965). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: " 'A

mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " *State v. Smith,* 237 N.C. 1, 16, 74 S.E. 2d 291, 301 (1953), quoting *State v. Connor,* 179 N.C. 752, 103 S.E. 79 (1920). The conspiracy is the crime and not its execution. *State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932). Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964).

**[3, 4]** Once a conspiracy has been shown to exist the acts and declarations of each conspirator, done or uttered in furtherance of a common illegal design, are admissible in evidence against all. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508 (1951) ; *see State v. Goldberg, supra; State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322 (1950). The existence of a conspiracy may be established by direct or circumstantial evidence. To this end the unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969) ; *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473 (1954). However, "[d]irect proof of the charge [conspiracy] is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside,* 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933).

**[5]** Applying the foregoing principles of law, the evidence in this case is sufficient to establish the following facts which point unerringly to the existence of a conspiracy.

In June 1974, the Board of Aldermen of Gibsonville were considering whether to dismiss defendant as the Town's Chief of Police. In consequence, defendant was upset and resentful, especially toward the Mayor and Mayor Pro Tem, both of whom favored his dismissal. Defendant and Montgomery, a police sergeant who worked under him, were good friends. Defendant had given Montgomery a key to his house and Montgomery came and went at will, staying there whenever he chose. In early June defendant discussed with Montgomery his uncertain tenure as Chief of Police. He told Montgomery he might need help in retaining his position.

On June 3rd defendant told Montgomery to send Gregory Moon, a friend of defendant and Montgomery's "good friend," to his home. Montgomery delivered the message to Moon and that same afternoon the three men met at defendant's home and "talked." Defendant was upset with the Aldermen and the Mayor, and discussed with Montgomery and Moon various scare tactics which he had used in Pennsylvania. These included threatening telephone calls, throwing rocks through windows, sending "the target" a coffin, and hanging dummies in his yard. On June 4th, pursuant to Montgomery's direction, Moon telephoned defendant. Defendant told him he was getting tired of harassment from the Board and the Mayor; that they needed some pressure put on them; and that he had in mind a bomb. Moon said he would be willing to help and that he would keep in touch with defendant through their mutual friend, Montgomery. After this conversation Moon began to harass the Mayor. He threw two socks filled with rocks through the Mayor's picture window, reported a false case of "drug overdose" and ordered an ambulance sent to his home. He also had a load of concrete delivered there. Moon reported all his activities to defendant, who was both pleased and amused.

Sometime during the week of June 4th defendant promised Moon that those involved in the activities against the Mayor and Aldermen would "be given amnesty" and that they "could more or less run the town" without fear of retribution. On 9 June defendant told Montgomery he didn't believe the Mayor was scared enough and he "needed a fire in his bushes or on his fences." The next day, June 10th, Montgomery related to Moon just exactly what defendant had said and then drove Moon by the Mayor's home to show him its location. On this trip they spotted the Mayor's 1967 Buick parked in the driveway.

The circumstances which confronted defendant in June 1974; his decision to try to save his position as Chief of Police by terrorizing the Mayor and Mayor Pro Tem; the fact that he had engaged Montgomery and Moon to execute his scare tactics; and that they had already begun to implement his suggestions, create a strong inference that the conspiracy charged in the first count was complete when Montgomery, pursuant to defendant's direction, "passed the word" to Moon that Mayor Younger might "need a fire in his bushes or on his fence" and Montgomery then drove Moon by the Mayor's house to show him where the Mayor lived. Direct proof of a con-

spiracy is not essential or often obtainable, for the parties to it do not put their agreement in writing; nor do they discuss it in the formal language of contracts. However, " '[a]s soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.' . . . [T]he situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists." *State v. Whiteside, supra* at 712-13, 169 S.E. at 711, 712. Based upon the foregoing evidence, there can be no doubt that there was at least a tacit and implied agreement among defendant, Moon and Montgomery to burn the Mayor's property. The fact that neither bushes nor fences were actually burned is immaterial to the existence of the conspiracy. *See State v. Goldberg, supra.*

**[6]** Defendant's second contention is that no evidence in the record indicates that he knew about, approved of, or assisted Moon in his attempt to burn the Mayor's car by the use of an incendiary device. In support of this contention, defendant points to the fact that Montgomery testified that the idea to firebomb the car originated when he drove Moon by the Mayor's house. According to Montgomery's testimony Moon, upon seeing the Buick parked in the driveway, said he would "go for" it with a Molotov cocktail. The inference from Montgomery's testimony—so defendant contends—is that Moon formulated the plan to attack the car and defendant was unaware of this specific activity. From this, defendant further argues that since there is no evidence he participated in a conspiracy to burn the Mayor's fences or bushes, he cannot be held "vicariously liable" for an act "which Moon thought up himself and carried out without any assistance or even prior knowledge of the defendant." We necessarily reject this contention, having concluded that the evidence is sufficient to establish a conspiracy to terrorize and coerce the Mayor and Mayor Pro Tem by burning the Mayor's bushes and fences, throwing rocks through windows, and making telephone calls threatening fire. *See* 4 W. Blackstone's Commentaries *143.

Defendant correctly concedes that, once a conspiracy is shown, each conspirator "is responsible for all acts committed by the others in the execution of the common purpose which

are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design." *State v. Smith,* 221 N.C. 400, 405, 20 S.E. 2d 360, 364 (1942). *See also State v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482 (1947). "Conspiracy implies concert of design and not participation in every detail of execution, and it is not necessary that each conspirator should have taken part in every act, or known the exact part performed or to be performed by the others in the furtherance of the conspiracy." 15A C.J.S. *Conspiracy* § 40 (1967). "The act of one conspirator done in the effort to achieve the main object of the criminal plan will be imputed to the other even if the other was not present and the act deviates from the agreed-upon method of perpetration. . . . [However,] if one conspirator unexpectedly goes entirely outside the purpose of the combination to commit a crime he alone is guilty thereof." R. Perkins, Criminal Law Ch. 6, § 5 at 633-34 (2d Ed. 1969).

We have no doubt that the attempted firebombing of the Mayor's automobile in the driveway beside his house was done in furtherance of the basic purpose of the conspiracy, which was to intimidate the Mayor and Mayor Pro Tem by damaging their real and personal property and by general threats of fire. Thus, even if defendant were correct in asserting that there was no evidence to indicate that he knew about the firebombing or participated in it, defendant would, nonetheless, be criminally responsible for the attempted firebombing, since it was a natural and foreseeable consequence of the conspiracy which he had entered.

An alternate basis for our conclusion that the trial judge correctly denied defendant's motion to dismiss the second count is that, in our view, the evidence is sufficient to support a finding that defendant actually formulated and knew about the plan to firebomb the Mayor's vehicle. As defendant correctly points out Montgomery testified that this idea was Moon's alone. Defendant, however, ignores the fact that Moon testified that Montgomery told him that defendant wanted him "to firebomb the 1967 Buick parked in the driveway." In addition, both Moon and Montgomery testified that a little after 9:00 p.m. Montgomery advised Moon the Buick was still in the Mayor's driveway. Moon and Bobby Glenn proceeded to make a firebomb while Montgomery went to the home of defendant, where they "just sat there and talked."

From the foregoing evidence the jury could legitimately conclude that defendant had transmitted to Moon through Montgomery his direction to bomb the Mayor's car and that Montgomery had informed defendant Moon would do as directed. Under this evidence the unlawful agreement of defendant and the others encompassed the very act that was done, and defendant is therefore criminally responsible for it regardless of whether the attempted burning of the car was a foreseeable consequence of the more restricted conspiracy charged in the first count of the information.

[7] Defendant's next contention is that the court should have granted his motion to nonsuit the third count in the information, which charges that defendant "unlawfully, wilfully and feloniously did aid and abet Gregory Moon, Danny Moore, Bobby Howard Glenn and Stephen Montgomery in the malicious damage to the real property of W. Hal Laughlin, 521 Ossippee Road, Gibsonville, North Carolina, by the use of incendiary material . . . setting fire to the front yard lawn after said gasoline had been placed on it." Defendant concedes that the State's evidence tends to show that the fire in Laughlin's yard was defendant's idea; that it was accomplished according to his plan; that defendant supplied the gasoline for the fire; and that he himself created a diversion to distract attention from the Laughlin premises at the time the fire was set. His contention is that the information charges him with aiding and abetting the burning of Laughlin's lawn; that the evidence tends to show he was an accessory before the fact to the crime in that he was not present at the burning; and that the discrepancy between the allegation and proof constitutes a fatal variance. We find no merit in this contention for the following reason:

Although the third count charges that defendant feloniously aided and abetted others in maliciously damaging real property by the use of incendiary material—a felony under G.S. 14-49(b)—the trial judge submitted the issue of the jury on the theory that defendant's conduct was a violation of G.S. 14-127, a misdemeanor. In this State, as in all common law jurisdictions, "[t]he distinction between principals and accessories is made only in felonies. All persons who participate in treason or in misdemeanors, whether present or absent, are indictable and punishable as principals." *State v. Bennett*, 237 N.C. 749, 752, 76 S.E. 2d 42, 43 (1953). Thus, if the information was sufficient to support a conviction under G.S. 14-127 there could be no fatal variance.

G.S. 14-49(b), under which the third count was drawn, provides: "Any person who wilfully and maliciously damages or attempts to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony."

G.S. 14-127 provides: "If any person shall wilfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the court."

Although the language of the third count in the information does not follow exactly the language of either G.S. 14-49(b) or G.S. 14-127, it does allege specific acts which would constitute a violation of either section. "The fact that an indictment fails to follow the language of the statute, or fails to specify the statute under which it was drawn, is not a vitiating defect if the pleading charges facts sufficient to enable the court to proceed to judgment." 4 Strong's N. C. Index 2d *Indictment and Warrant* § 9 (1968). We hold that *upon the facts here* the third count charging a violation of G.S. 14-49(b) also embraces a charge under G.S. 14-127 and therefore supports the verdict. *Id.* § 18.

For the reasons stated defendant's first assignment of error is overruled.

We note that under the evidence, defendant, as a party to the conspiracy to burn Laughlin's yard, was equally guilty with the other participants as a principal. However, this was not the theory upon which the solicitor drew the third count of the information. We also note that in sentencing defendant upon the second count, a felony for which the punishment prescribed is imprisonment in the State's prison for not less than five nor more than thirty years, Judge Chess only imposed a sentence of two to three years.

Defendant's final assignment of error raises the question whether the judge's inadvertent violation of G.S. 9-18 in failing to dismiss the alternate juror who remained in the jury room from three to four minutes after the jury retired to consider its verdict, nothing else appearing, infringed his right to trial by jury as guaranteed by N. C. Const. art. I, § 24. At the outset we note (1) that the judge summarily recalled and dismissed the alternate without making any effort whatever to

ascertain whether the jury had begun its deliberations; and (2) that defense counsel did not move for a mistrial on this ground then or later.

In pertinent part, N. C. Const. art. I, § 24 provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for the trial de novo."

N. C. Gen. Stat. § 9-18 provides for the selection of one or more alternate jurors after the regular jury has been impaneled so that if, before the case is submitted to the jury, a juror dies, becomes unable or disqualified to serve, or is discharged for any reason, an alternate may be substituted in his stead. If he has not been substituted and becomes a part of the regular panel, the statute requires that "[a]n alternate juror . . . shall be discharged upon the final submission of the case to the jury."

Many decisions evidence this Court's commitment to preserving inviolate the right of trial by jury as at common law.

In *Whitehurst v. Davis,* 3 N.C. (2 Haywood's Law & Equity) 113 (1800), the error assigned was that a caveat had been tried by thirteen jurors. In awarding a new trial the Court said: "It may be said, if 13 concur in a verdict, 12 must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end, endanger or prevent this excellent institution from its usual course: therefore, no such innovation should be permitted."

In *State v. Alston (and Battle),* 21 N.C. App. 544, 204 S.E. 2d 860 (1974), the defendants were tried jointly upon identical indictments charging felonies. A thirteenth juror was selected and seated as an alternate. When the case was submitted to the jury all thirteen jurors retired, deliberated, and returned verdicts of guilty as charged. The Court of Appeals ordered a new trial upon the authority of *Whitehurst v. Davis, supra.*

In *State v. Dalton,* 206 N.C. 507, 174 S.E. 422 (1934), in holding the alternate juror statute (G.S. 9-18, enacted as N. C. Sess. Laws, ch. 103 (1931)) constitutional, the Court pointed out that it preserved all the essential attributes of the common law jury system, including the number of jurors, since the alternate becomes a juror only when the judge, for cause, substitutes

him for a member of the original panel. "From the beginning to the end of the trial the number never varies, and, by a jury of twelve men the verdict is declared." *Id.* at 512, 174 S.E. at 425. Here we note that it required a constitutional amendment (passed at the general election of 1946) to make the women of the State eligible for jury service. *See State v. Emery,* 224 N.C. 581, 31 S.E. 2d 858 (1944); N. C. Sess. Laws, ch. 634 (1945); N. C. Const. art. I, § 26.

An unbroken line of North Carolina cases hold that in felony trials the accused must be tried by a jury of twelve and he cannot consent to a lesser number. The rule is stated and authorities cited in *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189 (1971).

**[8, 9]** Thus, there can be no doubt that the jury contemplated by our Constitution is a body of twelve persons who reach their decision in the privacy and confidentialty of the jury room. There can be no question that the presence of an alternate juror in the jury room after a criminal case has been submitted to the regular panel of twelve is always error. The requirements of G.S. 9-18 and N. C. Const. art. I, § 24, and similar statutes and constitutional provisions in other jurisdictions, are mandatory. The question is whether this error is prejudicial *per se* or are there circumstances under which it can be considered harmless?

The rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either during the entire period of deliberation preceding the verdict, *or* his presence at any time during the *deliberations* of the twelve regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate. *See United States v. Beasley,* 464 F. 2d 468 (10th Cir. 1972); *United States v. Virginia Erection Corporation,* 335 F. 2d 868 (4th Cir. 1964); *People v. Britton,* 4 Cal. 2d 622, 52 P. 2d 217 (1935); *People v. Adame,* 36 Cal. App. 3d 402, 111 Cal. Rptr. 462 (1973); *People v. Bruneman,* 4 Cal. App. 2d 75, 40 P. 2d 891 (1935); *Berry v. State,* 298 So. 2d 491 (Fla. 4th Dis. Ct. of App. 1974); *Glenn v. State,* 217 Ga. 553, 123 S.E. 2d 896 (1962); *State Highway Comm. v. Dunks,* ...... Mont. ......, 531 P. 2d 1316 (1975); *People v. King,* 13 N.Y. App. Div. 2d 264, 216 N.Y.S. 2d 638 (1961); *Brigman v. State,* 350 P. 2d 321 (Okla. Crim. App. 1960); *Commonwealth v. Krick,* 164

Pa. Super. 516, 67 A. 2d 746 (1949); *State v. Cuzick,* 85 Wash. 2d 146, 530 P. 2d 288 (1975); Annot., *Alternate or Additional Jurors,* 84 A.L.R. 2d 1288, 1312-14 (1962); 50 C.J.S. *Juries* § 123 c. & d. (1947).

We have found the California decisions cited above particularly instructive. In *People v. Bruneman,* 4 Cal. App. 2d 75, 40 P. 2d 891 (1935), two alternates, instructed to listen but not to discuss the case in any way, retired with the jury to the jury room with the consent of the defendant's counsel. They remained with the jury until its verdict was returned. On appeal, the court granted the defendant a new trial on the ground that the California Constitution guaranteed him the right of trial by jury as the right existed at common law, and one of the essential characteristics of the common law jury is "that twelve persons, not more nor fewer, shall pass upon the issues of fact." *Id.* at 79, 40 P. 2d at 893. The court also emphasized the common law tenet "that the jury are entitled, and bound, to deliberate in private," and that, under it, the presence of the two alternates was an intrusion upon the privacy and confidence of the jury room, "tending to defeat the purpose for which they were sent out." Their presence was "an error so far destructive" of their right to trial by jury that it could not be cured by the consent of defendant's attorney. *Id.* at p. 81, 40 P. 2d at 893. Accord, *People v. Britton,* 4 Cal. 2d 622, 52 P. 2d 217 (1935).

In *People v. Adame,* 36 Cal. App. 3d 402, 111 Cal. Rpt. 462 (1973), the California Court of Appeal again considered the issue. In *Adame,* the alternate juror retired with the jury and was present for one hour and forty minutes while the jury deliberated. Upon learning of her presence the trial judge immediately removed her, and the jury continued its deliberations until they were sent home for the night. The next day, having deliberated a total of four and one half hours, the jury returned its verdict. The trial court, having concluded that the presence of the alternate during the jury's deliberations constituted prejudicial error of constitutional stature, granted defendant a new trial, and the State appealed. Relying on *Britton* and *Bruneman,* the Court of Appeal affirmed the trial judge's ruling. The State had sought to distinguish *Bruneman* and *Britton* on the basis that those cases involved the presence of the alternate in the jury room during the entire period of deliberation and the reaching of a verdict, whereas in *Adame* the alternate was present in the jury room for only an hour and forty minutes of the

four and one half hours of deliberation. The court said, "This argument suggests that early deliberations of the jury are of less significance to the verdict than later deliberations. Not only is appellant's position untenable insofar as suggesting that the jury's early deliberations are disrelated to its ultimate decision, but it is entirely contrary to the *ratio decidendi* of *Bruneman* and *Britton*. These cases in substance declare that it is the very sanctity of the jury room with only the regular jurors present which is protected by Article I, Section 7 of the State Constitution." *Id.* at 408, 111 Cal. Rptr. at 465.

In a footnote, the California Court said that in any hearing to determine prejudice the defendant should not be forced to rely on the memory of an alternate juror as to what transpired in the jury room. It noted that this problem was particularly apparent in *Adame* where the alternate testified, "I think I was in there around five to ten minutes until the bailiff came and got me out. It might have been a little longer than that." In fact, she was in the jury room for approximately one hour and forty minutes. *Id.*, n. 4 at 407, 111 Cal. Rptr. at 465.

In *United States v. Beasley*, *supra*, the alternate juror retired with the original twelve and remained with them for twenty minutes before the court removed her. Upon defendant's motion for a mistrial the judge conducted a hearing and ascertained that during the twenty minutes the thirteen had elected a foreman and then voted to go to lunch. The judge found "no prejudice" and denied the motion. In considering defendant's appeal from a conviction, the United States Court of Appeals for the Tenth Circuit said "the authorities on this point" presented the trial judge with two alternatives: (1) He could conduct a hearing, question the jurors, or some of them, to see how far their deliberations had progressed and how the alternate juror had participated therein and thus attempt to determine whether any prejudice to the defendant had occurred; or (2) he could proceed on the assumption that a mistrial was required if the alternate participated in any proceeding commenced by the jury itself after it retired to deliberate.

In rejecting the first alternative the court reasoned: (1) To provide or apply an appropriate standard or test of prejudice could be "difficult"; (2) An inquiry at a hearing under a standard which requires a showing of prejudice would itself be a dangerous intrusion into the proceedings and privacy of the jury; and (3) The purpose sought to be achieved at such

a hearing is not of sufficient importance to warrant such an inquiry in comparison to the possible harm or appearance of interference.

The decision in *Beasley* was that the trial court's "inquiry is limited to determining whether the jury had begun its function as a separate entity. The facts here show that this point had been passed and the alternate was present. Thus a mistrial is necessary." *Id.* at 471.

In *State v. Cuzick, supra,* the Supreme Court of Washington also rejected the alternative of a factual inquiry into the extent of the alternate juror's participation in the deliberations on the ground that it would be unlikely to shed much light on the actual effect of the alternate's presence in the jury room. The court reasoned (1) that it would be impossible to recreate every move, every expression he might have made during the time he was in the jury room; (2) that even if it were possible to determine exactly what he did or said, it could not be known how or whether his actions affected the others; and (3) that the primary effect of such an inquiry would be to further invade the jury room and impose on those who served in it.

In *Commonwealth v. Krick, supra,* the defendant appealed his conviction, assigning as error that the trial judge, at the time he submitted the case to the jury, had permitted two alternate jurors to retire with the twelve to the jury room where they remained for ten minutes before they were withdrawn. The appellate court considered defendant's appeal as based on the denial of a constitutional right and awarded a new trial. The court said it could not be known whether the alternates deliberated with the jurors during those ten minutes or in any way influenced the verdict. The court reasoned, however, that to have allowed the alternates *any* opportunity to deliberate with the others was a direct violation of the Act which forbade alternates to "retire with the jury of twelve after the case is submitted to it." *Id.* at 521, 67 A. 2d at 749.

At least one court does not agree with the majority view, delineated in the authorities cited and discussed above, that the presence of an alternate during the jury's deliberations automatically necessitates a new trial. This court, although recognizing that such presence is error, requires the defendant to show prejudice from the actions or presence of the alternate juror. To provide a defendant this opportunity the trial court is re-

quired to hold a hearing to determine what transpired in the jury room during deliberations. This was the conclusion reached and the procedure followed in *United States v. Allison,* 481 F. 2d 468 (5th Cir. 1973), *cert. denied,* 416 U.S. 982, *hearing aff'd.,* 487 F. 2d 339. As authority for its decision the court in *Allison* cited *United States v. Nash,* 414 F. 2d 234 (2nd Cir. 1969), *cert. denied,* 396 U.S. 940 and *United States v. Hayutin,* 398 F. 2d 944 (2nd Cir. 1968), *cert. denied,* 393 U.S. 961. These two cases involved factual situations differing from that of *Allison.* In *Nash* and *Hayutin* the alternates were never in the presence of the jury in the jury room during deliberations.

After considering the decisions expounding both the majority and minority views we are constrained to adopt the majority rule and hold that the presence of an alternate in the jury room during the jury's deliberations violates N. C. Const. art. I, § 24 and G.S. 9-18 and constitutes reversible error *per se.* We find the rationale upon which this rule is based irrefutable: (1) Participation of an alternate in the deliberations of the jury negates a defendant's right to trial by jury as it existed at common law, that is, by a jury of twelve in the inviolability, confidentiality and privacy of the jury room. (2) Public policy and practical considerations preclude any hearing to determine whether the alternate's presence in the jury room during deliberations affected the jury's verdict or prejudiced the defendant in that (a) any such hearing would necessarily be inconclusive because no adequate standards can be devised for determining whether the alternate's presence affected the jury; (b) upon a hearing in which a defendant attempts to show prejudice he would have to rely upon either the testimony of the alternate juror, members of the panel or both; and (c) an inquiry into what transpired in the jury room during the alternate's presence itself invades the sanctity, confidentiality, and privacy of the jury process and gives the appearance of judicial interference with the jury.

We cannot adopt a rule which would allow the trial judge to attempt to determine whether the alternate was present in the jury room a "substantial" length of time during deliberations or had participated in the deliberations to defendant's prejudice. Where would the court draw the line between insubstantial and substantial presence? In *Beasley* the court held that presence for twenty minutes invalidated the verdict; in *Krick,* ten minutes voided the trial. We hold that at any time an alternate is in the

jury room *during deliberations* he participates by his presence and, whether he says little or nothing, his presence will void the trial.

There is, however, no substitute for common sense, and the foregoing rule has no application where the alternate's presence in the jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity. In *People v. Rhodes,* 38 Ill. 2d 389, 231 N.E. 2d 400 (1967), at the time the original twelve retired, the alternate went into the jury room for the sole purpose of obtaining her coat before leaving the courtroom, and she left before deliberations began or the foreman was chosen. The Illinois Supreme Court sensibly held that the fact "the alternate juror was allowed to remove her coat from the jury room could at the most extreme characterization be considered as an irregularity and is not sufficient to require a reversal of his [defendant's] conviction." *Id.* at 395, 231 N.E. 2d at 403.

The California Supreme Court has also held that the momentary presence of an alternate in the jury room immediately after the jury has retired, and under circumstances which negate the beginning of its deliberations, will not invalidate the verdict. *People v. French,* 12 Cal. 2d 720, 87 P. 2d 1014 (1939).

Obviously, once the jury has retired to the jury room and shut the door, the judge—to whom the jury room is off limits—cannot know for certain when deliberations have begun. After the jury has been "out" for a "substantial" length of time, it must be assumed that it has begun the business for which it was impaneled. Yet, as all trial judges and courtroom personnel know, it would be a rare case in which the jurors begin their deliberations the instant the last member is inside the jury room and the door is closed. If the judge's charge was a lengthy one, or if the jury has been sitting continuously for an appreciable length of time before retiring, each juror would most likely want to make himself comfortable before beginning the decision process. The length of time this would require would depend upon many variables and differ from case to case.

**[9]** During that relatively short period, however, if the inadvertent presence of the alternate in the jury room is discovered, and no deliberations have begun before he is removed, his mere temporary presence would not invalidate the trial. There-

fore, if the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been *any* discussion of the case. If the answer is NO, the alternate will be excused and the jury returned to consider its verdict. If the answer is YES, there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible.

In our view, in this case, the trial judge could have properly conducted this limited inquiry. However, he did not do so. The Court of Appeals, after noting that the judge removed the alternate from the jury room "after only three or four minutes had elapsed," adjudicated that "the alternate did not participate in the deliberation and verdict of the other twelve. His brief visit to the jury room was not prejudicial." *State v. Bindyke,* 25 N.C. App. 273, 277, 212 S.E. 2d 666, 668 (1975).

This assumption, unsupported by any evidence in the record, cannot be sustained. It is quite possible that one or more jurors, including the alternate, had expressed an opinion as to defendant's guilt or innocence, or commented on the evidence. If so, as pointed out in *Adame, supra,* it cannot be assumed that observations and discussions which take place during the first few minutes after the jurors retire are less significant to the verdict than later deliberations.

As much as we regret the necessity of imposing upon the State the penalty of a retrial of this case we are persuaded that higher considerations require it, and that the rule which we have adopted will, in the long run, create certainty and promote judicial economy. That rule, as previously stated is this: The presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial. The alternate has participated by his presence; and the court will conduct no inquiry into the nature or extent of his participation. However, if through inadvertence, the alternate retires with the jury at the time the case is submitted to it, and his presence in the jury room is discovered so promptly that the trial judge believes it probable no deliberations have begun, he may recall the jury and the alternate and make the limited inquiry whether there has been any discussion of the case or comment with reference to what the verdict should be. If the answer is YES, the

judge must declare a mistrial; if the answer is NO, the jury will retire to begin its deliberations.

Finally, we would impress upon the trial judges that the requirement of the alternate jurors be discharged before the final submission of the case to the jury should be strictly observed. The most elementary precautions will prevent an alternate from entering the jury room upon the panel's retirement to deliberate, and surely this case proves that these precautions should be taken.

Since the case must be retried, we refrain from dicussing the other assignments of error; they are not likely to reoccur. The case is returned to the Court of Appeals with instructions to remand the cause to the Superior Court for a

New trial.

Justice HUSKINS dissenting.

Analysis of the decisions cited in the majority opinion leads me to conclude that defendant's conviction should be upheld.

Basically, the authorities relied on by the majority hold that a new trial is required if the alternate juror is present *during deliberations* of the jury. There is nothing in this record to support the notion that any deliberations had taken place during the brief presence of the alternate juror. Indeed, all the attendant circumstances suggest the contrary.

The trial of this case consumed the better part of three days. The case itself involves conspiracy, the law dealing with malicious attempts to damage personal property, and aiding and abetting such offenses. Following the charge to the jury dealing with these difficult legal principles, the trial judge inadvertently allowed the alternate juror to retire to the jury room with the twelve. After "three or four minutes" the jury and alternate were recalled to the courtroom and the alternate was dismissed. The jury returned to the jury room and ultimately rendered a verdict of guilty on all counts. The majority holds that the presence of the alternate juror in the jury room "during the jury's deliberations" violates Article I, section 24 of our Constitution and G.S. 9-18 and constitutes reversible error *per se*. To my way of thinking, that holding violates the following quotation from the majority opinion: "There is, how-

ever, no substitute for common sense, and the foregoing rule has no application where the alternate's presence in the jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury had not begun its function as a separate entity."

The circumstances negate the majority's assumption that the jury had begun its deliberations during the brief presence of the alternate juror. This conclusion is supported by common knowledge that jurors rarely begin their deliberations the instant the last juror enters the jury room and the door is closed. Reason dictates that this jury, after a three-day trial and a lengthy charge, spent the first three or four minutes after it retired "making itself comfortable," lighting up a cigarette, and inspecting the coffee pot. These preliminaries ordinarily consume more than four minutes. Few restrooms will accommodate twelve people simultaneously. Thus, application of reason to the facts and circumstances impels the conclusion drawn by the Court of Appeals that the alternate juror did not participate in the deliberations and verdict of the jury and "his brief visit to the jury room was not prejudicial."

Defendant's co-conspirators pled guilty to one charge of malicious damage to personal property by the use of an incendiary device, testified for the State in this case, and each is now serving a prison sentence of two to three years. Proof of this defendant's guilt is overwhelming.

Despite overcrowded dockets, our courts are faced with ever-increasing demands for speedy trials, and I am unwilling to impose upon the State and the courts the penalty of a retrial of this case. In my view defendant has had a fair trial free from prejudical error. The record shows that at the time the trial judge recalled the jury and dismissed the alternate he consulted with prosecution and defense counsel at the bench. Defendant raised no objection based on the inadvertence and made no motion for a mistrial. This suggests that defendant regarded the brief presence of the alternate juror as harmless and perceived no prejudice to his cause. He should not be permitted now to assume a different stance. Moreover, it is my view that the trial judge should never declare a mistrial based upon the inadvertent presence of the alternate juror, even after limited inquiry as to whether there has been any discussion of the case, unless defendant either seeks or consents to a mistrial.

Otherwise, a plea of double jeopardy upon retrial may present serious problems.

For the reasons stated, I respectfully dissent from the majority opinion and vote to affirm the decision of the Court of Appeals.

Justices COPELAND and EXUM join in this dissent.

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STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

No. 56

(Filed 17 December 1975)

1. **Criminal Law § 90— State's introduction of exculpatory statements by defendant**

The State is not bound by the exculpatory portions of a confession which it introduces in a homicide case if there is other evidence tending to throw a different light on the circumstances of the homicide.

2. **Homicide § 21— second degree murder — exculpatory statements — sufficiency of evidence for jury**

The State's evidence was sufficient for the jury in this prosecution for second degree murder, notwithstanding the State introduced exculpatory statements by defendant that he shot the victim while the victim was reaching into defendant's car with a knife at defendant's throat and a hand on his chest, where the State's evidence cast doubt on defendant's version by tending to show that (1) defendant fled the scene at a great rate of speed; (2) defendant originally lied about the gun used in the shooting and told the truth about it after his wife turned it in to the police; (3) deceased had no grease on his hands although defendant claimed a grease spot on his shirt was from being grabbed by the victim; (4) the victim was found with a cigarette in one hand although defendant contended the victim used two hands against him; (5) the victim was right handed and defendant claimed the victim wielded the knife with his left hand; (6) defendant said he was stopped by two persons while the State's evidence was that the victim was alone; and (7) the victim had never been seen with a knife similar to one recovered from defendant's vehicle.

3. **Criminal Law § 86— prior misconduct — question in good faith**

Defendant failed to show that the district attorney's question to him on cross-examination as to how many people he had shot before was asked in bad faith.

4. **Criminal Law § 162— failure to strike testimony — absence of motion to strike**

The trial court did not err in failing to strike defendant's testimony regarding prior arrests which did not result in conviction where there was no motion to strike such testimony.

5. **Criminal Law § 113— recapitulation of evidence — misstatement — collateral matter**

The trial court's inaccurate statement during recapitulation of the evidence in a homicide case that defendant testified he had been convicted of assault was a misstatement upon a collateral matter and not a ground for a new trial since no request for correction was made before the case was submitted to the jury.

6. **Homicide § 28— final mandate — absence of acquittal by self-defense — additional instructions**

In this homicide prosecution, the trial court's error in failing to include in its final mandate the theory of acquittal by reason of self-defense was cured by additional instructions given by the court after the jury had begun its deliberations.

7. **Homicide §§ 14, 24— absence of malice — self-defense — burden of proof on defendant — unconstitutionality — nonretroactivity**

Under the decision of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. However, the *Mullaney* decision is not retroactive and applies only to trials conducted on or after 9 June 1975.

8. **Homicide §§ 14, 24— presumption of malice and unlawfulness — constitutionality**

The *Mullaney* decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced.

Justice LAKE concurring in result.

APPEAL by defendant pursuant to N. C. Gen. Stat. 7A-30(2) to review the decision of the Court of Appeals reported in 26 N.C. App. 575, 217 S.E. 2d 9 (1975), which found no error, *Arnold, J.*, dissenting, in the trial before *Webb, J.*, at the November 21, 1974 Session of NASH County Superior Court.

After the appeal was filed in this Court on July 31, 1975, defendant moved to amend the record on August 19, 1975, to note additional exceptions and assignments of error which would raise for review additional questions suggested by *Mullaney v. Wilbur*, 421 U.S. 684, decided on June 9, 1975. This motion was allowed on September 2, 1975, and the case argued on September 10, 1975.

Defendant was charged with the second degree murder of Gregory Ashe and entered a plea of not guilty. It was stipulated that had Dr. D. E. Scarborough, who performed the post-mortem examination, been present at trial he would have testified that Gregory Ashe died on September 29, 1974, as a result of massive hemorrhage resulting from a gunshot wound to the heart.

Evidence for the State tended to show that on the night of September 29, 1974, Lorenzo Dancy, Wilbert Whitley, and the deceased, Gregory Ashe, left a dance hall and drove to a poolroom in Whitakers. Ashe was driving his car. Upon arrival at the poolroom, they discovered that it was closed. Ashe was unable then to restart his car. Ashe asked Dancy and Whitley for a match to light a cigarette. Neither had a match. Whitley announced that he was going to his home, one block away, and began walking. Dancy and Ashe were also walking away from the car when Ashe said that he was going back to "crank" the car. Dancy indicated that he was going on with Whitley. Dancy testified that he yelled for Whitley to wait and then proceeded to walk after Whitley. When last seen alive by Dancy, Ashe was seen walking alone back towards his car.

Moments later Dancy and Whitley each heard a gun fire. Dancy heard Ashe exclaim that he was shot and hollered this information to Whitley. A yellow and black Plymouth "Satellite" was observed pulling away at a fast rate of speed. It did not stop when it reached the nearby intersection of U. S. 301. Dancy and Whitley had differing accounts of whether the car left before or after Dancy hollered.

The shooting had occurred some time after 11:00 o'clock. Because of the darkness it was difficult to find Ashe. Around 12:00 o'clock, Ashe was discovered lying face down in a field about thirty feet from the road. A cigarette, which had been lit but which was now out, was in Ashe's hand. The body was removed at 4:00 or 5:00 o'clock that morning.

After determining the identity of the owner of the Plymouth, several law enforcement officers, including Deputy Sheriff M. M. Reams went to defendant's home, advised defendant of his rights, and questioned him. Defendant told Deputy Reams that he had been to Whitakers, had shot a person who had grabbed him and tried to cut his throat but did not know whether he had hit him. Reams testified that defendant's car was

searched with his consent and a knife was found in the middle of the front seat. Also found in the car was a ".30-06," ammunition for the ".30-06," and a hunting knife. Blood was observed on the driver's side of the car, just behind the door. Defendant gave Reams a shirt with a grease spot and stated that was where he had been grabbed. When asked about the pistol used in the shooting (*not* the ".30-06"), defendant told Reams that he was "in the process of buying" it but had already returned it to the seller, whom he refused to identify.

On cross-examination Reams gave this additional account of defendant's statements: Defendant was driving his Plymouth "Satellite" automobile near the poolroom when a man stopped him and asked him for a light. Defendant gave the man the cigarette lighter from the dash of his automobile. Defendant felt someone "shaking the car, shaking the right door that was locked." Defendant put the cigarette lighter back in the holder and when he turned around "the man" was reaching in with a knife at his throat and had a hand on defendant's chest. Defendant reached down, got a revolver, and "shot the man who already had his hand on his left chest."

Officer Reams also testified that after taking defendant's statement he returned to the morgue and examined the deceased's hands. He found no grease on them. Several witnesses for the State testified that they had never seen the deceased with a knife like the one in evidence found in defendant's car.

Defendant testified giving the following account of the incident: He was driving his Plymouth automobile slowly over a road containing large holes when someone asked for a light. Through his car mirror, defendant could see two men. One of them walked up to the car and defendant reached over to the dash of the car, pushed in the cigarette lighter, and gave the lighter to him. On returning the lighter to its holder, defendant felt the car move, and looked and noticed the second man standing on the right-hand side of the car. As he turned back to his left, the first man reached into his car, seized him by the left shoulder with his right hand and put a knife to defendant's throat with his left hand. Defendant felt the knife at his throat, grabbed his gun and shot. He surmised that his assailant dropped his knife in the car since it did not belong to the defendant.

Defendant admitted that he lied to the police about the whereabouts of the gun. He said:

> "The pistol was in my house at the time the law came there. He did ask me for the pistol then. I told him I had returned it to the person I got it from. I had not returned it. It was in the house right then.
>
> * * * *
>
> "The reason I didn't tell the Sheriff the truth about where the pistol was was because at that time I just wasn't thinking, but after I got up here in jail I decided I might as well go ahead and tell them. My wife had already given it to the officers at that time. It is true that I never told them where the pistol was. If they had wanted to search the house they could have found it right there under the mattress. I did not hide the gun. That was just to keep it away from the children."

Defendant's wife, however, testified that she got the pistol from defendant's drawer where "I am sure he put it."

In rebuttal the State introduced evidence that Gregory Ashe was right-handed.

The jury found defendant guilty of second degree murder. He was sentenced to not less than 20 nor more than 25 years imprisonment. The Court of Appeals found no error, Arnold, J., dissenting.

*Rufus L. Edmisten, Attorney General, by Claude W. Harris, Assistant Attorney General, for the State.*

*L. G. Diedrick, W. O. Rosser and Roland Braswell, Attorneys for defendant appellant.*

EXUM, Justice.

I

Defendant assigns as error the denial of his motions for judgment as of nonsuit. Judge Arnold's dissent was on the basis that nonsuit should have been allowed. Reviewing this assignment, we consider all of the evidence actually admitted, whether from the State or defendant, in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence. *State v. Cutler*, 271 N.C.

379, 382, 156 S.E. 2d 679, 681 (1967). Defendant more specifically urges that this case comes within the rule that, "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed. *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964).

In *State v. Johnson, supra*, a murder prosecution, the State's only evidence that defendant committed a homicide was a confession that established a perfect self-defense. Circumstantial evidence corroborated the confession. Defendant's evidence at trial was to the same effect. In this context we held defendant entitled to a nonsuit and reversed a conviction for manslaughter. *State v. Carter, supra*, presented basically the same situation. There was no evidence which tended to contradict or impeach defendant's confession or testimony at trial that she acted lawfully in the defense of another.

**[1]** The State contends, however, and we agree that this case falls more squarely within the rule that the State is not bound by the exculpatory portions of a confession which it introduces, if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E. 2d 407, 408 (1953); see also *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972) and *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968). In *State v. Bright, supra*, the State introduced defendant's statement that he killed his wife accidentally while they were scuffling on the bed. We held, however, that evidence "such as the absence of powder burns, the location and direction of the fatal wound, [and] the conduct of the defendant . . ." was sufficient to survive a motion for nonsuit, and we affirmed a manslaughter conviction.

**[2]** We hold that nonsuit in this case was properly denied in view of evidence which casts doubt on defendant's version of the incident. This evidence is to the effect that: (1) defendant fled the scene at a great rate of speed; (2) defendant originally

lied about the gun and decided to tell the truth about it after his wife had turned it in to the police; (3) the deceased had no grease on his hands although defendant claimed the grease spot on his shirt was from being grabbed by the deceased; (4) the deceased was found with a cigarette in one hand, although defendant claims the deceased used two hands against him; (5) the deceased was right-handed although defendant claims that deceased wielded the knife with his left hand; (6) defendant says he was stopped by two persons while the State's evidence was that the deceased, when last seen alive moments before the shooting, was alone; (7) the deceased had never been seen with a knife in his possession similar to the one recovered from defendant's vehicle.

While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to "throw a different light on the circumstances of the homicide" and to impeach the defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of defendant's statement. The case is for the jury.

II

On cross-examination of the defendant by the district attorney the following occurred:

"Q. How many people have you ever shot before?

OBJECTION: OVERRULED: EXCEPTION

DEFENDANT'S EXCEPTION NO. 3.

Q. Go ahead and tell us exactly how many?

A. I have shot one.

Q. Is that all?

A. Two.

Q. Is that all?

A. Yes."

As the cross-examination continued without further objection defendant admitted having been "convicted of whiskey" and "convicted one time of escaping from prison. . . . I have not been convicted of anything else. I have been up once before in North Carolina for assault; this is the second time. That was

for shooting. It was in self-defense. I came clear of that." On recross-examination the defendant testified: "I have not been previously convicted of assault. They kept me in jail three or four nights the time the man was hitting me with a stick. Years back a fellow whacked me with a knife and he was shot in the leg but I didn't go to jail for it. I just paid his hospital bill." Apparently with reference to this testimony the trial judge, summarizing the evidence, stated to the jury that the defendant "testified that he had once been convicted of escape and once he was convicted of assault, and you will recall the things he said he had been convicted for."

Defendant now assigns as error: first, the overruling of his objection to the district attorney's question, "How many people have you ever shot before?"; second, failure of the court to strike "defendant's testimony as to any prior arrests that did not result in a conviction"; and third, the statement of the trial judge hereinabove set out recapitulating the testimony of the defendant.

**[3]** With regard to the district attorney's question defendant properly concedes the right of the State to cross-examine defendant as to specific acts of misconduct, *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972), and properly concedes that unlawfully shooting other people would be such misconduct. Defendant contends, however, that the question was patently asked in bad faith since the district attorney must have been aware that the defendant was acquitted of that charge. Defendant, however, testified that he had shot people on *two* other occasions only one of which resulted in an acquittal by reason of self-defense. There is no showing in the record that the district attorney in fact knew the official outcome of these assaults. Apparently one of them never came to trial.

**[4]** As to the trial judge's failure to strike defendant's testimony regarding prior arrests which did not result in convictions, suffice it to say there was no motion to strike any of this testimony. Apparently defendant was satisfied at trial with his full explanation before the jury of the outcome of the two shooting incidents. The trial judge was not required, *sua sponte*, to strike this testimony. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

**[5]** Although defendant admitted he paid hospital bills for one of his victims, he said also that he "didn't go to jail for

it" and that he had "not previously been convicted of assault." The trial judge did, it seems, inaccurately recapitulate the defendant's testimony on this point. The misstatement is understandable. Nevertheless "inaccurate statements of this character are not ground for a new trial unless called to the court's attention with request that correction be made before the case is submitted to the jury." *State v. Revis,* 253 N.C. 50, 53, 116 S.E. 2d 171, 174 (1960). In *State v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887 (1949) relied on by defendant on this point, defendant was tried on a charge of carnally knowing his ten year old child. In dictum this Court volunteered the observation that it would have been error for the trial judge to say, in recapitulating the evidence, that defendant "admitted . . . he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton" unless such an admission appeared in the record. (It does not appear in the opinion but the record reveals that Dorline Shelton was not the prosecutrix, but another daughter of the defendant.) Noting that no exception was taken or assignment of error directed to this portion of the charge, this Court recognized that the defendant may indeed have made such an admission although none appeared in the record. Assuming the correctness of this dictum, the supposed misstatement there considered is clearly distinguishable from the one here. In prosecutions for various kinds of illicit sexual activity, our decisions have been characterized as being "markedly liberal in holding evidence of similar sex offenses admissible" on the question of guilt. 1 Stansbury's North Carolina Evidence 299 (Brandis Rev. 1973). It might then be considered that the assumed misstatement in *Cantrell* was one of a fact bearing directly on defendant's guilt. This Court has said that "a statement of a material fact not shown in the evidence constitutes reversible error" whether or not called to the trial court's attention. *State v. McCoy,* 236 N.C. 121, 124, 71 S.E. 2d 921, 923 (1952). The misstatement here complained of was clearly upon a collateral matter.

These assignments of error are, consequently, overruled.

III

**[6]** In his final mandate the trial judge failed to reiterate and specify that self-defense was a possible theory of acquittal. Defendant contends that under *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974) this is reversible error. After the jury had been deliberating approximately forty-five minutes, how-

ever, they returned to the courtroom to ask for clarification on the distinction between manslaughter and murder in the second degree. In the course of his instructions responsive to this inquiry the trial judge charged in addition as follows:

> "Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one."

While *Dooley* does require the trial judge to include in his final mandate the theory of acquittal by reason of self-defense where it has been raised by the evidence, failure here to do so was cured, in our opinion, by the additional instructions. *State v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238 (1945). Certainly the additional instructions render any error of omission in the final mandate harmless beyond a reasonable doubt.

IV

On June 9, 1975, the United States Supreme Court decided *Mullaney v. Wilbur,* 421 U.S. 684, which held that a Maine jury instruction requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship,* 397 U.S. 358 (1970) to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. It was subsequently re-explained in *Faretta v. California,* 422 U.S. 806, n. 15 (1975) that the right of the defendant to have this burden placed on the State, though not literally expressed in any particular provision of the Constitution, was essential to due process of law in a fair adversary process.

Defendant contends that under the rationale of *Mullaney* the trial judge's instructions to the jury in this case violate Fourteenth Amendment Due Process. While the trial judge in defining second degree murder and manslaughter and in his final mandate to the jury placed upon the State the burden to prove beyond a reasonable doubt both malice and unlawful-

ness, i.e., without justification or excuse, he also instructed the jury, in pertinent part, as follows:

> "*If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder.* . . .
>
> "As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. *In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense.* And I will charge you on self-defense in just a moment. But I do want to charge you that *to negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:* first, that he shot Gregory Ashe in the heat of a passion. . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation. . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.
>
> "*To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things:* first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. . . . The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness. . . . And the third thing the defendant must satisfy you of is that he was not the aggressor. . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force. . . .

> "If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter." (Emphases supplied.)

**[7]** We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975.

The law of Maine and the precise issue it presented was succinctly stated by the Supreme Court in *Mullaney:*

> *"Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—i.e., by life imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation,* in which case it is punished as manslaughter—i.e., by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 691-92. (Emphasis supplied.)

A portion of the trial judge's instructions to the jury in Maine were summarized in *Mullaney* as follows:

> "[*T*]*hat if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in*

> *the heat of passion on sudden provocation.* The court emphasized that *'malice aforethought and heat of passion on sudden provocation are inconsistent things.'* [Appendix to the Record] at 62; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of 'heat of passion' and 'sudden provocation.'" *Id.* at 686-87. (Emphases supplied.)

Maine's conclusive implication of malice which arose from proof of an unlawful and intentional killing meant simply that upon proof of these things the defendant was guilty of murder unless the defendant proved by a fair preponderance of the evidence that he acted in heat of passion on sudden provocation where the issue of heat of passion was raised. Thus Maine's law under these circumstances relieved the State of the burden of proving both malice and the absence of heat of passion. In this the Supreme Court found that due process was wanting. It said:

> "Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship,* 397 U.S. at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 703-704.

In North Carolina, our law of homicide pertinent to the questions here raised has not been substantially changed since it was enunciated in 1864 in *State v. Ellick,* 60 N.C. 450. This Court there said:

> "When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse or mitigation, is upon him." *Id.* at 459.

* * * *

> ". . . the fact of the homicide must be proved *by the State;* but if found or admitted, the *onus* of showing justification, excuse or mitigation, is upon the *prisoner.*" *Id.* at 462.

The Court in *Ellick* concluded its opinion by saying that any fact which the State is required to establish must be proved beyond a reasonable doubt; but as to facts which the prisoner is required to establish, the jury must be satisfied by the testimony that they are true. *Ellick* has been cited as authoritative in *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 341 (1965) and *State v. Creech,* 229 N.C. 662, 673, 51 S.E. 2d 348, 357 (1949).

Another of our early cases on the subject was *State v. Willis,* 63 N.C. 26 (1868), which while holding that the defendant need not prove mitigation or justification by a preponderance of the evidence, nevertheless approved the following instruction given by the trial judge:

> "[W]hen it is proved or admitted that one killed another intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and all the circumstances of such justification, excuse or mitigation are to be satisfactorily proved by him, unless they appear in the evidence against him; that the fact of killing being proved or admitted, nothing more appearing, the law presumes such killing to have been done in malice, and so to be murder; that the circumstances of justification, excuse or mitigation, are to be *satisfactorily* proved, not proved as the State is required to prove an essential fact, that is beyond a reasonable doubt, for the doctrine of reasonable doubt is never applied to the condemnation of a prisoner, but to his acquittal; and that the jury must be satisfied by the testimony offered in the case on either side that the matter in justification, excuse or mitigation is true." *Id.* at 26-27. (Emphasis supplied.)

The Court said further:

> "We prefer to stand *super antiquas vias,* and to adhere to the rules laid down in the *State v. Ellick,* above referred to. In that case the erroneous statement which we had inadvertently made in the *State v. Peter Johnson,* [48 N.C. 266 (1855)] that it was incumbent on the prisoner to establish the matters of excuse or extenuation beyond a

> reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth v. York* [9 Met. (50 Mass.) 93 (1845)], that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury." *Id.* at 29.

In *State v. Vann,* 82 N.C. 631, 635 (1880), Justice Dillard, elucidating the law laid down in *Ellick* and *Willis,* wrote:

> "In an indictment for murder, the two constituents of the crime, to-wit, a voluntary killing and malice aforethought, must be proved by the state, as it makes the charge; and as the accused is presumed to be innocent until the contrary is shown, both of these elements must be proved. The killing being shown, then the other ingredient, malice prepense, is also proved as a fact in the eyes of the law, not by evidence adduced, but by a presumption that the law makes from the fact of the killing. And these two essential facts being thus established, the legal conclusion thereon is, that the offense charged is murder. (Citations omitted.)
>
> "But the implication of malice, made by the law and taken as a fact, is not conclusive on the party accused, but may be rebutted. He may show, if he can, by his proofs, that there was no malice prepense and thereby extenuate to manslaughter, or make a case of justifiable or excusable homicide, or a case of no criminality at all by proof of insanity at the time of the act committed, disabling him to know right from wrong. (Citations omitted.) *The burden lies on the accused to make these proofs, if he can; otherwise, the conclusion of murder, on a malice implied, will continue against him and will call for, and in law, oblige a conviction by the jury.*" (Emphasis supplied.)

In *State v. Miller,* 112 N.C. 878, 885, 17 S.E. 167, 169 (1893), the Court pointed out "that when the killing with a deadly weapon is proved and admitted the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well that offered for the State as for the defense, that matter relied on to show mitigation or excuse is true."

These early cases were decided before the enactment of N. C. Pub. Laws 1893, ch. 85 (now N. C. Gen. Stat. 14-17), which divided murder into two degrees. This act made certain specified kinds of murder, including a deliberate and premeditated killing, murder in the first degree. All other kinds of murder were made by the statute murder in the second degree. *State v. Benton,* 276 N.C. 641, 657, 174 S.E. 2d 793 (1970). Homicide cases decided subsequent to this statute continued to sanction the presumptions of unlawfulness and malice but refused to recognize any presumption of premeditation or deliberation. *State v. Brown,* 249 N.C. 271, 106 S.E. 2d 232 (1958) ; *State v. Absher,* 226 N.C. 656, 40 S.E. 2d 26 (1946) ; *State v. Keaton,* 206 N.C. 682, 175 S.E. 296 (1934) ; *State v. Rhyne,* 124 N.C. 847, 33 S.E. 128 (1899) ; *State v. Fuller,* 114 N.C. 885, 19 S.E. 797 (1894). Modern, accurate and sufficient statements of the rules regarding these presumptions may be found in *State v. DuBoise,* 279 N.C. 73, 181 S.E. 2d 393 (1971) ; *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971).

The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules.

This Court has never defined precisely what is meant by "satisfying" the jury. It has been clear, however, from the earliest cases that satisfying the jury meant something other than persuading beyond a reasonable doubt and persuading by a preponderance of the evidence. *State v. Freeman,* 275 N.C.

662, 170 S.E. 2d 461 (1969); *State v. Barrett,* 132 N.C. 1005, 43 S.E. 832 (1903). This Court said in *Barrett:*

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations—one which robs the crime of malice and the other which excuses it altogether.

Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of passion in which case he could be convicted only of manslaughter. Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satifies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.

We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in *Mullaney.* There could not, consequently, be any *Mullaney* error prejudicial to defendant on this aspect of the case.

As a matter of state law, however, and as the jury was instructed here, our rules allocating burden of proof on self-defense and heat of passion are the same. As early as 1868 this

Court in *State v. Willis, supra* at 29-30 said, "In the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide." There is in this case evidence of self-defense. The issue regarding its existence is properly presented. For the guidance of our trial judges, consequently, and inasmuch as there are jury instructions given here as if there were evidence of a heat of passion killing, we have dicussed the matter as if such evidence were indeed present.

It is also true that the trial judge did near the beginning and at the end of his instructions tell the jury that the State had the burden to prove beyond a reasonable doubt both malice and unlawfulness. We are cognizant of the federal rule that jury instructions must be considered contextually in determining whether there is error of federal constitutional dimension. *Cupp v. Naughten,* 414 U.S. 141 (1973). Considering the entire instruction contextually we believe it must have meant this to the jury in this case: the state as a matter of abstract principle was required to prove each element of the offense charged, including malice and unlawfulness, beyond a reasonable doubt. If, however, an intentional killing with a deadly weapon was so proved (defendant here admitted this much) a presumption arises which even in the presence of evidence of a justifiable, and hence, lawful, homicide nevertheless relieves the state of proving unlawfulness and requires the jury to find the defendant guilty unless this evidence satisfies it of the truth of defendant's contention that he did kill in self-defense.

**[8]** The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney,* is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams, supra,* to remain and be weighed against contrary evidence if

it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence. *Cf.* McCormick, Evidence § 346, n. 91 (2d Ed. 1972). We find this perceptive language in G. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion-Practices in Criminal Cases," 77 Yale L.J. 905 (1968) (cited in *Mullaney v. Wilbur, supra,* n. 16):

> "The critical step in the conceptual evolution of malice is *MacKally's Case.* [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it is. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel."

The same, we believe, may be said of the element of unlawfulness. There is no suggestion in *Mullaney* that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. "Many States do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. (Citations omitted.) Nothing in this opinion is intended to affect that requirement." *Mullaney v. Wilbur, supra,* n. 28.

If there is evidence tending to show all elements of heat of passion on sudden provocation or self-defense the mandatory presumption of malice and unlawfulness, respectively, disappear but the logical inferences remaining from the facts proved

may be weighed against this evidence. In *United States v. Barnes,* 412 U.S. 837 (1973), the Supreme Court said:

> "Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory'. . . . The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the government."

*See United States v. Dube,* 520 F. 2d 250 (1st Cir. 1975) (Judge Campbell concurring.)

*Mullaney,* then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon

considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

V

This case was tried November 21, 1974; *Mullaney* was decided June 9, 1975. We decline, without further guidance from the Supreme Court, to give the decision retroactive effect. We believe and hope that the Supreme Court will eventually determine that the decision applies prospectively only. If such a determination is eventually made by the Supreme Court not only would we not be required to apply its principles to the case now before us, *Kaiser v. New York,* 394 U.S. 280 (1969); *Desist v. United States,* 394 U.S. 244 (1969), it seems that it would be considered error by the Supreme Court for us to do so. In *Michigan v. Payne,* 412 U.S. 47 (1973), the Michigan Supreme Court had rejected a higher sentence imposed upon a defendant convicted after a retrial than was imposed upon his first conviction as being violative of certain due process requirements established in *North Carolina v. Pearce,* 395 U.S. 711 (1969). The second sentence was imposed before the *Pearce* decision. In *Payne* the United States Supreme Court held that *Pearce* would not apply retroactively and it was, consequently, error for the Michigan Supreme Court to apply it to a sentencing proceeding which predated the decision although the question of the constitutionality of the higher sentence was pending before the Michigan Supreme Court when *Pearce* was decided. The judgment of the Michigan Supreme Court was reversed and the case remanded for further proceedings. *See also State v. Bullock,* 268 N.C. 560, 151 S.E. 2d 9 (1966) and *State v. Mills,* 268 N.C. 142, 150 S.E. 2d 13 (1966) where we declined to apply *Miranda v. Arizona,* 384 U.S. 436 (1966) to cases in which the trials were conducted before the decision but which were pending on appeal at the time the decision came down, on the authority of *Johnson v. New Jersey,* 384 U.S. 719 (1966).

While *Mullaney* relied heavily on *Winship* and *Winship* was held to be retroactive in *Ivan V. v. City of New York,* 407 U.S. 203 (1972), it does not necessarily follow that *Mullaney* will be given retroactive effect.

In determining whether a new rule of constitutional proportions is given retroactive effect the Supreme Court seems

to have considered three factors. The most important factor seems to have been the purpose to be served by the new rule. If the rule is designed to protect the reliability of the fact finding process and "the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined" then it has been said that the decision will on this basis alone be given full retroactive effect. *Ivan V. v. City of New York, supra* (holding *In re Winship, supra,* retroactive); *Roberts v. Russell,* 392 U.S. 293 (1968) (holding *Bruton v. United States,* 391 U.S. 123 (1968) retroactive).

If the first factor is not determinative then the Supreme Court has considered two other factors: the extent of reliance on previous decisions, *Tehan v. United States ex rel. Shott,* 382 U.S. 406 (1966), even though the new rule may have been "foreshadowed" by intervening cases, *Desist v. United States, supra* at 248, and the effect on the administration of justice of retroactive application, *Id.* at 251, not only in the nation as a whole but within the particular jurisdictions affected. *Tehan v. United States ex rel. Shott, supra* at 418-419.

Although the first factor listed is clearly the most important, how that factor is approached by the Supreme Court seems sometimes to depend on analysis of the other two factors. *Compare Tehan v. United States ex rel. Shott, supra* (holding *Griffin v. California,* 380 U.S. 609 (1965) not retroactive), *with Stovall v. Denno,* 388 U.S. 293 (1967) (holding *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California,* 388 U.S. 263 (1967) not retroactive). In holding *Griffin,* which declared unconstitutional the California practice of commenting on a defendant's failure to take the stand, not to be retroactive the Supreme Court in *Tehan* recognized that, although only six states would be affected by *Griffin,* almost every trial in those six states going back many years might have to be upset if *Griffin* were made retroactive. Noting such a devastating impact on the administration of justice, the Supreme Court said:

> "Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin.* Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." *Tehan v. United States ex rel. Shott, supra* at 418-419.

*Mullaney* and *Winship* are poles apart in terms of extent of reliance on previous rules and the effect on the administration of justice of retroactive application. It seems clear that the Supreme Court saw no reliance by New York on previous rules in *Winship*. It traced almost 100 years of cases in which it had "assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship, supra* at 362. It considered *In re Gault,* 387 U.S. 1 (1967) as an express rejection of the notion that the Due Process Clause was inapplicable to juvenile proceedings. *In re Winship, supra* at 365. *Winship,* furthermore, involved a juvenile proceeding. Its impact, consequently, on the administration of justice in New York would obviously be less than a rule which applies to all homicide cases.

The jury instructions here under attack are based upon rules which have been firmly with us for over one hundred years. Retroactive application of *Mullaney* in this State would, furthermore, have the same sort of affect, recognized in *Tehan,* as *Griffin* retroactivity would have had in California and other jurisdictions. As of June 30, 1975, there were 269 inmates in prison in this State who had been convicted of first degree murder serving sentences of life imprisonment or awaiting execution, and 728 inmates in prison having been convicted of second degree murder serving sentences ranging from two years to life. State Correctional Statistical Abstract for the Second Quarter, 1975. If *Mullaney* is to be applied retroactively new trials might have to be awarded in many cases decades old.

A number of other jurisdictions would, we believe, be similarly affected. In the following seven jurisdictions the defendant has (or had) the burden to prove by a preponderance of the evidence heat of passion on sudden provocation (or "extreme emotional distress") to reduce murder to manslaughter: *Delaware, Fuentes v. State,* 18 Crim. Law Rptr. 2153 (Del. Oct. 14, 1975); *Hawaii, (Mullaney* would probably affect cases in which the appeal was finally determined prior to August 27, 1971. *Compare State v. Santiago,* 53 Haw. 254, 492 P. 2d 657 (1971) *with State v. Cuevas,* 53 Haw. 110, 488 P. 2d 322 (1971)); *Maine, Mullaney v. Wilbur, supra; Maryland, Wilson v. State,* 261 Md. 551, 276 A. 2d 214 (1971); *Wilson v. State,* 28 Md. App. 168, 343 A. 2d 537 (1975); *Burko v. State,* 19 Md. App. 645, 313 A. 2d 864 (1974) vacated 422 U.S. 1003, 95 S.Ct. 2624 (1975); *Massachusetts, Comm. v. Johnson,* ____ Mass. App. ____, 326 N.E. 2d 355 (1975) restating the rule of *Comm.*

*v. York,* 50 Mass. (9 Met.) 93 (1845); *Cf. Comm. v. Gagne,* ...... Mass. ......, 326 N.E. 2d 907, 910 (1975); *New York, People v. Balogun,* 372 N.Y.S. 2d 384 (N. Y. Supreme Ct. Kings County 1975); *Tennessee, Hawkins v. State,* 527 S.W. 2d 157 (Tenn. App. 1975). If, as we believe, *Mullaney* prohibits requiring the defendant to prove that he acted in self-defense by a preponderance of the evidence when that issue is properly presented the following seven jurisdictions would be adversely affected: *Georgia, Chandle v. State,* 230 Ga. 574, 198 S.E. 2d 289 (1973); *See also Henderson v. State,* ...... *Ga.* ......, 218 S.E. 2d 612 (1975) (citing *Mullaney*); *Ohio, State v. Poole,* 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973) (for cases prior to January 1, 1974, the effective date of Ohio Rev. Code Ann. § 2901.05 (Page 1975) which probably corrects Ohio law); *Pennsylvania, Comm. v. Cropper,* ...... Pa. ......, 345 A. 2d 645 (1975) (intimating that *Mullaney* may affect Pennsylvania); *Comm. v. Carbonetto,* 455 Pa. 93, 314 A. 2d 304 (1974); *Comm. v. Winebrenner,* 439 Pa. 73, 265 A. 2d 108 (1970); *Rhode Island, State v. Mellow,* 107 A. 871 (1919); *South Carolina, State v. Judge,* 208 S.C. 497, 38 S.E. 2d 715 (1946); *Texas, Parkman v. State,* 149 Tex. Cr. 101, 191 S.W. 2d 743 (1945) (at least in cases tried before January 1, 1974, the effective date of the new Texas Penal Code §§ 2.03, 9.02, 9.31 (Vernon 1974), which probably corrects Texas law in this respect); *West Virginia, State v. Collins,* 154 W. Va. 771, 180 S.E. 2d 54 (1971).

Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

We concede that the purpose of the *Mullaney* rule, to insure a reliable determination of the question of guilt, or the degree of guilt, weighs in favor of retroactivity. Yet the Supreme Court has recognized that "the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities." *Williams v. United States,* 401 U.S. 646, n. 7 (1971); *Stovall v. Denno, supra.* While in *Winship* there could be no question that the standard of proof employed was determinative on the issue of guilt, *In re Winship, supra,* n. 2, whether the jury instructions condemned in *Mullaney* and even more clearly those under attack here would in the final analysis be so determinative to a jury so instructed is a matter of pure speculation.

We note that both cases from other jurisdictions which have so far considered the question, have determined that *Mullaney* should not be given retroactive effect. *Fuentes v. State, supra* (Delaware); *People v. Balogun, supra* (New York).

For the reasons given, in the trial we find

No error.

Justice LAKE concurring in result.

It is elementary that a decision of the Supreme Court of the United States interpreting the Constitution of the United States is binding upon this Court and, although we may believe it to be erroneous, we must give it full effect in cases coming before us. It is equally elementary that a decision of a court of last resort, declaring or interpreting a rule of law, is retroactive and applies to all cases thereafter to be decided, irrespective of when they arose, unless the court which rendered that decision declares otherwise. This is more clearly true when there has been no prior conflicting decision by that court. This Court does not have authority to declare a decision of the Supreme Court of the United States non-retroactive. In the silence of that Court on that question a decision by it, interpreting the Due Process Clause of the Fourteenth Amendment, gives to that clause the meaning so declared just as if the interpretation had been expressly written into it at the time the Amendment was ratified.

To hold, as the majority opinion does, that *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. ----, 44 L.Ed. 2d 508, declares that the instruction given the jury in the case now before us, violates the Due Process Clause of the Fourteenth Amendment, but that we will, nevertheless, refuse to order a new trial is for this Court to deny to this defendant his right under the United States Constitution. I agree that to give *Mullaney v. Wilbur, supra,* retroactive effect and to hold that it declares the instruction in question is contrary to the Due Process Clause of the Fourteenth Amendment would be disastrous, for such ruling would require a new trial, not only for this defendant, but for an unknown number, perhaps hundreds, of prisoners now serving sentences for murders of which this Court has held they were lawfully convicted. The practical effect would be to release most of these convicted murders upon society, since loss of witnesses, due to the passage of time, would, in most instances, pre-

vent conviction upon a retrial. This disaster can be averted if the Supreme Court of the United States declares *Mullaney v. Wilbur, supra,* to be non-retroactive, a consummation devoutly to be desired, but this Court has no authority so to declare and, as of this date, the Supreme Court of the United States has not done so.

There is a way, however, whereby this Court can avoid this disastrous result and, in my opinion, should do so. That is to hold, as I believe is correct, that *Mullaney v. Wilbur, supra,* does not declare the instruction given to the jury by the Superior Court in Hankerson's case a violation of the Due Process Clause. If that be true, Hankerson is not entitled to a new trial and the majority opinion has reached the correct result for the wrong reason.

This is the instruction in question:

> "Under our system, when a person is charged with a crime and he pleads not guilty he does not have to prove that he is innocent, he is presumed innocent, and the *burden of proof is on the State to prove beyond a reasonable doubt that he is guilty* before you can find him guilty.
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> * * *
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> "I charge that for you to find the defendant guilty of second degree murder [the crime with which Hankerson was charged and of which he stands convicted], *the State must prove two things beyond a reasonable doubt* * * * that the defendant intentionally *and without justification* or excuse and *with malice* shot Gregory Ashe with a deadly weapon. *Malice* * * * *means that condition of mind which prompts a person* to take the life of another intentionally, *or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.*
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> * * *
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> "In order to reduce the crime from second degree murder to manslaughter, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that there was no malice on his part. And in order to excuse his act altogether on the grounds of self defense, *the defendant must prove* not beyond a reasonable doubt but *simply to your satisfaction* that he acted in self defense.

* * *

"So I charge you, Ladies and Gentlemen, *if you find* from the evidence and *beyond a reasonable doubt* that on or about September 29, 1974, *the defendant,* Johnnie B. Hankerson, *intentionally and with malice* and *without justification or excuse* [i.e., not in self defense] shot Gregory Ashe with a deadly weapon, thereby proximately causing Gregory Ashe's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder. *However, if you* do not so find, or *have a reasonable doubt as to one or more of these things,* you will not return a verdict of guilty of second degree murder." (Emphasis added.)

By this instruction the trial judge put squarely upon the State the burden to prove *beyond a reasonable doubt* every element of second degree murder, namely: (1) The defendant shot Ashe; (2) he thereby proximately caused Ashe's death; (3) he shot Ashe with malice (i.e., intentionally and with a deadly weapon); (4) he shot Ashe without justification or excuse (i.e., not in self defense).

Clearly, if this were all that the jury was told, the rule of *Mullaney v. Wilbur, supra,* would be fully satisfied. But, says the majority, this is not all they were told. They were also told that to reduce the offense to manslaughter the defendant must prove *to the jury's satisfaction* he did not shoot Ashe with malice, and to excuse the killing entirely on the ground of self defense, the defendant must prove *to the jury's satisfaction* that he killed Ashe in self defense, the elements of which were correctly defined.

At first glance it seems inconsistent and contradictory to instruct the jury that the State has the burden to prove beyond a reasonable doubt the presence of malice and absence of the justification of self defense and the defendant has the burden of proving *to the satisfaction of the jury* the absence of malice or the presence of the justification of self defense. This Court has, however, held to the contrary many times, the harmonizing factor lying in the meaning of the term "to the satisfaction of the jury."

In *State v. Freeman*, 275 N.C. 662, 666, 170 S.E. 2d 461, Justice Sharp, now Chief Justice, speaking for a unanimous Court, said:

> "These cases [citations omitted] enunciate and reiterate the rule—established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868)—that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—*but simply to the satisfaction of the jury.*"

In Stansbury, North Carolina Evidence (Brandis Revision), § 214, it is said that proving the presence of self defense or the absence of malice "to the satisfaction of the jury" does not require a showing "by the greater weight of the evidence."

If the defendant can satisfy this requirement by less than the "greater weight" of the evidence; that is by less persuasive, less convincing evidence than would be sufficient to tip the scales ever so slightly in his favor, how can it be said that the burden *of proof* "has been put upon him?" The burden of proof is the *burden* to persuade the mind, to convince. A burden less than this can only be a burden to establish a reasonable, rational doubt. Thus, there is no inconsistency in telling the jury that, to convict the defendant of second degree murder, the State must prove presence of malice and absence of justification (self defense) beyond a reasonable doubt and, although the State has proved, beyond a reasonable doubt, an intentional killing with a deadly weapon, the defendant must be acquitted of that charge if he has *satisfied* the jury of the absence of malice or the presence of justification (self defense).

Admittedly, the jury cannot be expected to know what this Court has said proof "to the satisfaction of the jury" does not mean. The question is whether the jury could have been misled by what the trial judge told them in his charge *in this case.* As above stated, he clearly and unequivocally told the jury they must find the defendant not guilty of second degree murder unless the State had proved *beyond a reasonable doubt* every element of that crime, including the presence of malice and the absence of justification (self defense). In my opinion, the jury which found this defendant guilty of second degree

murder could not have been confused about this, and the charge of the court, which is a correct statement of the law of this State, did not in any way place upon the defendant a burden of proof forbidden by the Due Process Clause of the Fourteenth Amendment as now construed in *Mullaney v. Wilbur, supra.* I, therefore, concur in the majority's conclusion that this defendant is not entitled to a new trial.

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STATE OF NORTH CAROLINA v. ROGER DALE CURRY, JOSEPH MICHAEL GUNTER, ALBERT WILLIAM JOHNSON, RONALD ALLEN JOHNSON, LOWELL GENE BOWLES, JAMES OLIVER STEVENS

No. 37

(Filed 17 December 1975)

1. **Burglary and Unlawful Breakings § 5; Robbery § 4— first degree burglary — robbery with firearm — sufficiency of evidence**

Defendants' motions to dismiss the charges of first degree burglary and robbery with a firearm were properly denied where the evidence tended to show that the victim was awakened during the night by the growling of his dog, he observed a man shining a flashlight into his window, the man entered the house and told the victim to call his dog and come outside to talk, the victim refused and armed himself with a pistol, the intruder left the house, the victim observed eight armed men standing in his yard, three entered the house and began firing at the victim who returned their fire, the three men left and fired into the house from outside, one of the men told the victim to throw his gun down or they would burn the house, the victim complied, the eight men beat him, and the eight then went through the victim's house emptying drawers and boxes, smashing furniture, and taking various items belonging to the victim, and the victim identified the six defendants as participants in the crime.

2. **Searches and Seizures § 1— search of shed cellar — standing of defendants to object**

Defendants had no standing to object to the admission into evidence of weapons and articles found in the cellar of a shed in the vicinity of the crime, since the shed was not occupied by anyone at the time of the discovery and seizure of the articles and was not on or a part of the premises occupied by defendants, none of the defendants was then in or about the shed, and no defendant asserted any ownership or possessory interest therein; furthermore, a photograph of the articles seized and the articles themselves were admissible in evidence since they were seized during a lawful, though warrantless, search of the shed by officers who had probable cause to believe that two of the defendants were probably concealed in the vicinity.

**3. Criminal Law § 84; Searches and Seizures § 1— weapons in plain view — seizure without warrant — admissibility**

Where defendants failed to object at the time they were offered into evidence to the admission of weapons removed by officers from one defendant's house, they cannot assert on appeal that the weapons were the fruit of unreasonable search and seizure; moreover, evidence tended to show that the officers were lawfully in the house, having reason to believe that two other defendants for whom the officers had arrest warrants might be therein, and the evidence tended to show that the weapons seized were in plain view in the house.

**4. Burglary and Unlawful Breakings § 4; Robbery § 3— victim's description of assailants — competency**

The trial court in a prosecution for first degree burglary and robbery with a firearm did not err in allowing the victim, over objection, to describe the appearance of and clothing worn by his assailants or in admitting into evidence a shirt and jacket worn by one defendant when he was arrested.

**5. Criminal Law § 86— cross-examination of defendant — prior convictions or acts of misconduct**

A defendant in a criminal case who takes the witness stand may not be asked on cross-examination as to whether he has been accused, indicted or arrested for an unrelated criminal offense, but he may be asked whether he has been convicted of or has committed such criminal acts or other specific acts of reprehensible conduct, provided the question is asked in good faith; therefore, it was not error for the trial court to permit the State to cross-examine defendants charged with first degree burglary and robbery with a firearm with reference to other acts of misconduct.

**6. Criminal Law § 77— defendant held at gun point — statement competent as admission**

In a prosecution for first degree burglary and robbery with a firearm where the evidence tended to show that the victim's stepfather, not a police officer, held one defendant at gun point while the victim went to call police and the stepfather asked defendant who had been with him, defendant's response, "I'll take you to the rest of them if you will let me go," was competent as an admission against that defendant.

**7. Criminal Law § 58— handwriting expert — refusal to give opinion — other testimony admissible**

Although an expert handwriting witness was unable to form an opinion satisfactory to himself as to whether one defendant had or had not signed the document in question because it was the witness's opinion that the photostatic copy of the document offered him did not show clearly certain characteristics of the handwriting, it was not error for the court to allow the witness to point out certain observable differences between the photostatic copy of the document and a known sample of the defendant's handwriting.

**8. Criminal Law § 66— improper lineup procedure — in-court identification *not tainted***

In a prosecution for first degree burglary and robbery with a firearm, the trial court did not err in allowing the victim's in-court identification of each defendant, though the victim had previously identified four of the defendants in an improper lineup procedure, since the trial court determined that the victim's in-court identification of defendants was based solely on what he observed at the time of the crime and was not the result of any out-of-court confrontation.

**9. Criminal Law § 169— exclusion of witness's answers — failure to include answers in record — no error shown**

Defendant failed to show error in the exclusion of answers by a witness to questions where the record fails to show what the witness would have answered.

APPEAL by defendants from *Thornburg, J.*, at the 3 February 1975 Session of MECKLENBURG.

Under separate indictments, each proper in form, the six defendants were tried together and each was convicted of burglary in the first degree and of robbery with a firearm. On the burglary charge each was sentenced to imprisonment for life and on the robbery charge to imprisonment for 30 years, the sentences to run concurrently. All assignments of error relate to rulings of the trial court admitting evidence offered by the State, overruling of objections to cross-examination of the defendants and to the denial of motions for dismissal.

The evidence for the State, if true, is sufficient to show the following:

On 30 March 1974, Michael Francis moved into a house on Heavy Equipment School Road in Mecklenburg County. The defendants Gunter and Ronald Johnson lived in two other houses in the vicinity. On the night of 3-4 April 1974, Francis was alone with his dog in his house. He was awakened shortly after midnight by the growling of his dog. He observed a man outside the house shining a flashlight into it through a window. This man pushed the door open and entered the house, shining the light about. He told Francis to call his dog and to come outside to talk. Francis refused to do so and armed himself with a pistol. The intruder, identified in court by Francis as the defendant Curry, then left the house. In the yard there was a light similar to a street light. As Francis was dressing, the dog growled again, so Francis went to the window carrying a pistol and a rifle. He observed eight armed men standing in

his yard. Three of them approached the door. As they did so he could see their faces. They were the defendants Curry, Stevens and Bowles. They kicked the door open and entered the house. All three were armed with pistols and began firing at Francis, who returned the fire with his rifle. One of the three, believed by Francis to be Stevens, said he was shot, and the three men left the house. Thereafter, they fired into the house from outside it. The exchange of gunfire continued fifteen to twenty minutes. By the light from the yard lamp, Francis recognized Gunter, with whom he had had some discussion on the day he moved into the house. Gunter was armed and called to Francis, telling him to throw his gun down or they would burn the house. Francis, running low on ammunition, threw his gun down, turned on his light as directed and stood in the doorway with his hands raised.

Pursuant to direction from the armed group, Francis went out into the yard. Gunter hit him in the head with a pistol and Curry began taking things from Francis' pockets. Francis was then dragged back into the house, which was then well lighted, and badly beaten.

In the courtroom, Francis identified all six of the defendants as members of the attacking group. The other two men were not apprehended. Each of the six was armed with a pistol, rifle or machine gun. All participated in the beating of Francis. The group pulled the drawers from Francis' desk, emptying the contents and searching through these. Ronald Johnson broke open a locked box and took therefrom eight track tapes. Gunter removed Francis' wristwatch, knife, belt and holster. Others of the defendants smashed various articles of furniture and removed from Francis' pocket his wallet, car keys, pocket knife and change.

Finally, Francis broke away and ran out of the house and into the woods. Reaching a telephone, he called his stepfather who came to his assistance. They returned to the house, from which the intruders had departed, and found it generally ransacked and Francis' boots, guns, radio and stereo missing. Numerous bullet holes were in the furniture and door and window.

Francis' stepfather, hearing a noise outside, went out and observed the defendant Curry looking in the kitchen window. He held Curry at gun point. Francis came out and identified

Curry as one of the attacking group. Francis went to a telephone and summoned the police. After his return Curry broke away and ran to and dived into a nearby pond. He was recaptured by Francis and his stepfather and held until the arrival of the police officers, who took him into custody, searched him and found on him tools belonging to Francis.

At the time of the entry of the eight men into Francis' house, the defendant Stevens was wearing a cut off blue jean jacket on the back of which was printed the word "Outlaw." Curry, when captured, was wearing a black T-shirt on the back of which was the word "Outlaw" and on the front of which was a patch bearing the words "One Percenter." The remaining men in the attacking group were wearing blue jeans and T-shirts. All of the defendants wore long hair and beards or mustaches.

Arriving at the Law Enforcement Center, after first going to the hospital emergency room for treatment of his injuries, Francis described his attackers to the officers, who handed him photographs of ten known members of a motorcycle club in the Charlotte area known as the "Outlaws." All the photographs were of young white males with long hair and beards. From the photographs Francis identified the defendants Gunter, Bowles, Ronald Johnson and Stevens as among his eight attackers. Later in the day, he picked Albert Johnson from a lineup as another of the attacking group.

The next morning a group of police officers, having warrants for the arrest of Gunter, Stevens and Bowles, went to the Gunter and Johnson residences to arrest them. Gunter came out of one of the houses carrying a revolver. At the direction of the officers he dropped it and was arrested. The officers instructed him to call out of the houses anyone still therein. He called out the names "Glueball" and "Abby." The two defendants Johnson came out, one from each house. They were also placed under arrest for investigation for these offenses and the three were taken to the police station. Stevens and Bowles were not found by the officers at that time and were arrested at substantially later dates.

After the arrest of Gunter and the two Johnsons, officers went into the Johnson house in an effort to locate and arrest, pursuant to the warrants, the defendants Stevens and Bowles, having information that these defendants had been staying there. They did not find them. As they walked through the

house, they observed in plain view, and took into their possession, a loaded shotgun, a pistol, a .22 caliber rifle, a machine gun and substantial quantities of ammunition. These weapons were introduced in evidence. When they took possession of them, the officers did not know whether other persons, including Stevens and Bowles, were in the house.

Nearby was a shed building, not part of the Gunter or Johnson premises. It was unoccupied and the record does not indicate who was its owner. Two of the officers went to it to search for Stevens and Bowles. They crawled through a window and searched the structure but found no one. They removed a piece of aluminum siding from a cellar door and entered the cellar, still looking for Bowles and Stevens. They found no one, but observed, in plain view, a pair of boots and other articles identified by Francis as having been removed from his house by the attacking group. These were introduced in evidence. Francis had observed Gunter pick up the boots in his house.

On 26 October 1974, Francis, having previously identified the picture of the defendant Stevens as that of one of the attacking group, viewed a lineup of five persons from which he picked Stevens as one of the attacking group.

Three .22 caliber cartridge casings found by the officers in the yard of the Francis house were, in the opinion of the State's expert witness on ballistics, fired from the .22 caliber rifle found by the officers in the Johnson house.

The defendant Stevens, though not testifying himself, offered evidence which, if true, showed that he was in the State of Colorado at the time of the alleged offenses, that he was then using the name Gerald Murphy, and in that name, on the date of the alleged offenses, applied in Colorado for a transfer of an automobile title from a South Carolina registration to a Colorado registration. There is no scar on Stevens' body such as would have been there had he been shot on 4 April 1974, as Francis testified.

The woman, with whom the defendant Gunter was living on the date of the alleged offenses, testified that during the entire night of April 3-4 Gunter was with her in their house and, while they were watching television, they heard a number of gunshots. After the gunfire stopped, Gunter went to see what was happening. While the gunfire was in progress, Albert Johnson, who was staying with Ronald Johnson, came

to the Gunter house and commented on the gunfire. Gunter, himself, also testified that he was watching the television when the gunfire was heard, that Albert Johnson then came in and after the gunfire ceased the two of them went to investigate. He denied seeing Francis at any time that night and testified that none of the things alleged to have been taken from the Francis house was ever in Gunter's house at any time. The shed in which some of these articles were found by the searching officers is not on Gunter's property. Gunter denied that he had ever entered Francis' house, removed anything therefrom or struck Francis. When he went to investigate the shooting, he saw the defendant Bowles coming toward him. Bowles "had nothing" and they had no conversation.

The defendant Ronald Johnson testified that at the time of the shooting he was at his home working on a motorcycle. With him during the evening were his wife, Bowles and two other men who had come with Curry. When he heard the gunshots, he went out into his yard. At that time his shotgun was in a closet in his house. He never picked it up or left his premises or fired a gun that night. Albert Johnson, Bowles, Curry and Curry's two friends were in and out of the house during the evening. When the officers came to the Johnson house the next morning, the shotgun was in the closet, not on the window ledge where the officers testified they saw it. The .22 caliber rifle was not in the house at all. Johnson gave no officer or any other person permission to search his house or remove any gun or other object therefrom. The shed from which the searching officers removed articles is not on the Johnson property and Johnson put nothing therein. He did not see Stevens on the night in question.

The defendant Bowles testified that on the night of April 3-4, 1974, he was visiting at the home of Ronald Johnson. Also present there during the evening were Ronald Johnson's wife, Albert Johnson, Curry and two friends of Curry's whom Bowles had never seen before. Bowles left the Johnson house, after the gunfire stopped, to see what was happening. When he got to the Francis house, Francis, Curry and Curry's two friends were in the front yard and a scuffle was in progress. One of Curry's friends cried out that he had been shot. This man was beating Francis with a gun and Curry was trying to pull him away from Francis. Bowles attempted to take the gun and was, himself, struck in the head with it. At that time Francis ran away. Bowles

never went into the Francis house. On the way back to the Ronald Johnson house, he met Albert Johnson who asked what had happened. He also met Gunter. After this occurrence was concluded, Bowles left the vicinity and went to his parents' home, stayed there a day and then returned to his own home in Atlanta. When Bowles left the Francis premises the two friends of Curry's were still in the yard and Bowles never saw them again. He took no gun down to the Francis house and did not observe any gun in the Ronald Johnson house.

The defendant Curry testified:

On the evening of 3 April 1974, he was visting Ronald Johnson and Gunter, being accompanied by two acquaintances from Michigan. In the early evening the three of them had a conversation with Francis, as a result of which one of Curry's friends gave Francis a $100 bill for which Francis agreed to procure marijuana which he would deliver to Curry's friend at his house at 11 p.m. Curry and his two friends went to Francis' house at the appointed time to get the marijuana. Curry had no weapon and no flashlight and did not look through a window into Francis' house.

Curry knocked on the door and Francis came to the door with his German police dog on a chain and with a pistol, which he pointed at Curry. Curry asked Francis to come outside as Curry's two friends wanted to see him. Francis refused to do so and said he did not have the marijuana and they should come back the next day. Curry then went back to his two friends in the yard and reported to them what Francis had said. No one else was present. Curry and his two friends then approached the door of the Francis house. As they did so, a gun was fired through the doorway. One of Curry's Michigan friends cried out that he had been shot. The two Michigan men then ran back to their car, got their guns and returned the fire. Approximately a dozen shots were fired altogether.

Curry had no weapon and did not kick open the door to the Francis house. This was done by one of the men from Michigan. Francis gave up and came to the door. Curry's Michigan friend then seized Francis and dragged him into the yard, hit him with a rifle and knocked him down. Both of the men from Michigan then began to beat Francis. Curry grabbed one of them and tried to get him to stop. Bowles came up and tried to help Curry stop the fight, being, himself, hit by the rifle. Gunter was not present.

The Michigan man took Francis' wallet and searched it for the $100 bill he had given Francis. During the scuffle Francis got up and ran away. The two Michigan men then went into the house to look for the marijuana or the $100 bill. Curry left and went back to the Ronald Johnson house.

When the two Michigan friends did not follow him, Curry went back to the Francis house to find them and at that time was taken prisoner by the stepfather of Francis who held a gun on him. Francis then came up, said that Curry was one of the men who had attacked him and tried to cut Curry with a knife, so Curry ran. While running, he was shot at but not hit and he fell into the pond, swam out to the middle of it and was kept in the pond at gunpoint by Francis and his stepfather until the police officers arrived.

At no time did Curry go into the Francis house or take anything from Francis' pocket. Tools found in Curry's pocket by the arresting officers belong to Curry. He did not at any time see Stevens and never saw Ronald Johnson near the Francis house. He never struck Francis with anything. He has not seen his friends from Michigan since that night.

*Attorney General Rufus L. Edmisten by Associate Attorney Robert W. Kaylor for the State.*

*Eubanks, Villegas & Reavis by Larry L. Eubanks and Samuel J. Villegas for defendant Curry.*

*Michael G. Plumides for defendants Gunter, R. Johnson, A. Johnson and Bowles.*

*James E. Walker for defendant Bowles.*

*Jerry W. Whitley for defendant Stevens.*

LAKE, Justice.

[1] There was obviously no error in the denial of the defendants' motions to dismiss the charges of first degree burglary and robbery with a firearm. It is elementary that in the consideration of such a motion the court must treat the evidence favorable to the State as true, view it in the light most favorable to the State and give the State the benefit of every inference in its favor reasonably to he drawn therefrom. *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612; *State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182; *State v. Everette,* 284 N.C. 81, 199

S.E. 2d 462. Evidence of the defendants relating to matters of defense, or in conflict with the evidence of the State, is not considered upon such a motion. *State v. Carthens,* 284 N.C. 111, 199 S.E. 2d 456; *State v. Everette, supra; State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423; *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326. The court does, however, take into consideration all of the admitted evidence favorable to the State, whether such evidence be competent or incompetent. *State v. Holton, supra; State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. Contradictions and discrepancies, even in the State's evidence, do not warrant the allowance of a motion to dismiss, these being for the jury to resolve. *State v. Holton, supra; State v. Everette, supra; State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845; *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553.

If, so considered, the evidence is sufficient to support a finding of every element of the crime charged (or of any lesser included offense if the motion is directed to the entire bill of indictment) and that the defendant was the perpetrator, or one of the perpetrators, of the offense, the motion to dismiss should be denied. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842; *State v. Allred, supra; State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Virgil, supra.* When the evidence, so considered, is sufficient to support a finding that two or more persons acted together, aiding and abetting each other, to commit the offense charged and that such offense was actually committed by one or more persons in such group, all being present, the evidence is sufficient to support a verdict of guilty as to all members of the group and the motion to dismiss is properly denied as to each such defendant. *State v. Rankin, supra; State v. Peele, supra; State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, vacated as to death sentence only, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761; *State v. Bruton, supra; State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

So considered, the evidence of the State in the present case is ample to support a finding of each element of the offense of burglary in the first degree, each element of the offense of robbery with a firearm and the presence and participation in each such offense of each of the six defendants. Consequently, the motions to dismiss were properly denied.

**[2]** There is no error in the admission in evidence of the weapons taken by the officers from the Ronald Johnson house

or in the admission in evidence of the articles taken by the officers from the cellar of the shed. In each instance the contention of the defendants is that these articles were the products of an illegal search and seizure and, therefore, could not properly be admitted in evidence.

As to the articles taken from the cellar of the shed, it is sufficient to note that none of the defendants has standing to raise the question of unlawful search and seizure. The shed, a building apparently not occupied by anyone at the time of the discovery and seizure of the articles, was not on or a part of the premises occupied by Gunter or Ronald Johnson; none of the defendants was then in or about the shed; and no defendant asserted any ownership or possessory interest therein. Possession of the articles seized at the time of the search and seizure is not an essential element of either of the offenses with which they are charged. *Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed. 2d 208.

Ronald Johnson testified: "The shed is not on my property. I know nothing about the shed. I do not have any of my belongings down there or put any of my belongings in there or anything like it." Gunter testified: "The shed is really like a house. A man tried to rent it. It's got its own yard. It is not on my property. It has its own yard lines. There is [sic] a lot of big bushes and stuff and a lot of ground separating the shed from the Johnson property. The distance between my house and the shed is 100 to 130 feet. There are woods between my house and the shed. The woods are fairly dense." As Chief Justice Parker, speaking for the Court, said in *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25: "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." In *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441, we said: "Neither the Constitution of the United States nor the law of this State confers upon a mere intruder into the house of another the right of the owner to object to a search of it and so enable him to take possession of and use the house of another as a sanctuary within which to secrete stolen property. Such intruder has no right to privacy within such house. Consequently, he has no standing to object to the introduction of the fruits of a search of the house into evidence in his prosecution for the larceny thereof." See also: *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697; *State v. Gordon,* 287

N.C. 118, 213 S.E. 2d 708; *State v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; Strong, N. C. Index 2d, Criminal Law, § 84; Annot., 78 A.L.R. 2d 246; Annot., 4 L.Ed. 2d 1999, 2012.

Furthermore, when the defendants objected to testimony designed to authenticate a photograph of the articles so found in the cellar of the shed, the court properly conducted a voir dire. At its conclusion the court found the following facts which findings (here summarized) are supported by evidence introduced upon the voir dire or theretofore received in the presence of the jury:

> The officers went to the vicinity of the Gunter house carrying warrants for the arrest of Gunter, Stevens and Bowles upon the charges of first degree burglary and robbery with a firearm. Upon their arrival Gunter came from the house armed with a pistol, which he dropped upon orders from the officers. Two other persons, later charged with the same crimes, in response to calls from Gunter at the request of the officers, emerged from the Gunter house and another house nearby (the Johnson house). Under the circumstances, the officers had probable cause to believe that the defendant Bowles and Stevens had probably concealed themselves in the vicinity. The officer who discovered the articles in the cellar of the shed was at a place where he had a right and a duty to be. The articles in question were in his plain view while he was properly searching for Bowles and Stevens.

Upon these findings the court concluded that the photograph of the articles and the articles themselves were admissible in evidence. The findings of fact, being supported by the evidence in the record, are conclusive on appeal. *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364; *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. As Justice Sharp, now Chief Justice, speaking for the Court, said in *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495: "Neither the Fourth Amendment nor G.S. 15-27 is applicable where no search is made. The law does not prohibit a seizure without a [search] warrant by an officer in the discharge of his official duties where the article seized is in plain view." Accord: *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28.

**[3]** As to the weapons removed by the officers from the Ronald Johnson house, it is sufficient to note that the objection on the

ground of unreasonable search and seizure was not made in due time. During the testimony of Francis, concerning the breaking and entering of his house by the defendants and their beating of him, he was shown these weapons, marked for identification as the State's Exhibits 2, 11, 12 and 13, and he identified each as having been used by one of the defendants in beating him. They were then offered in evidence by the State and admitted over the defendants' objections. The prosecuting attorney then requested permission "to show the jury the weapons, State's Exhibits #2, #3, #11, #12 and #13." The defendants' objections thereto were overruled. When asked by the court as to the basis of objection to Francis' being asked, "Where have you seen that before?" the defendants' counsel stated: "I don't know how he can tie any of these weapons in. I've objected all along about their being the ones, unless he got them after the incident." Another of defendants' counsel said: "Your Honor, would the court see fit before introducing any of these weapons into evidence letting us cross examine him about he knows [sic] they are the same weapons, if he does know, and that sort of thing." Until long after these weapons were so admitted in evidence, there was no suggestion whatever to the trial court that the defendants, or any of them, contended the weapons were fruit of an unlawful search and seizure.

In *State v. Crews,* 286 N.C. 41, 44, 209 S.E. 2d 462, we said, "When the defendant objects to the admissibility of the State's evidence *on the ground that it was obtained by unlawful search,* it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant regarding the lawfulness of the search and seizure and to make findings thereon." (Emphasis added.) To the same effect see: *State v. Eppley, supra; State v. White,* 274 N.C. 220, 229, 162 S.E. 2d 473.

Nothing in the record indicates that, at the time these weapons were offered in evidence by the State, the defendants were unaware of when, where and how they came into the possession of the officers. Having failed then to object on the ground of unreasonable search and seizure, they may not now be heard to assert that as a ground for a new trial.

Furthermore, the record shows that, prior to any other testimony concerning these weapons, evidence was offered before the jury, without objection, to the effect that a large num-

ber of officers, wearing flak jackets to protect them from small arms fire, and carrying warrants for the arrest of Gunter, Stevens and Bowles for the alleged burglary and armed robbery, went to the vicinity of the Gunter and Johnson houses for the purposes of serving the warrants and arresting these defendants. Upon their arrival near the Gunter house, Gunter came out of the house armed with a pistol in response to the barking of dogs. Upon the instruction of the officers, then hidden in the bushes, Gunter dropped his loaded revolver and was arrested pursuant to the warrants against him. The officers instructed Gunter to call out to anyone still in the house. He did so and the two Johnsons (later identified by Francis as two of his assailants) came out and were taken in custody for investigation of the same offenses. Curry was already in custody. Officers went to and looked into the shed in search of Bowles and Stevens, with the above mentioned results.

After the arrest of Gunter and the two Johnsons, and apparently after the search of the shed, officers went into the Ronald Johnson house looking for Stevens and Bowles in order to arrest them pursuant to the warrants. Immediately upon entering the house the officers observed, in plain view, propped against a window which commanded the driveway approaching the house, a loaded pump shotgun (State's Exhibit 13) and, on a couch, a .22 caliber rifle (State's Exhibit 12) and a machine gun (State's Exhibit 2) and ammunition for these weapons. They also observed the butt of a pistol (State's Exhibit 11) projecting from a boot. They took the weapons into their possession not knowing whether Bowles or Stevens or some other person was in the house. To this evidence there was no objection.

Then, over objection, the officer who so took the weapons into his possession in the Ronald Johnson house was permitted to testify as to what he did with them. The defendants then moved to "disallow the evidence of these guns into evidence." This motion was denied. Subsequently, a ballistics expert, a witness for the State, was permitted, over objection, to testify concerning his opinion as to whether cartridge cases found in the Francis yard had been fired from these weapons, his testimony being that, in his opinion, three of them were fired from the .22 caliber rifle.

The facts with reference to the obtaining of these weapons were developed in the presence of the jury prior to any objec-

tion which could conceivably be supposed to relate to the method by which the weapons were obtained by the officers. Therefore, there was no occasion for the court to conduct a voir dire when the objections were interposed to the testimony of the officer as to what he did with the weapons and to the testimony of the ballistics expert. Upon the voir dire previously held with reference to the admissibility of the articles found in the cellar of the shed, the court had made the above mentioned findings of fact concerning the presence of the officers in the vicinity, their possession of the warrants and their purpose to serve them. Obviously, these findings were equally relevant to the entry into the Ronald Johnson house and the discovery there of the weapons.

Long after the weapons were admitted in evidence and exhibited to the jury and after the ballistics expert had testified concerning his opinion that the cartridge cases in evidence had been fired from the .22 caliber rifle, Ronald Johnson, a witness in his own behalf, testified before the jury on cross-examination that on the morning of April 5, when the police came to his house, the shotgun was in a closet and was not propped against the window and the .22 caliber rifle was not in his house at all. If true, this testimony would necessarily lead to the conclusion that these weapons were not in the plain view of the officers who entered his house and who testified that they removed the weapons therefrom. Johnson testified that he did not know whether the pistol was in the boot where the officer testified that he found it and he did not testify with reference to the location of the machine gun. This testimony came too late in the trial to require the trial judge to conduct a voir dire and make a finding of fact as to whether the rifle and shotgun were in the plain view of the officers as they walked into the Johnson house.

The testimony of the police officers concerning the entry into the Johnson house is not otherwise in dispute. The officers were, as the court found with reference to the articles removed from the shed, in possession of warrants for the arrest of Bowles and Stevens. Before entering the Johnson house they had taken Gunter and the two Johnsons into custody. Ronald Johnson thus knew that they were officers and the purpose of their being in the vicinity. Nothing in the record indicates that the officers used any force in gaining entrance to the Johnson house from which Ronald Johnson, himself, had just emerged.

G.S. 15A-401(e) had no application to the present case, which arose prior to the effective date of that statute. G.S. 15-44, now repealed by G.S. Ch. 15A, applies to the present case. It, however, relates to the right of an officer to "break open the door," enter the house and make the arrest. There is nothing to indicate that any such breaking by the officers occurred in this instance.

Upon this record, the officers were lawfully in the Ronald Johnson house, having reason to believe that Bowles and Stevens might be therein. Under the circumstances, the seizure by the officers of these weapons in a house wherein men charged with first degree burglary and armed robbery might well have been hiding cannot be deemed unreasonable. The admission of the weapons in evidence and the overruling of the defendants' objection to the testimony of the State's ballistics expert witness concerning them cannot be deemed error.

**[4]** There is no merit in the defendants' contention that the court erred in permitting Francis, over objection, to describe the appearance of and clothing worn by his assailants and in admitting in evidence a shirt and jacket worn by Curry when he was arrested.

Francis testified that, at the time his house was broken into and he was beaten by the eight assailants, Stevens was wearing a cut off blue jean jacket on the back of which was the word "Outlaw"; Curry was wearing a black T-shirt and blue jeans, the shirt bearing the word "Outlaw" on the back and the words "One Percenter" on a patch on the front; and the other assailants wore blue jeans and T-shirts, all having long hair and beards. He then testified that he had been shown approximately 20 photographs at the police station and from these he picked Gunter, Bowles, Ronald Johnson and Stevens as members of the group which attacked him. Nothing in the record indicates that photographs of Curry and Albert Johnson were among those shown to Francis.

The officer handling the photographic identification procedure testified that he, after talking with Francis about the incident, obtained from the Charlotte Police Department photographs of members of the "Outlaw Motorcycle Club" and these were the photographs from which Francis identified Gunter, Bowles and Stevens. Nothing in the record indicates that, at the time of the photographic identification procedure, Francis was told that these were photographs of members of the "Outlaw

Motorcycle Club" or that the photographs themselves so indicated. The shirt and jacket worn by Curry when he was taken into custody and which bore the words "Outlaw" and "One Percenter" were admitted in evidence.

Gunter, the two Johnsons and Stevens contended throughout that they were not present on the Francis premises when the alleged offenses occurred, and Bowles and Curry contended that, while present, they did not attack Francis or enter his house. Thus, one of the principal questions for the jury was the correctness of Francis' in-court identification of the six defendants as members of the attacking group. His testimony as to the clothing and personal appearance of his assailants was clearly relevant and competent evidence. Clothing worn by Curry at the time of his arrest at the scene of and shortly after the alleged offenses was relevant to his identification as one of the attacking group and its admission in evidence was proper. *State v. Dickens,* 278 N.C. 537, 180 S.E. 2d 844; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. The fact that it bore insignia identifying him as a member of an organization or characterizing him unfavorably does not make the article of clothing inadmissible. See, *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633. On cross-examination Ronald Johnson testified that, at the time the officers took him into custody, he also wore a black T-shirt bearing like emblems. We find no error in the admission of this testimony and these exhibits.

**[5]** There is no merit in the contention of the defendants that it was error to permit the State to cross-examine the defendants who testified in their own behalf with reference to other acts of misconduct. The defendants Gunter, Ronald Johnson, Bowles and Curry testified as witnesses in their own behalf. Consequently, they were subject to cross-examination designed to impeach their credibility. Strong, N. C. Index 2d, Criminal Law, § 86. For this purpose a defendant in a criminal case who takes the witness stand may not be asked on cross-examination as to whether he has been accused, indicted or arrested for an unrelated criminal offense. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. He may, however, be asked whether he has been convicted of or has committed such criminal acts or other specific acts of reprehensible conduct, provided the question is asked in good faith. *State v. Lowery,* 286 N.C. 698, 708, 213 S.E. 2d 255; *State v. Gainey,* 280 N.C. 366, 373, 185 S.E. 2d 874; Stansbury, North Carolina Evidence (Brandis Revision)

§ 111. The record discloses no violation of the rule of *State v. Williams, supra,* and contains no indication of bad faith on the part of the prosecuting attorney in questioning any of the defendants who testified concerning prior convictions and acts of misconduct.

**[6]** Francis' stepfather, not a police officer, apprehended Curry at the Francis house when the stepfather and Francis returned thereto following the alleged offenses. Francis immediately identified Curry as one of his assailants and the stepfather held Curry at gun point while Francis went to call the police. The stepfather asked Curry who had been with him. Curry first refused to give such information but later said, "I'll take you to the rest of them if you will let me go." The stepfather was permitted to testify as to this statement by Curry, over Curry's objection. All of the defendants now assign this ruling as error. Although Curry was being held at gun point, nothing in the record indicates any threat to use the weapon except for the purpose of detaining him until the officers arrived and nothing indicates that the above statement was coerced. As an admission by Curry it was competent against him. The other defendants did not object to the testimony and it does not in any way implicate any of them. There is no merit in this assignment of error.

**[7]** For the purpose of establishing his alibi, the defendant Stevens called as his expert witness Lawrence A. Kelly, who testified that, in his opinion, Stevens signed, in the name "Gerald Murphy," the application for a motor vehicle registration in the State of Colorado dated 4 April 1974, the date on which the burglary of the Francis house is alleged to have occurred. The document examined by Kelly, upon which this opinion by him was based, was a photostatic copy of the original application. To rebut the testimony of Kelly the State called Vincent Severs, a handwriting expert, who testified that, in his opinion, the photostatic copy was not adequate basis for the formation of a reliable opinion as to whether Stevens had signed the original application because a photostatic copy does not show clearly certain characteristics of the handwriting. The defendants contend that since Severs testified that he, himself, could not determine whether the signature shown on the photostatic copy and the known sample of Stevens' handwriting were written by the same hand, it was error to permit him to testify as to differences appearing upon the said exhibits in the formation

of certain letters. There is no merit in this contention. Although the witness was unable to form an opinion satisfactory to himself as to whether Stevens had or had not signed the document, he could still point out certain observable differences between the two documents offered him for comparison.

**[8]** Francis, when asked if he had any other occasion to see Albert Johnson after the attack upon him, replied that he had picked Albert Johnson out of a lineup the next day. The defendants objected and a voir dire was conducted. This disclosed that there were five people in the lineup, all white males in their twenties, all with long hair and beards and all wearing T-shirts and blue jeans. Of the five, Francis picked the two Johnsons, Gunter and Curry. Thus, of the five men in the lineup four were among the defendants now on trial and of these Curry had previously been identified by Francis at the time of his arrest, and Ronald Johnson and Gunter had been previously identified by him from photographs.

At the conclusion of the voir dire, the court found that the lineup was not conducted in a proper manner but that, at the time of the offenses, Francis had ample opportunity to observe his assailants in his home, which was well lighted, and outside the home in an area also well lighted and that his in-court identification of each defendant was of independent origin, based solely on what the witness saw at the time of the alleged crime and was not the result of any out-of-court confrontation or of the examination of any photograph. The court, therefore, concluded that Francis' in-court identification of each defendant was admissible. The court's findings of fact on the voir dire, being fully supported by evidence, are conclusive on this appeal. *State v. Harris, supra; State v. Pike, supra; State v. Gray, supra.* The findings support the court's conclusion. The court further concluded that each of the defendants, including Albert Johnson, had waived his right to object to his identification by Francis through each such defendant's failure to object earlier to Francis' in-court identification of him and to Francis' earlier detailed testimony as to the part played by each such defendant in the alleged offenses. The record clearly supports this conclusion. Accordingly, there was no error in the admission of the in-court identification by Francis of each defendant.

The reference by Francis to his having identified Albert Johnson in the lineup came in response to a question by the prosecuting attorney, which question did not indicate that a

lineup identification would be forthcoming. Hence failure to object prior to the answer would not waive the incompetency of the lineup identification, and had a motion to strike the answer been made, it should have been allowed. However, no motion to strike was made.

This testimony before the jury by Francis concerning the lineup did not relate to any other defendant. The fact that Gunter, Curry and Ronald Johnson were also in the lineup and were picked by Francis was brought out on the voir dire only and not before the jury. Consequently, the failure to strike this reference to the lineup identification of Albert Johnson would, in no event, entitle any other defendant to a new trial.

**[9]** Subsequently, Police Officer Morris testified on direct examination, without objection, that Francis identified Albert Johnson at a lineup composed of Albert Johnson, Gunter, Curry and an unidentified inmate of the jail. This being, obviously, the same lineup which the court had previously held invalid, this testimony was incompetent, but the failure of the defendants to object thereto waived the matter. On cross-examination the defendants developed that an attorney was present to represent the defendants at this lineup. To their question, "Mr. Selvey (the attorney) objected to that lineup, didn't he?" objection by the State was sustained. The State's objection to the defendants' question to the witness, "Do you consider that a fair lineup?" was also sustained. The record does not show what the witness would have answered to either of these questions. For this reason, if for no other, there is no merit in the assignment of error relating to these rulings of the trial court.

Due to the nature of the offenses with which the defendants are charged and to the sentences imposed, all of which are within the statutory authorizations, we have carefully examined each assignment of error brought forward in the briefs of the defendants. We find in none of them any basis for disturbing the judgments as to any of the defendants.

No error.

STATE OF NORTH CAROLINA v. GEORGE EDWARD WILLIAMS

No. 45

(Filed 17 December 1975)

1. **Homicide §§ 14, 24— presumption of malice and unlawfulness — burden of proof — instruction proper**

The trial court's instruction in a first degree murder case on the presumptions of malice and unlawfulness arising upon proof of the intentional inflicting of a wound with a deadly weapon proximately causing death did not unconstitutionally relieve the State of its burden to prove beyond a reasonable doubt each and every element of the crime charged.

2. **Homicide § 26— second-degree murder — instructions proper**

The trial court in a first degree murder prosecution did not err in instructing the jury that second-degree murder differs from first-degree murder in that neither specific intent to kill, premeditation, nor deliberation is necessary.

3. **Criminal Law § 48— silence of defendant — evidence inadmissible**

The State could not offer defendant's silence in the course of a police officer's investigation as evidence of defendant's guilt or for the purpose of impeaching him as a witness; however, this evidence was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless error beyond a reasonable doubt.

4. **Criminal Law § 122— additional jury charge — expense caused by mistrial — no coercion of jury**

An isolated portion of the trial court's additional charge to the jury which referred to the expense which would result to the State and County if no verdict were returned would not coerce or prejudice the mind of a juror of ordinary firmness and intelligence, particularly in light of the trial court's subsequent admonition to the jurors that the court did not intend to force or coerce the jury into reaching a verdict and that a juror should not reach a verdict which required him to surrender his conscientious convictions.

5. **Homicide § 20— pistol, bullets and fragments — chain of custody established — admissibility**

The trial court in a first degree murder prosecution did not err in allowing into evidence the .22 pistol allegedly used in the killing, bullets taken from the pocket of defendant, the envelope in which the pistol was placed while in the State's possession, and bullet fragments removed from the body of deceased where the chain of custody of the exhibits was clearly and amply established.

6. **Criminal Law § 69— telephone conversation — identity of caller established**

Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with

whom the witness was speaking must be established, and identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence.

7. **Criminal Law § 69— telephone conversation — identity of caller — circumstantial evidence**

Where a telephone call was made on the night of the crime to the house where the shooting subsequently occurred, and the caller identified himself only as "George," the trial court did not err in allowing evidence concerning the telephone conversation, though the caller's identification of himself as "George" was insufficient to establish his identity, since circumstantial evidence was sufficient to identify the caller.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Collier, J.*, 17 February 1975 Criminal Session of GUILFORD Superior Court.

The State's evidence, in summary, tended to show the following:

William Segal testified that on 4 May 1974 he left Charlotte at about 11:00 a.m. with defendant who was going to Greensboro for the purpose of picking up his girl friend, Ruby Jean McCrorey (Ruby). They arrived in Greensboro at about 1:00 and defendant went to several residences and made numerous telephone calls in a vain search for Ruby between 1:00 p.m. and 6:00 p.m. When they started back to Charlotte at about 6:00 p.m., the witness was driving because defendant was not feeling well. Segal became lost and finally turned around near the Virginia state line and they returned to Greensboro where defendant stopped at a hospital. There defendant made several telephone calls. They then drove to the police department where the witness and defendant parted company. Segal further testified that he had known Ruby while she and defendant were living together in Charlotte. He also identified State's Exhibit 2 as the .22 pistol he had seen in defendant's possession on 4 May 1974.

Police Officer James Hilliard testified that defendant came to the police station on 4 May 1974. Defendant had his girl friend's telephone number, but did not know her address. Using the City Directory, the officer located an address on Whittington Street that corresponded to the telephone number in defendant's possession. Defendant indicated to him that he had caught his girl friend with another man a few weeks prior to that day.

Joslyn Barnes testified that she and Ruby McCrorey were living in the Barnes's home at 213 West Whittington Street in Greensboro on 4 May 1974. On that day, they were having a surprise birthday party for Joslyn's mother. She stated that there were four telephone calls for Ruby between 9:00 and 12:00 p.m. The witness further testified that shortly after midnight she was standing beside Ruby at a point between the kitchen and the living room when defendant came through the front door into the house. At that time Ruby exclaimed "George," defendant shot twice and Ruby fell. She further testified that as she went out the front door, she looked back and saw Ruby falling. She passed very close to defendant as she left the house and she heard another shot after she had gone outside. She made an in-court identification of defendant as the man who did the shooting and identified State's Exhibit 2 as the murder weapon.

Harris Nesmith testified that he attended the party and that during the evening he answered the phone three times. We will fully consider the evidence concerning the telephone calls in the opinion. Nesmith further testified that at around midnight he was sitting in the kitchen drinking beer with Willie Watlington when he heard two shots. He at first thought that the explosions were caused by firecrackers. He got up to look when he heard the third explosion and at that time saw defendant with "the gun at the girl's head." Defendant came into the kitchen and "threw" the pistol on Willie Watlington but did not fire. Nesmith then left the house.

Willie Watlington gave testimony to the effect that he was sitting in the kitchen with Harris Nesmith when he heard a couple of shots. He also thought the noise was caused by firecrackers. Shortly thereafter defendant came into the kitchen with a pistol in his hand. At that time, the witness laid his head on the table. After defendant left, the witness went into the living room where he found Ruby lying on the floor. There was a wound on her head and it appeared that her ear had been shot off. The witness said that he had been "going with Ruby." He testified, over defendant's objection, that the pistol identified as State's Exhibit 2 was "something about like" the weapon the defendant had in his hand on the night of the party.

Cheryl Wilson said that she saw a man come in the front door and shoot Ruby. She was unable to identify the man who did the shooting.

Johnny Lee Brown testified that he was sitting in the living room of the house at 213 West Whittington Street at about midnight when he looked out the window and saw this "dude" running up the walk with a "shiny" gun in his hand. The man snatched the door open and fired a shot downward. The witness then fled. He identified defendant as the man who fired the pistol.

Portia Elaine Lindsey, who lived across the street from the house where the party was held, testified that she saw a cab and a green Chevrolet pull up before the house and she saw the cab driver point to the house at 213 West Whittington Street. The man who drove the green Chevrolet went to the front of the house and she heard someone say "George." This exclamation was followed by the sound of three shots. She later saw a man run from the house and as he turned toward a police officer, the police officer fired his pistol and the man fell. He fell near a streetlight. She identified defendant as the man who ran from the house and fell.

Officer K. L. Durham was riding along Whittington Street when he heard gunshots. He saw several people run out the front door of the house at 213 West Whittington Street. Defendant ran in front of him, stopped and pointed a pistol toward him and the pistol then made a clicking noise. Thereafter defendant ran and when the policeman called for defendant to stop, defendant made a turn toward him with the gun in his hand. Officer Durham fired one shot and defendant ran about fifty feet and fell. Upon taking defendant into custody, the officer observed a wound on defendant's right hand. The officer later picked up a .22 caliber pistol across the street from 213 West Whittington Street which he identified as State's Exhibit 2.

Officer Paul Biggs was also traveling on Whittington Street when he heard two or three shots. He parked his car and heard more shots when he approached 213 West Whittington Street. He saw a figure run from the house, heard a louder shot and shortly after he heard the louder shot, the running man fell. He later entered the house and found a wounded woman lying on the floor.

Dr. Edward A. Sharpless, an expert in pathology, testified that he performed an autopsy on the body of Ruby Jean McCrorey on 5 May 1974. His examination revealed that deceased had been shot three times. One bullet entered the right shoulder

and followed a path approximately parallel with the floor. Another penetrated the skull from left to right taking a piece of deceased's left ear with it. The third bullet entered the top of her head passing forward and downward, penetrating both sides of the brain. In his opinion, the cause of death was the gunshot wound which penetrated deceased's brain.

The State rested and defendant thereupon testified that, accompanied by William Segal, he came to Greensboro on 4 May 1974 for the purpose of taking Ruby back home. He had been furnished an address on Ashe Street as the place where he might locate her and upon failing to find Ruby, he called her mother in New York who was unable to give him any information. He asked Segal to drive him back to Charlotte at about 6:00 p.m. because he felt bad as a result of a recent gunshot wound in his stomach. He went to sleep and when he awakened they were near the Virginia line. He then drove back to Greensboro where he made a call to Ruby's uncle in New York who agreed to contact Ruby and ask her to call defendant. Ruby called and some "dude" on the phone told him how to get to the hospital. He called Ruby from the hospital and she told him she would come there. He waited in the car for about an hour and tried without success to again call Ruby. He then went to the police station where a police officer helped him locate the residence at 213 West Whittington Street. He proceeded to that address. Upon going to the porch of the house, he heard shots and heard Ruby "holler." He entered the house and saw Ruby lying on the floor and at the same time observed someone going out the back door with a gun in his hand. Defendant stated that he pulled his pistol, ran to the back door, and shot several times. He came back to the place where Ruby was lying and saw a hand in the back door pointing a pistol. He then ran out the front door and heard another shot. He ran in front of a police car and saw someone pointing a gun at him. As he turned, a bullet struck him in the hand.

Defendant testified that he did not fire a shot at Ruby. He had no ill will toward her but to the contrary he loved Ruby. He admitted that he and Ruby had lived together in Charlotte for about two years and that there had been some misunderstanding between them.

Ruth DeBerry, an employee of Congessman Richardson Preyer, said that she lived directly across the street from the place where the party was held. She attended the party and as

she was leaving, she heard a scream. She called the police and she heard further hollering from the house across the street. She went to her porch where she saw two people run from the back door of the house across the street and she then saw two flashes caused by gunfire.

The jury returned a verdict of murder in the second degree. Defendant appealed from judgment imposing a sentence of imprisonment for his natural life.

*Attorney General Rufus L. Edmisten, by Assistant Attorney General William B. Ray and Associate Attorney Isaac T. Avery III, for the State.*

*Wallace C. Harrelson, public defender, for defendant appellant.*

BRANCH, Justice.

**[1]** Defendant's first assignment of error presents the following question:

> WERE THE RIGHTS OF THE DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO PLACE THE BURDEN UPON THE STATE TO PROVE EACH AND EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT VIOLATED BY INSTRUCTING THE JURY THAT A KILLING IS PRESUMED UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED?

Portions of the charge pertinent to this assignment of error are:

> "If the State proves beyond a reasonable doubt that the defendant intentionally killed Ruby Jean McCrorey with a deadly weapon or intentionally inflicted a wound upon Ruby Jean McCrorey with a deadly weapon that proximately caused her death, the law raises two presumptions; first, that the killing was unlawful, and, second, that it was done with malice."

* * *

> "In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally shot Ruby Jean McCrorey with a deadly weapon thereby proximately caus-

ing her death, then nothing else appearing, the defendant would be guilty of second degree murder."

Substantially similar instructions have been approved by many decisions of this Court. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221; *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Fleming,* 202 N.C. 512, 163 S.E. 453. In instant case the trial judge correctly submitted to the jury as possible verdicts first-degree murder, second-degree murder or a verdict of not guilty since these were the only verdicts supported by the evidence. There was no evidence that defendant acted in suddenly provoked heat of passion so as to reduce the crime to manslaughter; neither was there evidence that the killing was without intent to kill or to inflict serious injury so as to justify a charge on involuntary manslaughter. We note, in passing, that the evidence did not warrant a charge on self-defense or that the killing was by accident or misadventure. The State's evidence shows that defendant by the intentional use of a deadly weapon shot Ruby Jean McCrorey thereby proximately causing her death. Defendant's evidence was to the effect that he did not fire the weapon that caused her death. Thus this assignment of error only presents the question of whether the instruction was constitutionally impermissible because it raised the presumptions of malice and unlawfulness upon proof of certain basic facts thereby relieving the State of the burden of proving all elements of the crime beyond a reasonable doubt.

Presumptions and inferences may arise upon proof of another fact or combination of facts. The types of presumptions and inferences so arising include: (1) a *conclusive presumption* is one in which the presumed fact is deemed to be conclusively demonstrated upon proof of the basic fact and no evidence of the non-existence of the presumed fact will be heard. (2) a *prima facie case* or an inference may arise upon proof of the basic facts by which the jury may (but need not) find the presumed fact. (3) A *true presumption* is one in which the trier of the facts must find the presumed fact upon establishment of the basic facts unless sufficient evidence of its non-existence has been introduced. See 2 Stansbury's North Carolina Evidence (Brandis Revision 1973) § 215 at pages 166-169 and the cases there cited.

The United States Supreme Court and this Court recognize that proof of certain basic facts in a criminal prosecution may give rise to an inference (prima facie case) or a true presumption. *Turner v. United States,* 396 U.S. 398, 24 L.Ed. 2d 610, 90 S.Ct. 642, reh. den. 397 U.S. 958, 25 L.Ed. 2d 144, 90 S.Ct. 939; *United States v. Gainey,* 380 U.S. 63, 13 L.Ed. 2d 658, 85 S.Ct. 754; *Davis v. United States,* 160 U.S. 469, 40 L.Ed. 499, 16 S.Ct. 353; *State v. Rummage, supra; State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535; *State v. Mercer, supra; State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578.

It must be borne in mind that presumptions and inferences differ. The distinctions between the two are well stated in 2 Stansbury's North Carolina Evidence (Brandis Revision 1973) § 218 beginning on page 172:

> . . . [A] "prima facie case" or "prima facie evidence" means evidence sufficient to go to the jury in support of a fact to be proved. There is nothing compulsory about it; the jury may disbelieve the evidence presented, or believe the evidence but decline to draw the inferences necessary to a finding of the ultimate fact, or believe the evidence and draw the necessary inferences. In the case of a presumption, however, although the jury may still disbelieve the evidence and thus fail to find the existence of the basic fact, it should be told that if it finds the basic fact it *must* also find the presumed fact, unless evidence of its nonexistence is produced sufficient to rebut the presumption.
>
> It will thus be seen that a prima facie case and a presumption differ sharply in their effect upon the burden of producing evidence. A prima facie case discharges the burden of the proponent, but does not shift the burden to his adversary. A presumption, however, not only discharges the proponent's burden but also throws upon the other party the burden of producing evidence that the presumed fact does not exist. If no such evidence is produced, or if the evidence proffered is insufficient for that purpose, the party against whom the presumption operates will be subject to an adverse ruling by the judge, directing the jury to find in favor of the presumed fact if the basic fact is found to have been established.

* * *

> . . . The general rule appears to be that a presumption merely fixes upon the opponent the burden of producing evidence, and leaves the burden of the issue unaffected. . . .

In this jurisdiction, upon proof that an accused intentionally inflicted a wound with a deadly weapon proximately causing death, *true presumptions* arise that the killing was unlawful and that it was done with malice.

Obviously such inferences and presumptions must arise within constitutional bounds and we therefore consider some of the cases which set out the standards of constitutionality which must be met.

In the case of *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768, Justice Parker (later Chief Justice) quoted with approval from 12 Am. Jur., Constitutional Law, Section 629, the following:

> "The legislature has power to enact provisions, even in criminal actions, that where certain facts have been proved, they shall be prima facie evidence of the main fact in question if the fact proved has some fair relation to, or natural connection with, the main fact. There is no vested right to the rule of evidence that everyone shall be presumed innocent until proved guilty, which prevents the legislature from making the doing of certain acts prima facie proof of guilt or of some element of guilt." To the same effect: *S. v. Barrett,* 138 N.C. 630, 50 S.E. 506; *S. v. Dowdy,* 145 N.C. 432, 58 S.E. 1002; *S. v. Hammond,* 138 N.C. 602, 125 S.E. 402; *S. v. Fowler and Brincefield,* 205 N.C. 608, 172 S.E. 191; *Casey v. U. S.,* 276 U.S. 413, 72 L.Ed. 632; 16 C.J.S., Constitutional Law, Section 128(d).

We note with interest that the author of *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881, Mr. Justice Powell, writing for the Court in the case of *Barnes v. United States,* 412 U.S. 837, 37 L.Ed. 2d 380, 93 S.Ct. 2357, approved an instruction that "possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." In holding this instruction to comport with due process the Court reviewed and relied on the recent cases of *Turner v.*

*United States, supra; Leary v. United States,* 395 U.S. 6, 23 L.Ed. 2d 57, 89 S.Ct. 1532, and *United States v. Gainey, supra.*

In *Gainey* the Court upheld the constitutionality of a statute which allowed the jury to infer from the defendant's unexplained presence at an illegal still that he was engaged in the "business of a distillery." The Court reasoned that there was a "rational connection between the fact proved and the ultimate fact presumed" because of the comprehensive nature of the charge and the fact that the operation of illicit stills is secret and furtive in nature.

In *Leary* the Court upheld a challenge to a statutory inference that possession of marijuana, unless satisfactorily explained, was sufficient to prove that defendant knew that the marijuana was illegally imported into the United States. The Court reasoned that the inference did not meet due process standards since it was altogether probable that defendant believed he possessed domestically grown marijuana. In reaching its decision, the Court stated that an inference is " 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that *the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.*" [Emphasis ours.]

The most stringent standard employed by the Supreme Court in this line of cases is the reasonable doubt standard, *i.e.*, proof necessary to invoke the presumption must be sufficient for a rational juror to find the presumed fact beyond a reasonable doubt. This standard was applied in the *Turner* case which upheld the constitutionality of an instruction that possession of heroin was sufficient to support an inference that the defendant knew the drug had been illegally imported.

We are of the opinion that when the State proves beyond a reasonable doubt that an accused intentionally inflicted a wound with a deadly weapon proximately causing death, such basic facts are sufficient to meet the most stringent of the standards of due process recognized by the Court. Establishment of the presumption requires the triers of fact to conclude that the prosecution has met its burden of proof with respect to the presumed fact by having established the required basic facts beyond a reasonable doubt. This does not shift the ultimate burden of proof from the State but actually only shifts the burden of going forward so that the defendant must present some evi-

dence contesting the facts presumed. We, therefore, hold that the presumptions here challenged comport with due process. See *Mullaney, supra,* page 522 n. 31. See also 2 Stansbury's North Carolina Evidence (Brandis Revision 1973) §§ 215, 218, and *Barnes v. United States, supra,* page 846 n. 11.

Here the evidence shows that defendant crashed into a dwelling, shot the deceased three times at close range thereby inflicting wounds which proximately caused her death. This shooting occurred upon a background of a lover's quarrel and a separation after the parties had lived together for several months. This evidence was amply sufficient to allow the jury to find beyond a reasonable doubt that defendant's intentional use of the deadly weapon which inflicted the mortal wound upon Ruby Jean McCrorey was done unlawfully and with malice.

The identical question presented by this assignment of error was before us in *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (decided 30 August 1974) *petition for cert. filed,* 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669), and this Court unanimously rejected defendant's contention that presumptions of malice and unlawfulness arising from the State's proof that the deceased's death was proximately caused by the defendant's intentional use of a deadly weapon were constitutionally impermissible. However, defendant strongly urges that the rule approved in *Sparks* has been overruled by *Mullaney v. Wilbur, supra.* We do not agree.

In *Mullaney* the defendant was charged with murder. At trial the trial judge instructed the jury that the defendant was required to prove by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide from murder to manslaughter. The jury returned a verdict of guilty of murder. Defendant appealed and the Supreme Court of Maine affirmed. After the case had been considered by lower federal courts, the United States Supreme Court allowed certiorari and held that this instruction violated the due process clause in that it relieved the prosecution of the requirement that it prove every element of a crime beyond a reasonable doubt. The Court, in part, stated:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant

> can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship,* 397 U.S., at 372, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. . . .

The sole issue presented in *Mullaney* was whether the Maine rule which placed the burden upon defendant to prove that he acted in the heat of passion on sudden provocation so as to reduce the crime from murder to manslaughter accorded with due process. We find nothing in *Mullaney* which declares that due process is violated by a rule which allows rational and natural presumptions or inferences to arise when certain facts are proved beyond a reasonable doubt by the State.

We hold that the challenged charge did not unconstitutionally relieve the State of its burden to prove beyond a reasonable doubt each and every element of the crime charged.

**[2]** Defendant next contends that the trial court erred in instructing the jury that second-degree murder differs from first-degree murder in that neither specific intent to kill, premeditation, nor deliberation is necessary. Defendant does not argue that premeditation or deliberation are constituent elements of second-degree murder but takes the position that the terms "intentionally killed" and "specific intent to kill" are for all practical purposes the same. This contention is contrary to the overwhelming weight of authority.

Murder in the second degree is the unlawful killing with malice. A specific intent to kill while a constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder. *State v. Mercer, supra; State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. In second-degree murder the intention to do an unlawful act supplies the requisite mental element. 40 Am. Jur. 2d, Homicide, § 10, page 301.

In *State v. Gordon, supra,* we stated:

> But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. . . .

We find no error in this portion of the trial judge's charge.

**[3]** By his sixth assignment of error, defendant argues that the trial judge erred in allowing a police officer to testify over objection that during a conversation with defendant on 8 May 1974 defendant failed to make a statement as to the events of the night of 4 May or the early morning hours of 5 May 1974.

The record discloses that defendant was served with a warrant charging him with murder in the first degree on 5 May 1974 and that he was held without bond until after his preliminary hearing. The record does not show that the conversation was an interrogation. Neither does it show that the defendant was specifically asked about the events of 4 and 5 May 1974.

After defendant had testified, police officer Everett Bruce was offered by the State in rebuttal and the following occurred:

> MR. JOHN:
>
> Q. Let me ask you this, Detective Bruce, during the course of your investigation, how many times, if ever, did you have to discuss these incidents or attempted to discuss these incidents with the defendant?
>
> MR. HARRELSON: OBJECTION.
>
> THE COURT: OVERRULED.
>
> A. (By the witness) I talked with him at Cone Hospital on May 8, 1974, at approximately 3:10 p.m.
>
> Q. And did you talk to him at any time after that, Detective Bruce?
>
> A. No, sir, I didn't.
>
> Q. At any time during the course of your investigation, did the defendant offer any statement to you as to the

events of the night of May 4th or late night of May 4th and early morning of May 5th, 1974?

MR. HARRELSON: OBJECTION.

THE COURT: OVERRULED.

A. (By the witness) No, sir, he did not.

In *State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848, we held that a defendant's constitutional right to remain silent while in custody precludes the admission of testimony that defendant remained silent in the face of accusations of his guilt. In that case defendant did not testify. The holding, however, was based squarely on defendant's right against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 23 of the North Carolina Constitution.

The State, relying on *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111, contends that when defendant testified, evidence of his in-custody silence was admissible for the purpose of impeachment. In *Bryant* we held that an illegally obtained statement taken from defendant could be used to impeach him after he became a witness in his own behalf. Instant case and *Bryant* are distinguishable in that a prior inconsistent statement by the defendant in *Bryant* obviously had a material bearing on his credibility as a witness. Conversely under the facts before us no such inference can be drawn solely from defendant's silence. See 2 Stansbury's North Carolina Evidence (Brandis Revision 1973) § 179 n. 96 at page 54.

We hold that under the circumstances of the case before us the State could not offer defendant's silence as evidence of his guilt or for the purpose of impeaching him as a witness. However, this evidence was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless error beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824; *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677; *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399.

**[4]** Defendant assigns as error an instruction by the court to the effect that a mistrial, because the jury could not agree upon

a verdict, would result in great expense to the State and County. Defendant contends that this instruction might well have coerced the jury into returning a hasty and ill-conceived verdict.

The jury began its deliberation on 6 March, 1975 at 5:38 p.m. The jury was returned to the courtroom at 10:30 p.m. on the same day and at that time the trial judge charged:

> Members of the jury, since we have not heard from you, I assume that you have not yet agreed on your verdict. I presume that you ladies and gentlemen realize what a disagreement means. It means, of course, that another three or four days or more of the time of the Court will have to be consumed in the trial of this action again.
>
> I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions.
>
> You have heard the evidence in this case. A mistrial, of course, would mean another jury would have to be selected to hear the case and the evidence all over again at great costs and expense to our state and your county.
>
> Now, I recognize the fact that there are sometimes reasons why jurors cannot agree, and I want to emphasize the fact that it is your duty to do whatever you can to reason the matter out, if you can, as reasonable men and women, and to reconcile your differences if such is possible without the surrender of conscientious convictions, and to reach a verdict.
>
> With that admonition, I will ask you to please go back and see if you can agree on your verdict in this case. You may continue for deliberations.

In *State v. Brodie*, 190 N.C. 554, 130 S.E. 205, this Court found no prejudicial error under the following circumstances:

> For three days the jury had been unable to agree on a verdict and on Saturday morning came into the courtroom and announced that they could not agree. They were requested to give the case further consideration and were afterwards recalled. Not having agreed they were given this instruction: "I presume you gentlemen realize what a disagreement means. It means that four more days of

> the time of the court will have to be taken up at the expense of several hundred dollars. I do not want to force or coerce you into an agreement and could not if I wished to do so, but still it is your duty as intelligent, reasonable men to consider the evidence, reconcile it, reason the matter over among you and come to an agreement. A mistrial is always a misfortune to any case or to any county. Jurors, if they cannot render verdicts, are entirely useless. It is the duty of jurors to agree if possible and I hope you gentlemen can retire and consider the matter further, reason with each other as intelligent men and come to an agreement."
>
> . . .

In *State v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552, the Court found no error in this portion of the trial judge's charge:

> . . . [I]t is your duty to decide it because it is an expense to the county to retry it. And it is your duty to try to come to some agreement. I am not trying to force you to agree on this case and you may go back to the jury room and continue your deliberation. . . . Remember about the expense of this case and the fact that someone has to try it. . . .

The following statement appears in 3 Strong, N. C. Index 2d, Criminal Law § 122 at page 34:

> . . . [T]he court may properly instruct the jury that the trial of the cause involved heavy expense to the county and that it was the duty of the jury to continue its deliberations and attempt to reach an agreement, but that the court was not attempting to force an agreement.

It is true that two of the cases relied upon to support the statement in *Strong* did not involve the question of expense to the county and State, however, this statement has been quoted with approval in the recent cases of *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85, cert. denied 409 U.S. 870; and *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652.

It is a well-recognized rule that a charge must be read as a whole and isolated portions will not be held to be prejudicial when the charge as a whole is correct. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765. Here defendant's attack is upon the isolated portion of this instruction which refers to the expense which would result if no verdict were returned. However, a

contextual reading of the charge reveals that the trial judge subsequently admonished the jurors that the court did not intend to force or coerce the jury into reaching a verdict and that a juror should not reach a verdict which required him to surrender his conscientious convictions. In our opinion, the isolated portion of the court's instruction here challenged would not coerce or prejudice the mind of a juror of ordinary firmness and intelligence.

We hold that this instruction did not amount to an expression of opinion by the trial judge as to defendant's guilt or innocence or coerce the jury into returning an ill-conceived verdict.

**[5]** Defendant assigns as error the introduction into evidence and the admission of the testimony concerning certain exhibits offered by the State.

The exhibits which are the subjects of this assignment of error are Exhibit 2, the .22 pistol allegedly used in the killing, State's Exhibit 10, bullets taken from the pocket of defendant, State's Exhibit 13, the envelope in which Exhibit 2 was placed while in the State's possession, and State's Exhibit 14, bullet fragments removed from the body of deceased.

We initially note that the pistol was properly *introduced* into evidence since it was positively identified by several State's witnesses and because the defendant admitted that it was the weapon which he fired several times at the scene of the killing. The State offered evidence which tended to show a chain of custody of all exhibits from the time they were originally obtained by the police officers until they were mailed to F.B.I. headquarters by registered mail. The exhibits were then returned to the Greensboro Police Department from the F.B.I. headquarters by registered mail. The police department delivered them to the District Attorney and they were thereafter at all times in the possession of the District Attorney or in a vault in the office of the Clerk of Superior Court of Guilford County. The bullet fragments were in the same condition as when received by the police. The defendant argues that since there was no showing that the vault was an "evidence vault" and because there was no specific showing of who had custody of the vault, that there was a "missing link" in the chain of custody. We are of the opinion that the chain of custody was clearly and amply established. However, assuming *arguendo,*

that chain of custody was not properly established, we find little prejudice in the testimony concerning these exhibits since the expert witness testified that the bullet fragments were so badly mutilated that he could form no opinion as to whether they were fired from State's Exhibit 2. All of these exhibits were sufficiently relevant to be admissible into evidence since they tended to shed some light upon the crime charged. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561. Defendant's claim of prejudice from the introduction of these exhibits is further diluted by the fact that generally the inferences which flow from the introduction of the exhibits are consistent with defendant's testimony and theory of defense. This assignment of error is overruled.

The introduction of and testimony concerning State's Exhibit 9, pistol grips found near the place of defendant's arrest, tended only to show that the grips *might* have been a part of State's Exhibit 2. Admittedly this evidence is of little probative force since defendant admitted possession of the weapon at the time of the killing. By the same token, the introduction of this exhibit and the testimony admitted concerning it did not result in prejudice to defendant.

**[6, 7]** Finally, defendant argues that the trial judge erred by admitting evidence concerning a telephone call by a person who identified himself only as "George."

The witness Harris Nesmith testified that on the evening of 4 May 1974, he was attending a party in the house where the killing later occurred. He answered the telephone on three occasions. The first call was placed by someone who identified himself as "George" who requested that he be allowed to speak to deceased, Ruby Jean McCrorey. The witness said that the three calls were placed by the same person and that the caller identified himself on the first call and the last call as "George.' The testimony to which defendant objects appears in the record as follows:

> Q. What, if anything, did he say to you in the course of the conversation?
>
> MR. HARRELSON: OBJECTION.
>
> THE COURT: OVERRULED.
>
> A. (By the witness) He said he'd come to kill two.
>
> MR. HARRELSON: OBJECTION and move to STRIKE.

Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established. *State v. Gardner,* 227 N.C. 37, 40 S.E. 2d 415; *Griffin Mfg. Co. v. Bray,* 193 N.C. 350, 137 S.E. 151. Identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence. *State v. Coleman,* 270 N.C. 357, 154 S.E. 2d 485; *State v. Gardner, supra;* 2 Jones on Evidence, § 7:33 (6th ed. 1972); 7 Wigmore on Evidence § 2155 (3d ed. 1940). The fact that the caller identified himself as "George" was not sufficient to establish his identity. However, in addition to the testimony of the witness Nesmith concerning the telephone calls, the record discloses the following circumstantial evidence:

William Segal testified that defendant made three or four telephone calls on the evening of 4 May 1974 between 9:30 and 10:00 p.m.

Joslyn Barnes testified that several telephone calls were received at her house on the night in question, and that the caller each time asked to speak to Ruby. The first call occurred at about 9:00 and the last call was made around 11:45.

The State's evidence also tended to show that shortly after the last telephone call defendant, armed with a pistol, burst into the Barnes's living room and shot Ruby. Just before she was shot, Ruby exclaimed "George."

Defendant admitted on cross-examination that he made two calls to Ruby. He related that on one occasion he was able to talk with her and on another occasion he did not talk to anyone. Defendant further testified that Ruby called him one time on the night in question and he asked her for directions to a hospital, and she had another person give him the requested directions.

We are of the opinion that the circumstantial evidence was sufficient to identify the caller and to permit the trial judge to overrule defendant's objection to the admission of this evidence.

Even had the evidence been improperly admitted, defendant would not be entitled to a new trial. Subsequent to the admission of the challenged testimony the District Attorney, without objection, asked Nesmith, "He said he'd come to kill

two?" The witness then answered, "Yes, and he asked me my name but I wouldn't tell him."

When testimony is improperly admitted over defendant's objection, but the same or similar evidence is thereafter admitted without objection, exception to the admission of the evidence is waived. *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229; *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4; *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873. Further, admission of this evidence went solely to the question of premeditation and deliberation. The jury's verdict of second-degree murder acquitted defendant of the charge of murder in the first degree and therefore rendered harmless any prejudice which might have arisen from its admission. This assignment of error is overruled.

Defendant's counsel concedes that the remaining assignments of error are formal and are brought forward for the purpose of preserving the record. Nevertheless we have carefully examined this entire record and each assignment of error and find no error warranting a new trial or that the judgment be disturbed.

No error.

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STATE OF NORTH CAROLINA v. JAMES EDWARD (JIMMY) BRITT

No. 9

(Filed 17 December 1975)

**1. Jury § 7— jurors opposed to capital punishment — excusal for cause**

The trial court properly excused for cause prospective jurors who eventually indicated, frequently only after inquiry by the court, that they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence.

**2. Constitutional Law § 30— right to fair trial — duty of court and prosecutor**

It is the duty of both the court and the prosecuting attorney to see that a defendant's right to a fair trial is sustained.

**3. Criminal Law § 102— argument of counsel — discretion of court**

The argument of counsel is left largely to the control and discretion of the presiding judge and counsel is allowed wide latitude in the argument of hotly contested cases.

4. **Criminal Law § 102— argument of counsel — evidence and inferences**

Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom and the law relevant thereto.

5. **Criminal Law § 102— conduct of counsel — injecting personal beliefs not supported by evidence**

Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence; nor may counsel ask impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and humiliate the witness.

6. **Criminal Law § 102— characterizations of defendant by prosecutor**

The district attorney should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred.

7. **Criminal Law § 102— questions by district attorney — informing jury of defendant's prior conviction in case being tried**

In this prosecution for first degree murder, questions asked by the district attorney during cross-examination of defendant which informed the jury that defendant had been on death row as a result of a prior conviction of first degree murder in the case being tried were so prejudicial to defendant that their prejudicial effect could not have been cured by the court's instructions to the jury to disregard defendant's prior conviction and return a verdict based solely upon the evidence presented in the present trial.

8. **Criminal Law § 102— unsupported argument of district attorney — irrelevant principles of law**

In a prosecution for first degree murder which allegedly occurred in the home of deceased's estranged wife, the repeated argument of the district attorney that deceased had a right to defend himself "in his own home" was unsupported by the evidence and violated the rule that counsel may not argue principles of law not relevant to the case; such improper argument was not cured when the court sustained the defendant's objection and stated that the evidence tended to show that deceased and his wife were separated and that defendant was an invitee of defendant's wife since the district attorney continued to argue the point.

9. **Criminal Law § 102— unsupported argument of district attorney — theory based on personal beliefs**

In this prosecution for first degree murder, the argument of the district attorney that defendant, after he shot and killed deceased, cut himself with a knife to cover up the murder was wholly unsupported by the evidence or by any facts or circumstances permitting such an inference and violated the rule that counsel may not travel outside the record and place before the jury an incompetent and prejudicial theory of the case grounded wholly on personal beliefs and opinions not supported by the evidence.

APPEAL by defendant from *Clark, J.*, 16 September 1974 Session, ROBESON Superior Court.

Defendant is charged in a bill of indictment, proper in form, with the first degree murder of Clarence Blackwell on 3 May 1973 in Robeson County.

H. L. Wiggins testified that he had known defendant for six or seven years; that three or four days prior to the death of Clarence Blackwell on 3 May 1973 he sold defendant a .357 magnum for $100.00; that State's Exhibit 1 is the weapon involved in that transaction.

David Blackwell, decedent's eleven-year-old son, testified that on the night of 3 May 1973 he was awakened by a "bang" and went into the hallway that leads from the bedroom to the living room, a distance of ten or twelve feet, and walked to the living room door. "I saw my daddy and Jimmy Britt fighting. They were in a chair and my daddy, Clarence Blackwell, was on top of him. They looked like they were fighting. I do not know how long I watched them in the chair fighting. I saw my daddy get up and he staggered. He then headed for the front door. . . . When my daddy got up, he was facing away from Jimmy Britt and he had his back to him. The door was open and my daddy took three or four steps toward it. . . . Jimmy picked up a gun and shot. He picked up a pistol. He turned it towards the door. I could see my daddy. He was still inside at that time. His back was toward Jimmy Britt. He shot my daddy in the back. I could see the gun go off and saw fire come out of it. Jimmy was holding the gun when it fired. He shot my daddy inside and he must have walked or run outside. I did not see him fall. I saw Jimmy Britt pick up another gun and walk out . . . the door."

On cross-examination David Blackwell stated that his father and mother were not living together, his father having left the home and moved out; that after the fight was over he found his father's knife in the living room in front of the coffee table with the blade open and that he put the knife under the cushions of the chair. This witness further stated that his father was "sort of out the door" when defendant shot him.

Allene Watson testified that she lived next door to Mrs. Carolyn Blackwell on 3 May 1973; that the Blackwells had been separated almost a year at that time; that Jimmy Britt lived in a house right behind the Blackwell and Watson homes. On

the night in question at approximately 10 p.m. she heard a motor running and saw defendant's truck and a patrol car stopped on a dirt road beside the Watson house. Shortly thereafter defendant's truck left and went toward town and a few minutes later she saw the truck in a service station across the road from Mrs. Blackwell's house. While watching, she saw Mrs. Blackwell's car pull out and head toward town and "then saw Mr. Britt take out behind her in his truck." A few minutes later they both returned and entered the Blackwell house. About 10:30 p.m. a car parked in her front yard and she saw Clarence Blackwell go toward Mrs. Blackwell's house and up onto the porch. Three or four minutes later she saw Mr. Blackwell come out of the house, walking pretty fast, his hands up, his face toward the road. When he reached the edge of the porch she heard a shot and heard Clarence Blackwell say, "Oh, my God," and he toppled from the porch into the front yard. Shortly thereafter she saw defendant come out of the house with something in his hands and leave the premises. She observed these things from her window next to the Blackwell house.

Billy Ray Watson, son of Mrs. Allene Watson, was fifteen years old on 3 May 1973. About 10 p.m. that night he observed a state patrolman who had someone stopped on the highway nearby and saw defendant's vehicle with motor running in the driveway leading to defendant's house. Defendant stayed there until the patrolman left and then drove to a nearby filling station across from the Blackwell house. Shortly thereafter Mrs. Blackwell's car left and defendant's truck followed it. Five or ten minutes later he saw the same two vehicles parked in front of Mrs. Blackwell's porch. A short time later he heard a horn blow and went around to the front yard where he saw Clarence Blackwell. He went back inside and three or four minutes later saw Mr. Blackwell rapidly leaving the Blackwell home with his hands over his head. As Mr. Blackwell got to the steps the witness heard a shot and heard Mr. Blackwell say, "Oh, my God." Blackwell pitched forward off the porch. Two or three minutes later defendant left the Blackwell home carrying a long object which he placed in his truck and then drove away.

Deputy Sheriff Carl Herring testified that on 3 May 1973 at about 10 p.m. defendant came to his home and offered him $50.00 to jail Clarence Blackwell. He told defendant he had no warrant for Clarence Blackwell and had no right to arrest him without a warrant unless he violated the law in an officer's presence. Defendant said Clarence Blackwell had been harassing

Blackwell's estranged wife Carolyn by running along behind her and bumping her bumper as she went to work at the mill. Deputy Herring advised defendant that he would follow Mrs. Blackwell to work that night and if Blackwell violated the law in his presence he would then have a right to arrest him. Defendant said if the officer "couldn't take care of it he could."

Officer Herring stated that he knew Clarence Blackwell was the estranged husband of Carolyn Blackwell and that it was reported that defendant was going with her at that time.

Later that night, in response to a radio message, Deputy Herring and Deputy Sanderson drove to the residence occupied by Carolyn Blackwell and her children, arriving about 11:30 p.m. There they found the body of Clarence Blackwell lying at the bottom of the front steps. The officers observed a small wound in Blackwell's back just under the belt line and, turning the body over, observed two wounds in the front. The body was later taken to the morgue at Southeastern General Hospital.

Dr. Marvin Thompson, a medical expert specializing in pathology, testified that on 3 May 1973 he viewed the body of Clarence Blackwell in the morgue at Southeastern General Hospital. Mr. Blackwell was dead. He performed an autopsy, found an entry wound in the lower part of the back to the right of the midline and two irregular exit wounds in the lower abdomen to the right of the midline approximately one inch apart. He theorized that the bullet had split to produce two exit wounds. The bullet pierced the lateral part of the sacrum. In the opinion of Dr. Thompson, Clarence Blackwell died from hemorrhage secondary to the gunshot wound.

Defendant's motion for judgment of nonsuit at the close of the State's evidence was denied.

Defendant, testifying in his own behalf, stated that on 3 May 1973 between 9:30 and 10:00 p.m., Clarence Blackwell telephoned and said he was going to kill defendant and Carolyn. As a result of that call defendant went to the police station and talked to Officer Baxley who said he could not do anything. He talked to an auxiliary policeman named John McLendon. After talking with Carolyn Blackwell on the phone defendant started to her house and saw Deputy Sheriff Herring along the way. He told Officer Herring about the threats and asked him to go to Carolyn Blackwell's house. Officer Herring told him he couldn't go. Defendant then returned to the police station to

see if other officers who might be willing to help had reported for duty. He then left the police station and went straight to the Blackwell home, entered, and locked the door. He sat on the couch in the living room and placed a pistol on the coffee table and a shotgun on the couch. Carolyn Blackwell sat across the room on a sofa chair facing the door. The only light in the room came from a small television. Defendant heard a car going up and down the road blowing the horn and telephoned the police department again but received no help. Within a few minutes Clarence Blackwell burst into the room. In the ensuing melee, Blackwell cut defendant in the stomach, on his back, leg, hand and side. Defendant managed to reach the pistol and shot Blackwell. Defendant then picked up his shotgun and went out the door. He went directly to the police station and from there to the hospital where he remained for six days. He was examined by Dr. Lawrence who found a laceration one and one-half inches long in the left abdominal wall, a two-inch laceration on the right knee, a two and one-half inch cut in the lateral thigh and a laceration in the right lateral chest wall two and one-half inches long. A tube was placed in the right pleural cavity for drainage.

Defendant admitted on cross-examination that he was in love with Carolyn Blackwell and had been dating her since March 1973. He stated that he went to her house on the night of 3 May 1973 armed with a pistol and a shotgun because Clarence Blackwell had threatened to kill him and Carolyn.

Robert Ransom testified that on 2 May 1973 Clarence Blackwell, referring to Jimmy Britt, said he was going to kill the "son of a bitch." The witness said he knew Clarence Blackwell was "mad about Jimmy running with his wife."

Herman Smith testified that on 3 May 1973 at about 9:30 p.m. Clarence Blackwell came to his door and wanted to use the telephone. He admitted Blackwell who made a phone call, and he heard Blackwell say, "Jimmy, you son of a bitch, you been going with my wife and I'm going to kill you." Blackwell then sought to borrow a shotgun but his request was declined. Clarence Blackwell was drinking and brought a small can of beer into the house with him.

This witness admitted on cross-examination that he had been convicted of public drunkenness two or three times, driving under the influence twice, careless and reckless driving and other traffic offenses.

Vicki Hall, a fifteen-year-old high school student, testified that on 3 May 1973 she lived beside the Blackwell home on Highway 20. At approximately 10:30 p.m. she was at home in bed, saw lights from a car, and then saw a person walking toward the Blackwell home. She heard someone kick the door and then heard a shot. After the shot she saw Jimmy Britt get into his truck and drive away. At the same time she observed Carolyn Blackwell and her children leaving in their car. The next morning she went over to the Blackwell home, examined the door, and saw two footprints on it.

Shirley Jackson testified that on the morning of 4 May 1973 she went to the Blackwell home to get some clothing for the two Blackwell children. She observed that the front door had been "busted" and there were two footprints on the door. The lock was just hanging on the inside of the door. The furniture in the living room had been pushed around and there was a large amount of blood on the floor, the couch and a chair.

Johnny McLendon testified that on 3 May 1973 he saw Jimmy Britt in the parking lot in front of the St. Pauls Police Department; that Britt told him Clarence Blackwell had threatened to kill him. He told defendant that a threat was no violation of the law and there was nothing that could be done about it.

Defendant rested his case, and the State, in rebuttal, called Officer Carl Herring who testified that he got the weapon, marked State's Exhibit 1, from the residence of Jimmy Britt; that there was one empty cartridge in it and all the other cartridges were loaded. The weapon, a .357 magnum pistol, was offered in evidence.

Detective Luther Sanderson, Robeson County Sheriff's force, testified that he investigated the killing of Clarence Blackwell together with Officer Carl Herring. In that investigation he examined the front door but did not see two footprints on it. He examined the living room but found no blood on the couch and no blood on the chair but did see a few drops of blood on the floor—this was the only blood he found in the room. The lock on the door was hanging loose and the face of the door was split.

Both the State and defendant rested. Defendant's motion for nonsuit at the close of all the evidence was denied. The trial judge submitted first degree murder, second degree murder,

voluntary manslaughter and not guilty as permissible verdicts. The jury returned a verdict of guilty of murder in the first degree, and defendant was sentenced to death. He appealed to this Court assigning errors discussed in the opinion.

*Moses & Diehl by Philip A. Diehl, attorney for defendant appellant.*

*Rufus L. Edmisten, Attorney General; James E. Magner, Jr., Assistant Attorney General, and Archie W. Anders, Associate Attorney, for the State of North Carolina.*

HUSKINS, Justice.

**[1]** Defendant contends the trial court erred in excusing for cause certain prospective jurors who indicated they could not return a verdict of guilty knowing such verdict would necessitate imposition of a death sentence.

We note initially that in his brief defendant names no specific juror he contends was improperly challenged for cause. He apparently challenges the phraseology of the questions propounded by the district attorney to prospective jurors McCall and McDonald. The district attorney asked these and other jurors whether they were "opposed to it" (capital punishment) or "felt it was necessary." The initial responses of these jurors were rather equivocal. Nevertheless, despite the imprecise questions of the district attorney, we conclude that all jurors who were excused for cause, including jurors McCall and McDonald, eventually indicated, frequently only after further inquiry by the court, that they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence.

With respect to jury selection in capital cases, we have interpreted *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), to mean that veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; but veniremen who are unwilling to consider all of the penalties provided by law and who are irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial may be challenged for cause on that ground. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *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). In light of these principles, we hold that the prospective jurors here in question were properly excused for cause. Defendant's first assignment of error is overruled.

Even so, we again emphasize that counsel involved in the trial of capital cases, particularly prosecuting attorneys, when interrogating veniremen concerning their scruples and attitudes toward capital punishment, should employ questions which incorporate the terminology required by *Witherspoon* and *Monk* and insist on unequivocal answers. "Since *Witherspoon* has so clearly specified the ultimate question that must be answered, the voir dire examination of prospective jurors should be based on questions phrased in *Witherspoon* language. Unless this course is followed, new trials will often be necessary in cases otherwise free from prejudicial error." *State v. Monk, supra.*

This brings us to the question whether defendant was denied a fair trial by prejudicial conduct of the district attorney. A few of the alleged improprieties assigned as error are discussed below.

1. The prosecutor inquired whether or not defendant considered Carolyn Blackwell, the wife of the deceased, to be his girl friend. The following exchange then occurred before the jury:

"Q. [By the district attorney:] Isn't she your girl friend?

A. [By defendant:] Yes, sir.

Q. She was your girl friend on the 3rd of May and prior thereto; isn't that right?

A. Yes, sir.

Q. She's discussed this case with you in detail while you sat on death row for the past year; hadn't she?

EXCEPTION NO. 85.

A. No, sir.

Q. Huh?

A. No, sir.

Q. She's been up there frequently and talked with you on death row about this case, after you were convicted the last time?

EXCEPTION NO. 86.

MR. DIEHL: OBJECTION.

THE COURT: SUSTAINED."

At this point the court directed the jury to retire to the jury room, and in its absence defense counsel moved for a mistrial on the ground that the foregoing questions were so prejudicial that a fair trial by this jury was no longer possible. The trial judge stated: "I'm very much concerned about this. This jury should not know that he has been previously convicted and sentenced to death. I will see counsel in Chambers." The judge retired to chambers to discuss the matter with the district attorney and defense counsel. Upon returning to the courtroom the trial judge, with the consent of defense counsel, recalled the jury and instructed it that defendant previously had been convicted of first degree murder and sentenced to death but his conviction had been reversed by the Supreme Court of North Carolina so that the present trial was entirely new. The judge instructed the jury not to consider the prior trial and not to be influenced to any extent by defendant's prior conviction. Following such instruction defense counsel stated that he desired no further instructions and that his motion for mistrial was withdrawn. Subsequently, upon completion of the trial and during its charge to the jury, the court again instructed the jury to disregard defendant's prior trial and conviction, not to hold it against him, and to render their verdict solely upon new evidence offered at this particular trial.

2. In his argument to the jury the district attorney asserted that Clarence Blackwell, the deceased, had a right to defend himself in his own home. This evoked the following exchange:

"MR. DIEHL [defense counsel]: OBJECTION, your Honor. He keeps referring to the man's right in his own home. Evidence is that he was separated from his wife for a long period of time. He goes over it and over it.

MR. BRITT [district attorney]: It is his home.

THE COURT: Well, as to that, the Court is not going to give any instructions to that effect. The evidence tends

to show that they were separated and that the defendant was an invitee of the woman who lived there. SUSTAINED.

MR. BRITT: Tell you what, I left my wife to go to Washington a couple of weeks ago and I was gone for nearly a week. I was separated from her.

MR. DIEHL: OBJECTION.

MR. BRITT: When I came back I didn't expect to find nobody else to be in there and I expect I done something about if I found anybody there."

3. During closing argument the district attorney said: "I just don't believe in my own heart and mind that Jimmy Britt was cut as bad as he says he was. I don't believe he was cut the way he was. A man who kills another can do anything, I believe, if he wants to. Just take a knife and whack across the stomach and once across the bottom and once across the leg and once across the arm, and report into the hospital. What better way to cover it up, Ladies and Gentlemen of the Jury?" There is no evidence, inferential or otherwise, to support this argument.

4. During his closing argument the district attorney referred to the fact that Mrs. Blackwell was not called to testify for defendant. In doing so he stated that the reason for her failure to testify was *"because she hasn't got what it takes to perjure herself the way Jimmy Britt swore to you."* Defendant's objection to this statement was sustained, whereupon the district attorney *immediately* asked again, "Where is Carolyn?" At this point the trial judge instructed the jury not to consider the remarks about perjury.

5. During the redirect examination of David Blackwell, a State's witness and the son of the deceased, the district attorney repeatedly asked leading questions, to which defendant's objections were sustained. The trial judge stated that he considered the questions to be leading notwithstanding the tender age of the witness. Despite the court's admonition not to lead the witness, the prosecutor continued to do so. After the court sustained defendant's objection to still another question as leading, the district attorney stated: "It was meant to be."

6. During further redirect examination of the witness Blackwell, and during his closing argument, the district attorney implied and stated that the possible inconsistencies in the wit-

ness's testimony could be attributed to the fact that he had been "brainwashed" while visiting defendant during his stay in prison and during meetings arranged by Mrs. Blackwell with defendant's half-sister. There is no evidence in the record to support this statement. At one point during the recross examination of this witness, counsel for defendant asked whether anyone had told him to do anything but tell the truth. The objection of the district attorney was overruled and the witness answered in the negative. The district attorney retorted: "Somebody told him something."

7. During final argument the district attorney repeatedly referred to the knife used by the deceased as "a little, old pocketknife" or a "penknife." The knife was not offered in evidence and its size is not shown by the record. Defendant's objections to such references to the knife were sustained.

**[2]** Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment. *Rogers v. Richmond,* 365 U.S. 534, 5 L.Ed. 2d 760, 81 S.Ct. 735 (1961); *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (1941); *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620 (1965); *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951). It is the duty of both the court and the prosecuting attorney to see that this right is sustained. *State v. Monk, supra; State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954); *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717 (1948), *cert. denied* 336 U.S. 969, 93 L.Ed. 1120, 69 S.Ct. 941 (1949); *State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705 (1941). To these ends there are rules of practice and decorum with which all counsel involved in the trial of criminal cases must abide.

The district attorney owes honesty and fervor to the State and fairness to the defendant in the performance of his duties as a prosecutor. His duties are more fully stated in 63 Am. Jur. 2d, Prosecuting Attorneys, § 27 (1972), as follows:

> "The public interests demand that a prosecution be conducted with energy and skill, but the prosecuting officer should see that no unfair advantage is taken of the accused. It is as much his duty to see that a person on trial is not

> deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged. Nonetheless, zeal in the prosecution of criminal cases is to be commended and not condemned. If convinced of the defendant's guilt, the prosecuting attorney should, in an honorable way, use every power that he has to secure the defendant's conviction. At the same time, it is his duty to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled, and it is as much his duty to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one."

*See Berger v. United States,* 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). *Accord, State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975) ; *State v. Monk, supra; State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972) ; 23A C.J.S., Criminal Law §§ 1081, 1083 (1961).

**[3, 4]** The argument of counsel is left largely to the control and discretion of the presiding judge and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Stegmann, supra; State v. Monk, supra; State v. Thompson, supra; State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960) ; *State v. Barefoot, supra; State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947). Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom and the law relevant thereto. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974) ; *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668 (1956) ; *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899 (1954). Language may be used *consistent with the facts in evidence* to present each side of the case. *State v. Monk, supra.*

**[5, 6]** Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. *State v. Monk, supra; State v. Noell, supra; State v. Phillips, supra; State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953). Nor may counsel ask impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and humiliate the witness. *State v. Daye,* 281 N.C.

592, 189 S.E. 2d 481 (1972); *State v. Wyatt*, 254 N.C. 220, 118 S.E. 2d 420 (1961). The district attorney should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred. *See State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962); *State v. Wyatt, supra; State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949). "Prosecuting attorneys are in a very peculiar sense servants of the law. [Citation omitted.] They owe the duty to the State which they represent, the accused whom they prosecute, and the cause of justice which they serve to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial." *State v. Phillips, supra.*

While G.S. 84-14 confers upon counsel the right to argue to the jury the whole case as well of law as of fact, "argument is not without its limitations. The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. [Citations omitted.] If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu, State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954)." *State v. Monk, supra. Accord, State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967).

Application of these principles to the present case compels the conclusion that the district attorney's courtroom tactics transcend the bounds of propriety and fairness. More specifically, we hold that the improprieties enumerated in paragraphs numbered 1, 2 and 3 constitute prejudicial error requiring a new trial.

**[7]** With respect to the challenged cross-examination of defendant shown in paragraph numbered 1, the district attorney has a right and duty in a homicide prosecution to cross-examine a defendant who testifies in his own defense, *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied* 397 U.S. 1050, 25 L.Ed. 2d 665, 90 S.Ct. 1387 (1970); *State v. Wentz*, 176 N.C. 745, 97 S.E. 420 (1918), but such cross-examination must be fair at all times. Cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. *State v. Daye, supra; State v. Phillips, supra;* American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, §§ 56, 57

at 38-39 (1971); American Bar Association, Code of Professional Responsibility, Canon 7 (1974).

The trial judge attempted to correct this transgression by sustaining defendant's objection and twice instructing the jury to disregard defendant's prior conviction and return a verdict based solely upon the evidence presented in the present trial. Ordinarily, counsel's improper conduct may be cured by such action by the trial court, *see State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717 (1948), since the presumption is that jurors will understand and comply with the instructions of the court. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93 (1972); *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972). We have recognized, however, that some transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors. *See State v. White,* 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Roach,* 248 N.C. 63, 102 S.E. 2d 413 (1958); *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954); *State v. Dockery, supra; State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170 (1951); *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35 (1948); *State v. Little, supra.* A fair consideration of the principles established and applied in these cases constrains us to hold that no instruction by the court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case. The probability that the jury's burden was unfairly eased by that knowledge is so great that we cannot assume an absence of prejudice. *State v. Hines, supra.* We hold the challenged questions by the district attorney were highly improper and incurably prejudicial.

**[8]** In paragraph numbered 2 the repeated argument of the district attorney that the deceased had a right to defend himself "in his own home" was unsupported by the evidence and placed before the jury legal principles not applicable to the case. Although the court sustained defendant's objection, stating that the evidence tended to show that the deceased and his wife were separated and that defendant was an invitee of Mrs. Blackwell, the district attorney quite effectively overruled the court and continued to argue the point. This violates the rule that counsel may not argue principles of law not relevant to the case. *State*

*v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402 (1956). The courteous rulings of the able and patient trial judge had no deterring effect upon the prosecutor. His conduct in this manner was disrespectful to the court and prejudicial to defendant.

**[9]** In paragraph numbered 3 the argument of the district attorney that defendant, after he shot and killed Clarence Blackwell, cut himself with a knife to cover up the murder is wholly unsupported by the evidence or by any facts or circumstances permitting such an inference. This violates the rule that counsel may not travel outside the record and place before the jury an incompetent and prejudicial theory of the case grounded wholly on personal beliefs and opinions not supported by the evidence. *State v. Monk, supra; State v. Noell, supra.* This improper argument was not brought to the attention of the court by timely objection so as to afford the court an opportunity to correct the transgression in the charge. Even so, the fact that it occurred without correction only adds to the biased atmosphere created by overzealousness of the prosecution.

The matters disclosed by numbered paragraphs 4, 5, 6 and 7 further accentuate the cumulative effect of the district attorney's excessive infringement upon defendant's constitutional right to a fair trial at the hands of an unprejudiced jury.

The balance between the dual roles of the district attorney as impartial representative of the people and zealous advocate for the State is a delicate one. Yet according fair treatment to the defendant does not require a compromise of advocacy, for zealousness and fairness are complementary qualities in an effective prosecution where the goal to be achieved is what it should be—a just conviction of the guilty. *See* H. B. Vess, "Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument," 64 Journal of Criminal Law and Criminology 23 (March 1973). The district attorney who prosecuted this case most likely committed the excesses noted by an overzealous desire to secure the conviction of an accused he believed to be guilty of murder. In that connection the following admonition of Justice Ervin, speaking for this Court in *State v. Warren,* 235 N.C. 117, 68 S.E. 2d 779 (1952), is most appropriate:

> "Ministers of the law ought not to permit zeal in its enforcement to cause them to transgress its precepts. They should remember that where law ends, tyranny begins."

We deem it unnecessary to discuss other assignments since the errors alleged may not recur on retrial.

For the reasons stated the judgment below is vacated and the case remanded to the Superior Court of Robeson County for a

New trial.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, NORTH STATE TELEPHONE COMPANY, DEFENDANT, BARNARDSVILLE TELEPHONE COMPANY, CAROLINA TELEPHONE & TELEGRAPH COMPANY, CENTRAL TELEPHONE COMPANY, CHAPEL HILL TELEPHONE COMPANY, CITIZENS TELEPHONE COMPANY, CONCORD TELEPHONE COMPANY, EASTERN ROWAN TELEPHONE COMPANY, ELLERBE TELEPHONE COMPANY, GENERAL TELEPHONE COMPANY OF THE SOUTHEAST, HEINS TELEPHONE COMPANY, LEXINGTON TELEPHONE COMPANY, MEBANE HOME TELEPHONE COMPANY, MID-CAROLINA TELEPHONE COMPANY, MOORESVILLE TELEPHONE COMPANY, NORFOLK & CAROLINA TELEPHONE COMPANY, NORTH CAROLINA TELEPHONE COMPANY, RANDOLPH TELEPHONE COMPANY, SALUDA MOUNTAIN TELEPHONE COMPANY, SANDHILL TELEPHONE COMPANY, SERVICE TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, THERMAL BELT TELEPHONE COMPANY, UNITED TELEPHONE COMPANY OF THE CAROLINAS, INC., WESTCO TELEPHONE COMPANY, AND WESTERN CAROLINA TELEPHONE COMPANY, RESPONDENTS v. NATIONAL MERCHANDISING CORPORATION, COMPLAINANT

No. 51

(Filed 17 December 1975)

1. **Utilities Commission § 2— manufacturer of plastic telephone directory covers — no regulation by Utilities Commission**

   Since complainant, a *manufacturer and distributor* of plastic covers designed to fit over the outside cover of a telephone directory, is not a public utility, its production in another state and distribution in N. C. of its plastic covers are not subject to regulation by the Utilities Commission. G.S. 62-3(23); G.S. 62-2; G.S. 62-30; G.S. 62-31.

2. **Utilities Commission §§ 6, 9— manufacturer of plastic telephone directory covers — interest in tariff and rule — standing to file complaint and appeal**

   Complainant manufacturer and distributor of plastic telephone directory covers had the requisite interest in a telephone company

tariff declaring telephone directories to be the property of the telephone company and forbidding any person to attach to the directory any cover not furnished by the telephone company upon the pain of having such person's telephone service suspended and had the requisite interest in the rule requiring such tariff promulgated by the Utilities Commission; therefore, complainant had standing to file the complaint which initiated the proceeding and had standing to prosecute the appeal. G.S. 62-73; G.S. 62-92; G.S. 62-96.

3. **Utilities Commission § 1 — commission as administrative agency — regulatory authority conferred by statute**

The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Ch. 62 of the General Statutes, and, obviously, the Commission may not, by its order, require or authorize a rule or practice by a public utility company which is forbidden by statute, or authorize such company to refuse to perform a duty imposed upon it by statute, unless Ch. 62 of the General Statutes has conferred such authority upon the Commission.

4. **Telephone and Telegraph Companies § 1; Utilities Commission § 2— telephone service — discontinuance without justification — authority of Utilities Commission**

G.S. 62-140 requires a telephone company serving in this State to render telephone service, without discrimination, to all within its service area who apply therefor, and a refusal by the company to serve without a reasonable justification therefor is a violation of the company's duty and the Commission has no authority to permit it.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— order prohibiting attachment of additional covers to telephone directories — suspension of service as penalty — unreasonableness of order**

It is unreasonable for a telephone company to discontinue service to a subscriber for the sole reason that such subscriber elects to place an opaque cover upon the directory supplied to him by the company, and such discontinuance cannot be justified on the grounds that (1) the subscriber will forget the name of his telephone company, the towns listed in the directory or other information printed on the directory cover once he places an opaque cover on his directory, (2) the printing on the added cover of telephone numbers of the advertising customers of the producer of the cover is an infringement of the telephone company's copyright of its directory, (3) attachment of the added cover to the directory poses a serious threat to the quality of the telephone company's service in that the printed list of "emergency numbers" on the added cover may include an occasional "wrong number," (4) title to the directory is reserved by the telephone company and the attachment of the added cover to the book is a trespass on the company's property, and (5) the covers carry advertisements of local businesses and therefore compete with the telephone company's yellow page advertising.

Justice BRANCH did not participate in the consideration or decision of this matter.

APPEAL by the complainant from the decision of the Court of Appeals, reported in 26 N.C. App. 617, 220 S.E. 2d 97, affirming the order of the North Carolina Utilities Commission, *Britt, J.*, dissenting.

North States Telephone Company is a public utility corporation rendering telephone service, its principal office being in the City of High Point. Its General Exchange Tariff, previously approved by the Commission provided:

> "Directories which are the property of the Telephone Company are furnished to subscribers as part of the telephone service. Binders, covers, folders, tags, stickers or other devices not furnished by the Telephone Company are prohibited and any persons [sic], firm or corporation who violates this rule, or permits it to be violated, is made subject to the penalty of having the telephone service suspended."

National Merchandising Corporation, hereinafter called the complainant, is a manufacturer and distributor of plastic covers designed to fit over the outside cover of a telephone directory. The inside flaps of these covers, which hold them in place on the directory, are of clear plastic so that they do not obscure any printing upon the interior of the cover sheet of the directory itself. The remainder of the complainant's cover is opaque so that, with the cover in place upon the directory, nothing printed upon the outside of the cover sheet of the directory itself can be read.

On the front of the complainant's cover advertisements are printed by the complainant, advertising and giving the telephone numbers of from six to sixteen local business establishments, of which no two are in the same business category. The complainant solicits such advertising from business establishments within an area to which the telephone directory relates. Usually, such area is not as extensive as that covered by the telephone directory. The complainant may subdivide even the area served by a single telephone exchange into two or more areas, for each of which it prepares its plastic cover carrying advertisements of business establishments within such smaller territory. The complainant charges the advertisers for its service. It distributes its cover to telephone subscribers within the area to which the advertisements relate, making no charge to the telephone subscriber, informing the subscriber that the cover is a gift

from the business establishments so advertising. The telephone subscriber then places the plastic cover on his telephone directory, throws it away or makes such other use as the subscriber sees fit.

On the outside of the back of the plastic cover, the complainant prints numerous telephone numbers which the subscriber may wish to call in the event of an emergency and the telephone numbers of various public institutions or offices, such as the Police Department, the Fire Department, schools, churches, ambulance service, hospitals and the like.

On the outside of the cover sheets of the telephone directory, itself, the Telephone Company has caused to be printed such matters as the name of the company, the exchanges to which the directory relates (a single directory often relating to more than one city or town), the area code number, references to interior pages on which instructions are given for such matters as direct distance dialing and reaching telephone repair service. The outside front cover of the telephone directory may also carry what the company deems an attractive picture, or other decoration, designed to promote good will for the company among its subscribers. Advertising for others than the Telephone Company itself does not appear on the outside pages of the telephone directory but is confined to the yellow page section thereof. Such advertising is not limited to one business establishment in each category but is available to all who desire it. A charge therefor is made to the advertiser. The proceeds of yellow page advertising, in most instances, are sufficient to pay the cost of preparing and distributing the telephone directory and often yield, in addition, a substantial profit to the Telephone Company. Such revenue is regarded as "operating revenue" for the purpose of telephone rate making.

The complainant instituted this proceeding by filing its complaint with the Utilities Commission, alleging that the above quoted provision of the Telephone Company's tariff is an unwarranted interference with the telephone subscriber's right to use his telephone and the directory furnished to him by the Telephone Company. It prayed that this provision be stricken from the tariff.

The company, in its answer, alleged that the telephone directories distributed by it to its telephone subscribers remain the property of the Telephone Company; the tariff provision

in question prohibits an interference with and an impairment of the company's services to its subscribers and the use of such covers on the directories would cause the Telephone Company to lose advertising revenues which loss would result in higher rates to its subscribers for telephone service.

The Commission ordered the matter expanded into a general investigation of tariff restrictions on such directory covers, made all telephone companies operating in North Carolina parties to the proceeding and conducted a hearing, at which all or substantially all of such telephone companies appeared and presented evidence.

The evidence introduced by the several telephone companies was substantially the same and was designed to show the following:

The telephone directories, after distribution by the telephone companies to their respective subscribers, remain the property of the Telephone Company although, when superseded by a later directory, the company does not make any effort to reclaim the old one. Errors sometimes appear in the emergency telephone numbers shown on such plastic covers due to a variety of reasons such as a change of the number following the distribution of the plastic cover, mistake as to the Police Office or Fire Station serving the area and human error in compilation. Covering the information shown on the outside of the front cover page of the directory itself deprives the company of the benefit of its own advertising and ornamentation and deprives the subscriber of direction to the page of the directory on which instructions, useful in obtaining certain telephone services, are set forth. This causes the subscriber to make unnecessary calls to the operator for assistance, which increases operating expense. The Telephone Company's revenues from yellow page advertising are substantial and potential advertisers in the yellow pages are discouraged from placing advertising therein by the preferential position occupied by a competitor whose advertisement appears on the plastic cover. This increases the likelihood of higher rates for telephone service. It also is discriminatory as between such competing businesses. The Telephone Company has copyrighted its directory and has not given the complainant permission to copy any portion of it.

The Commission entered its order (1) dismissing the complaint and denying the relief sought by the complainant, (2) hold-

ing the existing tariff provisions of all the telephone companies relating to the use of directory covers are just and reasonable but should be superseded by a uniform provision, (3) declaring that directories remain the property of the issuing telephone company until superseded by a later issue, (4) requiring all non-telephone utility advertising to be confined to the yellow pages of the directory, and (5) promulgating and making applicable to all telephone companies operating in this State the following rule:

> "Directories which are the property of the telephone utility are furnished to subscribers as part of the telephone service. No binder, holder, insert, or auxiliary cover or attachment of any kind not furnished by the telephone utility shall be attached to the telephone directories owned by the utility except that this prohibition shall not apply to a subscriber-provided binder, holder, insert, or auxiliary cover which is attached so that it does not obstruct vital and essential information such as the identity of the exchanges covered by the directory, the effective date of the directory, emergency numbers and federal and state laws and Rules and Regulations of the Commission pertaining to telecommunication services, and any person, firm or corporation violating this rule, or permits [sic] it to be violated is made subject to having telephone service suspended."

The complainant appealed to the Court of Appeals which affirmed the order of the Commission without discussion of the merits, Britt, J., dissenting.

*Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter and Benjamin F. Davis, Jr. for Complainant Appellant.*

*Edward B. Hipp, Commission Attorney, Maurice W. Horne, Deputy Commission Attorney, and John R. Molm, Associate Commission Attorney, for North Carolina Utilities Commission.*

*Jerry W. Amos; Brooks, Pierce, McLendon, Humphrey and Leonard by James T. Williams, Jr. for North State Telephone Company, The Concord Telephone Company and Lexington Telephone Company.*

*William C. Fleming for General Telephone Company of the Southeast.*

*Taylor, Brinson & Aycock by William W. Aycock, Jr. for Carolina Telephone and Telegraph Company.*

*Kimzey, Mackie & Smith by James M. Kimsey for United Telephone Company of the Carolinas, Inc.*

*A. Terry Wood for Central Telephone Company.*

LAKE, Justice.

[1] The complainant is not a public utility. G.S. 62-3(23). Consequently, its production in another state and distribution in North Carolina of plastic covers for telephone directories, even if not immune to State regulation by reason of the Commerce Clause of the Constitution of the United States, a question not now before us and which we do not decide, are not subject to regulation by the Utilities Commission. G.S. 62-2; G.S. 62-30; G.S. 62-31.

The order of the Commission from which the complainant appeals does not purport to require anything of the complainant or to prohibit or regulate any of the complainant's activities. The order leaves the complainant free to manufacture and distribute plastic covers for telephone directories and to print thereon advertising matter. What the order does is to require each telephone company operating in this State to file with the Commission a tariff declaring telephone directories, furnished to subscribers, to be the property of the telephone company and forbidding any person (i.e., the telephone subscriber) to attach to the directory any cover not furnished by the telephone company, with an exception not germane to this appeal, upon the pain of having such person's telephone service suspended. Thus, the order of the Commission is, ostensibly, directed against the telephone subscriber who has purchased, or otherwise acquired, from a source other than the telephone company itself, a cover for the telephone directory supplied to him by the telephone company. The order forbids the telephone subscriber to place this cover upon such directory even though the subscriber, after examining it, concludes that it is more attractive in appearance, or contains information more beneficial to him in his use of the telephone, than is or does the original cover of the directory. Such subscriber may retain such cover on his desk, table or telephone stand and use it as he sees fit so long as he does not attach it to the directory. If he does the latter, the telephone company is authorized, though not required, to discontinue telephone service to him.

The tariff of North State Telephone Company, against which the complaint of the complainant was directed, and which was previously in effect with the approval of the Commission, was to the same effect.

**[2]** Although the tariffs in question leave the complainant free to manufacture and distribute its covers, their effect is, necessarily, to discourage telephone subscribers from placing such covers on the directories in their homes, offices and places of business. Thus, the tariffs discourage prospective advertisers from contracting with the complainant for the placing of their advertisements on the covers and, therefore, substantially handicap the complainant in carrying on its business. G.S. 62-73 provides that a complaint may be filed with the Utilities Commission "by any person having an interest * * * in the subject matter of such complaint," alleging that any "rule, regulation or practice is unjust and unreasonable." We think it clear that the complainant had and has the requisite interest in the original tariff of the company and in the rule so promulgated by the Commission and, therefore, had standing to file the complaint which initiated this proceeding. Consequently, the complainant has standing to prosecute this appeal. G.S. 62-92; G.S. 62-96.

Upon this appeal we may reverse the decision of the Commission and declare the said rule so promulgated by it to be null and void if the order of the Commission is in excess of its statutory authority or jurisdiction or is arbitrary or capricious. G.S. 62-94; *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705; *Utilities Commission v. Morgan, Attorney General*, 277 N.C. 255, 267, 177 S.E. 2d 405.

**[3]** The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Ch. 62 of the General Statutes. *Utilities Commission v. R. R.*, 268 N.C. 242, 245, 150 S.E. 2d 386. Obviously, the Commission may not, by its order, require or authorize a rule or practice by a public utility company which is forbidden by statute, or authorize such company to refuse to perform a duty imposed upon it by statute, unless Ch. 62 of the General Statutes has conferred such authority upon the Commission.

The order of the Commission now before us purports to authorize a telephone company to discontinue telephone service

to a subscriber who pays his telephone bills promptly and complies with every rule of the company except that he places upon the directory, furnished him by the company, a cover which, while in place, prevents him from looking at a picture, which the telephone company considers attractive, and prevents him from reading the name of the company, the names of the towns, telephone directories for which are included in the book, a suggestion that the subscriber consult the yellow pages and such other information about its service as the company may see fit to put on the original cover of the directory.

**[4, 5]** G.S. 62-140 requires a telephone company serving in this State to render telephone service, without discrimination, to all within its service area who apply therefor. *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136; *Public Service Co. v. Power Co.*, 179 N.C. 18, 30, 101 S.E. 593, rehear. dism., 179 N.C. 330, 102 S.E. 625. A refusal by the company to serve without a reasonable justification therefor is a violation of the company's duty and the Commission has no authority to permit it. We are, therefore, brought to this question: Is it reasonable for a telephone company to discontinue service to a subscriber for the sole reason that such subscriber elects to place an opaque cover upon the directory supplied to him by the company? We conclude that it is not.

No one requires the subscriber to place such cover on the directory. He does so solely because he, after observing all that appears on the original cover of the directory and what appears on the added cover, concludes that the appearance of the added cover is more attractive or the information contained thereon is more useful to him than that which appears on the original cover.

It is completely unrealistic to say that, having placed the added cover on the directory, the subscriber will no longer remember the name of his telephone company or the towns, telephone subscribers in which are listed in the directory, or that the directory contains a yellow page section. The fact that the book is actually composed of several directories, each relating to a separate town, does not mean necessarily that subscribers in such other towns may be called toll free. A subscriber having frequent occasion to call a person or persons in another town will remember that the directory for such other town is included within his book whether or not the original front page of the book is obscured by an added cover. If he does not, such

information is readily obtained by him through the simple process of flipping quickly through the pages of the book.

It is equally unrealistic to attempt to justify such discontinuance of telephone service on the ground that the printing on the added cover of telephone numbers of the advertising customers of the producer of the cover is an infringement of the telephone company's copyright of its directory. It is entirely possible and probable that the producer of the cover obtained his information as to the telephone number of his advertising customer from such customer, not from reading the directory. In any event, nothing in the record before us indicates that this was not the source of the complainant's information. Furthermore, the order in question does not prohibit the producer of the cover from printing thereon such telephone numbers or from distributing such cover to telephone subscribers, even if it be assumed that the Utilities Commission has jurisdiction to deal with a violation of the copyright law. What the order in question does is to declare that the telephone company may discontinue service to its subscriber solely because the subscriber sees fit to place a cover on the directory supplied to him for use in his home or place of business. We are cited to no authority holding this a violation of the copyright law.

We find no reasonable basis in the evidence contained in the record for the Commission's finding that the attachment of the added cover to the directory poses a serious threat to the quality of the telephone company's service. The mere assertion by officials of the various telephone companies testifying at the hearing that such threat to the quality of the service results from the attachment of the added cover is not evidence sufficient to support such a finding. The evidence is that the printed list of "emergency numbers" and numbers for public institutions such as schools and churches, may include an occasional "wrong number" by reason of human error by the producer of the cover or a subsequent change in the number originally shown correctly. Obviously, there is no greater likelihood of such "wrong number" upon the added cover than there is in a list of such numbers compiled by the telephone subscriber himself and written by him in a space provided therefor by the telephone company on the back page of the original cover of the directory. In any event, the possibility of occasional use of a "wrong number" is not a reasonable ground for discontinuance of the subscriber's telephone service.

Another contention of the telephone companies in support of the Commission's order is that, as the order declares, title to the directory is reserved by the telephone company when it delivers the directory to the subscriber's residence or place of business for the subscriber's use in placing telephone calls and, therefore, the attachment of the added cover to the book is a trespass on the company's property. It is a matter of common knowledge that, except under most unusual circumstances, a telephone directory so delivered to a subscriber remains in the subscriber's possession until it is replaced by a later directory and is then discarded by the subscriber into the trash can or contributed by him to a scrap paper collection. If however, it be technically a trespass upon the telephone company's property to attach an opaque cover to its directory, so delivered to its subscriber, Ch. 62 of the General Statutes does not confer upon the Utilities Commission jurisdiction to prevent or redress such trespass. If the attachment of the cover be a trespass, it is the subscriber, not the producer of the cover, who is the trespasser and it is the subscriber whose telephone service is authorized to be discontinued by this order of the Commission. A trespass so technical in nature and trivial in consequence is not a reasonable ground for discontinuance of the subscriber's service by the telephone company.

Notwithstanding the disclaimer by the Commission, the record makes it abundently clear that the real reason for the objections of the telephone companies to the use of the complainant's covers by the telephone subscribers is that such covers carry advertisements of local businesses and, therefore, compete with the telephone company's yellow page advertising. This State has adopted the policy of granting to a telephone company a monopoly upon the rendering of telephone service within its service area. G.S. 62-110. Nothing in Ch. 62 of the General Statutes, however, confers upon a telephone company a monopoly upon advertising by its business subscribers. The order of the Utilities Commission attempts to do this by forbidding subscribers to the telephone company's service to attach a cover to the directory supplied by the company to such subscriber. In so doing, the Commission has acted in excess of its statutory authority and has acted arbitrarily and capriciously.

The separate briefs filed by the complainant, the Commission, and each of the telephone companies who are parties to this appeal, and our own research have brought to our atten-

tion only two decisions by courts of last resort upon the question presented by this appeal. Both involve the present complainant and both decisions were in its favor. *New England Tel. & Tel. Co. v. National Merchandising Corp.*, 335 Mass. 658, 141 N.E. 2d 702, 18 PUR 3d 343; *National Merchandising Corp. v. Public Service Commission,* 5 N.Y. 2d 485, 158 N.E. 2d 714, 29 PUR 3d 343. See also: *Hush-A-Phone Corp. v. United States,* 238 F. 2d 266.

Decisions by the intermediate appellate courts of Illinois and Missouri are to the contrary. *Illinois Bell Telephone Co. v. Miner,* 11 Ill. App. 2d 44, 136 N.E. 2d 1; *National Telephone Directory Co. v. Dawson Mfg. Co.*, 214 Mo. App. 683, 263 S.W. 483. Also to the contrary is a decision by Chief District Judge Craven in *Citizens Telephone Co. v. Tel. Service Co.*, 214 F. Supp. 627 (W.D.N.C.). In that case, Judge Craven had before him a suit for an injunction and monetary damages brought against a producer of directory covers, the case being in the Federal court by reason of diversity of citizenship. As Judge Craven pointed out in his decision, he was called upon to apply the law of North Carolina and there was no decision of this Court upon the question. He granted the injunction in reliance upon *Illinois Bell Telephone Co. v. Miner, supra.* His decision is, of course, not binding upon this Court and we do not find its reasoning persuasive. Furthermore, Judge Craven did not have before him the question of the right of the telephone company to cut off a subscriber's telephone service because of the subscriber's use of such a cover upon the directory supplied to him by the telephone company.

In *New England Tel. & Tel. Co. v. National Merchandising Co., supra,* the Massachusetts Court said:

> "The evidence does not justify a finding that interference with the company's service to the public will be caused by the use of the covers. The directory is not connected with the telephone company's mechanical and electrical system. * * *
>
> "The evidence, closest to having relevance on this issue, is proof of three errors only (each on a separate cover among the numerous covers distributed by National) in numbers listed on National's covers, one caused by a telephone number change after the cover was published, one caused by clerical error, and one based on a mistake in

transcription. These errors appear to have been corrected with promptness and energy, and there is no evidence that they caused any difficulty. It was conceded that inevitably there are errors in the telephone company's directories also. Any interference with service from this type of error is too trivial to warrant injunctive relief.

"It is suggested that important service instructions are concealed by the cover. Once read, such instructions rapidly become understood and of no importance. There is no basis in the evidence for concluding that any noticeable interference with service occurs from concealing these instructions, even by an opaque cover.

"It is unimportant that the telephone company retains title to the telephone directories, if it does. The subscriber is certainly given by the telephone company a license to use the directories on his own premises. He has sole possession of a directory while he remains a subscriber. * * *

"Apart from the company's tariffs, no contract between the subscribers and the telephone company not to use covers on telephone directories has been proved. * * * We think the provisions of the tariffs, already quoted, do not create such a contract. * * * We adopt this construction the more readily because it avoids * * * serious questions of the validity of the tariff as reasonable under applicable statutes * * * and conceivably also on constitutional grounds. Questions of reasonableness might well be presented by a tariff requirement that subscribers agree (as a condition of obtaining an essential monopolistic, regulated public service which the telephone company is bound to furnish to the public) that they will not attach National's covers or similar covers to the directories. Such a requirement could be designed only to further a private advertising interest of the telephone company. * * *

"Although the telephone company has a protected and necessary monopoly in furnishing telephone service, that does not mean that it can prevent the use by its subscribers of accessories with its equipment and books 'in ways which are privately beneficial without being publicly detrimental.' "

The Masschusetts Court, accordingly, found the reasoning of the Illinois Court of Appeals and of the Missouri Court of

Appeals in the *Illinois Bell Telephone Co. v. Miner, supra,* and *National Telephone Directory Co. v. Dawson Mfg. Co., supra,* not persuasive and held there was no error in the denial of an injunction sought to prevent the producer from distributing such covers. It would seem necessarily to follow that the subscriber's use of such a cover by attaching it to the directory is not justification for a cutting off of his telephone service.

In *National Merchandising Corp. v. Public Service Commission of New York, supra,* the New York Court of Appeals had before it for consideration the Public Service Commission's approval of a standard tariff provision similar to that which has been approved by the Utilities Commission in the present matter. The Court said:

> "The tariff, as approved by the commission, ostensibly governs the contractual relations of the telephone company and its subscribers, but its admitted purpose is to inhibit the activities of National and other firms engaged in similar enterprises. * * *
>
> "The repository of the commission's regulatory authority is the Public Service Law, and the commission is powerless to exceed the authority conferred on it by that statute. * * * The commission may not posit its jurisdiction upon the possible impact of these covers on advertising revenues. It is one thing to have limited jurisdiction over advertisements in the directory to see that all advertisers are treated equitably, and to insure that maximum revenues are derived from the sale of advertisements * * *; it is quite another thing to assert jurisdiction to immunize these telephone companies from competition, where the telephone companies engage in activities which do not come within the scope of an essential public service. * * *
>
> "Further, this attempted usurpation of power cannot be justified on the ground that the activity of National constitutes unfair competition or interference with the telephone companies' property rights since these matters are for the courts. * * *
>
> "We conclude, therefore, that the commission lacks authority to prohibit, either directly or indirectly, a lawful business enterprise from competing with the telephone companies in nonpublic service areas * * *.

"We conclude then that there is no rational basis for that part of the tariff regulation which forbids the use of directory covers which contain advertising. Indeed, this type of regulation constitutes an unwarranted invasion of the home of a subscriber, who should remain free to use such covers, once in his possession, as he sees fit."

We find the reasoning of the Massachusetts and New York Courts persuasive and conclude that the order of the Commission is in excess of its statutory authority and is arbitrary and capricious. The decision of the Court of Appeals is, therefore, reversed and the order of the Utilities Commission is declared null and void.

Reversed.

Justice BRANCH did not participate in the consideration or decision of this matter.

BRITT v. ALLEN

No. 101 PC.

Case below: 27 N.C. App. 122.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 December 1975.

CHURCH v. CHURCH

No. 100 PC.

Case below: 27 N.C. App. 127.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 December 1975.

HALL v. GENERAL MOTORS CORP.

No. 113 PC.

Case below: 27 N.C. App. 202.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

HALSEY v. CHOATE

No. 87 PC.

Case below: 27 N.C. App. 49.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 December 1975.

IN RE ARTHUR

No. 106 PC.

Case below: 27 N.C. App. 227.

Petition for discretionary review under G.S. 7A-31 allowed 17 December 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 17 December 1975.

LICENSING BOARD v. WOODARD

No. 122 PC.

Case below: 27 N.C. App. 398.

Petition for discretionary review under G.S. 7A-31 denied 17 December 1975.

PEELE v. SMITH

No. 108 PC.

Case below: 27 N.C. App. 274.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

PIERCE v. BLOCK CORP.

No. 114 PC.

Case below: 27 N.C. App. 276.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

RODGERSON v. DAVIS

No. 109 PC.

Case below: 27 N.C. App. 173.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

STATE v. CLAY

No. 98 PC.

Case below: 27 N.C. App. 118.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

STATE v. COURSON

No. 102 PC.

Case below: 27 N.C. App. 268.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975. Appeal dismissed ex mero motu 2 December 1975.

STATE v. CRAWFORD

No. 117 PC.

Case below: 27 N.C. App. 414.

Petition for discretionary review under G.S. 7A-31 denied 17 December 1975.

STATE v. LITTLE

No. 139 PC.

Case below: 27 N.C. App. 467.

Petition for discretionary review under G.S. 7A-31 denied 17 December 1975.

STATE v. MULWEE

No. 119 PC.

Case below: 27 N.C. App. 366.

Petition for discretionary review under G.S. 7A-31 denied 17 December 1975.

STATE v. PEARSON

No. 97 PC.

Case below: 27 N.C. App. 157.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 December 1975.

STATE v. PEARSON

No. 88 PC.

Case below: 27 N.C. App. 83.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 December 1975.

STATE v. RESPASS

No. 111.

Case below: 27 N.C. App. 137.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1975.

STATE v. WATKINS

No. 121 PC.

Case below: 27 N.C. App. 171.

Appeal dismissed ex mero motu for lack of substantial constitutional question 17 December 1975.

STATE v. WRIGHT

No. 112 PC.

Case below: 27 N.C. App. 263.

Petition for discretionary review under G.S. 7A-31 denied 17 December 1975.

STRANGE v. SINK

No. 95 PC.

Case below: 27 N.C. App. 113.

Petition for discretionary review under G.S. 7A-31 denied 2 December 1975.

TAYLOR v. JOHNSTON

No. 111 PC.

Case below: 27 N.C. App. 186.

Petition for discretionary review under G.S. 7A-31 allowed 17 December 1975.

YARBOROUGH v. YARBOROUGH

No. 77 PC.

Case below: 27 N.C. App. 100.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 December 1975.

# APPENDIXES

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ADDITIONS TO
RULES OF APPELLATE PROCEDURE

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AMENDMENTS TO RULES
OF THE JUDICIAL STANDARDS COMMISSION

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REVIEW OF
JUDICIAL STANDARDS COMMISSION
RECOMMENDATIONS

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AMENDMENTS TO RULES AND REGULATIONS
OF THE NORTH CAROLINA STATE BAR

# ADDITIONS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The following subdivision shall be added to Rule 30:

(e) **Decision of Appeal Without Publication of an Opinion.**

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

Done by the Court in Conference on December 18, 1975.

EXUM, J.
For the Court

## AMENDMENTS TO RULES OF THE JUDICIAL STANDARDS COMMISSION

### RULE 10

**Formal Hearings.** Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal hearing before it concerning the charges. The hearing shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 8.

At the date set for the formal hearing, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in support of the charges. Counsel shall be sworn to preserve the confidential nature of the proceeding.

The hearing shall be recorded by a reporter employed by the Commission for this purpose. The reporter shall also be sworn to preserve the confidential nature of the proceeding.

### RULE 13

**Rights of Respondent.** In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, which shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 14

**Evidence.** At a formal hearing before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence.

RULE 18

**Record of Proceedings.** The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal hearings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation.

This is to certify that the foregoing amendments to Rules 10, 13, 14 and 18 are the amendments duly adopted by the Judicial Standards Commission this the 12th day of December, 1975.

WALTER E. BROCK

Chairman, Judicial Standards Commission

# RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

## RULE 1

## DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) **Commission** means the Judicial Standards Commission.

(b) **Judge** or **respondent** means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) **Court** means the Supreme Court of North Carolina. **Clerk** means the Clerk of the Supreme Court.

(d) **Commission's attorney** means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) **Service** of a document required to be served means either mailing the document by U. S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N. C. Rules of Civil Procedure.

## RULE 2

## PETITION FOR HEARING

(a) **Notice to Judge.** When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U. S. certified mail, return receipt requested, to the respondent named therein.

(b) **Petition for Hearing.** The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate show-

ing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) **Failure to File Petition.** If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) **Briefs.** Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) **Oral Argument.** After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

## RULE 3

## DECISION BY THE COURT

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk as a part of the record of the proceeding.

## RULE 4

## REPRODUCTION OF RECORD AND BRIEFS

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

## RULE 5

## COSTS

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

Duly adopted by the Court in Conference this 25th day of September, 1975.

Exum, J.

For the Court

# AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and Certificate of Organization of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at its quarterly meetings on October 24, 1974, July 18, 1975, October 16, 1975 and January 16, 1976.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, c. Committee on Grievances — as appears in 205 N.C. 859 and as amended in 253 N.C. 820 be and the same is hereby amended by deleting all of Article VI, Section 5, c. and inserting in lieu thereof the following:

## ARTICLE VI

**Section 5. Standing Committees of the Council —**

c. Committee on Grievances —

Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman and one as Vice-Chairman. The Committee shall have as members at least three councilors from districts in each of the court divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

BE IT FURTHER RESOLVED by the Council of The North Carolina State Bar that Article IX, Discipline and Disbarment of Attorneys, as appears in 205 N.C. 861 and as amended in 253 N.C. 820 be and the same is hereby amended by deleting all of Article IX as it relates to discipline and disbarment of attorneys and inserting in lieu thereof the following:

## ARTICLE IX

### Discipline and Disbarment of Attorneys

Determination of Disability.

**§ 1. General Provisions.**

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain mis-

conduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the bar.

§ 2. **Proceeding for Discipline.**

The procedure to discipline members of the bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar.

§ 3. **Definitions.**

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **accused or accused attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **certificate of conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **complainant or complaining witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **court or courts of this State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **disabled or disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **incapacity or incapacitated:** condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) **Letter of Notice:** a communication to an accused attorney setting forth the substance of a grievance.

(23) **Office of the Counsel:** the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) **Office of the Secretary:** the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) **party:** after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) **plaintiff:** after a complaint has been filed, The North Carolina State Bar.

(27) **preliminary hearing:** hearing by the Grievance Committee to determine whether probable cause exists.

(28) **probable cause:** a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) **Secretary:** the Secretary-Treasurer of The North Carolina State Bar.

(30) **serious crime:** the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or wilful failure to file a tax return.

(31) **Supreme Court:** the Supreme Court of North Carolina.

**§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.**

**The Council of The North Carolina State Bar shall have the power and duty:**

(1) to supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) to appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) to appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) to order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) to accept the surrender of the license to practice law of any member of The North Carolina State Bar during the progress of disciplinary proceedings against the member and impose such conditions upon the acceptance as the Council deems appropriate.

(6) to review the report of any Hearing Committee upon a petition for reinstatement and make the final determination as to whether the license shall be restored.

**§ 5. Chairman of the Grievance Committee — Powers and Duties.**

**(A) The Chairman of the Grievance Committee shall have the power and duty:**

(1) to supervise the activities of the Counsel.

(2) to recommend to the Grievance Committee that an investigation be initiated.

(3) to recommend to the Grievance Committee that a grievance be dismissed.

(4) to direct a Letter of Notice to an accused attorney.

(5) to issue, at the direction and in the name of the Grievance Committee, Letters of Caution or private reprimands to an accused attorney.

(6) to notify an accused attorney and any complainant that a grievance has been dismissed.

(7) to call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) to issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) to administer oaths or affirmations to witnesses.

(10) to file and verify complaints and petitions in the name of The North Carolina State Bar.

**(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.**

**§ 6. Grievance Committee — Powers and Duties.**

**The Grievance Committee shall have the power and duty:**

(1) to direct the Counsel to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) to dismiss grievances upon a finding of no probable cause.

(4) to issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) to issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) to direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

## § 7. Counsel — Powers and Duties.

**The Counsel shall have the power and duty:**

(1) to investigate all matters involving alleged misconduct whether initiated by the filing of grievance or otherwise.

(2) to recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon by the Grievance Committee to determine whether probable cause exists.

(3) to prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) to represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

(5) to appear on behalf of The North Carolina State Bar at hearings conducted by the Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) to appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) to employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) to maintain permanent records of all matters processed and the disposition of such matters.

(9) to perform such other duties as the Council may from time to time direct.

**§ 8. Chairman of the Hearing Commission — Powers and Duties.**

**(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:**

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee and petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended or disbarred.

(2) to assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaint or petition. The Chairman shall designate one of the attorney members as chairman of the Hearing Committee. Provided: that no member shall be appointed to serve on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) to set the time and place for the hearing on each complaint or petition.

(4) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) to file findings, conclusions and orders of the Hearing Committees with the Secretary.

**(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified.**

**§ 9. Hearing Committee — Powers and Duties.**

**Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:**

(1) to hold hearings on complaints alleging misconduct and petitions seeking a determination of disability or reinstatement.

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee shall designate.

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) to administer oaths or affirmations to witnesses at hearings.

(5) to make findings of fact and conclusions of law.

(6) to enter orders dismissing complaints in matters before the committee.

(7) to enter orders of discipline against attorneys in matters before the committee.

(8) to tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) to enter orders transferring a member to inactive status on the ground of incapacity or disability to continue the practice of law.

(10) to report to the Council its findings of fact and recommendations after hearings on petitions for reinstatement or restoration of license by members previously transferred to inactive status by a Hearing Committee or the Council, suspended, or disbarred.

**§ 10. Secretary — Powers and Duties in Discipline and Disability Matters.**

**The Secretary shall have the following powers and duties in regard to discipline and disability procedures:**

(1) to receive complaints for transmittal to the Counsel.

(2) to issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the chairman of any Hearing Committee.

(3) to maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

**§ 11. Grievances — Form and Filing.**

(1) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of The North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

**§ 12. Investigation; initial determination.**

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorney in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) If, after the expiration of fifteen days from the date of receipt of a Letter of Notice, the accused attorney has failed or refused to respond or has given a response that is insufficient to resolve the grievance, the Chairman of the Grievance Committee may examine witnesses, including the accused, under oath and issue subpoenas to compel their attendance, and compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The Counsel may examine such witnesses under oath or otherwise.

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney.

## § 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, but no person other than members may be present while the Committee is deliberating or voting.

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of two-thirds of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such reprimand shall be maintained in the Office of the Secretary, and a copy of the reprimand shall be served upon the accused attorney as provided in G.S. § 1A-1, Rule 4. Within fifteen days after the reprimand is served the accused attorney may refuse the reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(11) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

§ **14. Formal Hearing.**

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. § 1A-1, Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the

defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of the receipt of a complaint, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant.

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the defendant's default and in such case the allegations contained in the complaint shall be deemed to be admitted. The Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate.

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. § 1A-1, Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences

between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(a) the simplification of the issues.

(b) the exchange and acceptance of service of exhibits proposed to be offered in evidence.

(c) the obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(d) the limitation of the number of witnesses.

(e) the discovery of production of data.

(f) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(10) The hearing may be continued for a period not to exceed thirty days, for good cause shown.

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. Hearings and other proceedings shall be as expeditious as possible, and all time limits shall be mandatory and nondiscretionary. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced.

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the chairman of the Hearing Committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other douments in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from that last reported to the Secretary by the defendant.

(15) When a defendant is represented by counsel in a hearing, counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its chairman, or the chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the superior courts of the State at the time of the hearing. The Hearing Committee shall rule on the admissibility of all evidence.

(18) If the Hearing Committee finds that the charges of misconduct are not established by the greater weight of the evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by the greater weight of the evidence, the Hearing Committee shall enter an order for discipline. In either instance the Committee shall file a separate report which shall include a certified transcript of the testimony, all pleadings, exhibits and briefs, and the Committee's findings of fact and conclusions of law.

(19) If the charges of misconduct are established, the Hearing Committee shall then hear any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall be contained in the transcript of the hearing.

(20) All reports and orders shall be signed by the members of the Hearing Committee and shall be filed with the Secretary. Copies of all reports and orders shall be delivered to the parties. The copy to the defendant shall be served as provided in G.S. § 1A-1, Rule 4.

(21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such transcript shall be made

in the form and by means authorized for civil trials in the courts of this State.

§ 15. **Effect of a Finding of Guilt in any Criminal Case.**

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed: Provided, that no hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. **Reciprocal Discipline.**

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this

State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. § 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) that the imposition of the same discipline would result in grave injustice; or

(d) that the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exist, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

**§ 17. Surrender of License While Proceeding Pending.**

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) the resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member

is fully aware of the implications of submitting the resignation;

(b) the member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) the member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may impose any conditions upon the acceptance of such resignation that it deems appropriate.

(3) Upon acceptance of the required affidavit, the Council shall enter an order suspending or disbarring the member on consent.

(4) The order suspending or disbarring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council.

**§ 18. Disability Hearings.**

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has become disabled, the Grievance Committee shall conduct a hearing in a manner that

shall conform as nearly as is possible to the procedures set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§ 8(A)(2) and 14(4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactive status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3(12), it shall proceed under the provisions of (3) above as if a petition alleging such disability had

been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

**§ 19. Enforcement of Powers.**

In proceedings before any committee, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

**§ 20. Notice to Accused of Action and Dismissal.**

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

**§ 21. Notice to Complainant.**

The Chairman of the Grievance Committee shall advise the complainant of the result when final action has been taken on a grievance. If the final action is dismissal, or a Letter of Caution or private reprimand is issued, complainant shall be advised that the matter is confidential and may be disclosed only upon the order of a court.

**§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or is Transferred to Inactive Status Because of Disability.**

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, per-

sonal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the superior court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. **Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.**

**(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, the following actions shall be taken:**

(1) reprimand. A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary.

(2) censure, suspension or disbarment. The Chairman of the Disciplinary Hearing Commission shall file the order of censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and also upon the minutes of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

**(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency**

**entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina.**

§ 24. **Notice to Clients of Disbarred or Suspended Attorneys.**

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any

new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement.

§ 25. **Reinstatement.**

(A) **After suspension or disbarment:**

(1) No member of The North Carolina State Bar suspended or disbarred may resume practice until reinstated by order of the Council.

(2) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least three years from the effective date of the disbarment.

(3) Petitions for reinstatement by disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in §§ 8(A)(2) and 14(4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence

that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(4) Petitions for reinstatement by suspended attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall refer the petition to the Council. The Council shall make such inquiry into the matter as it deems necessary. The Council may refer the petition to the Disciplinary Hearing Commission for hearing as set forth in subsection (3) of this section.

(5) In all proceedings upon a petition for reinstatement, cross-examination of the petitioner's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by the Counsel.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

**(B) After transfer to inactive status because of disability:**

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a

Hearing Committee as provided in §§ 8(A)(2) and 14(4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3(17) or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken, the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee.

**§ 26. Address of Record.**

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

**§ 27. Disqualification Due to Interest.**

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such member, or in which such member has a personal interest.

**§ 28. Trust Accounts; Audit.**

(1) Any bank account maintained by a member to comply with the Code of Professional Responsibility of The North Carolina State Bar is, and shall be clearly labeled and designated as, a trust account. Any safe deposit box used in connection with the practice of law in North Carolina maintained by a member of The North Carolina State Bar to comply with the Code of Professional Responsibility shall be located in this State (unless the client otherwise consents in writing) and the member shall advise any institution in which such deposit box is located that the contents of the same may include property of clients.

(2) A member of The North Carolina State Bar shall preserve, or cause to be preserved, the records of all bank accounts or other records pertaining to the funds or property of a client maintained by the member in compliance with the Code of Professional Responsibility for a period of not less than six years subsequent to the last transaction pertaining to the same or subsequent to the final conclusion of the representation of a client relative to such funds or property, whichever shall last occur. Such records shall include checkbooks, cancelled checks, check stubs, vouchers, ledgers, and journals, closing statements, accountings or other statements of disbursement rendered to clients or other parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source and reason for all receipts, withdrawals, deliveries and disbursements of the funds or property of a client. All of such records shall be kept as

a specific prerequisite to the right to receive, deliver and disburse funds or property of a client, and shall have a public aspect relating to the protection of clients and to fitness of the member to practice law. In any instance of an alleged violation by the member of any Disciplinary Rule of the Code of Professional Responsibility or of other misconduct such records, insofar as they may relate in any way to the transaction, occurrence or client in question, shall be produced by the member for inspection, audit and copying by the Counsel upon the direction of the Chairman of the Grievance Committee or of a Hearing Committee. Such records or copies thereof shall be admissible in evidence in any disciplinary proceeding. Provided: that notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the accused attorney or defendant and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices. Failure to maintain such records or produce them upon such direction shall constitute grounds for disciplinary action without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against the member.

### § 29. Confidentiality.

All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential except as provided in § 14(12) of this article or unless and until (1) there is entered a final order for the imposition of public discipline, (2) the accused attorney or defendant requests that the matter be public, or (3) the investigation is predicated upon a conviction of the accused attorney or defendant for a crime. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or Hearing Committee enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the

qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

BE IT FURTHER RESOLVED that the Secretary-Treasurer of The North Carolina State Bar is authorized and directed to certify these amendments to the Supreme Court of North Carolina; and upon approval by the Supreme Court that these amendments be published in the next issue of THE NORTH CAROLINA BAR.

BE IT FURTHER RESOLVED that these amendments shall become effective upon their approval by the Supreme Court in accordance with Section 84-21 of the General Statutes of North Carolina and shall apply to any grievance pertaining to cases, actions or proceedings received in the office of the Secretary-Treasurer on or after that date.

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 and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at regular quarterly meetings, unanimously adopt said amendments to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 21st day of October, 1975 and the 21st day of January, 1976.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar on October 24, 1974, July 18, 1975, October 16, 1975, and January 16, 1976, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of November, 1975 and the 3rd day of February, 1976.

Susie Sharp
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar adopted on October 24, 1974, July 18, 1975, October 16, 1975, and January 16, 1976, 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 4th day of November, 1975 and the 3rd day of February, 1976.

Exum, J.
For the Court

# ANALYTICAL INDEX

# 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.

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WITNESSES

## ADMINISTRATIVE LAW

**§ 5. Appeal and Review of Administrative Orders**

Fixing of fees by an airport authority is not an administrative decision, and the procedure provided for obtaining judicial review of administrative decisions is not applicable thereto. *Aviation, Inc. v. Airport Authority,* 98.

The Commissioner of Insurance was not an aggrieved party who could appeal an order of the Wake Superior Court reversing an order of the Motor Vehicle Reinsurance Facility requiring that an insurance company appoint and license a specified person as its agent to write automobile liability insurance. *Insurance Co. v. Ingram,* 381.

## APPEAL AND ERROR

**§ 3. Review of Constitutional Questions**

An appellant seeking to appeal a decision of the Court of Appeals as a matter of right on the ground of a substantial constitutional question must allege and show existence of such question. *Thompson v. Thompson,* 120.

**§ 7. Party Aggrieved**

The Commissioner of Insurance was not an aggrieved party who could appeal an order of the Wake Superior Court reversing an order of the Motor Vehicle Reinsurance Facility requiring that an insurance company appoint and license a specified person as its agent to write automobile liability insurance. *Insurance Co. v. Ingram,* 381.

**§ 16. Jurisdiction and Powers of Lower Court After Appeal**

Trial court's correction of a judgment of dismissal entered in the same term of court as the judgment of dismissal was proper. *Sink v. Easter,* 183.

Proceedings of the trial court constituted an adjudication by the court that plaintiff's prior appeal from denial of her Rule 60(b) motion had been abandoned and the trial court thereafter had jurisdiction to reconsider his prior denial of plaintiff's Rule 60(b) motion. *Ibid.*

**§ 42. Presumptions in Regard to Matters Omitted from Record**

It is not required that all the evidence in a case accompany an exception based on the insufficiency of the evidence to support an instruction to the jury. *Foods, Inc. v. Super Markets,* 213.

**§ 58. Injunction Proceedings**

Defendants' appeal from an order granting a preliminary injunction prohibiting them from obstructing a roadway over their land should have been dismissed where there was no evidence that showed a reasonable probability that defendants would incur the loss of a substantial right by the granting of the preliminary injunction unless reviewed before final judgment. *Pruitt v. Williams,* 368.

Supreme Court is not bound by the findings of fact of the trial court upon appeal from an order granting a preliminary injunction. *Ibid.*

## ARREST AND BAIL

**§ 3. Right to Arrest Without Warrant**

Officer properly arrested defendant without a warrant for carrying a concealed weapon after a stop and frisk. *S. v. McZorn,* 417.

## ARSON

**§ 4. Sufficiency of Evidence**

State's evidence was sufficient for the jury in an arson prosecution. *S. v. Whitley,* 106; *S. v. Caron,* 467.

**§ 5. Instructions**

Trial court should refrain from instructing on burning for a fraudulent purpose in a common law arson case. *S. v. White,* 44.

**§ 6. Verdict and Judgment**

A defendant sentenced to death for a crime of arson is entitled to have the case remanded for imposition of a life sentence pursuant to the 1975 Act which made the change in punishment retroactive. *S. v. Whitley,* 106.

## ASSAULT AND BATTERY

**§ 14. Sufficiency of Evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for injury to person by means of explosives. *S. v. Sanders,* 285.

## ATTORNEY AND CLIENT

**§ 2. Admission to Practice**

The character requirements for admission to the Bar in this State are constitutional. *In re Willis,* 1.

The burden is on the applicant to the State Bar to show good moral character and applicant in this case failed to carry his burden of proof. *Ibid.*

## AUTOMOBILES

**§ 62. Striking Pedestrians**

Defendant was not negligent in striking plaintiff pedestrian when plaintiff attempted to cross the three southbound lanes of a busy city street at a place that was neither a marked nor unmarked crosswalk, and plaintiff was contributorily negligent in attempting to cross the street. *Dendy v. Watkins,* 447.

**§ 65. Striking Animals**

Summary judgment was properly entered for defendant in an action to recover damages for injuries to plaintiff and her dog received when a bus driven by defendant struck plaintiff's dog and plaintiff was bitten by the dog when she attempted to protect a group of children who gathered around the dog. *Caldwell v. Deese,* 375.

## AVIATION

**§ 1. Airport Authorities**

A municipal airport authority was not required to conduct hearings or give notice it was contemplating a change in landing fees and rentals charged. *Aviation, Inc. v. Airport Authority,* 98.

Fixing of fees by an airport authority is not an administrative decision, and the procedure provided for obtaining judicial review of administrative decisions is not applicable thereto. *Ibid.*

## BROKERS AND FACTORS

**§ 4. Duties and Liabilities of Broker to Principal**

Negligence of a broker in failing to follow instructions was insulated by the intervening negligence of a second broker who refused to carry out plaintiff's sell order. *Meyer v. McCarley and Co.,* 62.

## BURGLARY AND UNLAWFUL BREAKINGS

**§ 3. Indictment**

Indictment for burglary must specify the felony which defendant is alleged to have intended to commit at the time of the breaking and entering. *S. v. Cooper,* 496.

An indictment which alleged that defendant broke and entered an apartment with intent to commit a felony therein, to wit: "by sexually assaulting a female," was insufficient to charge defendant with first degree burglary but was sufficient to support a conviction for wrongful breaking and entering. *Ibid.*

**§ 5. Sufficiency of Evidence**

Evidence was sufficient to be submitted to the jury in a first degree burglary case. *S. v. Curry,* 660.

**§ 7. Verdict**

Where defendant was found not guilty of felonious breaking and entering but guilty of felonious larceny, the jury must have found he aided and abetted the perpetrators in a larceny committed by them pursuant to a breaking, a felony under G.S. 14-72(b)(2). *S. v. Curry,* 312.

## CANCELLATION AND RESCISSION OF INSTRUMENTS

**§ 4. For Mutual Mistake**

Sale of land was not subject to rescission on ground of mutual mistake for reason the purchaser acted under the mistaken assumption an effective driveway permit for the land had been obtained by its assignor. *Financial Services v. Capitol Funds,* 122.

## CONSPIRACY

**§ 3. Nature and Elements of Criminal Conspiracy**

The crime of conspiracy to commit murder does not merge into the crime of accessory before the fact of murder. *S. v. Branch,* 514.

CONSPIRACY — Continued

**§ 5. Relevancy and Competency of Evidence**

Trial court properly admitted testimony of a co-conspirator against femme defendant before his in-court identification of her. *S. v. Branch,* 514.

Evidence of a loan to the male defendant shortly before defendants paid a third person to commit murder was admissible against the femme defendant. *Ibid.*

Evidence of declarations over the telephone by the male defendant after conspiracy had ended were inadmissible against the femme defendant, but admission of such evidence was harmless error. *Ibid.*

**§ 6. Sufficiency of Evidence**

State's evidence was sufficient for the jury in a prosecution for conspiracy to murder the femme defendant's husband. *S. v. Branch,* 514.

Evidence was sufficient for the jury in a prosecution for conspiracy among defendant and two others to set fire to the town mayor's bushes and fence. *S. v. Bindyke,* 608.

Defendant was criminally responsible for the attempted firebombing of the mayor's automobile done in furtherance of a conspiracy, even if defendant was without knowledge of the attempt. *Ibid.*

**§ 8. Verdict and Judgment**

Defendant can properly be convicted of first degree murder committed in perpetration of armed robbery and conspiracy to commit armed robbery. *S. v. Carey,* 254.

CONSTITUTIONAL LAW

**§ 12. Regulation of Professions**

The character requirements for admission to the Bar in this State are constitutional. *In re Willis,* 1.

**§ 27. Burdens on Interstate Commerce**

Statutes and Utilities Commission rule requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Utilities Comm. v. Telegraph Co.,* 201.

**§ 29. Right to Trial by Duly Constituted Jury**

A defendant is not entitled to a jury trial in a criminal contempt proceeding. *Thompson v. Thompson,* 120.

Trial court properly allowed the State to challenge jurors opposed to capital punishment. *S. v. Bock,* 145.

Procedure to be followed if an alternate juror inadvertently enters the jury room. *S. v. Bindyke,* 608.

**§ 31. Right of Confrontation and Access to Evidence**

Failure of defendant to deny a statement made in his presence by a codefendant was not an implied admission. *S. v. Spaulding,* 397.

Trial court did not err in denial of defendant's motion for pretrial discovery of a tape recording and photographs, nor in denial of his motion which failed to specify the information sought. *S. v. Branch,* 514.

## CONSTITUTIONAL LAW — Continued

Defendant was not denied the right to have access to exculpatory evidence by denial of his pretrial motion for discovery. *Ibid.*

**§ 32. Right to Counsel**

A defendant is not entitled to presence of counsel at a photographic identification. *S. v. Miller,* 582.

**§ 36. Cruel and Unusual Punishment**

Death penalty was properly imposed upon a conviction for first degree murder, *S. v. Bock,* 145; *S. v. Carey,* 254; *S. v. Spaulding,* 397; *S. v. Griffin,* 437; for rape, *S. v. Bernard,* 321.

**§ 37. Waiver of Constitutional Guaranties**

Trial court erred in allowing into evidence testimony concerning a second confession of defendant where defendant did not waive his constitutional rights. *S. v. White,* 44.

Actions by defendant constituted an oral waiver of his constitutional rights. *S. v. Patterson,* 553.

Trial court's error in allowing two officers to testify "in their opinion" defendant understood his rights was not prejudicial. *Ibid.*

## CONTEMPT OF COURT

**§ 6. Hearings, Findings and Judgment**

A defendant is not entitled to a jury trial in a criminal contempt proceeding. *Thompson v. Thompson,* 120.

## CONTRACTS

**§ 6. Contracts Against Public Policy**

The statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself. *Financial Services v. Capitol Funds,* 122.

**§ 14. Contracts for Benefit of Third Person**

Female plaintiffs who were incidental beneficiaries of a contract between male plaintiff and defendant had no standing to sue for breach of contract. *Meyer v. McCarley and Co.,* 62.

**§ 16. Conditions Precedent**

Trial court properly concluded that issuance of a valid driveway permit was not a condition precedent of the contract of sale of land. *Financial Services v. Capitol Funds,* 122.

**§ 17. Term and Duration of Agreement**

In an action to recover damages for breach of a contract, the trial court's instructions on time of termination and notice were proper. *Foods, Inc. v. Super Markets,* 213.

## CRIMINAL LAW

### § 5. Mental Capacity in General

Amnesia itself is no defense to a criminal charge. *S. v. Bock,* 145.

Trial court in a first degree murder case did not err in failing to instruct the jury as to the effect of insanity or mental weakness on premeditation and deliberation. *S. v. Shepherd,* 346.

### § 6. Mental Capacity as Affected by Intoxicating Liquor

Trial court's additional jury instructions as to the intoxication of defendant were proper. *S. v. Bock,* 145.

### § 7. Entrapment

Evidence was sufficient to show entrapment as a matter of law where defendant was induced to buy narcotics by a law enforcement officer. *S. v. Stanley,* 19.

### § 10. Accessories Before the Fact

Indictment was sufficient to charge the offense of accessory before the fact to murder although it did not specifically allege defendant was not present at the time the offense was committed. *S. v. Branch,* 514.

The crime of conspiracy to commit murder does not merge into the crime of accessory before the fact of murder. *Ibid.*

State's evidence was sufficient for the jury in a prosecution of defendants for accessory to the fact of murder of femme defendant's husband. *Ibid.*

### § 21. Preliminary Proceedings

Defendant could properly be tried on a bill of indictment without benefit of a preliminary hearing. *S. v. Branch,* 514.

### § 22. Arraignment and Pleas

Defendant is not entitled to a new trial because of failure of the record to show a formal arraignment. *S. v. McCotter,* 227.

Trial court did not err in failing to instruct the jury to disregard counsel's misstatement concerning defendant's plea. *S. v. Branch,* 514.

### § 23. Plea of Guilty

Trial court properly refused to accept defendant's tender of guilty pleas to the felonies charged where defendant stated during questioning by the court that he wanted the jury to decide the cases. *S. v. Whitley,* 106.

### § 26. Plea of Former Jeopardy

Defendant can properly be convicted of first degree murder committed in perpetration of armed robbery and conspiracy to commit armed robbery. *S. v. Carey,* 254.

Defendant was not subjected to double jeopardy where he was charged with damage to person and property by use of explosives though both offenses arose from one explosion. *S. v. Sanders,* 285.

**CRIMINAL LAW — Continued**

Where the State prosecuted defendant for first degree murder on the theory that he killed decedent while engaged in the perpetration of armed robbery of decedent's son, no separate punishment could be imposed for the robbery. *S. v. McZorn*, 417.

**§ 27. Plea in Abatement**

Trial court properly overruled defendant's plea in abatement which alleged the offense occurred in a county other than the one alleged in the bills of indictment. *S. v. Miller*, 582.

**§ 29. Suggestion of Mental Incapacity to Plead**

An indigent defendant was not entitled to a third psychiatric examination to be paid for by the State. *S. v. Patterson*, 553.

**§ 34. Evidence of Defendant's Guilt of Other Offenses**

Trial court did not err in admission of testimony that defendant had placed a check mark and his initials beside certain armed robberies, including the one in question, on a list presented to him. *S. v. Carey*, 254.

Trial court properly allowed the State to cross-examine defendant's wife about prior inconsistent statements even if the statements tended to implicate defendant in other unrelated crimes. *Ibid.*

Testimony that defendant had escaped from jail was competent where the purpose was to show circumstances under which defendant made incriminating statements. *S. v. McCotter*, 227.

Though part of defendant's confession disclosed the commission of another offense, the confession was nevertheless admissible. *S. v. Patterson*, 553.

**§ 42. Articles Connected With the Crime**

Trial court in a rape case properly allowed into evidence a .38 caliber derringer pistol. *S. v. Miller*, 582.

**§ 43. Photographs**

In a prosecution for first degree murder and felonious burning of the victim's automobile, trial court properly admitted photographs of the area in which the victim lived and where she was seen with defendants and photographs of the victim's automobile and its contents. *S. v. Mitchell*, 360.

Trial court gave proper restrictive instructions in admitting photographs into evidence. *S. v. Sanders*, 285.

**§ 45. Experimental Evidence**

Trial court did not err in allowing experimental evidence in a prosecution for damage to person and property by use of explosives. *S. v. Sanders*, 285.

**§ 48. Silence of Defendant as Implied Admission**

Failure of defendant to deny a statement made in his presence by a codefendant was not an implied admission. *S. v. Spaulding*, 397.

The State cannot offer the defendant's silence in the course of a public officer's investigation as evidence of defendant's guilt. *S. v. Williams*, 680.

**CRIMINAL LAW — Continued**

**§ 53. Medical Expert Testimony**

Trial court properly excluded a doctor's opinion concerning defendant's ability to recall events surrounding the time of the crime. *S. v. Bock,* 145.

Trial court in a first degree murder case did not err in refusing to allow defendant's expert medical witness to state his definition of the word "intent." *S. v. Griffin,* 437.

**§ 57. Evidence in Regard to Firearms**

Trial court properly allowed State's expert witness to give his opinion that lead pellets removed from a homicide victim's body were No. 6 buckshot. *S. v. Carey,* 254.

**§ 58. Evidence in Regard to Handwriting**

Trial court properly allowed testimony of an expert handwriting witness. *S. v. Curry,* 660.

**§ 62. Lie Detector Tests**

Defendant was not prejudiced by an officer's testimony that he was assigned to the polygraph unit. *S. v. Carey,* 254.

**§ 66. Evidence of Identity by Sight**

In-court identification of defendant by three witnesses was not tainted by pretrial photographic identification procedures. *S. v. Miller,* 582.

A victim's in-court identification of defendant was not tainted by a prior improper lineup procedure. *S. v. Curry,* 660.

Trial court did not err in denial of motion to reopen the voir dire examination concerning the in-court identification of defendant by a witness. *S. v. Branch,* 514.

Although photographic procedures before trial and during a noon recess were impermissibly suggestive, they did not give rise to a substantial likelihood of irreparable misidentification and thus taint the witness's subsequent in-court identification of the femme defendant. *Ibid.*

**§ 69. Telephone Conversations**

Trial court properly allowed evidence concerning a telephone conversation where there was sufficient evidence to identify the caller. *S. v. Williams,* 680.

**§ 71. Shorthand Statement of Facts**

Trial court properly allowed a witness to describe the bloody defendant under the shorthand statement of facts exception to the opinion evidence rule. *S. v. Spaulding,* 397.

**§ 75. Voluntariness and Admissibility of Confession**

Trial court did not err in allowing an in-custody statement made by defendant to two officers where defendant was given and waived his constitutional rights. *S. v. White,* 44.

Trial court erred in allowing into evidence testimony concerning a second confession of defendant where defendant did not waive his constitutional rights. *Ibid.*

**CRIMINAL LAW — Continued**

Defendant's confession was properly admitted in evidence although the court failed to make specific findings that the confession was voluntary. *S. v. Whitley,* 106.

Defendant's confession was not involuntary and inadmissible on the ground that he was misinformed as to the severity of punishment for the charges against him and that he was told that a polygraph test would be for his own benefit and could not be used in evidence against him. *S. v. Carey,* 254.

Where defendant's statement to an officer that he had shot decedent was volunteered after all police interrogation had ceased, an officer's request that defendant explain what happened did not render defendant's subsequent statement the product of custodial interrogation, and further Miranda warnings were not required. *S. v. McZorn,* 417.

Further Miranda warnings were not required prior to a second interrogation of defendant which occurred only 20-30 minutes after the first interrogation had terminated. *Ibid.*

Defendant's confession was not rendered inadmissible by failure of officers to notify defendant's family and girl friend that he was in custody. *Ibid.*

Actions by defendant constituted an oral waiver of his constitutional rights. *S. v. Patterson,* 553.

Though part of defendant's confession disclosed the commission of another offense, the confession was nevertheless admissible. *Ibid.*

**§ 76. Determination of Admissibility of Confession**

Trial court's error in allowing two officers to testify "in their opinion" defendant understood his rights was not prejudicial. *S. v. Patterson,* 553.

Trial court's finding that defendant's statement to a deputy sheriff was voluntarily made after he had been fully advised of his constitutional rights and had understandingly waived them was supported by competent evidence and is conclusive on appeal. *S. v. Bock,* 145.

**§ 77. Admissions and Declarations**

Trial court did not err in denial of motion to conduct a voir dire on admissibility of testimony by a witness as to admissions made to him over the telephone by the male defendant. *S. v. Branch,* 514.

Statement made by one defendant while he was being held at gunpoint by one other than a police officer was competent as an admission against that defendant. *S. v. Curry,* 660.

**§ 78. Stipulations**

Trial court did not err in allowing two expert State's witnesses to testify as to the cause of decedent's death though all defendants were willing to stipulate that the victim's death was caused by multiple stab wounds. *S. v. Spaulding,* 397.

**§ 79. Acts and Declarations of Coconspirators**

Evidence of declarations over the telephone by the male defendant after conspiracy had ended was inadmissible against the femme defendant, but admission of such evidence was harmless error. *S. v. Branch,* 514.

**CRIMINAL LAW — Continued**

Evidence of a loan to the male defendant shortly before defendants paid a third person to commit murder was admissible against the femme defendant. *Ibid.*

§ 80. **Records**

Certain testimony as to telephone calls between various telephone numbers was admissible under the business records exception to the hearsay rule, but other testimony concerning such calls was inadmissible hearsay where no records were introduced into evidence. *S. v. Branch,* 514.

Trial court did not err in denial of defendant's motion for pretrial discovery of a tape recording and photographs, nor in denial of his motion which failed to specify the information sought. *Ibid.*

Trial court properly allowed into evidence a properly certified copy of a record of the DMV. *S. v. Miller,* 582.

§ 81. **Best Evidence**

Best evidence rule did not require the exclusion of testimony as to a telephone conversation on the ground that a tape recording of the conversation was available. *S. v. Branch,* 514.

§ 84. **Evidence Obtained by Unlawful Means**

Testimony of a State's witness was not inadmissible as fruit of the poisonous tree on the ground defendant's telephone conversation with a third person was recorded. *S. v. Branch,* 514.

Trial court properly allowed into evidence weapons seized by officers which were in plain view. *S. v. Curry,* 660.

§ 86. **Credibility of Defendant**

Trial court properly allowed cross-examination of defendants concerning prior acts of misconduct. *S. v. Curry,* 660.

§ 87. **Direct Examination of Witnesses**

Defendants were not prejudiced where the trial court allowed three witnesses whose names did not appear on the list furnished defendant to testify. *S. v. Spaulding,* 397.

Trial court properly permitted a witness to testify on redirect as to subjects not covered on cross-examination. *S. v. Branch,* 514.

§ 88. **Cross-examination**

Defendant was not deprived of his right to cross-examine an officer concerning the circumstances surrounding his confession by the court's ruling that if defendant brought out evidence concerning a polygraph examination, the State would be allowed to bring out all of the circumstances regarding the examination. *S. v. Carey,* 254.

§ 89. **Corroboration**

Defendant was not prejudiced by admission of noncorroborative hearsay testimony. *S. v. McCotter,* 227.

A prior consistent statement was admissible for the purpose of corroboration. *S. v. Patterson,* 553.

Statements made by three witnesses on the day of the alleged rape to a sheriff's detective were competent for the limited purpose of corroborating the witnesses who made them. *S. v. Miller,* 582.

CRIMINAL LAW — Continued

**§ 90. Rule that Party is Bound by Own Witness**

The State is not bound by the exculpatory portions of a confession which it introduces in a homicide case where there is other evidence tending to throw a different light on the circumstances of the homicide. *S. v. Hankerson*, 632.

**§ 91. Time of Trial and Continuance**

Trial court did not err in denial of defendant's motion for continuance for the appointment of an additional attorney or because the solicitor stated he had known the trial judge all his life and admired him as a person and a judge. *S. v. McCotter*, 227.

Trial court properly denied defendant's motion to continue made to give his attorney time to prepare. *S. v. Miller*, 582.

Trial court properly denied defendant's motion for continuance to allow defendant to employ additional counsel. *S. v. Branch*, 514.

**§ 92. Consolidation of Counts**

Consolidation of charges against two defendants for first degree murder and felonious burning of personalty was not prejudicial to defendants. *S. v. Mitchell*, 360.

Trial court properly consolidated charges against two defendants for conspiracy to murder and for being accessories before the fact of murder. *S. v. Branch*, 514.

**§ 95. Admission of Evidence Competent for Restricted Purpose**

Trial court did not err in refusing to give an instruction at the time exhibits were admitted that they were admitted only for the purpose of illustrating the witness's testimony. *S. v. Branch*, 514.

**§ 96. Withdrawal of Evidence**

In withdrawing evidence from consideration by the jury, the trial court did not err in repeating the evidence. *S. v. Spaulding*, 397.

**§ 99. Conduct of Court and Expression of Opinion**

Trial court did not err in having armed prison guards and armed officers in and around the courthouse and in the presence of the jury. *S. v. Spaulding*, 397.

Trial judge did not express an opinion when he suggested that defense attorneys object in a certain order or when he asked the witness clarifying questions and gave numerous instructions to facilitate the jury's role and maintain order in the court. *S. v. Branch*, 514.

**§ 100. Permitting Counsel to Assist Solicitor**

Trial court properly allowed a private prosecutor to assist in the prosecution of defendant. *S. v. Branch*, 514.

**§ 101. Custody and Conduct of Jury**

Trial court's admonitions to the jury before dismissing them for the night were proper. *S. v. Shepherd*, 346.

**§ 102. Argument and Conduct of Counsel or District Attorney**

District attorney's use of the word "explosion" in a prosecution for damage to person and property by use of explosives did not invade the province of the jury. *S. v. Sanders*, 285.

**CRIMINAL LAW — Continued**

Defendant was not denied a fair trial by the district attorney's argument to the jury concerning a 15 year old "trigger man" and the 23 year old defendant. *S. v. Carey*, 254.

Defendant will not be deemed to have been denied a fair trial because of alleged facial expressions of the district attorney in response to testimony by defendant's wife. *Ibid.*

Repeated argument of the district attorney that deceased had a right to defend himself "in his own home" was unsupported by evidence and violated the rule that counsel may not argue principles of law not relevant to the case. *S. v. Britt*, 699.

Questions asked by the district attorney during cross-examination which informed the jury that defendant had been on death row as a result of a prior conviction of first degree murder in the case being tried were prejudicial to defendant. *Ibid.*

District attorney's argument which referred to defendants' race did not deprive defendants of a fair trial. *S. v. Miller*, 582.

The district attorney's jury argument suggesting that the only thing wrong with capital punishment was that it was not used, and that capital punishment was not a deterrent when people were convicted of capital crimes but never executed was well within the bounds of legitimate debate. *Ibid.*

**§ 104. Consideration of Evidence on Motion to Nonsuit**

Sufficiency of the State's evidence in a criminal case, if challenged by assignment of error and argued in the briefs, is reviewable upon appeal regardless of whether a motion for judgment of nonsuit was made by defendant in the trial court. *S. v. McKinney*, 113.

**§ 112. Instructions on Burden of Proof and Presumptions**

Trial court's jury instructions on reasonable doubt were proper. *S. v. Shepherd*, 346.

Trial court did not err in failing to charge that the State must prove a circumstance beyond a reasonable doubt before it could be considered by the jury. *S. v. Branch*, 514.

**§ 113. Statement of Evidence and Application of Law Thereto**

Trial court's instructions applying the law to the facts on the issue of aiding and abetting were proper. *S. v. Sanders*, 285.

Trial court's inaccurate statement during recapitulation of the evidence that defendant testified he had been convicted of assault was a misstatement upon a collateral matter and not ground for a new trial. *S. v. Hankerson*, 632.

**§ 114. Expression of Opinion by Court on Evidence in the Charge**

Trial court did not express an opinion in devoting more time to the State's evidence than to defendant's in its jury instructions. *S. v. Sanders*, 285.

Trial court did not express an opinion in instructing the jury that the court did not have to charge on circumstantial evidence, nor in referring to defendants in the conjunctive. *S. v. Branch*, 514.

**§ 116. Charge on Defendant's Failure to Testify**

In charging the jury on defendant's failure to testify, the trial court is not required to use the exact language of G.S. 8-54. *S. v. Sanders*, 285.

**CRIMINAL LAW — Continued**

Trial court's instructions on defendant's failure to testify were not prejudicial. *S. v. Caron,* 467.

**§ 117. Charge on Credibility of Witness**

Trial court erred in denying defendant's timely and written request for an instruction on accomplice testimony. *S. v. White,* 44.

**§ 120. Instructions on Death Penalty**

While the trial court erred in denial of defendant's request for an instruction that the death penalty would be imposed upon the return of a verdict of guilty of rape, such error was not prejudicial to defendant. *S. v. Bernard,* 321.

**§ 122. Additional Instructions to Jury**

Trial court's additional jury instructions as to the intoxication of defendant were proper. *S. v. Bock,* 145.

Trial court's additional charge to the jury which referred to the expense which would be caused by a mistrial did not amount to coercion of the jury. *S. v. Williams,* 680.

**§ 128. Mistrial**

Trial court in a prosecution for murder of the femme defendant's husband did not err in denial of a motion for mistrial when the court erroneously admitted certain evidence or when two deputy sheriffs violated sequestration order by showing photographs of the femme defendant to a State's witness during a recess. *S. v. Branch,* 514.

**§ 138. Severity of Sentence and Determination Thereof**

While the trial court erred in denial of defendant's request for an instruction that the death penalty would be imposed upon the return of a verdict of guilty of rape, such error was not prejudicial to defendant. *S. v. Bernard,* 321.

**CUSTOMS AND USAGES**

Trial court was not required to instruct the jury on the relevant law of usage of trade, though the alleged usage of trade was not in writing, where plaintiff made no demand for submission to the jury of an issue as to its existence. *Foods, Inc. v. Super Markets,* 213.

**DAMAGES**

**§ 15. Sufficiency of Evidence as to Damages**

Evidence was insufficient for the jury on the issue of punitive damages based on fraud in the sale of an automobile. *Hardy v. Toler,* 303.

**DEATH**

**§ 4. Time Within Which Action for Wrongful Death Must Be Instituted**

The two year statute of limitations was applicable in plaintiff's action for wrongful death against officers who were allegedly negligent in failing to provide medical attention to plaintiff's jailed intestate. *Williams v. Adams,* 501.

**§ 9. Distribution of Recovery**

A father who had abandoned his child when the child was a minor is precluded by G.S. 31A-2 from sharing in the proceeds of a settlement of a claim for wrongful death of the child. *Williford v. Williford,* 506.

## DEEDS

**§ 7. Registration**

Statute and city ordinance making it a misdemeanor to describe land in a deed by reference to a subdivision plat which has not been properly approved and recorded does not render a conveyance of land illegal on the ground the seller did not obtain city council approval of a subdivision plat. *Financial Services v. Capitol Funds,* 122.

**§ 14. Reservations and Exceptions**

Trial court properly granted defendant's motion for summary judgment in an action to enjoin defendant from using a passageway over plaintiffs' property for any purpose other than those purposes set out in G.S. 136-69, since the deed under which plaintiffs acquired title to land over which the passageway ran specifically exempted the easement granted to defendant. *Yount v. Lowe,* 90.

## DIVORCE AND ALIMONY

**§ 2. Process and Pleadings**

Pleadings in an action for alimony without divorce were not deemed amended to conform to the evidence of residence, and the court was therefore without jurisdiction to grant plaintiff's divorce from bed and board. *Eudy v. Eudy,* 71.

Where plaintiff failed to allege that either she or defendant had been a resident of the State for at least six months next preceding the institution of the action, the court was without jurisdiction to award her a divorce from bed and board. *Sauls v. Sauls,* 387.

**§ 8. Abandonment**

In an action for alimony without divorce where plaintiff alleged abandonment by defendant, evidence in the record on appeal was insufficient to permit a determination as to whether plaintiff or defendant was responsible for the separation. *Sauls v. Sauls,* 387.

**§ 16. Alimony Without Divorce**

Findings of fact are not required to support the trial judge's finding of the amount of alimony. *Eudy v. Eudy,* 71.

**§ 24. Child Custody**

Trial court erred in awarding custody of a minor to his older brother where evidence was insufficient to show changed circumstances affecting the welfare of the minor or that the child's mother was an unfit person to have custody. *Tucker v. Tucker,* 81.

## DURESS

Release from liability and a promissory note signed by plaintiff to regain possession of his car were not obtained from plaintiff by duress of goods. *Adder v. Holman & Moody, Inc.,* 484.

## EASEMENTS

**§ 9. Easements Running with the Land**

Trial court properly granted defendant's motion for summary judgment in an action to enjoin defendant from using a passageway over plain-

**EASEMENTS — Continued**

tiffs' property for any purpose other than those purposes set out in G.S. 136-69. *Yount v. Lowe,* 90.

Since a consent judgment is not limited to issues in the pleadings, the fact that a consent judgment granting defendant an easement in perpetuity with the unlimited right of egress, ingress and regress was entered in a cartway proceeding did not affect the validity of the easement granted. *Ibid.*

Plaintiffs had notice of an easement granted by their predecessor in title and therefore took title to the servient estate burdened with the easement. *Ibid.*

**FRAUD**

**§ 13. Damages**

Evidence was insufficient for the jury on the issue of punitive damages for false representations in the sale of an automobile, but such representations constituted deceptive acts or practices in commerce for which plaintiff is entitled to treble damages. *Hardy v. Toler,* 303.

**HIGHWAYS AND CARTWAYS**

**§ 14. Proceedings to Establish Cartway**

Since a consent judgment is not limited to issues in the pleadings, the fact that a consent judgment granting defendant an easement in perpetuity with the unlimited right of egress, ingress and regress was entered in a cartway proceeding did not affect the validity of the easement granted. *Yount v. Lowe,* 90.

**HOMICIDE**

**§ 4. Murder in the First Degree**

Defendant could be convicted of a felony-murder committed during an armed robbery although the charge against him for the felony of armed robbery had been dismissed in a previous trial. *S. v. Carey,* 254.

**§ 12. Indictment**

Indictment was sufficient to charge the offense of accessory before the fact to murder although it did not specifically allege defendant was not present at the time the offense was committed. *S. v. Branch,* 514.

**§ 14. Presumptions and Burden of Proof**

The decision of Mullaney v. Wilbur prohibits placing on defendant the burden of proving to the satisfaction of the jury that a killing was without malice and was lawful; however, that decision is not retroactive and applies only to trials conducted on or after 9 June 1975. *S. v. Hankerson,* 632.

Trial court's instructions in a first degree murder case on the presumption of malice and unlawfulness arising upon proof of the intentional inflicting of a wound with a deadly weapon did not unconstitutionally relieve the State of its burden of proof. *S. v. Williams,* 680.

**§ 15. Relevancy and Competency of Evidence**

Admission of evidence of the victim's home life, if erroneous, was harmless beyond a reasonable doubt. *S. v. Mitchell,* 360.

**HOMICIDE — Continued**

Trial court properly allowed a witness to describe the bloody scene of the crime. *S. v. Spaulding,* 397.

§ 18. **Evidence of Premeditation and Deliberation**

Testimony by two expert State's witnesses as to the cause of decedent's death was competent to show premeditation and deliberation though all defendants were willing to stipulate that the victim's death was caused by multiple stab wounds. *S. v. Spaulding,* 397.

§ 20. **Demonstrative Evidence; Photographs**

Trial court properly allowed into evidence photographs of deceased. *S. v. Bock,* 145.

Photographs of deceased were admissible in a homicide prosecution even though defendant had stipulated to the cause of death. *S. v. Patterson,* 553.

Trial court in a first degree murder prosecution properly allowed into evidence a pistol, bullets and bullet fragments. *S. v. Williams,* 680.

§ 21. **Sufficiency of Evidence and Nonsuit**

Evidence was sufficient to be submitted to the jury where it tended to show death by stabbing. *S. v. Bock,* 145.

Trial court in a first degree murder case properly denied defendant's motion for nonsuit based primarily on defendant's claim that he was insane at the time of the killing and that the State had failed to prove the killing was with premeditation and deliberation. *S. v. Shepherd,* 346.

State's evidence was sufficient to support an inference of premeditation and deliberation in a prosecution for first degree murder. *S. v. Mitchell,* 360; *S. v. Patterson,* 553.

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where the evidence tended to show that a prison inmate was stabbed to death. *S. v. Spaulding,* 397.

State's evidence was sufficient for the jury in a prosecution of defendants for accessory before the fact of murder of femme defendant's husband. *S. v. Branch,* 514.

State's evidence was sufficient for the jury in a prosecution for second degree murder, notwithstanding the State introduced exculpatory statements by defendant that the victim was reaching into defendant's car with a knife at defendant's throat. *S. v. Hankerson,* 632.

§ 24. **Instructions on Presumptions and Burden of Proof**

The decision of Mullaney v. Wilbur prohibits placing on defendant the burden of proving to the satisfaction of the jury that a killing was without malice and was lawful; however, that decision is not retroactive and applies only to trials conducted on or after 9 June 1975. *S. v. Hankerson,* 632.

Trial court's instructions in a first degree murder case on the presumption of malice and unlawfulness arising upon proof of the intentional inflicting of a wound with a deadly weapon did not unconstitutionally relieve the State of its burden of proof. *S. v. Williams,* 680.

§ 25. **Instructions on First Degree Murder**

Trial court's instructions in a first degree murder prosecution as to defendant's guilt or innocence, as to his ability to form a specific intent,

**HOMICIDE — Continued**

and as to dealing lethal blows after deceased had been felled were proper. *S. v. Griffin,* 437.

§ 28. **Instructions on Defenses**

Trial court did not err in instructing the jury that a person may not "normally" avail himself of self-defense when he has used deadly force to quell an assault by someone who has no deadly weapon. *S. v. Pearson,* 34.

Trial court in a first degree murder case did not err in failing to instruct the jury as to the effect of insanity or mental weakness on premeditation and deliberation. *S. v. Shepherd,* 346.

Trial court's erroneous failure to include in its final mandate the theory of acquittal by reason of self-defense was cured by the court's additional instructions. *S. v. Hankerson,* 632.

§ 31. **Verdict and Sentence**

Death penalty was properly imposed upon a conviction for first degree murder. *S. v. Bock,* 145; *S. v. Spaulding,* 397; *S. v. Griffin,* 437.

Defendant can properly be convicted of first degree murder committed in perpetration of armed robbery and conspiracy to commit armed robbery. *S. v. Carey,* 254.

Where the State prosecuted defendant for first degree murder on the theory that he killed decedent while engaged in the perpetration of armed robbery of decedent's son, no separate punishment could be imposed for the robbery. *S. v. McZorn,* 417.

**HUSBAND AND WIFE**

§ 6. **Right to Testify For or Against Spouse**

Trial court properly allowed the State to cross-examine defendant's wife about prior inconsistent statements even if the statements tended to implicate defendant in other unrelated crimes. *S. v. Carey,* 254.

**INDICTMENT AND WARRANT**

§ 9. **Charge of Crime**

Variance between the information which charged a felony and the proof which tended to show that defendant was an accessory before the fact did not require nonsuit since the information would support a conviction under G.S. 14-127, a misdemeanor. *S. v. Bindyke,* 608.

**INJUNCTIONS**

§ 13. **Grounds for Issuance of Temporary Order**

Plaintiff was entitled to a preliminary injunction prohibiting defendants from obstructing a roadway over their land. *Pruitt v. Williams,* 368.

**INSURANCE**

§ 1. **Contract and Regulation**

The Commissioner of Insurance was not an aggrieved party who could appeal an order of the Wake Superior Court reversing an order of

**INSURANCE — Continued**

the Motor Vehicle Reinsurance Facility requiring that an insurance company appoint and license a specified person as its agent to write automobile liability insurance. *Insurance Co. v. Ingram,* 381.

**§ 50. Accident Insurance — Proximate Cause**

In an action to recover under an accident policy, the trial judge found the ultimate facts sufficient to support his judgment for plaintiff when he found insured died as a result of an accidental fall and her death "was solely as a direct result thereof and independent of all other causes." *Williams v. Insurance Co.,* 338.

**§ 148. Title Insurance**

Pedestrian access to property was not reasonable access within the terms of a title insurance policy. *Financial Services v. Capitol Funds,* 122.

Title insurance policy did not insure against lack of vehicular access to property because of provisions excluding from coverage any loss by reason of exercise of governmental police power. *Ibid.*

**JUDGMENTS**

**§ 8. Consent Judgment**

Since a consent judgment is not limited to issues in the pleadings, the fact that a consent judgment granting defendant an easement in perpetuity with the unlimited right of egress, ingress and regress was entered in a cartway proceeding did not affect the validity of the easement granted. *Yount v. Lowe,* 90.

**§ 37. Judgment as Estoppel**

Plaintiffs' claim against a county board of education regarding selection of a school site was barred by an earlier judgment involving essentially the same parties. *Painter v. Board of Education,* 165.

**JURY**

**§ 3. Number of Jurors**

Procedure to be followed if an alternate juror inadvertently enters the jury room. *S. v. Bindyke,* 608.

**§ 7. Challenges**

Trial court properly allowed the State to challenge jurors opposed to capital punishment before defendant had an opportunity to cross-examine jurors. *S. v. Bock,* 145.

Trial court properly excused for cause prospective jurors who eventually indicated they were irrevocably committed to vote against a verdict carrying the death penalty. *S. v. Britt,* 699.

While the trial court erred in excusing for cause a prospective juror who stated only that he did not believe in the death penalty and another prospective juror who said he "thought" he would automatically vote against the death penalty, such error was not so prejudicial as to warrant a new trial. *S. v. Bernard,* 321.

## LABORERS' AND MATERIALMEN'S LIENS

**§ 7. Sufficiency of Claim of Lien**

Claim of lien for labor and materials which stated the wrong date on which materials were furnished was not fatally defective. *Canady v. Creech,* 354.

**§ 8. Enforcement of Lien**

Defendants could not take advantage of the erroneous date of the furnishing of materials in a claim of lien to defeat the lien which related back to a time predating their purchase of the land. *Canady v. Creech,* 354.

## LARCENY

**§ 9. Verdict**

Where defendant was found not guilty of felonious breaking and entering but guilty of felonious larceny, the jury must have found he aided and abetted the perpetrators in a larceny committed by them pursuant to a breaking, a felony under G.S. 14-72(b)(2). *S. v. Curry,* 312.

## MECHANICS' LIENS

**§ 1. Nature and Extent of Mechanics' Liens**

Defendant's lien for work done on plaintiff's car was not extinguished when plaintiff obtained possession of the car by giving defendant a worthless check. *Adder v. Holman & Moody, Inc.,* 484.

## MUNICIPAL CORPORATIONS

**§ 5. Distinction Between Governmental and Private Powers**

A municipal airport authority acts in a proprietary capacity in determining landing fees and rentals it will charge users of its facilities. *Aviation, Inc. v. Airport Authority,* 98.

**§ 30. Zoning Ordinances and Building Permits**

Statute and city ordinance making it a misdemeanor to describe land in a deed by reference to a subdivision plat which has not been properly approved and recorded does not render a conveyance of land illegal on the ground the seller did not obtain city council approval of a subdivision plat. *Financial Services v. Capitol Funds,* 122.

**§ 42. Claims and Actions Against Municipality for Personal Injury**

The city charter requirement that written notice of a claim for damages against the city be given to the city council within a certain time was substantially met where written notice of plaintiff's claim was filed with the city manager within the prescribed time, referred by him to the city attorney, and subsequently presented to the city council by the city attorney. *Miller v. City of Charlotte,* 475.

## NARCOTICS

**§ 4. Sufficiency of Evidence and Nonsuit**

Evidence was sufficient to show entrapment as a matter of law where defendant was induced to buy narcotics by a law enforcement officer. *S. v. Stanley,* 19.

**NARCOTICS — Continued**

Evidence was insufficient to be submitted to the jury in a prosecution for distribution of tetrahydrocannabinols. *S. v. McKinney*, 113.

**NEGLIGENCE**

**§ 10. Intervening Negligence**

Negligence of a broker in failing to follow instructions was insulated by the intervening negligence of a second broker who refused to carry out plaintiff's sell order. *Meyer v. McCarley and Co.*, 62.

**§ 17. Doctrine of Rescue**

The rescue doctrine does not apply unless it is shown that the peril was caused by the negligence of another. *Caldwell v. Deese*, 375.

**PARENT AND CHILD**

**§ 6. Right to Custody of Child**

Right of a parent to custody of a child is not absolute. *Tucker v. Tucker*, 81.

**PENSIONS**

Members of the High Point Policemen's Pension and Disability Fund were entitled to service retirement benefits and unrestricted disability retirement benefits whether or not disability resulted from injuries sustained in the performance of their duties as policemen. *Pritchett v. Clapp*, 329.

**PROPERTY**

**§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property**

Description of property allegedly damaged by explosives was sufficient to prevent quashal of the bill of indictment. *S. v. Sanders*, 285.

Evidence was sufficient to be submitted to the jury in a prosecution for damage to an SBI agent's car by explosives. *Ibid.*

Defendant was criminally responsible for the attempted firebombing of the mayor's automobile done in furtherance of a conspiracy, even if defendant was without knowledge of the attempt. *S. v. Bindyke*, 608.

Variance between the information which charged a felony and the proof which tended to show that defendant was an accessory before the fact did not require nonsuit since the information would support a conviction under G.S. 14-127, a misdemeanor. *Ibid.*

Evidence was sufficient for the jury in a prosecution for conspiracy among defendant and two others to set fire to the town mayor's bushes and fence. *Ibid.*

**RAPE**

**§ 7. Verdict and Judgment**

The death penalty for rape is constitutional. *S. v. Bernard*, 321.

## ROBBERY

**§ 4. Sufficiency of Evidence**

Evidence was sufficient for the jury in a prosecution for robbery with a firearm. *S. v. Curry*, 660.

## RULES OF CIVIL PROCEDURE

**§ 15. Amended and Supplemental Pleadings**

In order for pleadings to be amended to conform to the proof there must be evidence of an unpleaded issue introduced without objection, and the parties must have understood that the evidence was aimed at an issue not expressly pleaded. *Eudy v. Eudy*, 71.

**§ 49. Waiver of Jury Trial on Issue**

Plaintiff waived his right to have an issue as to usage of trade submitted to the jury where he failed to demand such submission. *Foods, Inc. v. Super Markets*, 213.

**§ 50. Motion for Directed Verdict**

Trial court may not direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. *Rose v. Motor Sales*, 53.

**§ 56. Summary Judgment**

Summary judgment is appropriate in negligence cases where the motion is supported by evidentiary matter showing a total lack of negligence on the movant's part and no evidence is offered in opposition thereto. *Caldwell v. Deese*, 375.

**§ 60. Relief From Judgment**

Defendant's 60(b) motion to dismiss subsequent to a denial of his 12(b) motion to dismiss was improper but was treated by the Court as a motion for summary judgment. *Sink v. Easter*, 183.

A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court. *Ibid.*

**§ 65. Injunctions**

Trial court issuing a preliminary injunction is not required to make specific findings of fact and conclusions of law absent a request therefor. *Pruitt v. Williams*, 368.

## SALES

**§ 16. Pleadings in Actions for Breach of Warranty**

Plaintiff's complaint was sufficient to state a claim for relief for rescission of the sale of an automobile for breach of warranty of merchantability. *Rose v. Motor Sales*, 53.

## SCHOOLS

**§ 6. School Property**

Statute permitting a school board to exchange property owned by it for property to be acquired for public school purposes is constitutional. *Painter v. Board of Education*, 165.

### SCHOOLS — Continued

Plaintiffs in an action to restrain a board of education from exchanging property were not entitled to a jury trial on the question of valuation of the two tracts involved. *Ibid.*

A county board of education was not required to obtain approval of the county board of commissioners for exchanging property. *Ibid.*

### SEARCHES AND SEIZURES

**§ 1. Search Without Warrant**

Stopping of defendant's vehicle and frisking of his person were constitutional where an officer had received information from a reliable informant that defendant was carrying a revolver used in a robbery and murder. *S. v. McZorn,* 417.

Defendants had no standing to object to the admission into evidence of articles seized from a shed cellar. *S. v. Curry,* 660.

Trial court properly allowed into evidence weapons seized by officers which were in plain view. *Ibid.*

### SHERIFFS AND CONSTABLES

**§ 4. Civil Liabilities to Individuals**

The two year statute of limitations was applicable in plaintiff's action for wrongful death against officers who were allegedly negligent in failing to provide medical attention to plaintiff's jailed intestate. *Williams v. Adams,* 501.

### TELEPHONE AND TELEGRAPH COMPANIES

**§ 1. Control and Regulation**

Statutes and Utilities Commission rule requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Utilities Comm. v. Telegraph Co.,* 201.

It is unreasonable for a telephone company to discontinue service to a subscriber for the sole reason such subscriber places an opaque cover upon the directory supplied to him by the company. *Utilities Comm. v. Merchandising Corp.,* 715.

### TORTS

**§ 7. Release from Liability**

Agreement stating that plaintiff has "no defenses or set-offs against such indebtedness grounded upon poor workmanship or other objections" did not constitute a release of plaintiff's claim against defendant based on negligence and breach of implied warranty. *Adder v. Holman & Moody, Inc.,* 484.

### TRIAL

**§ 58. Findings and Judgment of the Court**

Trial court in a nonjury trial is required to find and state the ultimate facts only and not the evidentiary facts. *Williams v. Insurance Co.,* 338.

## UNFAIR COMPETITION

False representations made by defendants in the sale of a car to plaintiff constituted unfair or deceptive acts or practices in commerce as a matter of law based upon stipulations by the parties. *Hardy v. Toler,* 303.

## UNIFORM COMMERCIAL CODE

**§ 15. Warranties**

Evidence was sufficient for the jury in an action to rescind the sale of an automobile on the ground of breach of implied warranty of merchantability where the automobile was destroyed by fire originating in its motor compartment some three hours after the sale. *Rose v. Motor Sales,* 53.

**§ 20. Breach and Repudiation**

A buyer who accepts goods may revoke acceptance where there is a nonconformity of the goods to the contract which substantially impairs their value to him. *Rose v. Motor Sales,* 53.

## UTILITIES COMMISSION

**§ 2. Jurisdiction and Authority of Commission**

Statutes relating to regulation of the securities of public utilities apply to foreign corporations engaged in interstate commerce. *Utilities Comm. v. Telegraph Co.,* 201.

Statutes and Utilities Commission rule requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Ibid.*

Complainant's production and distribution of plastic telephone directory covers are not subject to regulation by the Utilities Commission. *Utilities Comm. v. Merchandising Corp.,* 715.

**§ 6. Hearings and Orders; Rates**

Utilities Commission properly excluded from the rate base of a water utility the amount of contributions in aid of construction made directly by patrons of the water utility, and an amount representing the difference between the original cost of a water system constructed by subdivision developers and the price paid to such developers by the utility. *Utilities Comm. v. Utilities, Inc.,* 457.

Utilities Commission properly refused to allow a water utility to make an annual charge to operating expenses for depreciation of properties representing contributions in aid of construction. *Ibid.*

A manufacturer of plastic telephone directory covers had standing to file a complaint challenging the Utilities Commission tariff forbidding the attachment of covers not furnished by the telephone company for telephone directories. *Utilities Comm. v. Merchandising Corp.,* 715.

It is unreasonable for a telephone company to discontinue service to a subscriber for the sole reason such subscriber places an opaque cover upon the directory supplied to him from the company. *Ibid.*

## VENDOR AND PURCHASER

**§ 3. Description of Land**

Statute and city ordinance making it a misdemeanor to describe land in a deed by reference to a subdivision plat which has not been properly approved and recorded does not render a conveyance of land illegal on the ground the seller did not obtain city council approval of a subdivision plat. *Financial Services v. Capitol Funds,* 122.

## WITNESSES

**§ 1. Competency of Witnesses**

Defendants were not prejudiced where the trial court allowed three witnesses whose names did not appear on the list furnished defendant to testify. *S. v. Spaulding,* 397.

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