NORTH CAROLINA REPORTS

VOLUME 290

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1976

FALL TERM 1976

RALEIGH
1977

CITE THIS VOLUME

290 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

SUSIE SHARP

Associate Justices

I. BEVERLY LAKE
JOSEPH BRANCH
J. FRANK HUSKINS
DAN K. MOORE
J. WILLIAM COPELAND
JAMES G. EXUM, JR.

Retired Justices

J. WILL PLESS, JR.
WILLIAM H. BOBBITT, C.J.
CARLISLE W. HIGGINS

Clerk

ADRIAN J. NEWTON[1]

Adm. Asst. to the Clerk

JOHN R. MORGAN[2]

Marshal and Librarian

RAYMOND M. TAYLOR[3]

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director

FRANKLIN FREEMAN, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

[1] Retired 30 November 1976.
[2] Appointed Clerk effective 1 December 1976.
[3] On leave of absence during 1976. Acting Librarian, Karen C. Sorvari.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

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

Second Division

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

Third Division

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

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	RONALD W. HOWELL[1]	Marshall
25	SAM J. ERVIN III	Morganton
	FORREST A. FERRELL	Hickory
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
27	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES[2]	Gastonia
28	HARRY C. MARTIN	Asheville
	ROBERT D. LEWIS	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

ROBERT R. BROWNING	Greenville
RALPH A. WALKER	Greensboro
ROBERT L. GAVIN	Pinehurst
JAMES M. BALEY, JR.	Asheville
DONALD L. SMITH	Raleigh
RONALD BARBEE	Greensboro
WILLIAM THOMAS GRAHAM	Winston-Salem
DAVID I. SMITH	Burlington

EMERGENCY JUDGES

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

[1] Appointed 27 November 1976.
[2] Appointed 21 October 1976.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	CHARLES H. WHEDBEE (Chief)[1]	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.[2]	Greenville
	NORRIS C. REED, JR.[3]	New Bern
4	KENNETH W. TURNER (Chief)[4]	Rose Hill
	HARVEY BONEY	Jacksonville
	WALTER P. HENDERSON	Trenton
	STEPHEN W. WILLIAMSON[5]	Kenansville
5	GILBERT H. BURNETT (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER	Wilmington
6	JOSEPH D. BLYTHE (Chief)	Harrellsville
	NICHOLAS LONG	Roanoke Rapids
	ROBERT E. WILLIFORD[6]	Lewiston
7	J. PHIL CARLTON (Chief)	Pinetops
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	JOHN PATRICK EXUM (Chief)	Kinston
	W. MILTON NOWELL	Goldsboro
	HERBERT W. HARDY	Maury
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS[7]	Fremont
9	CLAUDE W. ALLEN, JR. (Chief)[8]	Oxford
	LINWOOD T. PEOPLES	Henderson
	BEN U. ALLEN[9]	Henderson
	CHARLES W. WILKINSON[10]	Oxford

DISTRICT	JUDGES	ADDRESS
10	GEORGE F. BASON (Chief)	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER[11]	Raleigh
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WOODROW HILL	Dunn
	ELTON C. PRIDGEN	Smithfield
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	COY E. BREWER, JR.	Fayetteville
	GEORGE STUHL	Fayetteville
	CHARLES LEE GUY	Fayetteville
13	FRANK T. GRADY (Chief)	Elizabethtown
	J. WILTON HUNT, SR.	Whiteville
	WILLIAM E. WOOD[12]	Whiteville
14	E. LAWSON MOORE (Chief)	Durham
	J. MILTON READ, JR.	Durham
	SAMUEL F. GANTT	Durham
15	JASPER B. ALLEN, JR. (Chief)	Burlington
	STANLEY PEELE	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	THOMAS D. COOPER, JR.[13]	Burlington
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. McLEAN	Lumberton
	B. CRAIG ELLIS[14]	Laurinburg
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	GEORGE M. HARRIS	Yanceyville
	FRANK FREEMAN	Dobson
18	EDWARD K. WASHINGTON (Chief)[15]	Jamestown
	BYRON HAWORTH	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	JAMES SAMUEL PFAFF[16]	Greensboro

DISTRICT	JUDGES	ADDRESS
	JOHN B. HATFIELD, JR.[17]	Greensboro
	JOHN F. YEATTES[18]	Greensboro
	ROBERT L. CECIL[19]	High Point
19	ROBERT L. WARREN (Chief)	Concord
	L. T. HAMMOND, JR.	Asheboro
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	L. FRANK FAGGART	Kannapolis
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	DONALD R. HUFFMAN[20]	Wadesboro
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	WILLIAM H. FREEMAN[21]	Winston-Salem
	JAMES A. HARRILL, JR.[22]	Winston-Salem
	R. KASON KEIGER[23]	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	HUBERT E. OLIVE, JR.	Lexington
	PRESTON CORNELIUS	Troutman
	ROBERT W. JOHNSON	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	ROBERT HOWARD LACEY	Newland
25	LIVINGSTON VERNON (Chief)	Morganton
	BENJAMIN BEACH	Lenoir
	JOSEPH P. EDENS, JR.	Hickory
	BILL J. MARTIN	Hickory
	SAMUEL McD. TATE	Morganton
26	CLIFTON E. JOHNSON (Chief)	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	L. STANLEY BROWN	Charlotte
	LARRY THOMAS BLACK	Charlotte
	DAVID B. SENTELLE	Matthews
	JAMES E. LANNING	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	WILLIAM G. JONES[24]	Charlotte

DISTRICT	JUDGES	ADDRESS
27	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	ARNOLD MAX HARRIS	Ellenboro
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.[25]	Gastonia
28	CARY WALTER ALLEN (Chief)	Asheville
	JAMES O. ISRAEL, JR.	Candler
	WILLIAM MARION STYLES	Black Mountain
	GARY A. SLUDER	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	HOLLIS M. OWENS, JR.[26]	Rutherfordton
	ZORO J. GUICE, JR.[27]	Hendersonville
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES McDARRIS	Waynesville
	JOHN J. SNOW, JR.[28]	Murphy

[1] Appointed Chief Judge 6 December 1976.
[2] Elected 2 November 1976 and took office 6 December 1976 to succeed J. W. H. Roberts who retired 5 December 1976.
[3] Elected 2 November 1976 and took office 6 December 1976.
[4] Appointed Chief Judge 1 December 1976.
[5] Elected 2 November 1976 and took office 6 December 1976 to succeed Paul M. Crumpler whose term expired 5 December 1976.
[6] Elected 2 November 1976 and took office 6 December 1976 to succeed Ballard S. Gay who retired 5 December 1976.
[7] Elected 2 November 1976 and took office 6 December 1976 to succeed Lester W. Pate whose term expired 5 December 1976.
[8] Appointed Chief Judge 6 December 1976.
[9] Elected 2 November 1976 and took office 6 December 1976 to succeed Julius Banzet who retired 5 December 1976.
[10] Elected 2 November 1976 and took office 6 December 1976.
[11] Elected 2 November 1976 and took office 6 December 1976 to succeed Carlos W. Murray, Jr. whose term expired 5 December 1976.
[12] Elected 2 November 1976 and took office 6 December 1976 to succeed William Lewis Sauls whose term expired 5 December 1976.
[13] Elected 2 November 1976 and took office 6 December 1976 to succeed Coleman Cates whose term expired 5 December 1976.
[14] Elected 2 November 1976 and took office 6 December 1976.
[15] Appointed Chief Judge 1 December 1976.
[16] Elected 2 November 1976 and took office 6 December 1976 to succeed E. D. Kuykendall, Jr. who retired 5 December 1976.
[17] Elected 2 November 1976 and took office 6 December 1976 to succeed Darl L. Fowler whose term expired 5 December 1976.
[18] Elected 2 November 1976 and took office 6 December 1976 to succeed Walter E. Clark, Jr. whose term expired 5 December 1976.
[19] Elected 2 November 1976 and took office 6 December 1976.
[20] Elected 2 November 1976 and took office 6 December 1976 to succeed A. A. Webb whose term expired 5 December 1976.
[21] Elected 2 November 1976 and took office 6 December 1976 to succeed Frank J. Yeager whose term expired 5 December 1976.
[22] Elected 2 November 1976 and took office 6 December 1976 to succeed John Clifford whose term expired 5 December 1976.
[23] Elected 2 November 1976 and took office 6 December 1976 to succeed A. Lincoln Sherk whose term expired 5 December 1976.
[24] Elected 2 November 1976 and took office 6 December 1976 to succeed J. Edward Stukes whose term expired 5 December 1976.
[25] Elected 2 November 1976 and took office 6 December 1976 to succeed Oscar F. Mason, Jr. whose term expired 5 December 1976.
[26] Elected 2 November 1976 and took office 6 December 1976 to succeed Wade B. Matheny who retired 5 December 1976.
[27] Elected 2 November 1976 and took office 5 December 1976 to succeed Ladson F. Hart whose term expired 5 December 1976.
[28] Elected 2 November 1976 and took office 6 December 1976.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

HOWARD A. KRAMER

Special Assistant to the Attorney General

JOHN A. ELMORE

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
ROBERT BRUCE WHITE, JR.

Deputy Attorneys General

JEAN A. BENOY
MILLARD R. RICH, JR.
WILLIAM W. MELVIN

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
EUGENE A. SMITH
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED
ROBERT P. GRUBER
GEORGE J. POE, JR.

Assistant Attorneys General

PARKS H. ICENHOUR
CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
JAMES L. BLACKBURN
RICHARD N. LEAGUE
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
H. AL COLE, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
CHARLES J. MURRAY
WILLIAM W. WEBB
I. B. HUDSON, JR.
JERRY J. RUTLEDGE
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
JAMES M. WALLACE, JR.
ARCHIE W. ANDERS

JESSE C. BRAKE

DISTRICT ATTORNEYS

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

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

LICENSED ATTORNEYS

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 22nd day of August, 1976, and said persons have been issued certificates of this Board:

J. JANE ADAMS ..... Asheboro
ROBERT DEW ALBERGOTTI ..... Orangeburg, S. C.
JOHN WILSON ALEXANDER, JR. ..... Asheboro
WILLIAM GEORGE ALEXANDER ..... Kannapolis
ERNEST MARVIN ALLEN III ..... Chapel Hill
PRENTISS ANNE ALLEN ..... Carrboro
CHARLES T. L. ANDERSON ..... Raleigh
DOUGLAS GRANT ANDREWS ..... Bonita Springs, Fla.
GERALD IRVING APPLEFIELD ..... Athens, Ga.
CATHARINE GRACE BIGGS ARROWOOD ..... Lumberton
DIXIE L. ATWATER ..... Yanceyville
WILLIAM BENNETT ATWATER, JR. ..... Yanceyville
ERNEST CORDELL AVERY ..... Greenville
DENNIS ROY AYERS ..... Winston-Salem
PATRICIA SMITH BAARS ..... Raleigh
HORACE MITCHELL BAKER III ..... Lumberton
DANIEL WILSON BAREFOOT ..... Maiden
KATHLEEN CARSON BARGER ..... Durham
AARON MICHAEL BARKER ..... Goldsboro
LINNA MAY BARNES ..... Athens, Ga.
ROBERT JOSEPH BARNES ..... Rock Hill, S. C.
STEPHEN BARNWELL ..... Weaverville
IRENE BARTLETT ..... Raleigh
ROBERT LINDSEY BAYNES ..... Greensboro
MICHAEL E. BEALE ..... Wilmington
ROBERT JOHN BEGGS ..... Durham
ADELAIDE GERARDINE BEHAN ..... Erie, Penn.
CARY PITTMAN BELL ..... Weldon
RAYMOND MARTIN BERNSTEIN ..... Chapel Hill
REBECCA RIGGAN BEVACQUA ..... Raleigh
RICHARD WAYNE BEYER ..... Winston-Salem
GEORGE TEMPLETON BLACKBURN II ..... Henderson
DAVID ROY BLACKWELL ..... Winston-Salem
JAMES LINWOOD BLANE ..... Roanoke, Va.
FRANKLIN LEE BLOCK ..... Wilmington
CLIFFORD JACKSON BOND III ..... High Point
WILLIAM JOSEPH BONEY, JR. ..... Wilmington
MICHAEL LOUIS BONFOEY ..... Chapel Hill
DAVID BRUCE BOSWORTH ..... Charlotte
IRA JAY BOTVINICK ..... Chapel Hill
WILLIAM JACKSON BOWMAN, JR. ..... Coral Gables, Fla.
DOUGLAS EUGENE BRAFFORD ..... Charlotte
JOHN LAWRENCE BRAMLETT ..... Durham
WILLIAM EARL BREWER, JR. ..... Chapel Hill

LINDA BRUCE BRIDGMAN	Elizabeth City
ROBERT AKIN BRINSON	High Point
SANDY DEXTER BROOKS	Pembroke
DAVID EARL BROOME, JR.	Morganton
GORDON HAMPTON BROWN	Galax, Va.
MELVYN HARRIS BROWN, JR.	Winston-Salem
TERRY DUE BROWN	Charlotte
CHARLES TALMADGE BROWNE	Star
RAY STERLING BROWNE II	Lexington
CAROLINE NICHOLSON BRUCKEL	Miami, Fla.
WILLIAM JOSEPH BRUCKEL, JR.	Avon, N. Y.
ANGELA REBECCA BRYANT	Rocky Mount
PETER COLEMAN BUCK	Kinston
JAMES LEON BULLOCK	Panama City, Fla.
DONALD STEPHEN BUNCE	Stedman
HENRY LIGON BUNDY	Morganton
ROBERT LEWIS BURCHETTE	Havelock
WILLIAM HAMILTON BURWELL	Charlotte
GEORGE EDWIN BUTLER II	Clinton
FRED BUTNER	Winston-Salem
JOHN HOMER BYRD	Raleigh
ALFRED HAROLD CAMPBELL	Greensboro
ROBERT EDWARD CAMPBELL	West Palm Beach, Fla.
CLAUDE CARL CANADAY III	Benson
BRUCE LEE CANNON	Lenoir
JOHN TILTON CARTER, JR.	McFarlan
GARY STEPHEN CASH	Oxford
RICHARD G. CHANEY	Durham
LEWIS ALEXANDER CHEEK	Durham
DEBORAH DEANE CARNES CHRISTIE	Carrboro
SUSAN CHRISTMAN	Charlotte
FRANCIS CHARLES CLARK	Murphy
ROWELL CONNOR CLONINGER, JR.	Shelby
RALPH CLAYTON CLONTZ III	Charlotte
KENNETH SEARS COE, JR.	Charlotte
MAX OLIVER COGBURN, JR.	Candler
JAY LINDSEY COHEN	Colonial Springs, N. Y.
NADINE RUTH COHODAS	Carrboro
CHARLES R. COLEMAN	Institute, W. Va.
JOHN CHARLES COLLINS	Bellerose, N. Y.
ROBERT EARLE COLLINS	Rocky Mount
ARTHUR WAYLAND COOKE	Greensboro
BARDEN WINSTEAD COOKE	Greensboro
FRANCES DYER COOKE	Durham
JULIA FITCHETT COOKE	Weaverville
CATHERINE LANE COOPER	Tarboro
CLAYWARD COLUMBUS CORRY, JR.	Kings Mountain
ROBERT G. COWEN	Sylva
AMY LYNN COX	Chapel Hill
JOSEPH BRINSON COX, JR.	Greenville
RANDY L. CRANFORD	Thomasville

RICHARD COLE CRAVEN	Pine Bluff
JOHN RANDOLPH CRESENZO	Reidsville
ANNE LAFFERTY CROTTY	Hickory
AULEY McRAE CROUCH III	Wilmington
WAYNE EVERETT CRUMWELL	Durham
RICHARD VICTOR CRUTCHFIELD, JR.	Winston-Salem
MICHAEL GORDON CULBRETH	Clemmons
BENJAMIN ADRAIN CURRENCE	Rowland
RODNEY ALAN CURRIN	Raleigh
THOMAS LEE CURRIN	Carrboro
ROSWALD BERNARD DALY, JR.	Broadway
GEORGE BERKLEY DANIEL	Yanceyville
CHARLES EDMUND DAVIS	Winston-Salem
GREGORY DAVIS	Sanford
THOMAS HILL DAVIS, JR.	Raleigh
WILLIE C. DAWSON	Kinston
WINFORD ROBINSON DEATON, JR.	Valdese
MYRA JEAN DeLAPP	Lexington
JOSEPH CLAY DELK III	Asheboro
JOHN WYATT DICKSON	Raeford
JAMES HENRY DOOLEY, JR.	Winston-Salem
WILLIAM WOODS DOSTER	Charlotte
MICHAEL WARREN DRYE	Charlotte
MARGARET ANNETTE DUDLEY	Greenville
DANIEL JAMES DUGAN	Durham
CLIFTON HARDY DUKE III	Kinston
GILBERT VINCENT DURHAM, JR.	Charlotte
PAUL BRADFORD EAGLIN	Fayetteville
MICHAEL FRANCIS EASLEY	Rocky Mount
ALDERT ROOT EDMONSON	Smithfield
JAMES DEWEY EDWARDS, JR.	Jacksonville
L. HOLMES ELEAZER, JR.	Charlotte
RICHARD ALEXANDER ELKINS	Charlotte
KERMIT WELDON ELLIS, JR.	Henderson
BRUCE ALEXANDER ELMORE, JR.	Asheville
WINFRED REYNOLDS ERVIN, JR.	Charlotte
NANCY BENTSON ESSEX	Raleigh
WALTER JAMES ETRINGER	Merrick, N. Y.
CAROL EUBANK	Covington, Ky.
STEVEN LEE EVANS	Lexington
DAVID HAYDEN FAUCETTE	Swannanoa
MICHAEL R. FERRELL	Fayetteville
MARTHA DELL FINLATOR	Raleigh
MARK STEPHEN FISCHER	Pelham Manor, N. Y.
WILLIAM HOUGH FLOWE, JR.	Burlington
NANCY JoANNE FOIL	Chapel Hill
LARRY JAMES FORD	Warne
BRENDA MARIA FOREMAN	Snow Hill
PAUL WESLEY FREEMAN, JR.	Raleigh
BILLY DELEON FRIENDE, JR.	Winston-Salem
GEORGE THOMAS FULLER	Louisburg

ROBERT HEADLEY GAGE	Wilmington
EDWARD HINES GALLOWAY	Greensboro
JANE RAY GARVEY	Chapel Hill
LLOYD MICHAEL GENTRY	Pelham
SARAH ELIZABETH GIBSON	Raleigh
STEVEN GRAY GIBSON	High Point
MARGARET SMYLLIE GLASS	Hartford, Conn.
DALE DEAN GLENDENING	Fayetteville
DURANT MURRELL GLOVER	Chapel Hill
MICHAEL DAVID GORDON	Greenville
C. BARRETT GRAHAM	Chapel Hill
WILLIAM GRIFFIN GRAVES III	Burlington
WILLIAM CAMPBELL GRAY, JR.	Wilkesboro
PETER GREAR	Wilmington
WILLIAM PROCTOR GREATHOUSE, JR.	Lexington
JOSEPH VENABLE GREEN	Raleigh
THOMAS WILLIAMS GREENE, JR.	Ahoskie
NANCY LU GRIFFIN	Charlotte
HOWARD LEE GUM	Altamont, Ill.
ALLEN HOLT GWYN, JR.	Winston-Salem
WILLIAM RUSSELL HAMILTON III	Macon, Ga.
DOUGLAS HARGRAVE	Abingdon, Pa.
HARRY HOKEY HARKINS, JR.	Sarasota, Fla.
EDWIN LEDBETTER HARRIS III	Fayetteville
JOHN FRANKLIN HARRIS	Burlington
RESA LAVERNE HARRIS	Charlotte
HARRY BENJAMIN HARTLEY	Winston-Salem
STEPHEN CRAIG HASSENFELT	Southern Pines
EDWARD C. HAY, JR.	Columbus, Ga.
WILLIAM SNOW HAYES, JR.	High Point
MICHAEL DEAN HEARN	Asheville
JOSEPH CLAUDIUS HEDGPETH II	Concord
DAVID GEORGE HEETER	Raleigh
JACKSON WALTER HENSON	Vilas
STEPHEN JOEL HERRING	Morehead City
ROBERT LESLIE HERSH	Durham
RALPH GARDNER HILL, JR.	Arden
DONALD JOSEPH HODGENS	Charlotte
PATRICIA B. HODULIK	Elroy, Wisc.
CYRUS AUBURN HOLBROOK	Kenova, W. Va.
KATHERINE McKEE HOLEMAN	Durham
RICHLYN DAVID HOLT	Waynesville
CARL HORN III	Charlotte
STEPHEN FRANCIS HORNE II	Rocky Mount
CORINNE ANDERSON HOUPT	Seattle, Wash.
SAMUEL JOHNSON HOWARD	Raleigh
DENNIS LEE HOWELL	Burnsville
ROBIN ELVERE HUDSON	Greensboro
NELSON LAWRENCE HUDSPETH III	Yadkinville
NOAH HAYWOOD HUFFSTETLER III	Mount Holly
ROBERT BALL HULBERT, JR.	High Point

WILLIAM HERMAN HUMBERT ..... Covington, Va.
CHARLIE ARMON HUNT, JR. ..... Denton
MALCOLM RAY HUNTER, JR. ..... Greensboro
WILLIAM GERHARDT HUSSMAN, JR. ..... Valparise, Ind.
JOSEPH LEO HUTCHERSON II ..... Winston-Salem
MICHAEL REED ISENBERG ..... Hickory
KENNETH RICHARD JACOBSON ..... Konocha, Wisc.
CLAUSTON LEVI JENKINS, JR. ..... Raleigh
LEONARD THELL JERNIGAN, JR. ..... Chapel Hill
MARION WHITE JERVAY ..... Raleigh
ELIZABETH DALE JOHNSON ..... Chapel Hill
JOHN HOWARD JOHNSON, JR. ..... Raleigh
LINDA L. JOHNSON ..... Falls Church, Va.
PHYLLIS CAMERON JOHNSON ..... Benson
EDWARD HAYES JOHNSTON, JR. ..... Wagram
JOSEPH CHARLES JONES ..... Charlotte
LAWRENCE THOMAS JONES ..... Arden
JAMES TRENTON JORDAN ..... Candor
RANDALL A. JORDAN ..... Brunswick, Ga.
STEPHEN PAUL KARR ..... Brookfield, Wisc.
KIRBY BERNARD KEPFORD ..... Hickory
JOHN CLARK KILLOUGH ..... Charlotte
GARY EDWARD KIRBY ..... Asheville
RANDAL WAYNE KODER ..... Jamestown
JUDITH LEONOMIE KORNEGAY ..... Rocky Mount
E. J. KROMIS, JR. ..... Wilson
RICHARD L. KUCHARSKI ..... Chicago, Ill.
CONSTANTINE HANNA KUTTEH II ..... Statesville
WILLIAM FRANK LARIMER ..... Chapel Hill
BENNIE MARK LAUGHTER ..... Hendersonville
JAMES R. LAWRENCE, JR. ..... Dunn
GEORGE WRIGHT LENNON ..... Lumberton
JERRY RICHIE LEONARD ..... Welcome
ARLINDA FAYE LOCKLEAR ..... Durham
DAVID MARK LOMAS ..... Winston-Salem
KEITH CLARK LONG ..... Charlotte
MICHAEL WAYNE LONG ..... Charlotte
RALPH JAMES LORE ..... Raleigh
JAMES WILLIAM LUNG ..... Chapel Hill
JAMES AUSTIN LYBRAND IV ..... Greensboro
R. ALEXANDER LYERLY ..... Banner Elk
JOHN POPE MCADAMS ..... Winston-Salem
CAROLYN MCALLASTER ..... Chapel Hill
ROBERT EDWIN MCCLEAREN ..... Raleigh
JOHN GREGORY MCCORMICK ..... Greensboro
MICHAEL J. MCCRANN ..... Raleigh
H. KING MCGLAUGHON ..... Jacksonville
ANNE MARIE MCKINNEY ..... Oak Ridge, Tenn.
RUSSELL LYWAY MCLEAN III ..... Waynesville
MARY CLAIRE MCNAUGHT ..... Winston-Salem
ROBERT BURTON MARSHALL ..... Charlotte

STEPHEN JOHN MARTIN	Gainesville, Fla.
THOMAS WILBUR MARTIN, JR.	Lattimore
AARON CLARE MOSES MASSEY	Lowgap
FRED KEVIN MAUNEY	Shelby
MICHAEL T. MEDFORD	Carrboro
JEFFREY STEPHEN MILLER	Swansboro
JERRY W. MILLER	Asheville
PAUL EUGENE MILLER, JR.	Boone
PAUL FELIX MILLER II	Ayden
TERRY JAMES MILLER	Charlotte
CAROLE YVONNE MIMS	Hendersonville
PAGE ALLEN MITCHELL	Winston-Salem
JAMES CURTIS MOFFATT	Chapel Hill
SUSAN REBECCA ROTHROCK MONTAQUILA	Kernersville
MICHAEL THOMAS MOORE	Lexington, Ky.
JOHN CHARLES MOREHEAD	Raleigh
FRED MICHAEL MORELOCK	Raleigh
JOHN GRIFFIN MORGAN	Black Mountain
THOMAS JADA MORGAN	Wilmington
STEPHEN HARLEN MORRIS	Charlotte
THERON ERNEST MULLINAX, JR.	Hendersonville
FREDERICK JANSSEN MURRELL	Winter Haven, Fla.
ROYCE LEE MYERS	Charlotte
WILLIAM MARCUS NEELY	Summerton, S. C.
MARY KATHERINE NICHOLSON	East Bend
JOHN HAWKINS NOBLITT	Thomasville
JULIUS LYNN NOLAND	Waynesville
ROBERT BRYAN NORRIS	Statesville
ALBERT WESLEY OAKLEY	Roxboro
SUSAN FREYA OLIVE	Durham
JACQUELINE MASON O'NEIL	Tulsa, Okla.
CLARE MURIEL O'NEILL	New Milford, N. J.
ROBERT AARON O'QUINN	Wilmington
WENDELL HARRELL OTT	Osyka, Miss.
RANDALL MARTIN PAIS	Charlotte
WALTER HOYTT PARAMORE III	New Bern
JAMES RILEY PARISH	Wendell
JOHN JOHNSTON PARKER III	Charlotte
CARL NORRIS PATTERSON, JR.	Durham
ROBERT LYNN PEACE	Raleigh
MICHAEL RIGGS PENDERGRAFT	Chapel Hill
GARY RAYMOND PERDUE	New Bern
WILLIAM LEE PETERS	Clarksburg, W. Va.
ALLEN JAY PETERSON	Chapel Hill
EDMUND PICKUP, JR.	Charlotte
JULIAN THOMAS PIERCE	Raeford
JOHN HOWELL PIKE	Louisburg
STEPHEN DOUGLAS POE	Charlotte
FREDERICK DAVIS POISSON, JR.	Raleigh
DAVID BRUCE POST	Salisbury
LACY MARTIN PRESNELL III	Raleigh

EDWIN ARNESON PRESSLY	Statesville
ALAN VIRGIL PUGH	Asheboro
FRANK GRAHAM QUEEN	Waynesville
ALICE ANN RATLIFF	Durham
EUGENE AUSTIN REESE, JR.	Gastonia
CHRISTY EVE REID	Charlotte
CHARLES ARTHUR REINHARDT, JR.	Jacksonville, Fla.
WILLIAM WALLACE RESPESS, JR.	Pantego
JIMART LEE RHINEHART	Greenville
MARILYN RUTH YEOMANS RICH	Raleigh
HERBERT L. RICHARDSON	Nashville
ROBERT JOSEPH ROBBINS, JR.	Lenoir
THOMAS ALFRED ROBINSON	Gastonia
TODD ALAN ROBINSON	Gastonia
RANDALL MAITLAND RODEN	Chapel Hill
PAUL ALAN RODGMAN	Winston-Salem
JONATHAN MICHAEL ROGOFF	Durham
RANDOLPH CORDELL ROMEO	Hendersonville
WILLIAM HENRY ROMM, JR.	Moyock
DAVID M. ROOKS III	Asheboro
RICHARD GREGORY ROOSE	Murfreesboro, Tenn.
STEVEN J. ROSE	Pittsboro
WILLIAM SEHON ROSE, JR.	Charlotte
RICHARD ALAN ROSEN	Charlotte
BARBARA CAROL RUBY	Raleigh
JACK EDWARD RUBY	Lewisville
GEORGE WALTER SAENGER	Asheville
PETER J. SARDA	Winston-Salem
EVERETT B. SASLOW, JR.	Greensboro
DONALD MAXWELL SAUNDERS	Morganton
ERIC ALTON SAUNDERS	Greensboro
DAVID McINTOSH SAVORY	Asheville
KATHRYN ANNE SCHNEBERK-KING	Durham
HARMON CHRISTOPHER SEARS	Greensboro
DARRELL LEE SECHREST, JR.	Greensboro
MARY PAULINE SECHRIEST	Chapel Hill
MARCELLA CHERIE SELF	Reidsville
DIANNE CECELIA SELLERS	Forest City
STEVEN MANSFIELD SHABER	Durham
ROSA ELLIS SHEARIN	Garysburg
ALLIE JOHNSON SHEFFIELD	Warsaw
PAUL COOPER SHEPARD	Winston-Salem
CARL MEREDITH SHORT, JR.	Rockwell
MOHAMED MADIEU SHYLLON	Raleigh
P. WAYNE SIGMON	Mount Holly
SHERI HELENE SILVERMAN	Great Neck, N. Y.
EDWARD BARDIN SIMMONS	Tarboro
IRVIN RAY SINK	Welcome
THOMAS WILLIAM SINKS	Chapel Hill
CURTIS HOWARD SITTERSON	Chapel Hill
ROBERT LANIER SLAUGHTER	Fuquay-Varina

ANNE ROSALIND SLIFKIN ..... Chapel Hill
BARRY STEPHEN SLOOP ..... Mooresville
ARCHIE LEHMAN SMITH III ..... Durham
BURTON CLINTON SMITH, JR. ..... West Palm Beach, Fla.
CECILY PEARSON SMITH ..... Durham
DAVID MURPHY SMITH ..... Lynn, Mass.
EUGENE GRAY SMITH III ..... Winston-Salem
JAMES KENNETH SMITH ..... Williamston
STEPHEN LEWIS SMITH ..... Charlotte
WILLIAM OSMOND SMITH III ..... Semora
JAMES McNEIL SNOW ..... Elkin
MARION PATRICE SOLBERG ..... Fayetteville
CHARLES KENNETH SPACH, JR. ..... Winston-Salem
WILLIAM McGEE SPEAKS, JR. ..... Winston-Salem
PAUL JERALD STAINBACK ..... Henderson
LANA LEE STARNES ..... Charlotte
SANFORD LEWIS STEELMAN, JR. ..... Watchung, N. Y.
WILLIAM McKINLEY STEIMER ..... Anderson, Ind.
GORDON SEFTON STEVENS ..... Kannapolis
TIMOTHY MICHAEL STOKES ..... Kannapolis
MICHAEL CORBETT STOVALL, JR. ..... Wilmington
EARL HOMER STRICKLAND ..... Pembroke
LUCY COLE DURHAM STRICKLAND ..... Buena Vista, Va.
RALPH BOWLING STRICKLAND, JR. ..... Durham
DEBRA JO STUART ..... Greenville
ROGER BRYAN SUTTON ..... Greensboro
ALBERT CRAIG SWAIN ..... Wilson
JOHN ARTHUR SWEM ..... Carrboro
GWYNN TERESA SWINSON ..... Belhaven
JULIA ANN TALBUTT ..... Charlotte
ROBERT MACON TALFORD ..... Charlotte
JAMES ALEXANDER TANFORD ..... Durham
DAVID ROBERT TANIS ..... Winston-Salem
DANIEL RUSSELL TAYLOR, JR. ..... Greenville
DOUGLAS OWEN THIGPEN ..... Asheville
SHARON ANDREA THOMPSON ..... Durham
STEPHEN RUSSELL THOMPSON ..... Albemarle
CRAIG JOHNSON TILLERY ..... Wilmington
KENNETH C. TITUS ..... Durham
ROBERT JOSEPH TOLAN ..... Durham
ALLEN RAY TOMLINSON ..... Coral Gables, Fla.
DANIEL WEBSTER TRASK ..... Wilmington
BENJAMIN FREDERICK TUCKER ..... Roanoke, Va.
JOSEPH EPPES TURNER ..... Greensboro
ANDREW ANDERSON VANCE, JR. ..... Salisbury
CURTIS J. VAUGHT ..... Hickory
ANN CARROLL VILLIER ..... Charlotte
JOHN CHARLES WALDRUP ..... Asheville
DAVID ANDREW WALLACE ..... Winston-Salem
JOHN RUDY WALLACE ..... St. Petersburg, Fla.
MARTHA KIRKLAND WALSTON ..... Wilson

HENRY VANCE WARD, JR. ..... Wilmington
WILLIAM CECIL WARDEN, JR. ..... Sparta
ANDREW JACKSON WARMACK, JR. ..... Rich Square
JOHN CRAIN WARREN ..... Charlotte
ANDREW LAMARR WATERS ..... Brooklyn, N. Y.
EDGAR THOMAS WATSON ..... Greensboro
LAWRENCE FLEMMING WATSON ..... McCain
CHARLES BRUCE WAYNE ..... Chapel Hill
KEITH WAYNE WEAVER ..... Durham
JAMES BARNES WEEKS ..... Newton Grove
FELICE JOY WEINER ..... Chapel Hill
RICHARD N. WEINTRAUB ..... Florence, S. C.
BRYANT LIBBY WELCH ..... Carrboro
THOMAS HOLMES WELLMAN ..... Weldon
JOHN CHARLES WESSELL III ..... Wilmington
J. PATRICK WHALEN, JR. ..... Jacksonville, Fla.
ROBERT LEE WHITE ..... Greenville
NEIL BRYAN WHITFORD ..... Plymouth
FRED JAMES WILLIAMS ..... Durham
JOHN SAMUEL WILLIFORD, JR. ..... Pinetops
CHARLES MICHAEL WILSON ..... Winston-Salem
GERALD WISS WILSON ..... Bakersville
GROVER GRAY WILSON ..... Boone
WILLIAM T. WILSON, JR. ..... Apex
GEORGE CRISTON WINDHAM ..... Chevy Chase, Md.
ALLAN DAVID WINDT ..... Durham
RONALD EUGENE WINFREY ..... Chapel Hill
EDWARD LOWRY WINN III ..... Carrboro
LESLIE JANE WINNER ..... Asheville
DAVID WARREN WOODARD, JR. ..... Wilson
KENNETH WAYNE WOODARD ..... Conway
STEPHEN CLARENCE WOODARD, JR. ..... Smithfield
GORDON CLAIBORNE WOODRUFF ..... Selma
BRINTON DOUGLAS WRIGHT ..... Winston-Salem
DONALD MORGAN WRIGHT ..... Goldsboro
MARY ELIZABETH WRIGHT ..... Wallace
ROBERT ANTHONY YANCEY ..... W. Columbia, S. C.
GARLAND NELSON YATES ..... Denton
JULIUS OSBORNE YOUNG III ..... Winston-Salem
WILLIAM LOUIS YOUNG ..... Burlington
LYLE JOSEPH YURKO ..... Raleigh
FRANK CURRY ZACHARY ..... Yadkinville
JOHN ENGLER ZELIFF III ..... Raleigh

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

KENNETH STANLEY BROUN	Chapel Hill
PETER WILLIAM BROWN	Durham
JOHN MICHAEL BURTIS	Charlotte
WILLIAM AUBREY CAMPBELL	Chapel Hill
JACK EDMUND CARTER	Fayetteville
WALTER LEE DAVIS, JR.	Boone
CHARLES EDWARD DAYE	Chapel Hill
RALPH HARDING DOUGHERTY	Charlotte
CHARLES DWIN EDELMAN	Durham
JOHN MENGEL FISHER	Winston-Salem
ANTHONY GAETA, JR.	Whiteville
HAROLD GAVARIS	Nags Head
CARROLL CLEO HASTON	Charlotte
BUDDY O. H. HERRING	Winston-Salem
LAWRENCE AUSTIN HOGAN	Greensboro
BRADLEY KEITH JONES	Raleigh
RICHARD EUGENE JONES	Raleigh
RAYMOND ANTHONY LEDOGAR	Greensboro
ROBERT LEVITT	Greensboro
ELVIS LEWIS, JR.	Fayetteville
JOHN RICHARD LYNCH	Raleigh
LARRY JAMES MCGLOTHLIN	Fayetteville
DON GILLIAM NICHOLSON	Raleigh
EDWARD MARC QUINTO	Brevard
ROBERT CARL ROOS, JR.	Greensboro
CHARLES NORMAN STEDMAN	Burlington
MARK EUGENE SULLIVAN	Fayetteville
BOWEN CROSSLING TATUM, JR.	Jacksonville

Given over my hand and the Seal of the Board of Law Examiners, this the 27th day of October, 1976.

FRED P. PARKER III

Executive Secretary

Board of Law Examiners of

The State of North Carolina

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 said person has been issued a license certificate by the Board:

CHARLES LORENZO MCLAWHORN ..... Winterville

Given under my hand and the Seal of the Board of Law Examiners, this the 13th day of December, 1976.

FRED P. PARKER III

Executive Secretary

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1976

STATE OF NORTH CAROLINA v. HENRY FRANK HAMMONDS

No 40

(Filed 14 May 1976)

1. **Criminal Law § 5— test of insanity**

The test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation.

2. **Criminal Law § 5— insanity — burden of proof**

Defendant has the burden of proving his insanity to the satisfaction of the jury.

3. **Homicide § 7— mental capacity to form intent to kill**

If a defendant does not have the mental capacity to form an intent to kill or to premeditate and deliberate upon the killing, he cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to disease of the mind or some other cause.

4. **Criminal Law § 5; Homicide § 7— insanity as defense to murder — jury question**

Although defendant in this first degree murder case presented opinion testimony by two psychiatrists that he was unable to distinguish right from wrong at the time of the crime as a result of mental illness and defect in reason, the question of defendant's insanity as a defense to the charge was for the jury when the testimony of two police officers that defendant appeared and acted normal immediately

after the fatal shooting is considered with the presumption that every man is sane.

5. **Homicide §§ 14, 24— presumptions of malice and unlawfulness — instructions**

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.

6. **Criminal Law §§ 5, 112; Homicide § 28— insanity — instructions on burden of proof**

Trial court's instruction placing the burden on defendant to prove to the jury's satisfaction that he was insane when he shot deceased, and the court's refusal to give defendant's proffered instruction which would have placed the burden on the State to prove defendant's sanity beyond a reasonable doubt, did not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684.

7. **Criminal Law §§ 5, 63; Homicide §§ 7, 28— evidence of mental disease — effect on intent — refusal to instruct**

The trial court in a first degree murder case did not err in refusing to give defendant's requested instruction that evidence of defendant's mental debilities could be considered on the question of defendant's ability to form a specific intent.

8. **Criminal Law §§ 5, 111— defense of insanity — argument of solicitor — refusal to instruct on commitment procedures for criminally insane**

Where the district attorney in his argument to the jury in a first degree murder case stated that defendant would be back in the community if found not guilty by reason of insanity, the court's instruction to the jury to disregard such argument was insufficient to cure its prejudicial effect, and the court erred in refusing to give defendant's tendered instruction explaining the statutory procedure for commitment upon an acquittal by reason of insanity.

9. **Criminal Law §§ 5, 111— defense of insanity — instructions on commitment procedure**

A defendant who interposes a defense of insanity to a criminal charge is entitled, upon request, to an instruction by the trial judge setting out in substance the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness. To the extent this rule is in conflict with *State v. Bracy*, 215 N.C. 248, that decision is modified.

10. **Constitutional Law § 36; Homicide § 31— death penalty — constitutionality**

Death penalty for first degree murder does not violate the rule of *Furman v. Georgia*, 408 U.S. 238, and does not constitute cruel and unusual punishment in violation of the Eighth Amendment.

State v. Hammonds

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 8 September 1975 Criminal Session of ANSON Superior Court.

On indictment, proper in form, defendant was charged with the murder of Herman Capel. He entered a plea of not guilty by reason of insanity. The jury returned a verdict of guilty of murder in the first degree and death sentence was imposed.

The evidence for the State tended to show the following: About 9:00 a.m. on 21 May 1975, several employees of a store operated by Herman Capel, and others who were in the store, saw defendant walking back and forth in front of the store before entering. After he entered, they heard a loud "pop," saw Mr. Capel fall, and saw defendant walk out of the store with a gun in his hand.

Detective Tommy Allen of the Wadesboro Police Department was immediately called to the store where he found Mr. Capel dead, with a gunshot wound in the head. An autopsy revealed that Mr. Capel died as a result of this wound.

When Detective Allen arrived at the police station around 10:00 a.m. on 21 May, he found defendant, who had voluntarily surrendered, waiting for him. After being fully advised of his rights, defendant was asked by Allen if he understood these rights or had any questions. Defendant said he had no questions, that he understood his rights, and that he did not want a lawyer. He then told Allen that about a month earlier he had a "run-in" with Mr. Capel about two cans of pepper that he had put in his pocket and for which Mr. Capel had accused him of not paying. He said he then paid Mr. Capel for the pepper and left the store. Defendant further stated to Allen that about a week before the shooting he overheard people talking about how Mr. Capel had caught him stealing pepper from the store, and as a result he went to see Mr. Capel and talked to him about these conversations. Mr. Capel stated that he had not told anyone about the pepper incident. Defendant told Allen, however, that this incident continued to bother him, and that he had gone to Mr. Capel's store on 21 May to talk with him but that Mr. Capel had not arrived. He left and returned about an hour later, at which time he entered the store with the gun in his hand. He saw Mr. Capel on the right side of the store talking to a man, walked straight over to where Mr. Capel was standing, stuck the gun up to the back of his head and shot him one

time. He then left the store, taking the gun with him. He told Detective Allen that he had thrown the gun out on the side of the road on 109 North and agreed to take Allen to find it. As they were leaving the station, he told Allen that the gun was not on the side of the road but was at his house. They then went to Mr. Hammond's house and at defendant's request his wife gave the gun to Allen.

Defendant did not testify but offered the testimony of two psychiatrists, his wife and several other witnesses. The testimony for the defendant and other facts necessary to decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten, Assistant Attorney General Charles M. Hensey and Assistant Attorney General Archie W. Anders for the State.

Larry E. Harrington and James E. Ferguson II for defendant appellant.

MOORE, Justice.

Defendant first assigns as error the failure of the trial court to direct a verdict of not guilty by reason of insanity. Dr. Hinson, a private psychiatrist who examined defendant prior to trial, and Dr. Rollins, Director of Forensic Services at Dorothea Dix Hospital, where defendant was sent for pretrial examination, testified that in their opinions defendant, as a result of mental illness and defect in reason, was not able to distinguish right from wrong at the time of the alleged crime. Each further testified that this inability to distinguish right from wrong resulted from physical disabilities, more specifically, cerebral arteriosclerosis, presenile dementia, chronic brain syndrome and malignant hypertension. Dr. Rollins also found that on a scale of zero to five for measuring brain damage, defendant had a disability of 3.5, which he described as "moderate to severe brain damage."

Defendant presented testimony through his wife and several witnesses that he and his wife had operated a lunchroom in Wadesboro for many years. He had never been in trouble before, and his character and reputation in the community were good. This testimony further showed that for the last three months before the shooting his appearance, dress and behavior had deteriorated. Defendant's ability to manage his lunchroom and his behavior toward his customers had also deteriorated.

During this time he experienced difficulty in sleeping, and spent a large part of his time gazing blankly out the window.

Detective Tommy W. Allen, Jr., of the Wadesboro Police Department, a witness for the State, testified that he saw defendant at approximately 10:00 a.m. on 21 May 1975 at the police station in Wadesboro, he had known defendant for some six months, he appeared to be normal, what he said made sense, and that he appeared to be the same as he had been for the last six months.

Lieutenant Ed Hightower of the Wadesboro Police Department testified for the State that he had been a police officer in Wadesboro for eighteen years and had known defendant for approximately twenty-five years, having seen defendant frequently over the years. He further testified that he had seen defendant and had talked to him many times since February 1975, that he was present for approximately one hour at the time defendant gave his statement to Detective Allen on 21 May 1975, and that in his opinion defendant was normal on that day. Hightower stated that he didn't notice any difference in his condition on that day as compared with the many other occasions when he had seen and talked with him, and that he was the same Henry Hammonds he had known for a long time.

A motion for a directed verdict of not guilty has the same effect as a motion for nonsuit. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). On such motion, the evidence for the State is taken to be true, conflicts and discrepancies therein are resolved in the State's favor and the State is entitled to every reasonable inference which may be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

[1] It is well settled that the test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973), *cert. den.*, 414 U.S. 1042, 38 L.Ed. 2d 334, 94 S.Ct. 546 (1973); *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971).

Testimony as to mental capacity is not confined to expert witnesses alone.

> " 'Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable oppor-

tunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders.' This has been settled doctrine in North Carolina since the pioneer case of *Clary v. Clary* [24 N.C. 78 (1841)], and under it lay opinion may be received as to the mental capacity of . . . a defendant in a criminal case. . . . " 1 Stansbury, N. C. Evidence § 127 (Brandis Rev. 1973); *State v. Nall*, 211 N.C. 61, 188 S.E. 637 (1936); *State v. Hauser*, 202 N.C. 738, 164 S.E. 114 (1932); *State v. Journegan*, 185 N.C. 700, 117 S.E. 27 (1923).

[2] Defendant has the burden of proving that he was insane. However, unlike the State, which must prove defendant's guilt beyond a reasonable doubt, defendant must only prove his insanity to the satisfaction of the jury. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Cooper, supra; State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death penalty*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). In *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948), Justice Ervin, speaking for this Court, said:

> "Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crime, but it is rebuttable. [Citations omitted.] These considerations give rise to the firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury. [Citations omitted.]"

[3] In order to convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by G.S. 14-17 and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. G.S. 14-17; 4 Strong, N. C. Index 2d, Homicide § 4, and cases cited therein. It is well established that a specific intent to kill is a necessary ingredient of premeditation and deliberation. *State v. Cooper, supra; State v.*

Baldwin, 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). If a defendant does not have the mental capacity to form an intent to kill or to premeditate and deliberate upon the killing, he cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to disease of the mind or some other cause. *State v. Cooper, supra.*

[4] The basis for defendant's motion for a directed verdict of not guilty was that at the time the alleged offense was committed the defendant was insane and therefore not criminally responsible. Obviously, the evidence was sufficient otherwise to require that the charge of murder in the first degree be submitted to the jury. Considering the testimony of the police officers concerning defendant's condition immediately after the fatal shooting, together with the presumption that every man is sane, we hold that the question of defendant's insanity as a defense to the charge was for the jury under proper instructions by the court. The motion for a directed verdict of not guilty was properly overruled.

By Assignments of Error Nos. VIII, IX and XXI, defendant assigns as error the failure of the trial court to impose upon the State the burden of proving each and every element of the offense, including malice and the sanity of the defendant, and his refusal to instruct the jury that evidence of defendant's mental condition could be considered on the question of the required *mens rea.* Defendant contends that the court's instruction to the jury contravenes the decision of the Supreme Court of the United States in *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

[5] In present case, the jury was instructed:

> "[I]f the State proves beyond a reasonable doubt that the defendant intentionally killed Herman Capel with a deadly weapon, or intentionally inflicted a wound upon Mr. Capel with a deadly weapon that proximately caused his death, then if no other evidence is presented, the law raises two presumptions, first, that the killing was unlawful, and second, that it was done with malice.
>
> "Now, second degree murder differs from first degree murder in that neither specific intent to kill, premeditation, nor deliberation is necessary. 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 Mr. Capel with a deadly weapon thereby proximately causing his 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. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129 (1971). In *State v. Williams, supra,* Justice Branch, speaking for the Court, stated:

"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.

". . . 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."

It should be noted that the trial court in the present case first instructed the jury that insanity is a complete defense to the charge of murder, and then charged that in order to convict defendant of first degree murder the State must prove five things beyond a reasonable doubt, the first one being "that the defendant intentionally and without justification or excuse *and with malice* shot Mr. Capel with a deadly weapon." In the final mandate to the jury, the Court stated:

". . . I charge that if you find from the evidence beyond a reasonable doubt that on or about May 21, 1975 the defendant intentionally and without justification or excuse shot Herman Capel with a deadly weapon thereby proximately causing Mr. Capel's death, and that the defendant intended to kill Mr. Capel, and that he acted with malice and with premeditation and deliberation, it would be your duty, nothing else appearing, to return a verdict of guilty of first degree murder. However, if you do not so find or have a reasonable doubt as to one or more of those things, you will not return a verdict of guilty of first degree murder."

[6] Under these same assignments, defendant contends the trial court erred when it placed the burden of proof on defendant to prove to the jury's satisfaction that he was insane when he shot the deceased, and further erred when it refused to give defendant's proffered instruction that would have placed the burden on the State to prove defendant's sanity beyond a reasonable doubt. Defendant admits that this Court recently reaffirmed this allocation of the burden of proof on the issue of insanity. *See State v. Caddell, supra.* However, defendant contends that the holding of the United States Supreme Court in the intervening case of *Mullaney v. Wilbur, supra,* requires a reexamination of our decision in *Caddell.* We did reexamine this holding in *State v. Shepherd,* 288 N.C. 346, 218 S.E. 2d 176 (1975). In that case, the defendant assigned as error the trial court's denial of his motion for nonsuit as to first degree murder, based primarily on defendant's claim that at the time of the killing the defendant was insane, and that the State had failed to prove beyond a reasonable doubt that the killing was with premeditation and deliberation. In *Shepherd,* we stated: "*Mullaney* was not based on a plea of insanity and is no authority for these assignments of error." The two concurring opinions in *Mullaney* support this statement. These noted that the cases which placed the burden of proof of insanity on the defendant were not overruled by *Mullaney.* Specifically, Mr. Justice Rehnquist, who was joined by the Chief Justice in his concurring opinion, stated:

"I agree with the Court that *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against a

defendant. I see no inconsistency between that holding and the holding of *Leland v. Oregon,* 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002 (1952). In the latter case this Court held that there was no constitutional requirement that the State shoulder the burden of proving the sanity of the defendant."

[7] In present case, the trial court placed the burden upon the State to prove beyond a reasonable doubt all the essential elements of murder in the first degree. Defendant, however, further contends that the court erred in its refusal to give his requested instruction that the evidence of defendant's mental debilities could be considered on the question of defendant's ability to form the specific intent, which intent is an element of first degree murder. Defendant cites and relies heavily upon *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). In that case there was evidence concerning defendant's intoxication. Justice Bobbitt (later Chief Justice), speaking for the Court, stated:

"In our view, the evidence as to defendant's intoxication is insufficient to support a finding that he was so drunk that he was *utterly unable* to form an actual, specific intent to kill, after premeditation and deliberation, and was insufficient to support a finding that defendant was *utterly unable* to form a specific intent to shoot Taylor. Even so, when considered in connection with the testimony referred to in the preceding paragraph, and in connection with the testimony as to defendant's mental status and nervous condition, we think the testimony relating to his intoxication was competent *for consideration* as bearing upon whether the State had satisfied the jury from the evidence beyond a reasonable doubt that defendant had unlawfully killed Taylor in the execution of *an actual, specific intent to kill, formed after premeditation and deliberation,* and for consideration as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonable doubt that defendant *intentionally* shot Taylor and thereby proximately caused his death. In our view, the court, in charging the jury, should have referred to the evidence relating to defendant's intoxication and should have given instructions as to how it should be considered."

Defendant recognizes that this Court in *State v. Cooper, supra,* specifically refused to extend the *Propst* holding to a case in-

volving evidence of insanity rather than intoxication. We adhere to the *Cooper* decision. These assignments of error are overruled.

[8] During his final argument to the jury, the district attorney made the following remarks:

> ". . . In this case they are saying back yonder when this offense is alleged to have been committed he didn't know right from wrong. I hope you understand fully the difference. See, that is a totally separate defense of insanity, and if you conclude he is not guilty, that is, by way of finding that he didn't know right from wrong back then, he walks out of this courtroom not guilty, returned to this community."

Upon objection by defense counsel, the district attorney first defended his remarks as proper but then withdrew them and asked the court to tell the jury not to consider them. The court then instructed the jury: "Disregard the last remark, ladies and gentlemen, about returning to the community."

After the closing arguments of counsel, and before the charge of the court, defendant submitted to the court a proposed instruction explaining the statutory procedure for commitment upon an acquittal by reason of insanity. Defendant excepted to the trial court's refusal to give this instruction.

Defendant contends that the effect of the district attorney's remarks about defendant's possible return to the community was so prejudicial that the instruction given by the court did not suffice, and that the court at that time should have gone further and explained to the jury what would happen to defendant if acquitted by reason of insanity. Having failed to do this, defendant further contends the court should have given the instruction proposed by defendant. We agree.

In *State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846 (1969), this Court held that as a general rule the judge should not inform the jury in "noncapital cases" of the quantum of punishment a verdict would allow him to impose. Following the decisions of *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), and *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), the jury may no longer recommend life imprisonment for a capital crime which now carries a mandatory death sentence. Therefore, the amount of punishment ap-

plicable to a verdict of guilty was held of no concern to jurors in *capital* cases also. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973).

The General Assembly has modified the general rule by the enactment of G.S. 15-176.3 through G.S. 15-176.5. In capital cases, these statutes (1) permit advising prospective jurors on the consequences of a verdict of guilty, (2) require, upon request, an instruction to the jury that the death penalty will be imposed upon the rendering of such a verdict, and (3) permit either party to indicate in its argument to the jury the consequences of a verdict of guilty.

This Court, moreover, has recognized exceptions to the general rule that the jury remain ignorant of the punishment their verdict may allow. In *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974), we stated:

> ". . . However, we recognize that in a capital case, there may be a 'compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties. . . .' *State v. Rhodes, supra.* Thus in a capital case if the jury appears to be *confused* or *uncertain,* the trial judge should act to alleviate such uncertainty or confusion. . . ." (Emphasis added.)

The case before us is not specifically concerned with whether the jury should be told what punishment will follow a verdict of guilty, rather, it is concerned with the disposition that will follow a verdict of not guilty by reason of insanity. On this issue, we are confronted with the case of *State v. Bracy,* 215 N.C. 248, 1 S.E. 2d 891 (1939), in which this Court held that when a defendant is charged with a capital crime and interposes the defense of insanity, he is not entitled to have the jury know the provisions of the commitment laws applicable upon acquittal by reason of insanity. In that case, the solicitor argued to the jury that the defendant would go free if the jury returned a verdict of not guilty by reason of insanity. Defense counsel argued that if acquitted on that ground defendant would not go free but would be committed to the State Prison's department for the criminally insane. Defense counsel then read and explained the applicable commitment statutes to the jury. No objection was made to either argument. The

judge was then requested by defendant to explain these commitment statutes to the jury. He refused and we affirmed. In *Bracy,* however, defense counsel, without objection, read and explained these statutes to the jury. The jury was thus fully aware of the disposition to be made of defendant if acquitted by reason of insanity. To that extent, *Bracy* is distinguishable from the case at bar.

Here, the fate of defendant, should he be acquitted by reason of insanity, became a central and confusing issue in the arguments of counsel. Defense counsel attempted to argue that defendant was a sick old man who belonged somewhere other than in a penal institution. The district attorney objected to this argument and the jury was instructed by the trial judge that they were not to speculate as to what would happen to defendant. Then, the district attorney in the final argument to the jury told them that defendant would be back in the community if found not guilty by reason of insanity. The judge instructed the jury to disregard this remark. We do not believe this was sufficient, however, to overcome the idea planted in the minds of the jurors that if defendant were found not guilty he would return to the community, perhaps to kill again. Further evidence of the jury's confusion on this issue is seen by the jury's return to the courtroom after their deliberations had begun to inquire whether they might make a recommendation for mercy when they returned their verdict. Had they been informed by the trial judge that if they returned a verdict of not guilty by reason of insanity that defendant would be treated as provided by law in such cases, the jury might well have been more inclined to return a verdict of not guilty.

Several other states have considered the question of what a judge should tell the jury concerning a verdict of not guilty by reason of insanity. *See generally* Annot., 11 A.L.R. 3d 737 (1967), Instructions in Criminal Case in Which Defendant Pleads Insanity as to his Hospital Confinement in the Event of Acquittal. In a case similar to ours, *Dipert v. State,* 286 N.E. 2d 405 (Ind. 1972), the Indiana Supreme Court held that the trial judge should have granted defendant's request for an instruction on the applicable commitment statutes where the district attorney in his argument to the jury had stated that defendant would go "scot free" if found not guilty by reason of insanity. The court stated that normally the jury is not entitled to know what post-trial procedures defendant will face

when acquitted by reason of insanity. However, where an erroneous view of the law had been planted in their minds by the argument of the district attorney, such an instruction was necessary for the protection of the defendant.

Several jurisdictions have gone further and required an instruction on commitment procedures whenever defendant presents the defense of insanity and requests such an instruction. The District of Columbia Circuit in a series of decisions, beginning with *Lyles v. United States,* 254 F. 2d 725 (D.C. Cir. 1957), *cert. den.,* 356 U.S. 961, 2 L.Ed. 2d 1067, 78 S.Ct. 997 (1958), has held that a defendant who relies on an insanity defense is entitled to the instruction unless it affirmatively appears that defendant does *not* want such an instruction. *See also McDonald v. United States,* 312 F. 2d 847 (D.C. Cir. 1962). The rationale of these decisions rests on the presumption that although the jury understands that a verdict of guilty means the defendant will be punished by a prison sentence or fine, and that a verdict of not guilty means the defendant will go free, the average jury does not know what a verdict of not guilty by reason of insanity will mean to the defendant. This uncertainty may lead the jury to convict the accused in a mistaken belief that he will be set free if an insanity verdict is returned. One state, Kansas, also requires by statute the instruction be given even without request by defendant. *See State v. Hamilton,* 216 Kan. 559, 534 P. 2d 226 (1975).

At least five other states have adopted the rule that *upon request* a defendant who is relying on the defense of insanity is entitled to an instruction on commitment procedures. *Kuk v. State,* 80 Nev. 291, 392 P. 2d 630 (1964); *People v. Cole,* 382 Mich. 695, 172 N.W. 2d 354 (1969); *Schade v. State,* 512 P. 2d 907 (Alaska 1973); *State v. Babin,* 319 So. 2d 367 (La. 1975); *Commonwealth v. Mutina,* 323 N.E. 2d 294 (Mass. 1975). In *Commonwealth v. Mutina, supra,* the court set out at length why it followed the reasoning of *Lyles v. United States, supra,* and other cases requiring the instruction. The court recognized, as have several of the other decisions cited above, that the choice lies between (1) a possible miscarriage of justice resulting from the conviction of an accused by a jury fearful for the safety of the community and ignorant of post-trial commitment procedures and (2) a possible invitation to the jury to engage in result-oriented verdicts, thereby deviating

from their task of deciding guilt or innocence. The court elected to avoid the possibility of a miscarriage of justice.

We find the reasoning of these cases persuasive. To allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that defendant will be incarcerated for his own safety and the safety of the community at large. In the case before us, there could be no doubt in the jurors' minds that defendant murdered Mr. Capel. There was considerable evidence that defendant was incapable of knowing right from wrong at the time he killed Mr. Capel, and also evidence that his mental condition would worsen with age. The jury's questions on a recommendation of mercy indicate their sympathy for defendant's condition. However, an overriding fear for the safety of the community could well have dictated their verdict in the absence of any information that defendant could be committed to a mental hospital if found not guilty by reason of insanity. The atmosphere was one of confusion and of uncertainty. To insure fairness to defendant and to get the trial back "on an even keel," the trial judge, upon request by defendant, should have instructed the jury on the consequences of a verdict of not guilty by reason of insanity.

[9] We hold, therefore, that, upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness. The failure to give such instruction in this case was prejudicial error, entitling defendant to a new trial. To the extent this opinion is in conflict with *State v. Bracy, supra,* that decision is modified. On retrial, in the absence of a judicial admission that defendant committed the homicide, it would be appropriate to submit as the first issue an issue worded substantially as follows: "Did the defendant kill the deceased?" The burden of proof rests upon the State to establish beyond a reasonable doubt the affirmative of such issue. A negative answer would end the case. If answered in the affirmative, the jury would consider a second issue worded substantially as follows: "If so, was defendant insane when the killing occurred?" Upon this issue, the defendant would have the burden of proving to the satisfaction of the jury that this issue should be answered "Yes." An affirmative

answer to this issue would end the case. If answered in the negative, instructions appropriate to a prosecution in which insanity is not pleaded as a complete defense would be applicable.

[10] By his Assignment of Error No. XXIII, defendant contends that the death sentence is illegal and unconstitutional for the reasons that capital punishment in North Carolina is still imposed in a selective and arbitrary manner that violates the rule of *Furman v. Georgia, supra*, and the imposition of capital punishment is excessively and unnecessarily cruel in light of contemporary standards of decency and dignity enshrined in the Eighth Amendment. These contentions have been considered and rejected by this Court in many cases in recent years. Further discussion would be merely repetitious. *See State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333 (1976), and cases therein cited.

Other assignments of error relating to the motion for a continuance, further medical examination of defendant, and the selection of the jury, present questions which probably will not recur at another trial. Discussion thereof is unnecessary and inappropriate at this time.

For the reasons stated above, defendant is entitled to a new trial and it is so ordered.

New trial.

STATE OF NORTH CAROLINA v. ALBERT RHODES

No. 83

(Filed 14 May 1976)

1. **Criminal Law § 99— conduct of trial — discretion of court**

The presiding judge is given large discretionary power as to the conduct of a trial, and in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court are within his discretion.

2. **Criminal Law §§ 99, 101— admonition to witness about perjury**

A trial judge may, if the necessity exists because of some statement or action of a witness, excuse the jurors and, in a judicious

manner, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury.

3. **Criminal Law § 99— intimation that witness committed perjury — expression of opinion**

Any intimation by the trial judge in the presence of the jury that a witness has committed perjury would be a violation of G.S. 1-180 and constitute reversible error.

4. **Criminal Law §§ 99, 101; Constitutional Law §§ 31, 32—admonitions to witness about perjury — invasion of province of jury — right of confrontation — effective assistance of counsel — impartial tribunal**

Judicial warnings and admonitions to a witness in a criminal trial create the following special hazards: (1) the trial judge may invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced; (2) the judge may, expressly or impliedly, threaten the witness with prosecution for perjury, thereby causing him to change his testimony to fit the judge's interpretation of the facts or to refuse to testify at all, which would constitute a violation of defendant's Sixth Amendment rights to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense; (3) the judge may intimidate or discourage defendant's attorney from eliciting essential testimony from a witness and thus violate defendant's constitutional right to effective representation guaranteed by the Sixth Amendment; and (4) the trial judge's manner of warning a witness may violate defendant's due process right to a trial before an impartial tribunal.

5. **Criminal Law §§ 99, 101— admonitions to witness about perjury — prejudicial error**

When a witness in an incest prosecution—the wife of defendant and mother of the prosecuting witness—testified that she did not recall making any statement to officers implicating defendant in the crime charged or signing such a statement, the trial judge committed reversible error in extensively warning the witness, out of the jury's presence, that he was "not impressed with her truthfulness" and that he was "just not going to tolerate any perjury in this case" since it appears from the record that the remarks were calculated to alter counsel's trial strategy and probably had the effect of stifling the free presentation of competent, available testimony.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals, reported at 28 N.C. App. 432, 221 S.E. 2d 730 (1975), which affirmed defendant's conviction at the 21 April 1975 Session of the Superior Court of HAYWOOD, *Wood, J.*, presiding.

Defendant appeals his conviction of incest with his stepdaughter, Rose Marie Ledford, a violation of G.S. 14-178.

The State's evidence, except when quoted, is summarized below:

Rose Marie Ledford (Rose), aged 12, testified that prior to 19 January 1974 she lived with her mother and her stepfather—the defendant in this case. During the evenings of 19, 20, and 21 January 1974, between the hours of 9:00 and 10:00 p.m., her mother called her into her stepfather's bedroom where, at his insistence, she engaged in sexual intercourse with him. Her mother was present at the time of each incident. On the morning of 22 January, Rose and her mother related the events of the preceding three nights to their pastor, Mr. Riddley, who took them to the sheriff's office. She was interviewed, in the presence of her mother, by several officers and a social worker, and was later examined by Dr. Weaver. Since that time she has been living in a foster home. Rose indicated that prior to 19 January, relations between her and the rest of her family had not been harmonious and, in her words, "I didn't like my stepdaddy too good."

Deputy Charles Messer, Deputy Susie Young, Sheriff Jack Arrington, and social worker Frances Burgin, all testified they interviewed Rose and her mother on 22 January. For purposes of corroboration they testified that Rose told them that defendant had intercourse with her on each of the three preceding nights. Sheriff Arrington said that Mr. and Mrs. Rhodes had had domestic problems and that he knew "Mrs. Rhodes has a mental condition." Mrs. Burgin testified that Rose told her "this had been going on for approximately six months."

During the course of the trial, the State sought to have Mrs. Rhodes, Rose's mother, declared a hostile witness. On a *voir dire* hearing to explore that issue the State produced evidence tending to show that on 22 January 1974 Mrs. Rhodes accompanied Rose to the sheriff's office where she told several officers that her husband had had intercourse with her daughter on the nights in question. She also signed a four-page written statement (State's Exhibit No. 1) which, in graphic terms, purported to detail the events of the three nights about which Rose had testified. Officer Messer testified that he had written the statement as she had given it, "the exact words." Mrs. Rhodes, however, testified that she did not remember making or signing any statement on 22 January. Although she identified her signature on the statement, she said, "but none of this is true."

In explanation she stated that for the past several years, at several institutions, she had been treated for a mental illness which causes temporary periods of amnesia. For five or six years she had been taking medications prescribed by a doctor at Broughton Hospital, one of the State's hospitals for the mentally disordered.

Judge Wood, after stating that Mrs. Rhodes' "statement verifies what the daughter has testified to," declared Mrs. Rhodes a hostile witness, and the State called her as such.

Thereafter, she testified before the jury that she did not remember going to the sheriff's office on 22 January 1974. She was shown State's Exhibit No. 1 and testified that she had no recollection of signing it or of making any statement which implicated her husband in the crime charged. However, she again identified her signature on the document shown her. Mrs. Rhodes insisted that she remembered nothing about being in the sheriff's office until she "came to herself" about 4:00 p.m. She was sitting in the sheriff's office, and the officer told her she could leave.

On cross-examination by defendant's attorney, Mrs. Rhodes testified that she and defendant were married on 25 September 1964; that she had been treated in four mental hospitals—in one, approximately four times. On 22 January, and for the preceding five years, she "was on medication" in order to control her illness. She said she went to the sheriff's office on 22 January 1974 with the Reverend Riddley and Deputy Sheriff Messer, but she has no recollection of having made any statement. She said she had no recollection because she had taken a double dose of medication.

At this point the judge excused the jury and the following transpired:

"THE COURT: The reason that I sent the jury out, I say this to this witness, and that is, I think she's treading on mighty dangerous ground here. Her memory is she remembers the pill she took that morning, and she remembers everything that's convenient for her to remember that's favorable to the position that she's now taking. The Court is just not going to tolerate any perjury in this case. And I thought that I might ought to remind you of that at this point. Now, you have sat here and testified already and I'm sure the jury is aware of this. That you don't remember signing this, but you remember a great deal

of other things. . . . And I'm not impressed with this witness. And I think as a duty in trying to get to the truth that I need to warn her at this time. I'm not impressed with her truthfulness in the statement that was made at the time. But to deny any knowledge of this statement bothers me considerably. I feel compelled to make this to the witness, that her story is not the same now as it was a while ago. She's treading a little further. Her memory is getting better. . . .

"A. (by Mrs. Rhodes) Yes, sir. I do remember about taking my medicine at about 1:00 o'clock in the morning.

"THE COURT: Yes ma'am, you do. In my estimation you remember the whole thing—whatever you did that day. I just want to let you know that you are treading on very dangerous ground here. And all I'm asking you to do is to tell the truth, Mrs. Rhodes, whatever the truth is.

"A. All right. I'll just tell the truth. My husband did not do any of it. He's not that type of man. As far as being a wonderful husband. He's a wonderful husband to me. And to my children he's been a wonderful father. And to that little girl down there (indicating), he's treated her as his. And he supported her when I didn't have no support for her. I had to ask the welfare for support for her.

"MR. FRANCIS: (Defendant's attorney) Your Honor, while the jury is out, will you let me ask her—

"THE COURT: I'll let you ask her anything you want. But I felt compelled to counsel with her that she's getting on dangerous ground. Her memory is too convenient. This thing is a bad thing. The things that she said on that statement. And the things that this little girl has testified to here. I just don't believe that minds are that bad that they can conjure up that sort of thing. And that she could not know at this time that she did not make that statement. I just don't know—maybe I shouldn't be permitted to think, Mr. Francis, but I'm saying what my feelings are out of the presence of the jury.

"MR. FRANCIS: I don't have any further questions, Judge.

"THE COURT: But if the witness signed this statement—she says that she doesn't remember signing any statements for the doctor to examine this little girl. She remembers all about taking pills. She remembers about being brought down here—

and I assume that she's about to remember that the sheriff threatened to indict her. . . .

"A. Mr. Charlie Messer. The officer came down there and told me to get in the car, and I was not advised of my rights. . . . He did threaten me. . . . I was threatened the next morning that I would be indicted.

"THE COURT: All right. I'm going to allow the State to continue to cross-examine her. I think that the jury will determine what the truth is. I still want you to keep in mind that you are treading upon perjury in your testimony. All I want is the truth. What the Court seeks is the truth. I don't want this man convicted on false testimony. Nor do I want this tragedy to happen."

At this point the jury returned and defendant's counsel stated that he had no further questions for the witness. Mrs. Rhodes, in response to the district attorney's questions, again stated that she did not remember making a statement to the officers that defendant had intercourse with her daughter.

Subsequently, Dr. Kenneth Weaver testified for the State that he examined Rose on the morning of 22 January 1974 and he "found nothing unusual to indicate that [she] had had sexual intercourse within the last three days. No evidence at all of it." He said that "assuming the girl were truly virginal three days prior to examination," ordinarily one would expect to find some bleeding. In addition to his physical examination, Dr. Weaver took several specimens which, analysis showed, contained no sperm.

Defendant's evidence consisted of the testimony of several character witnesses, including a former chief of police of Clyde, who attested to his excellent reputation and character.

In addition, Bonnie Mae Wells, a sister of Mrs. Rhodes, testified that on 17 January 1974 she went to care for the Rhodes family while her sister was recovering from a recent illness. She spent each night thereafter in the Rhodes home until she left on 28 January 1974. She was present each of the three nights on which the events allegedly occurred, (19, 20, 21 January 1974) and, according to her, the entire family, including Rose, all watched television together on those nights. Each night she was there she slept with Rose in the back bedroom across the hall from the bedroom in which defendant and

his wife slept. She knows Mrs. Rhodes did not at any time take Rose into defendant's bedroom; that at no time were defendant and Rose together in any bedroom; and that defendant did not have intercourse with Rose.

Mrs. Frances Downs, defendant's mother, testified that she also was in the Rhodes home from 18 January 1974 until defendant took her home around 10:00 p.m. on 20 January. She stated she was there to give defendant his medicine and to attend him on account of injuries he had sustained in a recent explosion in the plant at which he worked. On both the 19th and 20th, the family watched television and nothing unusual occurred. At no time did Mrs. Rhodes ever take Rose into defendant's bedroom. She said that Bonnie Wells was there all the time and that Bonnie slept in the bedroom with Rose.

Defendant's ten-year-old son, James Rhodes, also testified that the entire Rhodes family, his aunt, and his grandmother watched television on the nights in question and his mother never took Rose into his father's room.

Defendant, aged 54, testified that he is a retired Air Force staff sergeant having "completed thirty years of honorable service," which included twenty-three years of active duty. On 15 January 1974 he was injured when a boiler blew up at the Unagusta Manufacturing Company where he had worked for the past five years. Defendant denied having sexual relations with Rose and stated that for some time Rose had been a behavioral problem. According to him, Rose resented the other children and at times would fail to come home from school. On several occasions she took money from his wallet without asking and when he disciplined her, she told him "she would get even with [him] one way or the other." The State asked defendant no questions on cross-examination.

At the close of all the evidence, the judge instructed the jury, who after deliberations, returned a verdict of guilty. From the judgment sentencing him to twelve to fifteen years imprisonment, defendant appealed to the Court of Appeals. That court, in a 2-1 decision, affirmed the conviction and defendant appealed as of right to this Court.

Attorney General Rufus L. Edmisten and Special Deputy Attorney General James L. Blackburn for the State.

Swain, Leake & Stevenson for defendant appellant.

SHARP, Chief Justice.

Defendant's appeal presents the single question whether the trial judge committed reversible error when, after excusing the jury during defendant's cross-examination of Mrs. Rhodes, he extensively warned her that he was "not impressed with her truthfulness" and that he was "just not going to tolerate any perjury in this case." (The judge's remarks to the witness are set forth in the preliminary statement of facts.)

[1, 2] The presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion. *Shute v. Fisher,* 270 N.C. 247, 154 S.E. 2d 75 (1967); *Rooks v. Bruce,* 213 N.C. 58, 195 S.E. 2d 26 (1938); 88 C.J.S. *Trial* § 36 (1955); 7 Strong's N. C. Index 2d *Trial* § 5 (1968). Thus a trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, *in a judicious manner,* caution the witness to testify truthfully, pointing out to him generally the consequences of perjury. *See* 75 Am. Jur. 2d *Trial* § 115 (1974); Annot., *Error—Statements as to Perjury,* 127 A.L.R. 1385, 1388 (1940).

[3] Any intimation by the judge in the presence of the jury, however, that a witness had committed perjury would, of course, be a violation of G.S. 1-180 and constitute reversible error. *State v. McBryde,* 270 N.C. 766, 155 S.E. 2d 266 (1967); *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568 (1951); *State v. Swink,* 151 N.C. 726, 66 S.E. 448 (1909). Moreover, whether the reference to perjury be made in or out of the presence of the jury, "error may be found in any remark of the judge, in either a civil or criminal trial, which is calculated to deprive the litigants or their counsel of the right to a full and free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury (or court in a proper case)." Annot., 127 A.L.R. 1385, 1387. Therefore, judicial warnings and admonitions to a witness with reference to perjury are not to be issued lightly or impulsively. Unless given discriminatively and in a careful manner they can upset the delicate balance of the scales which a judge must hold evenhandedly. Potential error is inherent in such warnings, and in a criminal case they create special hazards.

[4] First among these is that the judge will invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced. *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954) ; 7 Strong's N. C. Index 2d *Trial* § 18 (1968). It is most unlikely that a judge would ever warn a witness of the consequences of perjury unless he had determined in his own mind that the witness had testified falsely. Therefore, if, while acting upon an assumption which only the jury can establish as a fact, he makes declarations which alter the course of the trial, he risks committing prejudicial error. For this reason, *inter alia,* the judge has no duty to caution a witness to testify truthfully. "Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it." *United States v. Winter,* 348 F. 2d 204, 210 (2d Cir. 1965).

[4] A second hazard is that the judge's righteous indignation engendered by his "finding of fact" that the witness has testified untruthfully may cause the judge, expressly or impliedly, to threaten the witness with prosecution for perjury, thereby causing him to change his testimony to fit the judge's interpretation of the facts or to refuse to testify at all. Either choice could be an infringement of the defendant's Sixth Amendment rights to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense. Both rights are fundamental elements of due process of law, and a violation of either could hamper the free presentation of legitimate testimony. The following statement from Annot., 127 A.L.R. 1385, 1390, is pertinent: "Any statement by a trial court to a witness which is so severe as to put him or other witnesses present in fear of the consequences of testifying freely constitutes reversible error."

The United States Supreme Court considered the foregoing principle in *Webb v. Texas,* 409 U.S. 95, 34 L.Ed. 2d 330, 93 S.Ct. 351 (1972) *(per curiam).* In that case the defendant was convicted of burglary. At his trial, when the State rested its case, the defendant called his sole witness, who was then serving a prison sentence. In the absence of the jury, on his own initiative, the judge admonished the potential witness concerning the consequences of perjury and threatened him with indictment and a prison sentence if he lied on the stand. The

defendant's attorney objected to these comments on the ground that the court was thereby depriving him of his defense by coercing his only witness into refusing to testify. When counsel indicated that he was nonetheless going to ask the witness to take the stand the judge interrupted: "Counsel, you can state the facts, nobody is going to dispute it. Let him decline to testify." The witness then refused to testify for any purpose and was excused by the court.

Upon his conviction the defendant appealed to the Texas Court of Criminal Appeals, contending that the judge had coerced his witness from testifying and that this conduct indicated the trial judge's bias and resulted in a deprivation of due process. That court affirmed the conviction, holding that the petitioner had not adequately objected to the judge's conduct and that, in any event, "there was no showing that the witness had been intimidated by the admonition or had refused to testify because of it."

The Supreme Court, rejecting both of these theories, reversed. The Court said: "The suggestion that the petitioner or his counsel should have interrupted the judge in the middle of his remarks to object is, on this record, not a basis to ground a waiver of the petitioner's rights. The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify.

"The trial judge gratuitously singled out this one witness for a lengthy admonition on the damages of perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth. Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to carry out. Yet in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.

"In *Washington v. Texas,* 388 U.S. 14, 19 (1967), we stated:

" 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'

"In the circumstances of this case, we conclude that the judge's threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." *Webb v. Texas, supra* at 97-98, 34 L.Ed. 2d at 333, 93 S.Ct. at 353.

[4] A third hazard is that the judge's admonition to the witness with reference to perjury may intimidate or discourage the defendant's attorney from eliciting essential testimony from the witness. This is particularly true when the judge anticipates a line of defense and indicates his opinion that the testimony necessary to establish it can only be supplied by perjury; *a fortiori,* if the judge's warnings and admonitions to the witness are extended to the attorney, coercion can occur. A law license does not necessarily insulate one from intimidation. In short, even a seasoned trial attorney may trim his sails to meet the prevailing judicial wind. If a defendant's attorney is intimidated by a trial judge's unwarranted or unduly harsh attack on a witness or the attorney himself, then the defendant's constitutional right to effective representation guaranteed by the Sixth Amendment is impinged.

The danger that a defendant's right to effective representation may be impaired by a trial judge's threat to or intimidation of the defendant's counsel has been treated in Annot., *Conduct of Court-Rebuking Counsel,* 62 A.L.R. 2d 166 (1958). In it there appears the following:

"[I]n reviewing a case where the defendant's lawyer has run into stormy judicial weather, courts usually confine their inquiry to the single question: Was the jury influenced, or

likely to be influenced, against the defendant? Once satisfied on this point, most courts promptly decide whether or not to affirm.

"But the jury makes up but a part of the cast of characters in a trial. The lawyer also has his important role; and although the profession, especially that part of it that engages in criminal trials, is often thought to be tough-skinned, it is a fallacy to regard it as deficient in ordinary human sensitivity. If this premise is well taken, it follows that the judge can, by punishment, threat, abuse, and stricture, with or without design, cow or obstruct all but the most daring or determined lawyers to the point that their clients suffer from loss of effective representation. Once such a possibility is recognized, it no longer suffices merely to decide whether or not the jury was biased. Error may have been present although the jury's disposition towards the defendant was not at all warped; it could be that an intimidated or discouraged attorney left undeveloped a persuasive defense, and the trial became ex parte for practical purposes.

"So far as quantity goes, opinions giving direct recognition to the likeness of the judge's hurting the defendant by scaring or disorienting his lawyer are unimpressive; but the handful that have used it are logically attractive." *Id.* at 190.

[4] A fourth and final interest of a criminal defendant that may be affected by a trial judge's manner of warning a witness is the defendant's due process right to trial before an impartial tribunal. "A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process." It is a maxim that " '[e]very litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge.' " *Ponder v. Davis,* 233 N.C. 699, 703-04, 65 S.E. 2d 356, 359 (1951). *See State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Canipe, supra; In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675 (1951). The right to an impartial judge embraces a defendant's right to present and conduct his *own* defense unhampered by the judge's idea of what that defense should be or how it should proceed. *See Webb v. Texas, supra.* Compare *Faretta v. California,* ... U.S. ...., 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975). Thus a criminal defendant has the right to present his own version of the facts, to present his own witness without unwarranted judicial interference, and to have his guilt or innocence determined only after all admissible, rele-

vant testimony which he has offered has been considered by the jury. *See United States v. Handy,* 203 F. 2d 407 (3d Cir. 1953) *(per curiam).*

Because of the inherent hazards and many potential errors in the innumerable factual situations in which they may occur, a slide-rule definition of "reversible error" to measure a trial judge's comments to a witness with reference to perjury has not been formulated. As pointed out in Annot., 127 A.L.R. 1385, 1386-87, "The principal questions are, of course, whether acts or reference regarding perjury, by whomsoever made, have the effect either of stifling the free presentation of all the legitimate testimony available, or of preventing the unprejudiced consideration of all the testimony given, either of which may be sufficient to constitute reversible error."

[5] After applying these considerations to the present case, it is our opinion that the judge's remarks probably had the effect of stifling the free presentation of competent, available testimony. We therefore hold that they constituted reversible error.

Judge Wood's remarks to Mrs. Rhodes, although less severe than the trial judge's admonitions in *Webb v. Texas, supra,* were extensive, accusatory, and threatening. The judge clearly indicated his opinion that the witness was lying when she said she remembered neither making the oral statement to Sheriff Arrington and Deputy Sheriff Messer (about which they both testified) nor signing the written statement (State's Exhibit 1), which Messer testified contained word for word what she had told the officers. The judge was equally positive in his statement that he was "just not going to tolerate any perjury in this case." This last remark was clearly addressed to Mr. Francis, counsel for defendant, as well as to the witness.

Subsequently, in reply to the judge's statement to Mrs. Rhodes that all he was asking her to do was to tell the truth, she said: "All right, I'll just tell the truth. My husband didn't do any of it. He's not that kind of man. . . . " It would appear from this response that Mrs. Rhodes herself had not been intimidated; that, had she been questioned before the jury about events on the nights in question, she would have contradicted the testimony of her daughter, the prosecuting witness.

After Mrs. Rhodes had told the judge the truth was that defendant "didn't do any of it," he specifically told defense

counsel that he'd let him ask her anything he wanted but he was telling him "out of the presence of the jury" what the court's feelings were; that the witness' memory was "too convenient"; that he just didn't believe "minds are that bad that they can conjure up that sort of thing." The clear implication of this judicial pronouncement was that if Mrs. Rhodes, in response to questioning by Mr. Francis, testified before the jury that defendant "did not do any of it," repudiated the statement which bore her signature (State's Exhibit 1), and said she had no recollection of signing it, Mr. Francis would have deliberately offered testimony which the court believed to be perjured.

It was then that Mr. Francis said, "I don't have any further questions, Judge." Shortly thereafter the jury was brought back and Mr. Francis immediately said in their presence, "No further questions, your Honor, for the defendant." However, in response to questions from the district attorney, Mrs. Rhodes then testified, *inter alia*, "I do not remember making a statement in front of Mr. Messer and my daughter, Rose Marie, that my husband, Albert Rhodes, had sexual intercourse with my daughter on January 20, 1974."

Since Mrs. Rhodes did not give the jury her version of the events of the nights of January 19, 20, and 21, 1974, State's Exhibit No. 1 was not competent evidence. However, in the presence of the jury she identified her signature on "the four handwritten pages . . . dated January 22, 1974 . . . State's Exhibit No. 1." Further, Sheriff Arrington and Deputy Sheriffs Messer and Young testified in the presence of the jury that Mrs. Rhodes was present when Rose made the statement charging defendant with incest on the nights in question. The unmistakable inference was that she had made and signed a statement corroborating Rose's testimony. Thereafter she only testified generally as to her mental illness and her treatments for it. The jury were left to speculate why Mrs. Rhodes did not testify further and why the statement, about which there was so much talk, was not offered in evidence.

The Attorney General argues that defendant's trial counsel was fully aware that if Mrs. Rhodes gave testimony exonerating her husband of the crimes charged, her signed statement corroborating her daughter's incriminating testimony would immediately become competent for the purpose of im-

peachment. Therefore, he contends the trial counsel's decision not to offer her exculpatory testimony was not the result of judicial interference or intimidation but represented his considered opinion that her signed statement would do defendant more harm than her testimony could cure.

Obviously counsel faced a difficult decision. State's Exhibit No. 1 did more than corroborate Rose. It added another dimension (purposely omitted here) to conduct which, by all known contemporary standards, is universally condemned. Indeed, the entire statement is so shocking that it brings to mind the old admonition, "I pray you, sir, to understate your case lest the full truth, surprising beyond belief, deafen untutored ears." It is interesting that in his early remarks to counsel during the *voir dire,* the judge himself felt constrained to say with reference to State's Exhibit No. 1, "I'm not impressed with the truthfulness in the statement that was made at the time." At that point he was "bothered" by Mrs. Rhodes' assertion that she had no recollection of making the statement. The testimony of Mrs. Rhodes, one of the three people who knew the truth of the matters in issue, was extremely important to both the State and the defendant. Unfortunately, her history of mental illness and her inconsistent statements made her reliability as a witness for either side suspect.

The credibility of the witness was, of course, for the jury alone. Just as certainly, counsel for defendant was entitled to make the difficult decision whether to offer Mrs. Rhodes' testimony unhampered by pressure from the trial judge. In his brief, represented by different counsel on appeal, defendant asserts that Mr. Francis's "trial tactics" originally called for a thorough examination of Mrs. Rhodes, and these plans were "completely disrupted" by the trial judge's extended comments. On this record we cannot say that counsel's failure to permit her to tell the jury what she had told the judge on *voir dire,* that is, that defendant "didn't do any of it," was the result of trial strategy. On the contrary, the record suggests a substantial likelihood that Mrs. Rhodes was not asked whether defendant committed the alleged acts because her attorney felt constrained by the judge's statements. This being true, we feel justice requires that defendant be given a new trial so that all relevant testimony may be adduced and subjected to searching cross-examination.

As the California District Court of Appeals said in *People v. Byrd,* 88 Cal. App. 2d 188, 189-90, 198 P. 2d 561, 562 (1948):

" 'Accusations such as were made by defendant's stepdaughter of themselves arouse feelings of animosity and prejudice against the accused, and the testimony of the accuser in such cases frequently is, and in this case it certainly was, of such a nature as to depict the defendant as a depraved individual. . . . "In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced. . . . It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused." . . . . "It has long been recognized that there is no class of prosecution 'attended with so much danger, or which affords so ample an opportunity for the free play of malice or private vengeance.' " . . . ' "

In conclusion, we emphasize that nothing said herein is to be construed as the expression of an opinion as to the credibility of any witness or as to Mrs. Rhodes' veracity at any particular time. These questions must be left to the jury who can observe all the witnesses and weigh their testimony, and whose function it is to find the facts. Because it appears from the record that the judge improperly projected himself into this case in a manner calculated to alter counsel's trial strategy there must be a

New trial.

MONA ROBINSON COGDILL v. SUSAN WEEKS SCATES AND GEORGE THOMAS COGDILL

No. 64

(Filed 14 May 1976)

Evidence § 34; Trial § 22— plaintiff's own unfavorable testimony — judicial admissions — defeat of claim — testimony by other witnesses

A plaintiff under no disability who at trial (1) deliberately and unequivocally repudiated the allegations in the pleadings upon which

she based her claim for relief, and (2) testified to objective facts purportedly within her knowledge which utterly destroyed her case and exonerated defendant of any liability to her, will not be allowed to recover damages upon the testimony contra of other witnesses.

APPEAL by plaintiff under G.S. 7A-30(2) from the decision of the Court of Appeals reported in 26 N.C. App. 382, 216 S.E. 2d 428 (1975), which reversed the judgment for plaintiff against defendant Cogdill, entered by *Friday, J.*, at the 16 September 1974 Session of HAYWOOD Superior Court, docketed and argued as Case No. 60 at the Fall Term 1975.

Plaintiff, Mona Cogdill, instituted this action on 24 April 1974 against her husband, George Thomas Cogdill, and Susan Weeks Scates (Scates), to recover for personal injuries sustained on 2 May 1971 when the automobile driven by her husband, in which she was a passenger, collided with an automobile driven by Scates. In her complaint plaintiff alleged that she was injured by the concurrent negligence of both defendants. As to her husband, she averred he was negligent in that (1) he drove his car carelessly and recklessly, in wilful and wanton disregard of the rights and safety of others, and in a manner and at a speed likely to endanger persons and property on the highway; (2) he failed to keep a proper lookout, operated his car at an excessive speed and without having it under proper control; (3) he suddenly made a left turn across the highway without signaling; and (4) he drove his car while under the influence of alcoholic beverages.

Prior to trial, plaintiff settled her case against defendant Scates and took a voluntary dismissal with prejudice as to her.

In September 1972 Edna Reece Ruff, the owner-occupant of the car driven by defendant Scates, and Robert Reece, a passenger in the same vehicle, each instituted an action against defendant Scates and defendant Cogdill. They alleged they were injured by the concurrent negligence of the two defendants. In these actions the two defendants filed cross actions against each other for damages and for contribution. In Ruff's case, defendant Cogdill also filed a counterclaim against her as the owner-occupant of the vehicle which defendant Scates was driving.

Without objection the three actions growing out of the collision between Scates and Cogdill were consolidated for trial. When the matter came to trial, plaintiff Cogdill amended her

complaint against her husband by deleting therefrom the allegations that at the time of the collision he was operating his vehicle while intoxicated and in a manner so as to be guilty of careless and reckless driving.

At trial, plaintiffs Ruff and Reece presented evidence sufficient to support a finding that both drivers were negligent. In summary their evidence tended to show that immediately preceding the collision, the Scates vehicle was headed west on Balsam Road, a two-lane highway, and the Cogdill vehicle was traveling east. As the two vehicles approached Little Bill's Drive-In restaurant, located on the north side of Balsam Road, a third car recklessly pulled out in front of the Scates vehicle and headed in a westerly direction down Balsam Road. The Cogdill vehicle, which was traveling at an excessive rate of speed, swerved to the right to avoid the third car which apparently crossed the center line as it made its turn. The Cogdill vehicle skidded off the road, straightened up, and then reentered the highway at a 45-degree angle. Meanwhile the Scates vehicle also swerved to the left to avoid the third car. The Cogdill and Scates vehicles collided almost head-on in the center of the highway with both vehicles angled over the center line.

Immediately following the testimony of Scates, who (the record shows) "was presented as a witness for plaintiffs Ruff and Reece," plaintiff Cogdill was examined by the attorney for plaintiffs Ruff and Reece. On his direct examination she stated that as she and defendant Cogdill approached Little Bill's her husband gave a left turn signal, indicating his intention to turn into the entrance of the drive-in, and, while their car was "sitting still, waiting to turn into Little Bill's," the collision occurred. On cross-examination by her own attorney she said, "Prior to and at the time of the collision I was looking outside the right-hand side window. I know that our car was in its proper lane."

On cross-examination by the attorney for defendant Scates, Mrs. Cogdill admitted that she had signed, verified, and filed a complaint in the present action in which she had alleged (1) that her husband was driving while intoxicated; (2) that he was driving at a high and dangerous speed; and (3) that immediately preceding the collision he turned his automobile to the left across the highway without giving a proper signal.

At this point defendant Cogdill's attorney, Mr. Morris, took over the cross-examination. He sought to establish that Mrs.

Cogdill had never read her complaint and did not know what allegations it contained. Counsel for Scates objected, and the trial judge sustained objections to this line of questioning, apparently on the theory that she could not impeach the verification, in her complaint, which was "a judicial instrument . . . sworn to before a judicial officer," the clerk of the court. Mr. Morris was permitted to cross-examine Mrs. Cogdill in the absence of the jury. The record shows that, *inter alia*, questions were propounded and answered as follows:

"Q. . . . Mrs. Cogdill you didn't actually read this complaint before you signed it, did you?

. . . .

The witness: No, sir, I didn't have a chance.

. . . .

Q. As a matter of fact, if you had read it, you would not have stated that your husband was operating on the wrong side of the road would you?

A. No, sir.

Q. And if you had read the complaint, you would not have stated that he was driving at a high and dangerous rate of speed?

A. No.

Q. And you would not have stated that your husband was driving on the left side of the center of the road if you had read it, would you?

A. No.

Q. As a matter of fact, your husband was stopped at the time this accident occurred wasn't he?

A. Yes, sir.

Q. And he was stopped on his side of the road?

A. Yes, sir.

Q. And he was waiting to turn into the Little Bill's Drive-In?

A. Yes, sir.

Q. And he was giving a signal of his intention to turn left, wasn't he?

A. Yes, sir.

Q. As a matter of fact he wasn't negligent in any way, was he?

A. No, sir.

The Court: Mr. Powell [plaintiff's attorney], I trust your client is aware of the penalty for perjury. If not, you better advise her."

Over Mr. Morris's objection, at this point plaintiff's attorney consulted with her "outside the record." She returned to testify that she did not know whether she swore to the complaint when she signed it in the clerk's office. Mr. Powell stated "for the record" that he prepared the complaint; that he sent it to Waynesville by another attorney, who was to file it; and that plaintiff apparently had not read it. More he could not say. Thereafter, after consultation with counsel, the court permitted plaintiff Cogdill to testify before the jury on cross-examination, in part, as follows:

"Q. Mrs. Cogdill, at the time that this accident occurred, your husband, driving the 1965 model Ford automobile, was stopped dead-still in the highway, wasn't he?

A. Yes, sir.

Q. And he was stopped on his side of the road, that is, to the right of the center line of Balsam Road, at the time the accident occurred?

A. Yes, sir.

Q. And he had been stopped there for several seconds, hadn't he?

A. Yes, sir.

Q. As a matter of fact, the reason he stopped was so that traffic traveling toward Balsam Gap could clear so that he could turn into Little Bill's Drive-In?

A. Yes, sir.

. . . .

Q. I say, at the time the accident happened, all of your husband's car was on the right-hand side of the road, right-hand side of the center line or southern half of Balsam Road, wasn't it?

A. Yes, sir.

Q. And he was not under the influence of any intoxicating beverages at the time was he?

A. No."

At this juncture in the trial counsel for defendant Cogdill asked plaintiff Cogdill the following questions on cross-examination; counsel for plaintiffs Ruff and Reece objected. Parentheses indicate the objection to that question was sustained and the answer was not given in the presence of the jury but was supplied later.

"Q. At the time of this accident, your husband was, immediately before, at least, your husband was driving at least 20 miles an hour along the highway there before he came to a stop, wasn't he?

A. Yes, sir.

Q. At the time the accident occurred, and immediately before that, your husband had control of his automobile, hadn't he?

A. Yes, sir.

Q. And at the time this accident occurred, your husband had such control over the automobile that he was able to stop it with the brakes?

A. (Yes, sir.)

Q. When he wanted to, and within a very reasonable distance, didn't he?

A. (Yes.)

Q. Your husband never turned from a direct line of traffic at the time of this accident—

A. (No.)

Q. —without giving a signal for it?

A. (No.)

Q. At the time this accident occurred, your husband didn't turn his automobile across the opposing traffic lane without giving a signal, did he?

A. (No.)

Q. And at the time of this accident, your husband had not consumed any alcoholic beverages, had he?

A. (No.)

Q. You had been with him all day, hadn't you?

A. Yes, sir.

Q. He hadn't consumed any alcoholic beverages, had he?

Q. Well, you know, don't you, Mrs. Cogdill?

A. Yes, sir.

Q. As a matter of fact, your husband had not consumed any alcoholic beverages, had he?

A. No.

Q. Your answer is 'no'?

A. Yes.

Q. As a matter of fact, Mrs. Cogdill, there wasn't any way that your husband could have avoided that accident that occurred there, in this collision between his vehicle and the one operated by Susan Scates, could he?

A. (No.)

Q. And, as a matter of fact, before this collision occurred, and as your husband was approaching the place where he brought his vehicle to a stop, he never turned his vehicle across the center line, did he?

A. (No.)"

At the close of plaintiff Cogdill's evidence, defendant Cogdill presented his evidence which consisted of his own and other eyewitness testimony. In summary, this evidence tended to show that as defendant Cogdill approached Little Bill's Drive-In, he gave an appropriate left turn signal and slowed almost to a stop waiting for the on-coming traffic to clear so that he could

make his turn. As he was waiting to turn, the Scates vehicle drifted across the center line and struck his car head-on.

At the close of all the evidence defendant Cogdill moved for a directed verdict in his favor against plaintiff Cogdill. This motion was denied and twenty-one issues were submitted to the jury.

In an obviously inconsistent verdict the jury returned the following findings: (1) that plaintiff Cogdill was injured by defendant Cogdill's negligence in the amount of $40,000; (2) that plaintiff Reece was injured by the concurrent negligence of defendants Scates and Cogdill; (3) that plaintiff Ruff was injured by the concurrent negligence of Scates and Cogdill and the negligence of defendant Scates, as imputed to plaintiff Ruff as the owner of the vehicle driven by Scates, did not contribute to plaintiff Ruff's injuries; (4) that defendant Cogdill was injured by the negligence of defendant Scates and his own negligence did not contribute to his injuries; and (5) that defendant Scates was injured by defendant Cogdill's negligence, and her own negligence did not contribute to her injuries. Defendant's motions for judgment notwithstanding the verdict were denied and judgments were entered in accordance with the jury's verdict.

From the judgment that plaintiff Cogdill recover from him the sum of $40,000 defendant Cogdill appealed to the Court of Appeals. In a 2-to-1 decision that court reversed the judgment upon the holding that "plaintiff Cogdill is conclusively bound by her unequivocal testimony that her husband, defendant Cogdill, was not negligent in any way, that he was not driving in a reckless manner, that he was in his proper lane of traffic, either stopped or moving slightly, had given a proper signal for a left turn, and was waiting for traffic to clear." *Cogdill v. Scates,* 26 N.C. App. 382, 385-86, 216 S.E. 2d 428, 430 (1975).

From the decision of the Court of Appeals, plaintiff appealed as of right to this Court.

Bruce A. Elmore and John A. Powell for plaintiff appellant.

Morris, Golding, Blue & Phillips for George Thomas Cogdill, defendant appellee.

SHARP, Chief Justice.

This appeal involves the question to what extent and under what circumstances a party is bound by his own adverse testimony in the trial of his case. This "has been characterized as one of the most troublesome questions in the law of evidence and has been the subject of much diversity of judicial opinion." 32A C.J.S. *Evidence* § 1040 (3) (1964). Specifically, the question here presented is: Upon the trial of an action, may a party under no disability who (1) deliberately and unequivocally repudiates the allegations in the pleadings upon which she has based her claim for relief, and (2) testifies to objective facts purportedly within her knowledge which utterly destroy her case and exonerate the adverse party of any liability to her, be allowed to recover damages upon the testimony contra of other witnesses?

Our research, and that of the parties, has not discovered any prior decision in which this Court has considered the effect of testimony by a party which, if true, would defeat his action when the testimony of other witnesses tends to establish his case.

Plaintiff argues that the case of *Arthur v. Henry*, 157 N.C. 393, 73 S.E. 206 (1911), stands for the proposition that a party's adverse admissions, given as testimony on the stand, are not to be accorded conclusive weight, for they are neither judicial admissions nor a retraxit. *Arthur v. Henry* was an action for damages to real property and injunctive relief. In that case the plaintiff and the defendant owned adjoining land. From June 1904 to October 1906 defendant operated a quarry on his land. Blasting in the quarry caused rocks and dust to be thrown upon the plaintiff's house and land. In February 1906 the defendant sought to negotiate a contract with the plaintiff whereby he could operate the quarry without liability. After "some bitter words between the parties" the defendant told the plaintiff he would "find a way to operate that quarry without being liable." In July 1906 the defendant leased the quarry to a corporation which operated it from the fall of 1906 until April 1907. After operations in the quarry were resumed in 1909 the plaintiff instituted an action against the defendant on 4 August 1909, alleging that the quarry constituted a nuisance and that the defendant had been out of the state from May 1906 to October 1907.

At trial the plaintiff testified "that he did not claim damages prior to 4 August 1906." The issue submitted was, "What amount of damages . . . for . . . acts committed after 4 March 1905, if any, is the plaintiff entitled to recover?" This issue was framed so as to permit the plaintiff to recover any damages sustained during the three years prior to the institution of the action, plus the time the defendant was out of the state. The jury answered all issues in favor of the plaintiff and, upon the defendant's appeal, the Court stated one of the questions to be: "Does the evidence of the plaintiff that he claimed no damages prior to August 1906, prevent a recovery of other damages, not barred by the statute of limitations?" *Id.* at 401, 73 S.E. at 209. Obviously, the answer to this question was NO. The Court, however, disposed of it in these words:

"Nor did the statement of the plaintiff on the witness stand, that he claimed no damages prior to 4 August 1906 prevent an inquiry as to all damages not barred by the statute of limitations.

"It is a statement which ought to have had weight with the jury, but it does not amount to a *retraxit*, and as a contract there is no mutuality and no consideration." *Id.* at 406, 73 S.E. at 211.

Defendant contends that the proper interpretation of the plaintiff's testimony in *Arthur v. Henry* is that the plaintiff had made no claim for damages prior to August 1906; that he did not say he had sustained no damages before then. We cannot tell from the statement of facts in the opinion what the plaintiff meant to say. However, even if his statement be construed as an intended waiver of damages occurring prior to 4 August 1906, it certainly was not a repudiation of his entire claim or a disavowal of the allegations of his complaint. The plaintiff's statement in *Arthur* is not comparable to the unequivocal testimony of plaintiff Cogdill by which she positively repudiated the complaint on which she based her action. *Arthur v. Henry,* therefore, is not dispositive of the question before us; nor does its terse and imprecise rationale aid decision here.

As heretofore noted, other courts and commentators have fully considered the effect of a party's own adverse testimony upon his right to recover. The cases are collected and analyzed in the following materials: Annot., *Binding effect of party's own unfavorable testimony,* 169 A.L.R. 798 (1947) and later

case service volumes; 32A C.J.S. *Evidence* § 1040 (3); McCormick, Handbook of the Law of Evidence § 266 (2d Ed. 1972); IX J. Wigmore, Evidence, § 2594*a* (3d Ed. 1940).

The exposition of Professor McCormick is summarized, except when quoted, below:

If, while testifying, a party has made an admission which—if true—is fatal to his cause of action or defense, and it stands unimpeached and uncontradicted at the end of the trial, it is generally conclusive against him. "The controversal question is whether he is bound by his own testimony in the sense that he will not be allowed to contradict it by other testimony, or, if contradictory testimony has been received, the judge and jury are required to disregard it and to accept as true the party's self-disserving testimony, as a judicial admission." McCormick, *supra*, § 266.

The courts have taken three often overlapping approaches to the question. "First, the view that a party's testimony in this respect is like the testimony of any other witness called by the party, that is, the party is free (as far as any rule of law is concerned) to elicit contradictory testimony from the witness himself or to call other witnesses to contradict him. Obviously, however, the problem of persuasion may be a difficult one when the party seeks to explain or contradict his own words, and equally obviously the trial judge would often be justified in saying, on motion for directed verdict, that reasonable minds in the particular state of the proof could only believe that the party's testimony against his interest was true.

"Second, the view that the party's testimony is not conclusive against contradiction except when he testifies unequivocally to matters 'in his peculiar knowledge.' These matters may consist of subjective facts, such as his own knowledge or motivation, or they may consist of objective facts observed by him.

"Third, the doctrine that a party's testimony adverse to himself is in general to be treated as a judicial admission, conclusive against him, so that he may not bring other witnesses to contradict it, and if he or his adversary does elicit such conflicting testimony it will be disregarded. Obviously, this general rule demands many qualifications and exceptions. Among these are the following: (1) The party is free to contradict, and thus correct, his own testimony; only when his own testimony taken as a whole unequivocally affirms the statement

does the rule of conclusiveness apply. The rule is inapplicable, moreover, when the party's testimony (2) may be attributable to inadvertence or to a foreigner's mistake as to meaning, or (3) is merely negative in effect, or (4) is avowedly uncertain, or is an estimate or opinion rather than an assertion of concrete fact, or (5) relates to a matter as to which the party could easily have been mistaken, such as the swiftly moving events just preceding a collision in which the party was injured." *Id.*

Of these three approaches, it is McCormick's view that the first "seems preferable in policy and most in accord with the tradition of jury trials." The second, which binds the party only as to facts within his "peculiar knowledge," is based on the doubtful assumption that as to such facts the possibility that he may be mistaken is insubstantial. "There are few, if any subjects, on which plaintiffs [parties] are infallible." The third, which purports to apply the rule of conclusiveness, was probably the result of judicial outrage engendered by the "seeming attempts by parties to play fast and loose with the court." However, experience shows that it is not the unscrupulous party who is punished by it but "the one who can be pushed into an admission by the ingenuity or persistence of adverse counsel, or the unusually candid or conscientious party willing to speak the truth to his own hurt." A party's testimony, "uttered by a layman in the stress of examination, cannot with justice be given the conclusiveness of the traditional judicial admission in a pleading or stipulation, deliberately drafted by counsel for the express purpose of limiting and defining the facts in issue." Further, a general rule of conclusiveness, leads to mechanical solutions, unrelated to the needs of justice, and breeds exceptions "calculated to proliferate appeals" in situations better left to the judgment of the jurors or the judge, as the case may be. The views of Professor McCormick are also those of Dean Wigmore. *See* IX J. Wigmore, Evidence § 2594*a* (3d Ed. 1940).

For full discussions of the three approaches listed by Mccormick see: *Sholly v. Annan,* 450 F. 2d 74 (9th Cir. 1971); *Bolam v. Louisville & Nashville R. R.,* 295 F. 2d 809 (6th Cir. 1961); *Alamo v. Del Rosario,* 98 F. 2d 328 (D.C. Cir. 1938); *Kanopka v. Kanopka,* 113 Conn. 30, 154 A. 144 (1931); *Elpers v. Kimball,* 366 S.W. 2d 157 (Ky. App. 1963); *Hill v. West End St. Ry.,* 158 Mass. 458, 33 N.E. 582 (1893); *Bradshaw v. Stieffel,* 230 Miss. 361, 92 So. 2d 565 (1957); *Vermaas v.*

Heckel, 170 Neb. 321, 102 N.W. 2d 647 (1960); *Harlow v. Leclair,* 82 N.H. 506, 136 A. 128 (1927); *Bailey v. Mead,* 260 Ore. 410, 492 P. 2d 798 (1972); *Lytle v. Reagan,* 256 S.C. 269, 182 S.E. 2d 302 (1971). In addition see Note, 5 Western Reserve L. Rev. 398 (1954).

After considering the three approaches to the problem of a party's "self-disserving" testimony, it is our opinion that the facts of this case do not require us to adopt any one of them, and it would, therefore, be inappropriate for us to attempt to formulate a general rule for determining the circumstances under which a party's adverse testimony will defeat his action.

Mrs. Cogdill testified to concrete facts, not matters of opinion, estimate, appearance, inference or uncertain memory. Her testimony was deliberate, unequivocal and repeated. It left no room for the hypothesis of mistake or slip of the tongue. Her statements were diametrically opposed to the essential allegations of her complaint and destroyed the theory upon which she had brought her action for damages. They clearly indicated her intentions not only to renounce her suit, but to acknowledge that she had never had a cause of action against her husband.

As set out in the preliminary statement, plaintiff testified on *voir dire* that she never read the complaint she verified; that had she read it she would never have stated her husband was operating his automobile in the manner alleged therein; and that he was not negligent in any way. Even after being warned of the consequences of perjury, she testified before the jury deliberately, unequivocably, and persistently that at the time of the collision her husband, having given the proper turn signal, was in his proper lane awaiting the opportunity to make a turn. Thereafter her attorney did not seek to elicit any remedial testimony from her. Instead, in the absence of the jury, he assured the court that, although he was not present when Mrs. Cogdill signed the verification to her complaint, if she said she did not read it, she didn't read it.

A civil action is ordinarily commenced by filing with the court a complaint, which "shall contain" a short and plain statement of the claim "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing the pleader is entitled to relief, and a demand for judgment

for the relief to which he deems himself entitled." G.S. 1A-1, Rules 3 and 8. If, at the close of the evidence, a plaintiff's own testimony has unequivocally repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery against the defendant, the defendant's motion for a directed verdict should be allowed.

Even Professor McCormick, the chief exponent of the liberal view that generally a party should not be concluded by his adverse testimony, recognized that in some situations a court would be fully justified in giving a party's adverse testimony the effect of a judicial admission. He wrote: "This much, however, should be conceded, even under the liberal view. . . . [I]f a party testifies deliberately to a fact fatal to his case, the judge if his counsel, on inquiry, indicates no intention to seek to elicit contradictory testimony, may give a nonsuit or directed verdict. Under these circumstances, the party and his counsel advisedly manifest an intention to be bound." McCormick, *supra* at page 638, n. 82.

The circumstances of this case come well within the McCormick concession. In our view, to permit plaintiff Cogdill's judgment against defendant Cogdill to stand would be *contra bonos mores* and a violation of public policy. The Court of Appeals correctly held that defendant's motion for a directed verdict should have been allowed.

Two final comments seem appropriate. The three cases which were consolidated for trial grew out of the same two-car collision. They were tried together because all the claimants were injured in one and the same accident. The jury's extraordinary verdicts, which permitted passengers to recover from the drivers of both vehicles and the drivers to recover from each other, clearly indicate that the jurors never saw the cases whole or understood the applicable law. Indeed, they seem to have assessed damages on the theory they were dividing the proceeds of no-fault insurance policies.

Confusion might have been avoided if the issues relating to liability had been reduced to the following: (1) Was the negligence of Cogdill a proximate cause of the collision between his automobile and the automobile driven by Scates? (2) Was the negligence of Scates a proximate cause of the collision between the Ruff automobile which she was driving and the automobile driven by Cogdill? (3) Was Scates operating the Ruff

automobile as the agent of Ruff? (On this third issue a peremptory instruction on the uncontradicted evidence would have been appropriate.)

The remaining five issues would have related to the damages, if any, each claimant was entitled to recover on account of injuries sustained as a result of the collision. Whether the jury would have considered none or only some of these issues would have depended upon their answers to issues (1) and (2). Issue (3) would have been material only if issue (2) had been answered YES.

For the reasons stated the decision of the Court of Appeals remanding this case to the Superior Court for entry of judgment allowing defendant Cogdill's motion for a directed verdict is

Affirmed.

STATE OF NORTH CAROLINA v. FRANKLIN WRIGHT

No. 81

(Filed 14 May 1976)

1. **Constitutional Law § 29— systematic racial exclusion of jurors — insufficient showing**

The trial court did not err in summarily denying defendant's motion to dismiss the jury array "for the reason that there are no blacks" without requiring the State to show affirmatively the absence of systematic exclusion where defendant offered no evidence that Negroes were excluded by reason of their race, although he had ample time to do so, and thus failed to carry the burden of establishing discrimination and also failed to make out a *prima facie* case of racial discrimination.

2. **Constitutional Law § 30— nineteen month delay between warrant and trial — no denial of right to speedy trial**

Defendant was not denied his constitutional right to a speedy trial by a delay of some nineteen months between the date the warrant was served and the date of defendant's trial on charges of breaking and entering and larceny where defendant was either in jail awaiting trial on other charges or in prison following conviction on other charges during such time; statistics on the operation of the courts in this State show that regular sessions of court scheduled for the county were not sufficient to dispose of the cases calendared and it is thus apparent that the district attorney did not negligently or

arbitrarily delay trying defendant; defendant failed to show the names of witnesses whom he claimed were unavailable, what their testimony might be, or what efforts had been made to secure their presence at trial; defendant failed to show the existence of a detainer against him; and defendant filed a handwritten motion for a speedy trial before he was indicted upon the charges, no additional attempts to obtain a speedy trial were made after counsel was appointed, and defendant was tried at a special session of court six weeks after he filed a motion to dismiss because of the delay.

3. **Constitutional Law § 30; Criminal Law § 91— mandatory disposition of detainers — inapplicability of statute**

The statute relating to mandatory disposition of detainer charges upon request by a prisoner, G.S. 15-10.2, was inapplicable where defendant was not serving a sentence in the State prison system and no detainer had been filed against him at the time he filed a motion with the clerk for disposition of charges against him; furthermore, defendant was not entitled to the benefit of the statute where he failed to send his motion to the district attorney of the judicial district in which the charges were pending.

Justice EXUM dissenting.

APPEAL by defendant pursuant to G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 28 N.C. App. 426, 221 S.E. 2d 751 (1976), finding no error in the trial before *Martin (Harry C.), J.*, at the 19 May 1975 Session of WATAUGA Superior Court.

Defendant was charged on a bill of indictment, proper in form, with the felonious breaking and entering of the Villa Maria restaurant in Blowing Rock, North Carolina, and with the felonious larceny therefrom of $600.

The State's evidence tends to show the following: The Villa Maria was broken into on the night of 22 August 1973 and some $500 to $800 in coins was taken from the vending machines located therein. On that date, Bruce Johnson and defendant, both Negroes, were living together in a trailer in Boone, North Carolina. That night, around midnight, Johnson drove defendant to the Villa Maria restaurant, which was closed, and let him out. Defendant told Johnson that he was going to rob the pinball machines at the Villa Maria and for him to return and pick him up in about an hour and a half. Later that night while Johnson was waiting for defendant, he was questioned by a Blowing Rock police officer for parking near the Villa Maria at such a late hour. After this incident, Johnson drove back to a friend's house in Boone. There he found defend-

ant who told Johnson that he had called a friend to pick him up at the Villa Maria, which she did. Johnson and defendant then returned to a place near the Villa Maria and retrieved a metal box containing approximately $525 in coins, which defendant said he had taken from the Villa Maria and hidden there. On 23 August 1973, Johnson and defendant drove to Johnson's home in Louisburg, North Carolina, stopping at a bank in Winston-Salem where defendant converted the coins into currency.

The officer who had questioned Johnson in Blowing Rock on the night of 22 August had noted Johnson's license number, and by this, the police traced Johnson to his home in Louisburg. Johnson was arrested on 7 September 1973, and on 9 September he made a complete statement to the police relating the facts substantially as set out above. A warrant was served on defendant charging him with these offenses on 5 October 1973 while he was being held in Franklin County Jail on another charge.

Defendant testified that on the night in question Johnson drove him to Blowing Rock to see a girl friend with whom he stayed for several hours before returning to Boone. When Johnson returned later that night, he had a large number of coins in his possession. The next day he accompanied Johnson to his home in Louisburg, stopping in Winston-Salem where defendant converted the coins into currency for Johnson. Defendant denied breaking into or robbing the Villa Maria. He admitted, however: "I have been convicted of larceny, arson, breaking, and entering. I don't know how many times I have been convicted of larceny. I have been convicted of breaking and entering into other people's buildings once or twice. I am not sure about that either, I have been convicted of arson once."

The jury found defendant guilty as charged. From the imposition of a prison sentence of three to five years, effective at the expiration of two ten-year sentences imposed on defendant in Wake Superior Court on 17 December 1973, defendant appealed to the Court of Appeals. That court found no error. Defendant appealed to this Court as a matter of right for the reason that the case involved substantial questions arising under the Constitution of the United States.

Attorney General Rufus L. Edmisten and Associate Attorney Noel Lee Allen for the State.

Robert H. West for defendant appellant.

MOORE, Justice.

[1] Defendant's case was called and he was arraigned in open court, entered a plea of not guilty, and twelve jurors were called to the jury box but not empaneled. Defense counsel then moved to dismiss the entire jury "for the reason that there are no blacks." Defendant offered no evidence in support of this motion and the court overruled it. Defendant argues that the court erred in summarily denying his motion without giving him an opportunity to offer evidence on the motion and without requiring the State to show affirmatively the absence of systematic exclusion. This is the first assignment discussed in defendant's brief.

Defendant's counsel was appointed on 3 April 1974, and during the some thirteen months which elapsed prior to trial, counsel could have investigated all aspects of the selection or exclusion of blacks from the jury box of Watauga County. Yet, he did not offer any evidence that no Negroes had been summoned as jurors for that particular term, nor that Negroes had been systematically excluded from jury service on the basis of race. Neither did he request additional time in which to procure such evidence. To the contrary, when the motion was denied, defendant excepted and stated: "We pass on the Jury." The trial judge then excused the jurors and, in their absence, asked defense counsel, "Do you have any evidence in support of the motion which appears of record . . .?" To this question, defendant's attorney replied, "No, sir." Although defense counsel contends that this request referred to another motion pending at the time, the record clearly indicates that if defendant had testimony concerning the jury's selection, the judge would have heard it at that time. In fact, defendant was immediately thereafter placed on the stand and testified on *voir dire* concerning his motion for a speedy trial. He made no statement and was not asked anything concerning the composition or the selection of the jury.

In *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), Justice Huskins, speaking for the Court, said:

> "Both state and federal courts have long approved the following propositions:
>
> "1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury

from which Negroes were excluded by reason of their race, the conviction cannot stand. [Citations omitted.]

"2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. [Citations omitted.] But once he establishes a *prima facie* case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. [Citations omitted.]

"3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. [Citations omitted.]

"4. A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case. [Citations omitted.] 'Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a . . . jury panel must be determined from the facts in each particular case.' *State v. Perry, supra* [248 N.C. 334, 103 S.E. 2d 404 (1958)]."

See also State v. Cornell, 281 N.C. 20, 187 S.E. 2d 768 (1972).

In present case, defendant offered no evidence that Negroes were excluded by reason of their race, although he had ample time to do so. Hence, he failed to carry the burden of establishing discrimination and also failed to establish a *prima facie* case of racial discrimination. Therefore, the State had nothing to rebut and the trial judge correctly denied defendant's motion challenging the array.

[2] Defendant next contends the Court of Appeals erred in affirming the trial court's refusal to dismiss the charges against defendant on the ground that his Sixth Amendment right to a speedy trial had been violated.

The law concerning a defendant's right to a speedy trial is well established in North Carolina. In *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969), Justice Sharp (now Chief

Justice) set out the basic precepts established by decisions of this Court.

"1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967)).

"2. A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.

"3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

"4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

"5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed,* 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965); *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891, *cert. denied,* 376 U.S. 956, 11 L.Ed. 2d 974, 84 S.Ct. 977 (1964); *State v. Webb,* 155 N.C. 426, 70 S.E. 1064."

With these principles in mind, we now consider the four factors enunciated in *State v. Johnson, supra,* and followed in *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), as they apply to the case before us.

Defendant was arrested on an unrelated charge on 7 September 1973 and served with a warrant for the breaking and entering of the Villa Maria, and larceny therefrom, while in jail on 5 October 1973. An indictment was returned on these charges in January 1974 and defendant was tried in May 1975. Therefore, some nineteen months elapsed between the date the warrant was served and the date of defendant's trial. Although we do not approve of such a long delay, we do not determine the right to a speedy trial by the calendar alone, but must weigh the length of the delay in relation to the three remaining factors. *Barker v. Wingo, supra.*

The second factor, the reason for the nineteen-month delay, does not clearly appear in the record. It *is* clear that defendant was indicted in January 1974, the first session of court after he was arrested, and that at the next session of court in April 1974 an attorney was appointed to represent him. Thereafter, defendant's case was calendared at each succeeding session of court—September 1974, January 1975, March 1975—but not reached. Finally, a special session of court was scheduled for the weeks of 12 May and 19 May 1975 for the trial of the backlog of felony cases. Defendant's case was tried during the week of May 19.

The Court of Appeals took judicial notice of the infrequent sessions of court in Watauga County and found that it was common knowledge that the district attorney first disposes of the cases involving defendants incarcerated in the county jail. From September 1973 through the time of trial, defendant was either in jail in Wake County awaiting trial there on an unrelated charge, or serving time in the State's prison system based on his Wake County conviction; hence, he was not deprived of his liberty due to the charges in this case. The Court of Appeals reasoned that the district attorney was unable to reach defendant's case before each one-week session of court expired, due to the number of defendants in the county jail.

While the conclusions of the Court of Appeals as to the reasons for the delay are undoubtedly correct and would provide sufficient justification for the delay on the part of the State, the State should have presented evidence, preferably through the district attorney, fully explaining the reasons for the delay. In the present case, however, we take judicial notice of the statistics on the operation of the superior courts as compiled by our own Administrative Office of the Courts. G.S.

7A-340 through G.S. 7A-346; 1 Stansbury, N. C. Evidence § 13 (Brandis Rev. 1973), and cases therein cited. The 1974 Annual Report of that office shows that on 1 January 1974, 72 criminal cases were pending in Watauga Superior Court. During 1974, 142 additional criminal cases were filed, 97 of these being felonies. During 1974, 98 cases were disposed of by jury trial, plea or other disposition, leaving 116 cases remaining on 1 January 1975, or an increase of 44 cases from 1 January 1974. These figures further show that during 1974, Watauga County had only 20 days of superior court scheduled for the trial of criminal cases, and used all 20 days. This 100% utilization of such scheduled court days was achieved by only two other counties in the State during 1974. Despite utilizing all available court days, the district attorney was still unable to reduce the docket case load below that of 1973. On 1 January 1975, 116 criminal cases were pending, and during the year, 117 were added. Of these cases, 208 were disposed of in 1975, leaving a backlog of 25 cases pending on 1 January 1976, a significant decrease from 1974. This decrease was in part achieved by the scheduling of a special two-week session in May 1975. From these statistics, it is apparent that the district attorney did not negligently or arbitrarily delay trying defendant, but, on the contrary, the regular sessions scheduled for 1974 were not sufficient to dispose of the cases calendared. Due to this fact, a special session was provided for 1975, at which defendant was tried.

On the issue of prejudice, defendant stated:

> ". . . The reason why I filed a motion for dismissal is because I wanted witnesses, you know, called in my behalf, and due to the time limit, the witnesses done moved away and can't be contacted because I don't try to contact them, you know. I can't even get an accurate report, you know, recalling way back, what really transpired, you know, and almost two years."

No evidence was presented as to the witnesses he wanted to call, what their testimony would be, or what efforts he had made to contact them.

Lost witnesses and faded memories are only two of the disadvantages the right to a speedy trial is designed to avoid. When a detainer is filed against an individual who is already incarcerated, it jeopardizes his chances for a parole, for proper

good behavior credits, and for work release. *State v. O'Kelly*, 285 N.C. 368, 204 S.E. 2d 672 (1974); *State v. White*, 270 N.C. 78, 153 S.E. 2d 774 (1967). Here, however, defendant has failed to show the existence of a detainer against him or other circumstances arising from the delay that have prejudiced him.

Finally, we examine the defendant's demand for a speedy trial. The record discloses that on 13 November 1973, while in jail in Wake County awaiting trial there, defendant filed a motion with the Clerk of Superior Court of Watauga County. Obviously, it was handwritten by a man of limited education and without benefit of counsel. The motion reads as follows:

> "Comes now Franklin Wright afore said court and moves this herein styled 'Motion for Speedy Trial' be so entered on behalf of above named petitioner pursuant to KROPLER v N. CAROLINA, 385 Supp 2d Fd (b) 10; Due Process and Equal Protection Clause U. S. Const—Supra Note—WAINWRIGHT v U.S., 349 at 4d F, 'Right to Speedy Trial shall not be abused without due cause, violation of same shall constitute irreverseable error by trial court & dismissal thereof.' Petitioner was arrested Sept. 7, 1973, charged with B&E,L, the Villa Maria, located in Blowing Rock N. C.
>
> "So submitted this 9 day of Nov. 1973.
>
> s/ FRANKLIN WRIGHT
> Affidavit"

Defendant contends that by reason of G.S. 15-10.2, this case should be dismissed. G.S. 15-10.2, in part, provides:

> "(a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Secretary of Correction stating the term of the sentence or sentences under which

the prisoner is being held, the date he was received, and the time remaining to be served. . . ."

[2, 3] At the time defendant filed his motion with the clerk, he had not been indicted for the offenses *sub judice*. He was in jail awaiting trial on nonrelated charges. He was not serving a sentence within the State prison system and no detainer had been filed against him by the superior court of Watauga County. Hence, G.S. 15-10.2 does not apply. Furthermore, defendant failed to comply with the requirements of G.S. 15-10.2 that the motion be sent by registered mail to the district attorney of the judicial district in which the charges are pending. In *State v. White, supra*, we held that the failure to follow this requirement deprived defendant of the benefit of this statute. Regardless of the statute, however, defendant was entitled to a speedy trial as guaranteed by the Constitution of the United States and the Constitution of North Carolina. We do not believe he has been denied these constitutional rights. Once counsel was appointed for defendant, no additional attempts to secure a speedy trial were made. On 27 March 1975, defendant filed a motion to dismiss because of the delay. Six weeks later he was tried. Considering the number of criminal cases pending in Watauga County in 1974-1975, the limited number of days scheduled for the trial of criminal cases, the fact that the scheduled days were fully utilized, and the failure of defendant to show any prejudice by reason of this delay, we hold that defendant has not been deprived of his right to a speedy trial. Every effort should be made by the State to avoid a delay such as occurred in this case, but in view of all the circumstances here, we do not think the prosecution has been negligent or willful in the handling of defendant's case or has deliberately or unnecessarily caused the delay for the convenience or supposed advantage of the State. Defendant's motion to dismiss was therefore properly overruled.

The decision of the Court of Appeals finding no prejudicial error is correct and is therefore affirmed.

Affirmed.

Justice EXUM dissenting.

While I agree with almost all the majority *says* about the speedy trial issue, I respectfully disagree with the conclusion

drawn from what is said. Defendant's motion to dismiss for failure of the State to provide him a speedy trial under Amendments VI and XIV to the United States Constitution and Section 18, Article I, of the North Carolina Constitution should have been allowed.

I agree with the majority that upon defendant's showing of a delay of eighteen months, it was incumbent upon the State to present "evidence, preferably through the district attorney, fully explaining the reasons for the delay." I agree, too, that the factor of waiver also weighs in defendant's favor inasmuch as he made demand early in the proceedings against him for trial.

The factor of prejudice, I believe, weighs neither in favor of nor against defendant. It is true that he could not name the witnesses whom he claimed were unavailable or relate what their testimony might be; nor did he say what efforts were made to have them present. He seems to attribute, however, these very inabilities to the long lapse of time saying in effect that because of it the witnesses had "moved away and can't be contacted" and that his own memory of the occasion had largely faded. He must have suffered at least from prolonged anxiety, public distrust and, more specifically, distrust by those in whose custody he was held on unrelated charges—these being some of the things which, the majority recognizes, a speedy trial is designed to avoid.

Only one factor—the reason for the delay—is left to weigh against defendant on his motion. Because the State failed to come forward with any adequate reason, as was incumbent upon it to do upon defendant's showing, defendant's motion should have been allowed.

The majority circumvents this failure of the prosecution below by judicially noticing certain statistical data from the Administrative Office of the Courts. I agree that this data may be judicially noticed, but I disagree with the majority's conclusion that the data demonstrates "the district attorney did not negligently or arbitrarily delay trying defendant. . . ." At most the data shows that the District Attorney was busy in Watauga County during the pendency of this prosecution and fully utilized the time available to him. The question, though, is not whether he was busy, generally, but why he did not busy himself with the case against this defendant. Had the District

Attorney relied at trial upon the information judicially noticed by the majority, *and shown further* that he reasonably gave the matters which he did handle precedence over defendant's case, I would have no quarrel with denying the motion for a speedy trial. The District Attorney might have shown, for example, that the cases to which he gave preference were older than defendant's, or that they involved people in jail because of charges pending against them in Watauga County, or that they involved witnesses or other evidence which if not promptly utilized may not later be available. There could be other various reasons why the cases he did dispose of *should have been handled* before defendant's. The point is that no such reasons appear in this record and the statistical data relied on by the majority does not supply them.

STATE OF NORTH CAROLINA v. JEROME ROBINSON

No. 42

(Filed 14 May 1976)

1. **Constitutional Law § 32— indigent defendant — right to court-appointed counsel**

An indigent defendant was entitled to representation by counsel at his trial and it was the duty of the trial court to appoint competent counsel so to represent him, unless the defendant voluntarily and understandingly waived his right thereto.

2. **Constitutional Law § 32— right to conduct own defense**

A defendant charged with a criminal offense has the right, if he so elects, to conduct his own defense without counsel.

3. **Constitutional Law § 32— indigent defendant — effective assistance of counsel**

The right of an indigent criminal defendant to have counsel appointed to represent him at his trial is intended to guarantee effective assistance of counsel, but it is not a right to have the attorney of his choice appointed to represent him.

4. **Constitutional Law § 32— indigent defendant — dissatisfaction with counsel — appointment of other counsel**

The constitutional right of an indigent defendant to have the effective assistance of competent counsel appointed by the court does not include the right to insist that competent counsel, so assigned and so assisting him, be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services.

5. Constitutional Law § 32— disagreement with counsel as to trial tactics — replacement of counsel

A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace the court-appointed counsel with another attorney.

6. Constitutional Law § 32— counsel's refusal to present perjured testimony — motion for appointment of another attorney — discretion of court

Discord between defendant and his court-appointed trial counsel because of counsel's refusal to be a party to the introduction of what he reasonably believed to be prejured testimony did not require the trial court to replace such counsel with another attorney; under these circumstances, the appointment of another attorney rested in the sound discretion of the trial court, and the court did not abuse its discretion in the denial of defendant's motion for the appointment of another counsel.

7. Constitutional Law § 32— discord between defendant and counsel — leaving counsel in charge of portion of trial — denial of fair trial

Where discord developed between defendant and his court-appointed counsel because of counsel's refusal to be a party to the introduction of what he believed to be perjured testimony by defendant and his witness, and defendant repeatedly stated to the court that he did not wish to have such counsel continue to represent him at his trial, defendant was deprived of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and Art. I, § 19 of the Constitution of North Carolina when the court left such counsel in charge of a portion of the trial while relieving him of responsibility for questioning defendant's only witness or defendant, himself, if he elected to testify, as a result of which counsel began the questioning of defendant's only witness and then fell silent, leaving defendant to take over the direct examination, since such procedure must have conveyed to the jury the impression that defendant's counsel attached little significance or credibility to the testimony of the witness, or that defendant and his counsel were at odds.

APPEAL by defendant from the Court of Appeals which found no error upon the defendant's appeal to it from *Kirby, J.*, at the 10 March 1975 Special Criminal Session of MECKLENBURG, the opinion of the Court of Appeals being reported in 28 N.C. App. 65, 220 S.E. 2d 387 (1975).

Upon an indictment, proper in form, the defendant was found guilty of felonious breaking and entering and of larceny after having feloniously broken and entered a building occupied by Walker's Drugstore at 229 Hawthorne Lane, Charlotte, North Carolina. He was sentenced to ten years on the breaking and entering charge and three to five years on the larceny

charge, the sentences to be served consecutively. The evidence for the State, if true, is ample to support each conviction. The sole question presented to the Court of Appeals and to this Court is:

> "Did the trial judge deny the defendant his constitutional right to effective assistance of counsel when he denied the defendant's motion to allow his court-appointed counsel to withdraw and refused to appoint substitute counsel?"

Prior to the defendant's pleading to the indictment, William F. Burns, Jr., court-appointed counsel for the defendant, made a motion, at the request of the defendant and in his own behalf, that he be permitted to withdraw as counsel for the defendant. In support of the motion, Mr. Burns stated to the court:

> "The defendant has indicated to me he wishes to take the witness stand in his own behalf; which, in my opinion, is perjured testimony. He has indicated he intends to call a witness to the witness stand and elicit testimony which would be perjured testimony to that individual; and I feel that on the basis of that, substantial conflict has arisen between the defendant and myself which would prevent me from devoting my full effort to his representation in this matter; and in addition to that, I don't feel that I should participate in the matter any further because of the foregoing; and I do respectfully request that I be allowed to withdraw as counsel for the defendant."

The said motion and statement were made in the absence of prospective jurors and all subsequent remarks, hereinafter set forth, were also made in the absence of prospective jurors and in the absence of the jury selected and impaneled.

Upon the making of this motion and statement by Mr. Burns, the court interrogated the defendant who stated to the court that Mr. Burns had expressed these views to him, including the opinion of Mr. Burns that the proposed testimony would constitute perjury and the unwillingness of Mr. Burns to participate in "what he believes to be" a fraud upon the court. Thereupon, the court said to the defendant:

> "I'm going to tell you just as straight as I know how to tell you—I'm not going to appoint any lawyer to sit

with you in a case which is, in that counsel's opinion, perjury testimony. If you want to represent yourself and present perjury testimony, for whatever it's worth, to a jury; I'll allow counsel to sit with you and just tell you what's going on; but I don't think there's a lawyer at this Bar that I know about, who would knowingly and wilfully present a witness whom he believed to be perjuring himself and present it to the jury as the truth. And I don't think it would be fair to him for me to impose that responsibility on any attorney. So, if you want an attorney to represent you, and you want to take his advice, you've got one. If you want somebody just to sit there at the table to tell you what's happening next, I'll be glad to give you that kind of counsel. But I'm not going to impose the responsibility on any lawyer to sit in the courtroom and present to the jury and to the judge evidence which he does not believe is truthful, or perhaps that which he knows is untruthful. If you want to employ one, you might find one that you could convince that that would be a proper procedure; but I'm certainly not going to appoint one for that type procedure. Do you understand that?"

The defendant replied that he did understand this statement by the court and requested the court to appoint an attorney to represent him.

At this stage the prosecuting attorney informed the court that, in his opinion, the defendant was simply trying to delay the trial with which the State was ready to proceed.

Thereupon, the court announced it would withhold its final ruling until the following day but proceeded to say to the defendant:

"I'm telling you now, that the only kind of an attorney, the only responsibility I'm going to impose on any lawyer, in your defense who, in his own mind, believes that you're going to go on this witness stand and present perjured testimony, is to instruct him to sit at this table and tell you who I am, and let him pick the jury; and then you can defend yourself of [sic] perjured testimony if you want to; but I'm not going to ask a lawyer to; I'll let Mr. Burns sit by you and pick a jury, examine the State's witnesses in your behalf; but when it comes to your defense, if you're going to offer perjured testimony, I'm going to

let Mr. Burns sit there silently and ask you nothing. When you come on the witness stand, you're on your own. And I want to put in the record outside of the hearing of the jury impaneled to try you that in the opinion of your attorney you were offering perjured testimony, and he wanted no part of it, and I did not insist that he participate; that you are testifying against his will to evidence which he believes perjury; and if the jury convicts you, heaven help your soul—and your witness's too."

The court then instructed the defendant to think about the matter overnight, advising him to talk to his lawyer and to listen to him.

The next day, the defendant entered a plea of not guilty to each charge and, through his counsel, Mr. Burns, renewed his motion to have another attorney appointed to represent him, Mr. Burns making that motion in behalf of the defendant and in his own behalf. The court denied the motion, to which ruling the defendant excepted. The trial then proceeded. The State introduced the testimony of a number of witnesses, each of whom Mr. Burns, as counsel for the defendant, cross-examined. At the conclusion of the direct examination of the first witness for the State, and prior to cross-examination, Mr. Burns requested the court to permit the defendant to make for the record a statement in the absence of the jury. The jury having been sent from the courtroom, the following exchange between the defendant and the court took place:

"DEFENDANT: I would like to have another attorney.

"THE COURT: I'm not going to appoint you another attorney. I have already made that eminently clear to you.

"DEFENDANT: I don't want Mr. Burns to defend me.

"THE COURT: You have had since November 1973, or shortly thereafter, to employ any counsel you want to represent you. Mr. Burns was appointed by the Court to represent you; and I told you yesterday my reasons, and I'm going to stand by those reasons and have Mr. Burns examine this witness or any other witness; or I'll let you ask him some questions, if you wish.

"DEFENDANT: I'd like to have another attorney, because he's not going to put in any evidence in the case.

"THE COURT: He's not going to put in evidence which he believes to perjure [sic] testimony based upon—

"DEFENDANT: What he believes to be perjury.

"THE COURT: Sit down. Sit down. He's your attorney. He's conducting your defense until I rule otherwise, and I haven't ruled otherwise. Bring the jury back."

To the foregoing ruling the defendant excepted. Subsequently, while the State was still putting on its witnesses, the jury was again sent from the courtroom and the following exchange between the defendant and the court occurred:

"DEFENDANT: I want my attorney to be dismissed from the case.

"THE COURT: I am not going to do that. I've already told you that about fourteen times. Mr. Burns is doing all he can to properly represent you. * * * I don't know what other question relative to your defense Mr. Burns could have asked; and I've been sitting here listening; and I'm not going to discharge Mr. Burns just to accommodate you in delaying this trial. * * *

"DEFENDANT: I don't think he's in my defense.

"THE COURT: What can he say when two witnesses saw you come out the door, were apprehended at the scene, and apprehended with the bag. You don't offer him much to defend you with. I don't know what else he could do.

"DEFENDANT: But what they're saying is wrong.

"THE COURT: Well, my friend, that's for that jury, and he can't tell those officers what to say. He can't change what they're going to say on direct examination.

"DEFENDANT: I understand that.

"THE COURT: And he certainly asked every relevant question that doesn't reach the point of ridiculous. He's not going to sit there and make a fool of himself.

"DEFENDANT: I understand that; but he's also explained to me how far he'll go on my case.

"THE COURT: He has done what?

"DEFENDANT: He has explained to me how far he will go in my defense.

"THE COURT: He's explained to you that he will not participate in your coming on this witness stand and perjure yourself when you told him that's what you were going to do. That's what he told you.

"DEFENDANT: No, that's not what he told me.

"THE COURT: Well, he'll get to that. Is there anything else you want to say? * * * This individual attorney has already represented you once and it ended in mistrial. [A previous trial of the same case.] That was a major feat, I'd say. Do you have anything else? I don't know any lawyer who would know any more about the facts or the relative facts about what he should or should not ask. He convinced one person on the jury to go with you. Sit down. That's all."

At the conclusion of the State's evidence, the defendant, through his counsel, Mr. Burns, moved for a judgment of nonsuit, which motion was denied. Thereupon, in the absence of the jury, the court asked the defendant if he desired to take the witness stand. The defendant replied that he did not but he had a witness, Carolyn Bertha, whom he wished to call, she being in the courtroom. Thereupon, Mr. Burns advised the court that this was one of the witnesses referred to in the previous remarks of Mr. Burns to the court. He further advised the court as follows:

"MR. BURNS: My position about the witness is, simply, that I do not wish to examine nor cross-examine in favor of her testimony to the jury for the reason that I have been advised that the testimony will be perjury.

"THE COURT: Who advised you of that fact?

"MR. BURNS: The defendant advised me.

"THE COURT: So, it is your firm belief based upon your investigation of this case that the witness who is about to be called will give testimony which is perjury?

"MR. BURNS: Yes, and the basis of my position is also supported by what the witness told me earlier on previous occasions.

* * *

"THE COURT: This is not based necessarily on what your client has told you, but the witness, herself.

"MR. BURNS: On both what my client has told me and what the witness has told me of her knowledge.

"THE COURT: And you think that whatever she testifies will be perjury?

"MR. BURNS: I think there's a distinct possibility of it.

"THE COURT: I'm going to allow you to call the witness, identify her by name and address, and you can tell her to say whatever she wants to say about it and you won't have to ask her any questions about it. The Court takes the position, for the record, that a duly licensed attorney is bound by certain ethics, and is also an officer of the Court; and in that capacity he is not to be allowed, even though he is bound to represent a client to the best of his ability, that the ethics don't require him to offer to the Court testimony which he believes to be perjury; or, as an officer of the Court, to knowingly or even by suspicion practice fraud; and the Court, at the outset of this trial advised counsel that the Court would not require him to participate in what he, counsel, believed to be perjury or fraud; that he wanted to disassociate himself from the testimony if it were offered; and the Court, therefore, concludes that although the attorney has a duty to represent his client, that the duty doesn't extend so far as to require him to offer testimony which he believes to be untruthful, and therefore, perjury.

"MR. BURNS: I think the defendant wishes to address the Court again at this time.

"THE COURT: One more time.

"THE DEFENDANT: I never said to Mr. Burns that the witness lied, were coming in to commit perjury. I never made this statement.

"THE COURT: He says the witness, herself, has indicated that. Bring the jury back."

Carolyn Bertha was, thereupon, called to the stand as a witness for the defendant. Preliminary questions were directed to her by Mr. Burns. After narrating briefly the activities of herself and her companions, including the defendant, during the evening preceding the alleged robbery and their arrival in the vicinity of the store alleged to have been broken and entered,

the witness asked, "You want me just to tell what happened?" Mr. Burns replied, "Tell what you would like to tell." The witness said she did not understand. Thereupon, the court stated: "Ma'am, just tell the truth—whatever you know. You were called as the defendant's witness. The defendant wanted you called. Go ahead and tell what it is you know." Thereupon, the witness testified that she was arrested, along with her companions, and taken to jail and charged with store breaking, that she was in the car in which she and her companions had been riding, in front of the drugstore, "and, that's about all."

Thereupon, the defendant, himself, took over the direct examination of this witness. She then testified: She did not know what happened in the drugstore, she being out in the car; the defendant had driven the car to the drugstore; one of their male companions got out of the car; about 15 minutes thereafter the defendant left the car in response to the witness' having directed him to go and get their companion; the witness does not know what the defendant did after he got out of the car; thereafter, the witness instructed another male companion to go and get the defendant; some 10 minutes later the police arrived and the entire group was arrested and charged with store breaking.

The defendant's evidence having thus concluded, the defendant renewed his motion for judgment of nonsuit, which was denied.

Upon appeal the defendant has been represented in the Court of Appeals and in this Court by another court-appointed counsel, Peter H. Gerns.

Rufus L. Edmisten, Attorney General, by Alan S. Hirsch, Associate Attorney, for the State.

Peter H. Gerns for defendant.

LAKE, Justice.

[1, 2] The defendant, an indigent, was entitled to representation by counsel at his trial and it was the duty of the trial court to appoint competent counsel so to represent him, unless the defendant voluntarily and understandingly waived his right thereto. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). Conversely, a defendant, so charged with a criminal offense, has the right, if he so elects, to conduct his

own defense without counsel. The services of counsel unsatisfactory to him may not be forced upon him. *State v. Alston,* 272 N.C. 278, 158 S.E. 2d 52 (1967); *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606 (1967); *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967); *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667 (1964).

[3] The right of an indigent defendant charged with a criminal offense to have counsel appointed to represent him at his trial is not "an empty formality but is intended to guarantee effective assistance of counsel." *State v. Sneed,* 284 N.C. 606, 201 S.E. 2d 867 (1974). It is not, however, a right to have the attorney of his choice appointed to represent him.

In *State v. McNeil, supra,* counsel was appointed to represent the defendant at his trial. As in the present case, McNeil informed the court that he wanted a lawyer to represent him but did not wish to be represented by his appointed counsel, his reason being that, in his opinion, the lawyer was "doing me no good." In support of this position, he said, "He talks against me; I tell him what to say and he says other things." The trial court informed the defendant that his court-appointed counsel was found by the court to be well qualified, but if the defendant would prefer to have no one rather than his court-appointed counsel, the court would release the court-appointed counsel. This was done and the defendant conducted his trial himself with disastrous results. Upon appeal this Court, speaking through Justice Parker, later Chief Justice, said:

> "The United States Constitution does not deny to a defendant the right to defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none. * * *
>
> "An indigent defendant in a criminal action, in the absence of statute, has no right to select counsel of his own choice to defend him, and we have no statute in North Carolina that gives him the right to select counsel. In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense."

[4] The constitutional right of an indigent defendant in a criminal action to have the effective assistance of competent

counsel, appointed by the court to represent him, does not include the right to insist that competent counsel, so assigned and so assisting him, be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services. In *State v. Sneed, supra,* speaking through Justice Branch, this Court said:

> "[I]ncompetency * * * of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice."

[5] A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. Trial counsel, whether court-appointed or privately employed, is not the mere lackey or "mouthpiece" of his client. He is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them. He is an officer of the court and owes duties to it as well as to his client. In this there is no conflict of interest. Clearly, the client has no right to insist that counsel assist him by presenting in evidence testimony which counsel knows, or reasonably believes, constitutes perjury. This was the sole basis for the discord between the defendant and his court-appointed trial counsel, Mr. Burns. Mr. Burns' refusal to be a party to the introduction of what he reasonably believed to be perjured testimony and his action in bringing this to the attention of the trial court was commendable, not basis for his removal as a disloyal counsel.

[6] The existence of such a conflict of wills between the defendant and his court-appointed counsel did not require the trial court to replace such counsel with another attorney. Under these circumstances, the appointment of another attorney rested in the sound discretion of the trial court and we find in this record no indication of abuse of that discretion. See: *United States v. Young,* 482 F. 2d 993 (5th Cir., 1973). There was, therefore, no error in the denial of the defendant's motion for the appointment of another counsel.

The record does, however, show clearly that an irreconcilable conflict had arisen between the defendant and his court-

appointed counsel, and the defendant repeatedly stated to the court that he did not wish to have Mr. Burns continue to represent him at his trial. Though the defendant's dissatisfaction with his court-appointed counsel appeared to the trial court, and appears to us, to have been completely unjustified, the defendant was entitled to try his case without the presence of Mr. Burns at the counsel table, if he so desired. *State v. McNeil, supra.* Upon the defendant's advising the court that he did not desire to be represented at his trial by Mr. Burns, the trial court, having found there was no other basis for removing Mr. Burns, could properly have advised the defendant that if the defendant insisted thereon, the court would relieve Mr. Burns from his assignment but would not appoint another counsel to represent the defendant at the trial. Instead of doing this, the trial court, in an obvious effort to afford the defendant assistance which circumstances indicated the defendant needed, adopted a middle course.

[7] The court did not relieve Mr. Burns from his assignment, but left him in charge of a portion of the trial while relieving him of responsibility for questioning the witness called by the defendant and of assisting the defendant, himself, to present his own testimony if the defendant elected to take the stand. As a result of this procedure, Mr. Burns began the questioning of the defendant's only witness and then fell silent, leaving the defendant to take over the direct examination, Mr. Burns remaining seated at the counsel table. This procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable.

For this reason, we conclude that the defendant has been denied the fair trial which is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the comparable provision in the Constitution of North Carolina, Art. I, § 19. The defendant must, therefore, be awarded a new trial. At such new trial, we assume that he will be represented by his present counsel, appointed by the court to represent him upon his appeal. If not, the trial court should appoint competent counsel, selected by the court not by the defendant, to represent him and, if such counsel is not

acceptable to the defendant, permit the defendant to conduct his own trial without counsel.

New trial.

STATE OF NORTH CAROLINA v. JOHN MINOR

No. 51

(Filed 14 May 1976)

Narcotics § 4— marijuana growing in field — constructive possession — insufficiency of evidence

The State's evidence was insufficient to support a finding that defendant was in constructive possession of marijuana found growing in a field, and defendant's motion for nonsuit on charges of possession of marijuana for the purpose of distribution and manufacturing and growing marijuana should have been allowed, where the evidence tended to show only that the property on which the marijuana was growing had been leased by a codefendant; defendant had been a visitor at an abandoned house on the property leased by the codefendant; the marijuana field was 100 feet away from the house and obscured by a wooded area; the marijuana field was accessible by three different routes; and defendant was a passenger in the front seat of an automobile owned and operated by the codefendant when marijuana leaves were found in the left rear floorboard and in the trunk of the automobile.

ON petition by defendant for discretionary review of the decision of the Court of Appeals, reported in 28 N.C. App. 85, 220 S.E. 2d 160 (1975), affirming the judgments of *Friday, J.*, entered at the 23 July 1975 Session of CHEROKEE County Superior Court.

Defendant was tried on indictment charging him with possession of a controlled substance, to-wit, marijuana, for the purpose of distribution, and with manufacturing and growing marijuana.

Without objection, the cases were consolidated for trial with those of co-defendant Ingram, who was charged with the same offenses as this defendant as well as another charge of concealment of a weapon.

The evidence for the State tended to show that on 22 July 1973 at 11:15 p.m. a search warrant was secured by SBI Agent

Cope to search the premises of Dale Ingram and this defendant in a rural area near Murphy, North Carolina. The affidavit to obtain the search warrant described the location of the property as follows:

> "The marijuana is in a cornfield on the Bill Roberts home place on Buckhorn Creek. The property is owned by Tiny Roberts. . . . The house and marijuana field is about one-half mile up the driveway. . . . Buckhorn Creek runs through the property and near the house. There is an old house and barn below the house."

At midnight, or shortly thereafter, SBI Agent Kenneth Cope went to the Roberts' place and identified some marijuana growing in an one-acre tract there. He also identified some garden utensils, fertilizer, camping gear, items of personal property, and one bottle with the name "Minor" on it that were found in an unoccupied dwelling house at the Roberts' place known as the Moneymaker house. Later that day Cope secured warrants for the arrest of defendant herein and co-defendant Ingram.

Thereafter in the afternoon of the same day, defendants were stopped and arrested under the warrants previously secured about one-half of a mile from the Buckhorn Creek premises as they were turning from the public road. Defendant had been riding in a Volkswagen automobile owned and operated by co-defendant Ingram. The State's evidence is conflicting as to the search of this vehicle, but it appears to have been made sometime after the arrest. The officers did not have a search warrant for the vehicle. The search revealed a .22 caliber rifle on the back seat under some spools of thread and papers and a .22 caliber pistol in the glove compartment. These items belonged to co-defendant Ingram. On the left rear floorboard SBI Agent Cope said he found wilted marijuana leaves, and in the trunk he said he found a wilted marijuana leaf along with some grains of fertilizer.

It was stipulated by co-defendant Ingram that he secured consent from Mrs. Tinney Roberts for the use of the old Roberts' homeplace for the purpose of raising garden crops during 1973 and that some time before 23 July 1973 he paid her $25. Defendant Minor stipulated that he rode in the vehicle with co-defendant Ingram on the first occasion but remained in the automobile.

Defendants Minor and Ingram were from Tennessee. Defendant Minor had been seen in this general area of Cherokee County two or three times during the Spring of 1973. On one occasion, defendant Minor and Ingram said they were preparing a garden on the Roberts' place. Ingram employed someone in the Spring of 1973 to plow and break the land on the one-acre tract as well as on a quarter-acre tract which was adjacent to a house on the Roberts' place known as the Roberts' house. No controlled substance was found on the quarter-acre tract. The person that performed the ground breaking had no arrangements with defendant Minor and had never seen him.

SBI Agent Cope, who had made the search shortly after midnight, estimated that the one-acre field contained 800 or 900 pounds of marijuana. After the arrest of the two defendants, photographs were made of the vehicle, field, buildings and path. State's exhibits 2, 3 and 4 indicated a few stalks of corn close to the "tasselling stage" in the marijuana field.

The defendant's evidence tended to show the following:

The neighbor who plowed and broke the one-acre field for Ingram in which was found the marijuana told Ingram that the field was too rough to plow and that it was a bad spot for a garden. Ingram responded that he did not intend to use the spot himself but asked the neighbor to prepare the land as best he could. The neighbor indicated there were three ways to get to the field, only one of which was visible from the road.

There had been some discussion between Minor and Ingram about planting a garden. Ingram had lived in the area before and worked as a schoolteacher. A garden was planted in the one-quarter acre plot, but grass and weeds appear to have overtaken it. Both defendants denied planting in the field where the marijuana was discovered. Defendant Minor's evidence indicated that he came to the Moneymaker house (the one nearer the field where the marijuana was discovered) during the week of July 4th. Most of Minor's activities were related to camping and fishing. His sister, mother and nephew came with him in the latter part of May and again during the fourth of July period. During these periods the garden was planted. During the July 4th period Minor and family stayed in the Moneymaker house. In the house was found a little camping stove and a Coleman lantern that Minor's mother had brought. The bottle with the name "Minor" on it belonged to the mother of defend-

ant Minor and contained coal oil for the purpose of keeping chiggers off her legs. Minor had never been to the Moneymaker house before July 4th.

Each of the defendants was given an active sentence, but Ingram did not appeal.

Other pertinent facts will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General William F. O'Connell and Assistant Attorney General Robert R. Reilly for the State.

Ronald W. Howell for defendant Minor.

COPELAND, Justice.

Defendant makes a number of assignments of error, but we first consider the question of whether the trial court committed prejudicial error in denying defendant Minor's motion for nonsuit at the close of all the evidence.

"If there is any evidence tending to prove the fact of guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of guilt." 2 Strong's N.C. Index 2d, Criminal Law § 106 at 654. *See State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Roberts,* 270 N.C. 655, 155 S.E. 2d 303 (1967); *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967).

The State relied completely upon circumstantial evidence as to defendant Minor. In order to withstand the motion for nonsuit, there must be substantial evidence of all material elements of the offenses. It makes no difference whether the substantial evidence is circumstantial or direct or both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956).

Although the cases against Minor and Ingram were consolidated for trial, the evidence certainly is not identical as to both of them.

What does the evidence show as to the defendant, John Minor, when it is taken in the light most favorable to the State, resolving all contradictions in the State's evidence in its favor

and including all the evidence whether it is competent or incompetent? It shows the following:

On 23 July 1973, shortly after midnight, SBI Agent Cope went to the Bill Roberts' homeplace in Cherokee County with a search warrant. He discovered the dilapidated Roberts' house and barn and the so-called Moneymaker house about one-half mile from an unpaved road. There was an one-quarter acre garden plot plowed and planted near the Roberts' house. The vegetable garden apparently had been neglected or abandoned. Near the Moneymaker house the agent walked down a little path to a wooded area. State's Exhibit 7, a photograph, indicates a substantial wooded area obscures the marijuana field from the Moneymaker house. He then walked through the woods and across a branch. The distance from the house along the route traveled was approximately 100 feet. On the other side of the branch he found a field of the dimensions of 400 feet by 150 feet and somewhat circular in shape. In this field were a few stalks of corn growing dispersed among the marijuana plants. The photographs taken on 23 July 1973 indicated corn in the "tasselling stage" and marijuana plants, all approximately six feet in height.

The agent then went to the Moneymaker house, and his search revealed some camping gear, weed cutters, strings, hoes, shirts, and a bottle with the name "Minor" on it which contained kerosine or coal oil.

Later on the same day in the afternoon after securing warrants, the agent arrested defendant Minor outside a red Volkswagen owned by co-defendant Ingram. There was some evidence that a search of the vehicle was made and some wilted marijuana leaves were found on the left rear floorboard. These leaves could not have been seen from outside the vehicle.

There was some evidence that a search of the trunk of the vehicle revealed some grains of fertilizer and one marijuana leaf. The only evidence linking defendant Minor to any of the items in the Volkswagen was his presence in Ingram's vehicle before his arrest.

The stipulation tended to show that Ingram had made the arrangements for the use or lease of the premises. There was nothing in it that disclosed any "knowledge" of the lease by defendant Minor. The record is devoid of any evidence making Minor a lessee of any kind.

Defendant Ingram had the one-acre field plowed in which the marijuana was later discovered. It is true that the defendant Minor had been in the neighborhood two or three times with Ingram and they had discussed preparing a garden. A garden was found on the quarter-acre tract adjacent to the Roberts' house. No marijuana was found in that tract.

All the evidence pointed to Ingram as the lessee or possessor of the premises; the person who had the ground plowed; the owner and operator of the automobile in which some wilted marijuana leaves were found. Warrants had already been issued and served when the vehicle was searched. Obviously Minor is not charged with possession of any marijuana in the Volkswagen. The only possible link of Minor to the Volkswagen was his presence in the front-passenger seat prior to his arrest outside the vehicle. The only evidence linking him to the premises was a bottle in the Moneymaker house with the name "Minor" on it. His mother said it contained coal oil and belonged to her. No controlled substance was found in the Moneymaker house.

All the evidence of the State and defendant must be considered on the motion to nonsuit at the close of the case. There is nothing in the defendant's evidence to help the State's case. It simply explains Minor's presence at the scene where he was arrested.

The brief and argument of the State concedes that in order to hold Minor the State's case must rest on "constructive possession" by the defendant Minor of the field of marijuana.

Possession of narcotics may be either actual or constructive. An accused has possession of contraband materials within the meaning of the law when he has both the power and intent to control the drug or its use. Thus, when such materials are found on premises under the control of defendant, this fact gives rise to an inference of knowledge and possession which may be sufficient to take the case to the jury. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972). "Also, the State may overcome a motion . . . for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession. [Citations omitted.]" *State v. Harvey, supra* at 12-13, 187 S.E. 2d at 714. In *Harvey* the facts indicated that defendant was found alone in a room in his home

some three to four feet from the marijuana. Our Court has held that this evidence supported the reasonable inference that the marijuana was in defendant's possession.

Our Court in *Harvey* and in *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680 (1971) referred to *Hunt v. State,* 158 Tex. Crim. 618, 258 S.W. 2d 320 (1953). In that case defendant was convicted of unlawful possession of marijuana. The evidence against him indicated that he had been seen at a lumber pile between two buildings reaching under the end of the pile. Later two tobacco cans full of marijuana were found in this place. This was held sufficient for a conviction.

Our Court in *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972), held that evidence disclosing that defendant had been seen on numerous occasions in and around a pig shed where marijuana was found, this being some twenty yards from the defendant's residence, and that some marijuana seeds were found in defendant's bedroom, led to a reasonable inference that defendant exercised custody and control over the pig shed and the marijuana found therein.

In *State v. Allen, supra,* our Court held that it was sufficient to show "constructive possession" where the heroin was found in a house with the public utilities listed in defendant's name; an Army identification card and other papers bearing defendant's name were found in the same bedroom where the heroin was discovered; and a sixteen-year-old boy, having obtained heroin from the described house pursuant to defendant's instructions, sold it at defendant's direction.

In each of these cases our Court, speaking through Justice Branch, held there was sufficient evidence to go to the jury. Defendants were placed in either actual possession of the drugs or in such close juxtaposition to the drugs as to raise a reasonable inference that they controlled the contraband.

In our case the evidence does not come close to the fact situations of any of the cases discussed. About all our evidence shows is (1) that defendant Minor had been a visitor at an abandoned house leased or controlled by co-defendant Ingram; (2) that the marijuana field was 100 feet away from the house but obscured by a wooded area; (3) that the marijuana field was accessible by three different routes; (4) that on the date of Minor's arrest he was on the front seat of a Volkswagen

automobile owned and operated by Ingram, where some wilted marijuana leaves were found on the left rear floorboard and one marijuana leaf was found in the trunk.

The most the State has shown is that defendant had been in an area where he could have committed the crimes charged. Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do. The trial judge should have allowed the motion for judgment as of nonsuit at the close of defendant's evidence. Other material assignments of error were raised, but it is unnecessary to consider these because we have concluded the trial court was in error in not granting the motion for nonsuit. The decision of the Court of Appeals is

Reversed.

SAMUEL WHITE, MARY WHITE RAMSEY, GEORGE LYNCH AND LUCILLE LYNCH THOMPSON v. BILLY ROY ALEXANDER AND IVA WHITE

No. 74

(Filed 14 May 1976)

1. **Wills § 33— devise to life tenant — remainder upon death without heirs of body**

Where testatrix devised property to her son for life with the provision that "if he shall die without heirs of his body" the son's widow should receive a life estate and the remainder should go "to my heirs," the Rule in Shelley's Case, the doctrine of merger and G.S. 41-4 did not operate to give the son a fee simple, defeasible or absolute, and the son received only a life estate, since it is clear that the testatrix used the words "heirs of his body" to mean the son's children.

2. **Wills § 43— heirs of testator — determination at testator's death**

A class of persons described as testator's heirs who are given an estate in remainder are generally those persons who in fact and in law constitute the heirs of the testator at testator's death.

3. **Wills § 35— contingent remainder to testatrix's heirs — death without having child — time for determining heirs — effect of G.S. 41-4.**

Where the remainder to testatrix's heirs is contingent upon the death of the life tenant without having had a child, G.S. 41-4 does not require that testatrix's heirs be determined as those persons who would have fitted this description had testatrix died immediately after the life tenant.

4. Wills § 35— limitations on failure of issue — purpose of G.S. 41-4

The purpose of G.S. 41-4 is to save gifts over upon the contingency of someone's dying without issue even if the contingency occurs after the death of the testator or after some estate or period subsequent to his death.

5. Wills § 35— limitations on failure of issue — construction of G.S. 41-4

The words in G.S. 41-4 that a gift over "shall be . . . a limitation to take effect when such person dies not having such heir, or issue, or child . . . living at the time of his death, or born to him within ten lunar months thereafter" means simply that the interest will be sustained and will pass in possession when and if the contingency, *i.e.*, dying without issue, occurs even if this event takes place after the death of the testator or grantor or after some intervening estate or period following his death; these words do not mean that a determination of those persons who take the interest must necessarily wait until that event occurs.

6. Wills § 43— devise to son for life, remainder to heirs — exclusion of son as heir

Where testatrix devised property to her son for life with the provision that "if he shall die without heirs of his body," the son's widow should receive a life estate and the remainder should go "to my heirs," the testatrix intended the contingent remainder "to my heirs" to refer to all who at her death would be her legal heirs in the technical sense with the exception of her son, for whom and for whose family she had made other provisions.

ON *certiorari* to review the decision of the Court of Appeals, 24 N.C. App. 23, 209 S.E. 2d 876 (1974), which affirmed a judgment for defendants entered by *Smith, J.*, at the March 25, 1974 Session of BUNCOMBE Superior Court. This case was docketed and argued as No. 102 at the Spring Term 1975.

This action was brought by plaintiffs under the Uniform Declaratory Judgment Act to have the will of Harriet M. Stokes construed. The pertinent provisions of the will are:

> "I . . . devise . . . to my son, Samuel Stokes . . . land owned by me consisting of thirty-six and three-fourths (36-3/4) acres . . . to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body, then it is my will and desire, and I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs. The said land so devised to my said son and to his said wife in case my said son shall have no child or

children shall be chargeable with the reasonable expense for the support of my husband, Julius Stokes . . . . "

These facts are not in dispute: Harriet Stokes died on March 25, 1925 survived by her husband, Julius, who died on June 3, 1939; her son, Sam; and two daughters, Hattie and Cora. Sam Stokes died intestate March 24, 1970, without children being born to or adopted by him, survived by his widow, Emma, who died intestate August 22, 1971, survived by her nephew. Hattie Stokes White died testate December 15, 1961, devising her estate to her three children. Cora Stokes Lynch died intestate May 26, 1971, survived by two children.

The plaintiffs Sam White and Mary White Ramsey are the surviving children of testatrix's daughter Hattie. The plaintiffs George Lynch and Lucille Lynch Thompson are the children of testatrix's daughter Cora. The defendant Iva White is the widow of Hattie's son, Everette, who died intestate in October, 1964, without children being born to or adopted by him. The defendant Billy Roy Alexander is the nephew and only heir of Sam Stokes' widow Emma.

The plaintiffs contend that they are each entitled to a one-fourth undivided interest in the land devised by the testatrix. Defendants, on the other hand, contend that undivided interests in this land ought to be allotted as follows: one-third to Billy Roy Alexander, one-ninth each to Iva White, Mary White Ramsey, and Sam White; and one-sixth each to George Lynch and Lucille Lynch Thompson. The trial judge adopted the defendants' view of the matter and the Court of Appeals affirmed.

Adams, Hendon & Carson, P.A., by James Gary Rowe for plaintiff appellants.

Paul Young and Morris, Golding, Blue and Phillips, by James F. Blue III, for defendant appellee Billy Roy Alexander.

EXUM, Justice.

The Court of Appeals erred insofar as it decided that the testatrix's son, Sam, was to share in the estate devised ultimately "to my heirs," a class which it properly held under this will should be fixed and identified at testatrix's death.

In construing this will we are well reminded that:

"The epigram of Sir William Jones over 250 years ago 'no will has a brother' has been often quoted by the courts.

(Citations omitted.) Two wills rarely use exactly the same language. Every will is so much a thing of itself, and generally so unlike other wills, that it must be construed by itself as containing its own law, and upon considerations pertaining to its own peculiar terms." *Gatling v. Gatling,* 239 N.C. 215, 221, 79 S.E. 2d 466, 471 (1954).

Our purpose here is to determine the testatrix's intent "from a consideration of the will itself and the circumstances confronting [her]. To ascertain such intent, 'we must consider the instrument as a whole and give effect to such intent unless it is contrary to some rule of law or at variance with public policy.' *Trust Co. v. Taliaferro,* 246 N.C. 121, 127, 97 S.E. 2d 776, 780 [1957]." *Trust Co. v. Bass,* 265 N.C. 218, 143 S.E. 2d 689 (1965).

[1, 6] We hold that this will, properly construed, created estates in the subject property as follows: first, a life estate in testatrix's son, Sam. Testatrix clearly used the words "heirs of his [Sam's] body" to mean Sam's children. She later provided, "The said land so devised to my said son and to his said wife in case my said son shall have no *child or children* . . . . " (Emphasis added.) Without question "heirs of his [Sam's] body" meant, in testatrix's mind, Sam's children, if any. The Rule in Shelley's Case, the doctrine of merger, and General Statute 41-1 do not operate to give Sam a fee simple, defeasible or absolute. *McRorie v. Creswell,* 273 N.C. 615, 618, 160 S.E. 2d 681, 683 (1968). Next Sam's widow, Emma, got a contingent life estate. Finally we hold the language "and at her [Sam's widow's] death or remarriage, the same shall go to my heirs" created a remainder in the heirs of the testatrix, except Sam, contingent upon Sam's death without having had a child. This contingent remainder, assignable and transmissible, *Jernigan v. Lee,* 279 N.C. 341, 182 S.E. 2d 351 (1971); *Seawell v. Cheshire,* 241 N.C. 629, 86 S.E. 2d 256 (1955), passed in interest at testatrix's death to her two daughters and only heirs other than Sam in equal shares. At the death of each daughter that daughter's respective interest passed to her children. Thus Sam White, Mary White Ramsey, and Everette's widow, Iva, are each entitled to a one-sixth undivided interest; and George Lynch and Lucille Lynch Thompson are each entitled to a one-fourth undivided interest in the property.

[2] The general, long established rule of testamentary construction is that a class of persons described as testator's heirs

who are given an estate in remainder are those persons who in fact and in law constitute the heirs of the testator at testator's death. The class is fixed and determined at that time. *Whitty v. Whitty,* 184 N.C. 375, 114 S.E. 482 (1922). "It is undoubtedly the general rule that when a testator, after a prior limitation of his property by will, makes in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined on as of the time of his death. This is not only the primary meaning of the word heirs, but the position is said to be favored by the courts because in its tendency it hastens the time when the ulterior limitation takes on a transmissible quality." *Jenkins v. Lambeth,* 172 N.C. 466, 468, 90 S.E. 513, 514 (1916).

This rule of construction is to be followed "in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances." *Whitty v. Whitty, supra* at 378, 114 S.E. at 484. A different result follows where "the testator, in making an ulterior disposition of property after a particular life estate, uses such expressions as 'to such of my sons as may be living at their mother's death,' or 'surviving at her death,' or 'to the representatives of such as may have died before her death,' showing clearly that not only the enjoyment of the remainder, but also the right to take it was intended to be postponed until after the expiration of the preceding life estate." *Witty v. Witty, supra* at 381, 114 S.E. at 486. For applications of a survivorship condition see *Kale v. Forrest,* 278 N.C. 1, 178 S.E. 2d 622 (1971) ("my surviving heirs") and *Trust Co. v. Waddell,* 234 N.C. 34, 65 S.E. 2d 317 (1951) ("bodily heirs . . . then surviving.")

Here, however, as in *Witty,* we have no such expression in the instrument. The remainder after the life estates is simply to "go to my heirs." This means "a division among those who were the heirs of the [testatrix] at [her] death, and who took in right at that time . . . . " *Witty v. Witty, supra* at 381-82, 114 S.E. at 486.

[3] That the remainder to the testatrix's heirs is contingent upon Sam's death without having had a child does not, as plaintiffs contend, relying on General Statute 41-4, require that testatrix's heirs be determined as those persons who would have

fitted this description had testatrix died immediately after Sam. The statute, enacted in 1827, provides:

> "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, *shall be held and interpreted a limitation to take effect when such person dies not having* such heir, or issue, or *child,* or offspring, or descendant, or other relative (as the case may be) *living at the time of his death, or born to him within ten lunar months thereafter,* unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it . . . . " (Emphases added.)

At common law and before the enactment of this statute gifts over upon the condition of someone's dying without issue or without heirs were void for remoteness. *Weeks v. Weeks,* 40 N.C. 111 (1847). It was thought that the condition of the gift over meant the failure of issue at some indefinite time, whenever it might happen. *Brown v. Brown,* 25 N.C. 134 (1842). (This rule was said by Taylor, C.J., in *Davidson v. Davidson,* 8 N.C. 163 (1820), to be "highly technical and refined" but to have been derived from the English statute *de donis* and firmly fixed in the law of property.) In order to save such gifts and comply, insofar as possible, with the obvious intent of the testator, our Court, before the enactment of General Statue 41-4, construed the contingency to mean dying during the life of the testator or some subsequent period provided for in the will such as a life estate, some period prescribed for division, arrival at full age, or some similar period. If death without issue or heirs occurred during either of these periods, the gift over was sustained; otherwise it was void. *Patterson v. McCormick,* 177 N.C. 448, 99 S.E. 401 (1919). For an early application of this rule of construction see *Hilliard v. Kearney,* 45 N.C. 221 (1853) construing a will written in 1775.

[4, 5] The purpose of the statute was and is to save gifts over upon the contingency of someone's dying without issue even if the contingency occurs after the death of the testator or after some estate or period subsequent to his death. The words in the statute that the gift over "shall be . . . a limitation to take effect when such person dies not having such heir or issue, or

child . . . living at the time of his death, or born to him within ten lunar months thereafter" mean simply that the interest will be sustained and will pass in possession when and if the contingency, i.e., dying without issue, occurs, even if this event takes place after the death of the testator or grantor or after some intervening estate or period following his death. *Patterson v. McCormick, supra* at 452, 99 S.E. at 402; *Sain v. Baker,* 128 N.C. 256, 38 S.E. 858 (1901). These words do not mean that a determination of those persons who take the interest must necessarily wait until the event occurs. At what point in time those persons are determined remains a question of the testator's intent.

We are advertent to language in some of our cases that because of G.S. 41-4: "To determine the effectiveness of the limitation over the roll must be called as of the death of the first taker," *Turpin v. Jarrett,* 226 N.C. 135, 136, 37 S.E. 2d 124, 126 (1946), and "it cannot be determined who will take under the limitation until the death of [the first taker] . . . . " *Rees v. Williams,* 164 N.C. 128, 132, 80 S.E. 247, 249 (1913). In neither *Turpin* nor numerous cases cited therein to support the quoted statement, including *Rees,* was the question who among a class of ultimate takers had an interest or when the members of such a class should be determined. In both *Turpin* and *Rees* the sense of the expressions quoted was that until the death of the first taker with or without issue it could not be determined which among several possible classes of ultimate takers, rather than who among the same class, would have an interest. To the same effect see *Ziegler v. Love,* 185 N.C. 40, 115 S.E. 887 (1923). For clear holdings that membership of a class of remaindermen described simply as testator's heirs, or the like, which takes upon the contingency of death without issue, is determined at testator's death see *Sanderlin v. Deford,* 47 N.C. 74 (1854); *Weeks v. Weeks, supra; Jones v. Oliver,* 38 N.C. 369 (1844).

[6] Testatrix did not, however, intend for her son Sam to be included among the class of remaindermen she described as "my heirs." She clearly limits his interest to a life estate. She intended his child or children, had there been any, to have had the fee by clear implication. *McRorie v. Creswell, supra; Finch v. Honeycutt,* 246 N.C. 91, 97 S.E. 2d 478 (1957). Sam's child, had one been born, would have taken a vested remainder in fee subject to open to let in other children as they might have

been born. *Blanchard v. Ward,* 244 N.C. 142, 92 S.E. 2d 776 (1956). Only if Sam died without having had a child would Sam's widow get a life estate, and "my heirs" take the remainder. When testatrix envisioned that event, as she must have done, her thoughts naturally would have turned to her two daughters, her only other heirs expectant, and their progeny. They, consequently, are the persons she intended to benefit by the ultimate estate in remainder. Sam who, when and if the remainder took effect in possession, would be dead without having had a child and whose widow would have had a life estate, was clearly not in testatrix's contemplation when she used the expression "to my heirs."

This result finds support in *Trust Co. v. Bass, supra,* and *Van Winkle v. Berger,* 228 N.C. 473, 46 S.E. 2d 305 (1948). *Trust Co.* while multifaceted and different in many respects from this rather simple case factually, dealt with a testamentary trust from which testator's only son was to receive the income for life and such of the principal as the trustee in its discretion saw fit to invade for his benefit. At son's death the principal, if any, was to be paid over to testator's "next of kin." Similar provisions were made for a supposed "granddaughter" (actually a foster child of testator's son) except when she reached 25 years of age she was to take the corpus of her trust which she did. This Court held first, that in accordance with a rule of construction "grown reverend by age" the words "next of kin" meant testator's nearest of kin and not his heirs. Testator died survived by his son, his only authentic lineal descendant, the foster granddaughter and collateral relatives. The Court held next that testator, having made detailed and adequate provisions for both his son and the foster granddaughter, did not intend either of them to be included in the class, "my next of kin."

It is true that in *Trust Co.* the Court also held in determining which of testator's collateral relatives would take the corpus, that the class, "my next of kin," should be determined as if testator had died immediately after his son. This construction was based primarily on the circumstance that his son would have been the *sole* member of the class so described had it been determined at testator's death. The Court said:

> "In form and phraseology the devise under consideration here is indistinguishable from that in *Witty v. Witty, supra,* and, but for the fact that the life tenant here was the sole

> representative of the class, testator's next of kin, this case would in fact be indistinguishable from *Witty v. Witty, supra.* This fact, however, makes the difference . . . . " *Trust Co. v. Bass, supra* at 242, 143 S.E. 2d at 706.

For a similar result see *Grantham v. Jinnette,* 177 N.C. 229, 98 S.E. 724 (1919). In the case now before us there are others besides Sam who at testatrix's death fit the description "my heirs." It is indeed, as we have said, these very others and their progeny whom, it seems clear, testatrix had in mind when she used the words, "my heirs."

In *Van Winkle v. Berger, supra,* a testamentary trust was established from which testator's three daughters were to receive income for life. Each daughter was also allotted a share of the testator's residuary estate. The testamentary trust also provided that if any daughter should die leaving no issue her one-third share of the principal should go into the residuary estate to be distributed according to provisions dealing with it. One of testator's daughters, Ella, died without issue but testate and bequeathed all of her property to one Diehle. The Court held that testator did not intend for Ella to share in one-third of the corpus of the testamentary trust from which she derived a life income and which passed to the residuary estate upon Ella's death without issue; consequently Diehle was not entitled to it. The Court said, "That Ella . . . could take an interest in the will virtually created by the contingency of her own death, involves a formidable legal paradox which appellants seem to circle but not surmount." 228 N.C. at 478, 46 S.E. 2d at 308.

Other jurisdictions have likewise excluded the holder of a preceding estate who was one of testator's heirs from a class described as "heirs" or the like of the testator to whom a remainder or executory interest was given. L. Simes and A. Smith, The Law of Future Interests § 735 (2d ed. 1956); Annot. 30 A.L.R. 2d 393, 436-441 (1953).

The Court of Appeals relied on *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431 (1921), for the proposition that heirs means the testatrix's legal heirs at her death including her son Sam in which case both defendants would take an interest. Plaintiffs rely on *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863 (1914), distinguished by the Court of Appeals, for the proposition that testatrix's heirs ought to be determined as if she died immediately after her son Sam in which case both defendants

would be excluded and testatrix's four grandchildren would each take a one-fourth undivided interest. This is the construction some courts have utilized, but which we reject here, to avoid including the holder of a precedent estate among a class of remaindermen or executory devisees described as testator's heirs, or the like, when it was apparently the testator's intent not to include him and when he would have been included had the class been determined in its true legal sense as being those who take, as in intestacy, upon testator's death. Annots., 30 A.L.R. 2d 393, *supra;* 169 A.L.R. 207 (1947); 127 A.L.R. 602 (1940); 49 A.L.R. 174 (1927); L. Simes and A. Smith, The Law of Future Interests § 735, n. 19 (2d ed. 1956).

Both *Baugham* and *Burden* differ in material ways from this case. In *Baugham,* in the words of the Court, testator devised lands "to all his children, with provision that if one or more die without issue the interests of such children so dying shall vest in the survivors, and if all the children die without issue *then to the heirs of the testator.*" At his death testator was survived by his widow, three daughters and two sons, all of whom joined in a partition proceeding. One of the sons, Seth, acquired a lot in this proceeding which he apparently thereafter wanted to sell or mortgage. The question was whether Seth owned an indefeasible or defeasible fee. The Court applied the general rule that "the death of testator is the time at which members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives . . . . " and held that since testator's heirs had all joined in the partition proceeding by which Seth acquired his lot, he held an indefeasible fee. In *Baugham,* all testator's children were given by will the same interests. No question arose, nor could it have, regarding whether one or less than all the children should be excluded from the class to which the remainder was given. Either all of them should have been excluded or none. The Court decided to exclude none.

In *Burden,* on the other hand, there was a devise to a son, John, in fee simple "provided he has a child or children; but if he has no child, then I give him the said land during his life, and to his widow if he leaves one surviving, during her widowhood, and then the said land shall go in equal portions to my heirs at law . . . . " Testator died survived by six daughters, a granddaughter (child of a daughter who predeceased him) and John. These daughters, their spouses, and the granddaughter

conveyed their interests to John. John, a widower with no child ever having been born to him, contracted to convey the lands devised. This Court held that since those persons who were to take the executory devise upon John's death without having had a child could not be determined until John's death, John held only a defeasible fee. *Burden,* as the Court of Appeals noted, is distinguishable in that John initially obtained a defeasible fee rather than a life estate. It is pointed out in L. Simes and A. Smith, The Law of Future Interests § 735 (2d ed. 1956) that:

> "If the preceding estate is for life, and if the holder of that estate is not the sole heir, it is still possible to apply the usual rule of determining heirs at the testator's death and yet imply an exception to the class of heirs [as to the life tenant] . . . .
>
> "When the preceding estate is a defeasible fee, and the gift to the heirs is in the form of an executory interest, it is much easier to decide that the holder of the preceding estate is not to participate in the executory interest . . . . Accordingly, most courts are willing here [when the preceding holder is the sole heir] to determine the heirs as of the expiration of the prior interest. The same result probably follows even when [the preceding holder] is not the sole heir at testator's death, but is merely one of the class."

Even so we question as did the Court in *Baugham* the soundness of the result in *Burden.* A different result upon like facts might follow today.

[6] We hold, then, that when testatrix devised the contingent remainder "to my heirs" she intended to refer to all who at her death would be her legal heirs in the technical sense with the exception of her son, Sam, for whom and for whose family she had made other provisions. Thus when she died the contingent remainder passed in equal shares to her two daughters, Hattie and Cora. At Hattie White's death her one-half interest was devised to her three children, Sam, Mary and Everette. Everette's share at his death was inherited by his widow, Iva White. Thus the plaintiffs, Samuel White and Mary White Ramsey, and the defendant Iva White are each entitled to a one-sixth undivided interest in the land. Cora Lynch's one-half interest was inherited at her death by her two children, George Lynch and Lucille Lynch Thompson, the other plaintiffs herein, who are each

entitled to a one-fourth undivided interest in the land. The other defendant, Billy Roy Alexander, the only heir of Sam Stokes' widow, Emma, is not entitled to any interest in the land.

The Court of Appeals erred in holding that Billy Roy Alexander was entitled to an interest and in determining the quantities of undivided interests to which the other parties were entitled. The case is, therefore, remanded to the Court of Appeals to the end that it be remanded to the Superior Court for entry of judgment in conformity with our opinion.

After the preparation of this opinion and before it was filed the plaintiffs Ramsey, Lynch, and Thompson moved to substitute one Freda White for Samuel White, one of the plaintiffs, suggesting to the Court in their motion the death of Samuel White on August 23, 1975, a resident of Medina County, Ohio. The motion further alleged that Freda White is the surviving widow of Samuel White and that by will, a certified copy of which was attached to the motion, filed in the Probate Division of the Court of Common Pleas of Medina County, Ohio, Samuel White named Freda White his executrix and devised to her all of his real estate thereby making her his personal representative and successor in interest of his real estate. By order of the Court on May 3, 1976, Freda White was permitted to join in this action as a party-plaintiff for the purpose of asserting in the Superior Court such interest as she may have. Upon remand to it the Superior Court shall make due inquiry into the claim of Freda White. If it finds that she is in fact and in law the successor in interest of Samuel White it shall in its judgment allot to her all right, title and interest in the real property in question to which by virtue of this opinion Samuel White would otherwise have been entitled.

Error and remanded.

MARION HENDERSON v. LUCILLE MATTHEWS

BERTHLAND ROGERS v. MARION HENDERSON AND LUCILLE MATTHEWS

MARGIE RUTH NEWKIRK v. MARION HENDERSON AND LUCILLE MATTHEWS

KATIE MAE MATTHEWS LANIER v. MARION HENDERSON AND LUCILLE MATTHEWS

No. 66

(Filed 14 May 1976)

1. **Appeal and Error § 1— appellate jurisdiction — rights of party who failed to appeal**

Appellate courts generally do not vindicate the rights of parties aggrieved at trial who could appeal but choose not to do so.

2. **Appeal and Error § 1— appellate jurisdiction — rights of party who failed to appeal**

Parties aggrieved at trial who could but choose not to appeal are bound by the actions of the trial court even if these actions are later determined to be erroneous upon the appeal of another party.

3. **Appeal and Error § 1; Judgments § 36— failure to appeal — binding effect of judgment — new trial upon appeal by another**

In an action arising out of a two-car collision, plaintiff passengers, by failing to appeal, are bound by judgments against them and in favor of defendant driver of one car involved in the collision, and the Court of Appeals was without authority to order new trials of the passengers' claims against such driver upon an appeal taken only by the driver of the other car.

ON *certiorari* to review a decision of the Court of Appeals reported at 26 N.C. App. 280, 215 S.E. 2d 808 (1975). This case was docketed and argued as No. 69 at the Fall Term 1975.

These four civil actions, consolidated for trial, arise out of an automobile collision occurring on December 23, 1970, involving a 1963 Ford automobile owned and operated by Marion Henderson and a 1967 Rambler automobile owned and operated by Lucille Matthews. The plaintiffs, Rogers, Newkirk, and Lanier were all passengers in the Matthews vehicle.

In Case No. 73-CVD-494 Henderson sued Matthews to recover for personal injuries and property damage suffered in the collision on the ground of Matthews' negligence. Answering, Matthews denied her negligence and pleaded contributory negligence of Henderson. She did not seek any affirmative relief against Henderson.

In Cases Nos. 73-CVD-1309, 73-CVD-1310, and 73-CVD-1311 Rogers, Newkirk, and Lanier, respectively, sued Henderson and Matthews seeking recovery for personal injuries suffered in the collision. In each of these passenger suits the negligence of Henderson was specified and alleged to be the sole proximate cause of the collision. Each plaintiff also alleged "in the alternative . . . if it should be determined under any interpretation of the law or facts that the defendant, LUCILLE MATTHEWS, was also negligent and that her negligence joined and concurred with the negligence of the defendant, MARION HENDERSON, and was one of the proximate causes of said collision" that he, or she, then have recovery against the defendants "jointly or severally." In none of the passenger cases was the negligence of Matthews specified. In each of the passenger cases Henderson, answering, denied his negligence and, alternately, asserted a cross-claim for contribution against Matthews. Matthews, in each passenger suit, filed general denials to both the claim and cross-claim but sought no affirmative relief.

Four sets of issues, one set in each case, were submitted to the jury. In the suit between the vehicle operators the jury found that Henderson was injured and damaged by the negligence of Matthews, that Henderson was not contributorily negligent, and awarded damages for Henderson's personal injuries and property damage. In each of the passenger suits the jury found that plaintiff was injured by the negligence of Matthews, that defendant Henderson was not negligent and awarded damages for plaintiff's personal injuries. Judgments against Matthews were entered in each case. Only Matthews appealed to the Court of Appeals.

A summary of the evidence adduced at trial is set out in the Court of Appeals' opinion.

Because of error in the instructions to the jury, "among others," the Court of Appeals vacated all judgments, set aside all verdicts, and ordered new trials on all claims.

Crossley & Johnson, by Robert White Johnson, Attorneys for Petitioner Henderson.

Johnson & Johnson, by Rivers D. Johnson, Jr., Attorneys for Respondent Matthews.

E. C. Thompson III, Attorney for Respondents, Rogers, Newkirk and Lanier.

EXUM, Justice.

We allowed Henderson's petition for further review to consider whether the Court of Appeals erred in ordering new trials of the passengers' claims against defendant Henderson upon an appeal taken only by defendant Matthews. In our opinion it did.

[1, 2] Appellate courts do not generally vindicate the rights of parties aggrieved at trial who could appeal but choose not to do so. *Quenby Corp. v. Connor Co.*, 272 N.C. 208, 158 S.E. 2d 18 (1967); *cf. Van Dyke v. Insurance Co.*, 173 N.C. 700, 91 S.E. 600 (1917); *but see Edwards v. Butler*, 244 N.C. 205, 92 S.E. 2d 922 (1956) (exercise of supervisory powers of Supreme Court which benefited non-appealing party in an *in rem* action). The Court in *Quenby* said, 272 N.C. at 211, 158 S.E. 2d at 20, "Even though it would be desirable to make a uniform ruling as to all five defendants, who occupy similar legal positions, we can rule only as to those who properly present their appeals." Parties aggrieved at trial who could but choose not to appeal are bound by the actions of the trial court even if these actions are later determined to be erroneous upon the appeal of another party. *Mayo v. Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972); *Conger v. Insurance Co.*, 266 N.C. 496, 146 S.E. 2d 462 (1966); *cf. Gower v. Insurance Co.*, 281 N.C. 577, 189 S.E. 2d 165 (1972); *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366 (1942).

Both *Mayo* and *Conger* were actions against two defendants in the alternative. Theories of liability against defendants, respectively, in each case were mutually exclusive. In each case the trial court found in plaintiff's favor against only one of the defendants. Only the losing defendant in each case appealed. In neither case did the plaintiff appeal.

In *Mayo* the Court of Appeals awarded the appealing defendant a new trial saying, "Plaintiff did not appeal. The judg-

ment is therefore a final adjudication as between plaintiff and [the successful defendant below]." 15 N.C. App. at 311, 190 S.E. 2d at 399. Upon further review of this case, this Court held that plaintiff could not, as a matter of law, recover against the appealing defendant and that rather than order a new trial, the Court of Appeals should have reversed the judgment against this defendant. This Court said, further, "In this respect only the judgment of the Court of Appeals is in error." 282 N.C. at 356, 192 S.E. 2d at 834.

In *Conger* this Court reversed a judgment against the appealing defendant saying, "The judgment does not disclose the ground on which the [trial] court adjudged that plaintiff 'have and recover nothing' of [the successful defendant below]. Plaintiff did not appeal. Hence, the judgment is a final adjudication as between plaintiff and [the successful defendant below]." 266 N.C. at 499, 146 S.E. 2d at 464-465.

The upshot of the decisions on appeal in both *Mayo* and *Conger* was that plaintiff in each case by failing to appeal an adverse judgment as to one of the defendants, lost all right to proceed further against that defendant when a favorable judgment against the appealing defendant was reversed. This was true in *Mayo* even though it was determined finally on appeal in this Court that plaintiff should have been awarded a recovery against the successful defendant at trial.

[3] The passenger plaintiffs, by failing to appeal, are bound by the judgments against them and in favor of defendant Henderson although there might have been error in the trial leading to these judgments. While Matthews may have desired that the passenger plaintiffs recover against Henderson, Matthews was not aggrieved by their failure to do so but only by their recovery against her. Under the rationale in *Mayo* and *Conger* Matthews' appeal can challenge only the recovery against her. Matthews' appeal "did not bring before the Court of Appeals, and so does not present to us, so much of the judgment of the superior court as adjudicated the right of the [passenger] plaintiff[s] to recover from [Henderson]." *Mayo v. Casualty Co., supra* at 356, 192 S.E. 2d at 834.

The Court of Appeals was without authority on Matthews' appeal to order new trials of the passengers' claims against Henderson. The Court of Appeals could at most have awarded,

upon the errors assigned, new trials in Henderson's and the passengers' claims against Matthews.

The decision of the Court of Appeals is therefore vacated and this matter remanded to it for disposition in accordance with this opinion.

Vacated and remanded.

LAWRENCE E. KACZALA v. GEORGE GRADY RICHARDSON v. CITY OF WILMINGTON

No. 62

(Filed 14 May 1976)

Appeal and Error § 1; Judgments § 36— failure of defendant to appeal — effect of other parties' appeals

Where defendant did not appeal from an adverse determination of his claim for property damage and personal injury in the first trial, appeals by plaintiff and the third party defendant from an adverse determination of their claims did not give the Court of Appeals jurisdiction to consider or grant a new trial on defendant's claim.

ON appeal from a decision of the North Carolina Court of Appeals reported at 26 N.C. App. 268, 215 S.E. 2d 852 (1975). The opinion is by *Vaughn, J.*, concurred in by *Parker, J.* The dissent of *Britt, J.*, gives rise to the appeal. This case was docketed and argued as Case No. 48 at the Fall Term 1975.

Plaintiff, operator of a fire truck belonging to the City of Wilmington, brought suit to recover for his personal injuries allegedly incurred in a collision between the truck and an automobile being operated by defendant Richardson on the ground of Richardson's negligence. Richardson, answering, denied negligence, pleaded contributory negligence, and asserted by way of counterclaim and third-party complaint a claim for recovery of his property damage and personal injuries against the City and Kaczala. The City, answering, cross-claimed against Richardson for damage to its truck.

When the matter came on for trial before Wells, J., on June 12, 1972, the jury answered issues as to Richardson's negligence and Kaczala's contributory negligence affirmatively.

From a judgment denying recovery to any party, only Kaczala and the City appealed. The Court of Appeals in an opinion by Britt, J., awarded the appellants a new trial for errors committed.

At a second trial before Tillery, J., Kaczala and the City moved that the trial be limited to Kaczala's and the City's claims against Richardson inasmuch as Richardson had not appealed from the judgment adverse to him at the first trial. Judge Tillery reserved ruling on the motion and the trial proceeded resulting in a jury verdict in Richardson's favor against Kaczala and the City. The jury awarded Richardson damages for personal injury and damage to his automobile. Judge Tillery refused, however, to enter judgment as tendered by Richardson in accordance with the verdict but instead entered a judgment denying all parties a recovery.

Defendant Richardson appealed, assigning as error Judge Tillery's judgment as entered and his refusal to enter judgment on the verdict. The Court of Appeals reversed and remanded the case for entry of judgment in conformity with the verdict. Kaczala and the City appeal from this decision.

Smith & Spivey, by Vaiden P. Kendrick, Attorneys for Appellant Lawrence E. Kaczala.

Yow & Yow, by Cicero P. Yow, Attorneys for Appellant City of Wilmington.

Prickett & Scott, by Carlton S. Prickett, Jr., and Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, Attorneys for Appellee George Grady Richardson.

EXUM, Justice.

The Court of Appeals' majority saw the issue before it as whether on the first appeal it awarded "a partial new trial." Realizing that it could "in a proper case," direct a partial new trial it held that since the issues to be retried were not specifically and expressly designated in its first opinion, a "partial new trial" was not ordered. The majority then concluded that it was proper for Richardson's counterclaim and cross-claim to be retried and that judgment should have been entered on the verdict.

Because, we believe, the Court of Appeals' majority erroneously identified the issue before it, it reached an erroneous

conclusion. The issue, as indicated by Judge Britt in his dissent, was not whether fewer than all issues on any given claim ought to be retried, but whether Richardson's claim, in its entirety, against the plaintiff and third-party defendant ought to be retried. When the question is thus put, it is clear that the answer is "No."

Richardson did not appeal from an adverse determination of his claim in the first trial. He was, consequently, bound by this determination. Kaczala's and the City's appeals from an adverse determination at the first trial of their claims did not give the Court of Appeals jurisdiction to consider or grant a new trial on Richardson's claim. *Henderson v. Matthews,* 290 N.C. 87, 224 S.E. 2d 612 (1976) and cases therein cited.

That Richardson's claim was barred in the retrial did not preclude him from retrying all of the issues in the claims asserted against him, including the issue of the contributory negligence of Kaczala.

Judge Tillery, consequently, was correct in refusing to enter a judgment in favor of Richardson and in entering a judgment denying recovery to all parties. The Court of Appeals erred in reversing his judgment. The decision of the Court of Appeals is, therefore,

Reversed.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ASSOCIATES, INC. v. MYERLY and EQUIPMENT CO. v. MYERLY

No. 149 PC.

Case below: 29 N.C. App. 85.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976. Appeal dismissed ex mero motu for lack of substantial constitutional question.

BANK v. POCOCK

No. 139 PC.

Case below: 29 N.C. App. 52.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

FREEWOOD ASSOCIATES v. BOARD OF ADJUSTMENT

No. 120 PC.

Case below: 28 N.C. App. 717.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 June 1976. Defendant's motion to dismiss appeal for lack of substantial constitutional question allowed 1 June 1976.

HOWARD v. HAMILTON and HOWARD v. FAIRLEY

No. 105 PC.

Case below: 28 N.C. App. 670.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

NASCO EQUIPMENT CO. v. MASON

No. 133 PC.

Case below: 29 N.C. App. 185.

Petition for discretionary review under G.S. 7A-31 allowed 1 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

OVERTON v. HENDERSON

No. 131 PC.

Case below: 28 N.C. App. 699.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976. Appeal dismissed ex mero motu for lack of substantial constitutional question.

OWENS v. OWENS

No. 128 PC.

Case below: 28 N.C. App. 713.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

STATE v. BAUGUESS

No. 147 PC.

Case below: 29 N.C. App. 185.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

STATE v. HENSLEY

No. 125 PC.

Case below: 29 N.C. App. 8.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

STATE v. McCASKILL

No. 17.

Case below: 28 N.C. App. 730.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. MARTIN

No. 130 PC.

Case below: 29 N.C. App. 17.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

STATE v. MATTHEWS

No. 98.

Case below: 28 N.C. App. 592.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 June 1976.

STATE v. OLDFIELD

No. 148 PC.

Case below: 29 N.C. App. 131.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

STATE v. SMITH

No. 21.

Case below: 28 N.C. App. 729.

Motion of Attorney General to dismiss appeal under Rules 14A, 14D(1), 14D(2), 17A and 25 allowed 1 June 1976.

STATE v. UNDERWOOD

No. 124 PC.

Case below: 28 N.C. App. 729.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. VANDYKE

No. 115 PC.

Case below: 28 N.C. App. 619.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 June 1976.

STATE v. WEST

No. 132 PC.

Case below: 28 N.C. App. 689.

Petition for discretionary review under G.S. 7A-31 denied 1 June 1976.

VERNON v. CRIST

No. 106 PC.

Case below: 28 N.C. App. 631.

Petition for discretionary review under G.S. 7A-31 allowed 1 June 1976.

WHETSELL v. JERNIGAN

No. 143 PC.

Case below: 29 N.C. App. 136.

Petition for discretionary review under G.S. 7A-31 allowed 1 June 1976.

SHIRLEY T. TIDWELL v. DAVID BOOKER

No. 37

(Filed 17 June 1976)

1. **Bastards § 1; Constitutional Law § 32— wilful failure to support illegitimate child — right to counsel**

The judgment in a 1963 criminal action against defendant for failure to support his illegitimate child is deemed valid since defendant did not appeal from that judgment; even if defendant was an indigent in 1963 and counsel was not appointed to represent him, the judgment is still valid since the offense of which defendant was convicted is of such a nature that appointment of counsel for, or intelligent waiver thereof by, an indigent defendant is not required by the Sixth and Fourteenth Amendments to the U. S. Constitution.

2. **Bastards § 8; Judgments § 37; Criminal Law § 26— wilful failure to support illegitimate child — subsequent prosecution — no double jeopardy — finding of paternity — res judicata in subsequent prosecution**

The criminal offense of wilful nonsupport of an illegitimate child by a parent of the child may be repeated and, if it is, prosecution for the subsequent offense is not barred by the prosecution for the former offense on the theory of double jeopardy; however, upon such subsequent prosecution of the alleged father, the question of paternity, necessarily determined against him in the former criminal action, need not be re-litigated, that question being *res judicata.*

3. **Evidence § 22— conviction in criminal case — subsequent action for damages — evidence of conviction inadmissible**

It is the general rule in this jurisdiction that, in a civil action for damages, evidence of the defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the alleged liability in the civil action is not admissible, the defendant having entered a plea of "not guilty" in the criminal action.

4. **Bastards § 1— wilful failure to support illegitimate child — paternity issue incidental**

The question of paternity is incidental to the prosecution for the crime of nonsupport, but it is incidental only in the sense that proof of paternity is not proof of wilful nonsupport of the child; however, an affirmative answer to the question of paternity is an indispensable prerequisite to the defendant's conviction on the criminal charge. G.S. 49-7.

5. **Bastards § 3— wilful failure to support illegitimate child — State as party in criminal prosecution**

In no sense is the State a mere nominal party in a criminal prosecution under G.S. 49-2 for wilful failure to support an illegitimate child, nor is the State in privity with the mother or the child; rather, its interest, which is separate and distinct from that of the mother, is in the prevention of the child's becoming a charge upon the State so as to require the State, itself, to support the child.

6. **Bastards §§ 3, 8; Judgments § 44— nonsupport prosecution — subsequent civil action for child support — no privity of parties — no estoppel to deny paternity**

Since the parties in a prior criminal prosecution for wilful failure to support an illegitimate child and the parties in this civil action to have defendant declared the father of plaintiff's illegitimate child and to require child support of defendant are not the same, and the State and the plaintiff in this civil action are not in privity, the defendant is not estopped in the present action to deny paternity of plaintiff's illegitimate child, though the question of paternity was answered in the affirmative in the prior criminal prosecution.

7. **Parent and Child § 7— illegitimate child — duty of mother and father to support upon finding of paternity**

If and when it is properly determined in this civil action for child support that defendant is the father of plaintiff's illegitimate child, the rights, duties and obligations of the plaintiff and the defendant with regard to the support of the child will be the same, and may be enforced in the same manner, as if she were the legitimate child of the plaintiff and the defendant. G.S. 49-15.

8. **Parent and Child § 7— child support — father primarily responsible — mother secondarily responsible**

G.S. 50-13.4(b) imposes upon the father the primary duty to support a child, the mother's obligation being secondary.

9. **Principal and Surety § 11— default of party primarily liable for obligation — action for reimbursement by party secondarily liable proper**

A party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefor to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure.

10. **Bastards § 10— illegitimate child — sums for support expended by mother — action for reimbursement — three year statute of limitations**

An action to enforce the liability of the father to reimburse the mother of an illegitimate child for expenditures reasonably incurred in the support of such child is barred after three years, but each such expenditure by the mother creates in her a new right to reimbursement; therefore, upon a proper determination by the district court that the defendant is the father of plaintiff's illegitimate child, the court may enter an order requiring defendant to reimburse plaintiff for reasonably necessary expenditures made by her for the support of the child on and after October 9, 1971, plaintiff having instituted this action on October 9, 1974.

11. **Attorney and Client § 7; Bastards § 10— action for child support — when attorney's fees recoverable**

G.S. 50-13.6 providing for payment of attorney's fees in an action for child support applies to a proceeding to compel the future support of the child, not to a proceeding to compel reimbursement for past payments made by a person secondarily liable for such child's support.

Justice EXUM dissenting.

Justices HUSKINS and MOORE join in the dissenting opinion.

ON *certiorari* to the Court of Appeals to review its decision, reported in 27 N.C. App. 435, 219 S.E. 2d 648, affirming judgments of the District Court of MECKLENBURG in favor of the plaintiff.

On 18 December 1963, Shirley Tidwell swore out a warrant in the Domestic Relations Court of Mecklenburg County charging David Booker with the criminal offense of failing and refusing to provide adequate support for his illegitimate child, Clauda (sic) Ann, born 17 November 1963 to Shirley Tidwell, then unmarried. In that proceeding Judge Gatling of the Domestic Relations and Juvenile Court entered judgment 20 December 1963, reciting:

"The Defendant submitted a plea of not guilty.

"The Court finds as a fact, and the defendant admits, that he is the father of a child, Clauda (sic) Ann, born out of wedlock to the prosecuting witness, November 17, 1963.

"The Court entered a verdict of GUILTY."

The judgment was that the defendant be confined for a period of six months under the supervision of the State Prison Department, but the sentence was suspended, with the consent of the defendant, upon condition that he pay into the court each week "8.00 for the support of his child born out of wedlock, pending further orders."

From that judgment no appeal was taken. Pursuant thereto the defendant, David Booker, paid into the court eleven payments over a period of two years, totaling $139.00.

In 9 October 1974, the plaintiff, Shirley Tidwell, instituted the present action in the District Court of Mecklenburg County, filing her complaint consisting of two claims for relief. First, the complaint alleges: The defendant, David Booker, is the biological father of the minor child, Claudia Ann Tidwell, the plaintiff being the mother; the defendant previously admitted paternity in open court and the Domestic Relations and Juvenile Court found as a fact that he is the father of the child in the above mentioned judgment; the defendant has provided "some support and maintenance" for the benefit of the child within

three years next preceding the commencement of this action, but "on the whole has failed to provide for the support and maintenance of said child." Second, the complaint alleges: The child has been and is now under the direct control, care and supervision of the plaintiff; since the 1963 judgment, the defendant has made payments totaling $139.00 for the support and maintenance of the child, has provided toys and clothing of approximately $100.00 in value and has made cash payments direct to the plaintiff in the approximate amount of $72.00, the last such support being furnished in February 1974; otherwise, the defendant has refused to provide for the support and maintenance of the child; except as above mentioned, the plaintiff has provided the support and maintenance for the child, the total expended by her for this purpose since the entry of the 1963 judgment being $4,169; the defendant is gainfully employed and owns property, including real property in Mecklenburg County, and is able to pay a reasonable sum for the support and maintenance of the child; the reasonable needs of the child for such support are $50.00 per week; the plaintiff, an interested party acting in good faith, has insufficient means to defray the expenses of the action and is entitled to a reasonable sum from the defendant for attorney's fees.

Upon the first claim, the plaintiff prayed: "That Defendant be declared the biological father of Claudia Ann Tidwell pursuant to the provisions of North Carolina General Statute § 49-14 *et seq;* that Defendant be taxed with the costs of this action; and for such further relief as may seem proper." Upon the second cause of action, the plaintiff prayed: "That Defendant be ordered to pay the sum of $4,169 to Plaintiff as lump sum support which Plaintiff has been required to provide said child because of Defendant's refusal to do so; that Defendant be ordered to pay $50.00 each week for the continued support of said child, Claudia Ann Tidwell; that Defendant be taxed with the costs of this action; that Defendant be ordered to pay a reasonable sum to Plaintiff's attorney for representation in this matter; and for such further relief as may seem proper."

On 9 October 1974, the same day the complaint was filed, Robinson, D.J., entered an order reciting that "the plaintiff has instituted an action pursuant to the provisions of Chapter 50 of the General Statutes of North Carolina," and setting the matter for hearing at a non-jury session of the District Court

and ordering the defendant to file an affidavit showing his financial standing.

On 23 December 1974, the defendant filed answer in which he demanded a jury trial and alleged: Failure of the complaint to state a cause of action upon which relief can be granted; both Claim I and Claim II in the complaint are barred by the three year statute of limitations; a denial of paternity; a denial of any admission by him in open court (in the 1963 proceeding) that he is the father; an assertion that he was not represented in the 1963 proceeding by counsel and, being then an indigent, was entitled to have counsel, which right he did not intelligently waive; that he was not advised in that proceeding of his right to appeal from the said judgment and, therefore, the 1963 proceeding "cannot properly and lawfully be used against him in this subsequent civil proceeding"; and "the Plaintiff or the said minor child have (sic) no claim against him in this action for any amounts which were due or might have been due pursuant to any terms or conditions or any matters in said criminal action in this particular action"; a denial of his present ability to provide any support for the said child, he having a wife and family dependent upon him for their support and a limited income from his employment.

On 3 January 1975, the defendant filed a motion reciting that this is an action pursuant to G.S. 49-14 *et seq*, that the defendant has denied paternity and that any hearing or order prior to an adjudication of paternity in this action would be irregular and improper, this not being an action pursuant to Chapter 50 of the General Statutes. For these reasons, the defendant moved that no order be entered in this action requiring the defendant to provide support for the child "until this Defendant has properly been adjudicated the father of said child in this action."

The matter came on to be heard before Robinson, D.J., without a jury. He entered an order, filed 27 January 1975, reciting that such hearing was limited to determination of the matters of "continuing periodic support for said child and an award of counsel fees in connection therewith," the matter of the alleged lump sum for past arrearages to be heard by the court at a later date. The order of Judge Robinson contained detailed

findings of fact substantially in accord with the allegations of the complaint, including the following:

"8. Defendant was not represented by counsel at said trial on December 20, 1963; and, while Defendant has made conclusory allegations and statements that he was indigent at the time of said trial, Defendant has not alleged any facts or offered any evidence which would tend to support a conclusion that he was indigent at that time; and, Plaintiff has offered evidence that Defendant was not indigent at that time.

"9. Defendant has not alleged any facts or offered any evidence in support of his conclusory statements upon which this Court can determine whether he was effectively denied any right to counsel.

* * *

"12. As a result of his conviction on December 20, 1963 for violation of NCGS § 49-2, Defendant was not imprisoned; and, the suspended sentence imposed by the Court in its judgment on said date cannot now be revoked and an active sentence imposed; and, Defendant will never have to serve any portion of the sentence which was suspended by said Court on December 20, 1963.

* * *

"17. The factual issue of Defendant's paternity of said minor child, Claudia Ann Tidwell, was finally adjudicated in [the 1963 proceeding].

"18. Defendant is the biological father of said child.

"19. Said minor child has been and is now residing with Plaintiff.

"20. Defendant has provided some support and maintenance for said minor child within three years immediately prior to the commencement of this action.

"21. At the time of the institution of this action, Defendant was not providing any support or maintenance to or for said minor child; nor is he doing so now.

* * *

"The reasonable expenses for the support and maintenance of said minor child amount to $52.00 per week, at the present time.

* * *

"34. Defendant, as father of said minor child, is primarily liable for the support and maintenance of said minor child.

"35. Considering the estates, earnings, and conditions of the parties and the accustomed standard of living and needs of said minor child and the parties, the sum of $33 per week is a fair and reasonable amount for Defendant to pay to partially meet the needs of said minor child for her health, education, maintenance and support.

"36. Defendant is fully capable of paying and is able to pay the sum of $33 per week for the partial support and maintenance of said minor child."

Robinson, D.J., thereupon ordered that the defendant pay $33.00 per week for the partial support of the child and pay $350 as a fee to the plaintiff's attorney for his representation of the plaintiff and the child in this action.

From this order the defendant appealed to the Court of Appeals. Robinson, D.J., made appeal entries allowing the defendant 45 days in which to prepare and serve his statement of the case on appeal and fixing a supersedeas bond and an appeal bond.

On 14 February 1975, the plaintiff moved to dismiss the appeal "for the reason that said order is not a final judgment or other order from which Defendant has a right to appeal."

On 18 February 1975, the plaintiff moved for summary judgment on her claim for a lump sum award of $4,169 for support furnished by her to the child in the past because of the defendant's refusal to support the child, and for a reasonable sum to her attorney as a fee for representing her in connection with that claim. At the same time, she again moved to dismiss the defendant's appeal from the order entered by Robinson, D.J., on 27 January 1975, the ground for this motion to dismiss being that the defendant had failed to serve on the plaintiff a statement of the evidence and proceedings from available sources as he was required to do by law, no stenographic record of the hearing before Robinson, D.J., having been taken.

On 27 March 1975, the plaintiff filed a third motion to dismiss the defendant's said appeal and therein prayed for the

award of an additional fee to the plaintiff's attorney in the amount of $750 for his representation of the plaintiff and the said child in preparing to defend against the said appeal.

On 16 April 1975, Hicks, D.J., heard the matter upon the above motions and entered an order dismissing the appeal of the defendant from the above mentioned order by Robinson, D.J., directing the defendant to pay $750 to the plaintiff's attorney for his representation of the plaintiff and the child in opposition to the said appeal and adjudging that the plaintiff recover from the defendant $4,169, together with interest and costs of the action. This order by Hicks, D.J., contained numerous findings of fact, included the following:

"3. Said Order of the Honorable William G. Robinson adjudicated only one of Plaintiff's two claims, and said Order did not contain any finding or determination which made said Order immediately appealable under Rule 54(b) of the North Carolina Rules of Civil Procedure.

* * *

"6. Defendant did not prepare, file, and serve upon Plaintiff or her counsel within ten days of the filing of said Appeal Entries And Exceptions a statement of the evidence taken and proceedings had at the hearing held in this action on January 21, 1975.

* * *

"8. * * * there has never been filed any complete statement of Evidence Taken and Proceedings Had at said hearing on January 21, 1975.

* * *

"11. No extension of time within which to serve Defendant's Statement of Case on Appeal has been sought or obtained by Defendant or any of his counsel.

* * *

"20. There is no genuine issue as to the fact that since the entry of said Judgment of December 20, 1963 [the above judgment of Gatling, J., imposing a suspended sentence for nonsupport of the child], Defendant has been under a duty to provide for the support and maintenance of said minor child.

* * *

"22. * * * Defendant has provided some clothing or money to or for the benefit of said minor child within three years next preceding the commencement of this action.

* * *

"23. * * * Defendant has failed and refused to provide for the support and maintenance of said minor child.

"24. There is no genuine issue as to the facts that since the entry of said Judgment on December 20, 1963, Plaintiff has provided the support and maintenance of said minor child, and that she has expended $4,169 of her own money for the support and maintenance of said minor child on account of Defendant's refusal to so provide."

Hicks, D.J., concluded in his order that plaintiff's counsel is not entitled to any award for his fee for representation of the plaintiff in connection with her claim for the lump sum reimbursement of her expenditures for the support of the child, and no fee for those services was ordered to be paid by the defendant.

Hicks & Harris by Tate K. Sterrett for plaintiff.

Reginald L. Yates for defendant.

LAKE, Justice.

G.S. 49-2 provides that any parent, mother or father, who wilfully neglects or refuses to support his or her illegitimate child is guilty of a misdemeanor. This statute, in effect when Claudia Ann was conceived, imposed, both upon the plaintiff and the defendant, a duty to support the child. Its purpose is not to confer rights upon either the mother or the father but to protect the child and to protect the State against the child's becoming a public charge. Prosecution of the alleged father for the violation of this statute may be initiated by the mother, but her joining therein is not a prerequisite to the validity of the prosecution. G.S. 49-5. In such criminal proceeding, "the court before which the matter may be brought *shall* determine whether or not the defendant is a parent of the child *on whose behalf* the proceeding is instituted." G.S. 49-7 (Emphasis added.)

In 1963, upon a warrant valid in form, in a court of competent jurisdiction, the defendant was charged with violation

of G.S. 49-2 by his failure and refusal to provide support for Claudia Ann, then one month old. Despite his plea of "not guilty" that court found as a fact that the defendant is the father of Claudia Ann and found the defendant guilty of the offense of failure or refusal to support the child.

The 1963 judgment recites, parenthetically, that the defendant admitted he was the child's father, which statement the defendant now asserts was incorrect. The judgment does not rest upon this statement but upon the court's finding of his paternity as a fact despite his plea of not guilty. Neither the judgment nor the record presently before us gives any indication as to the nature or evidence of the alleged admission, whether it was in the course of testimony by the defendant or otherwise. Such admission is not inconsistent with his plea of "not guilty," for the criminal offense is not committed by the begetting but by the wilful nonsupport of the child. *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840 (1964).

[1] From the 1963 judgment the defendant did not appeal. On the contrary, the judgment recites that he consented to the terms upon which sentence was suspended. The defendant now asserts that this judgment was and is invalid because he was then an indigent and counsel was not appointed to represent him. Nothing in the record before us supports his contention that he was an indigent in 1963. In *State v. Green,* 277 N.C. 188, 176 S.E. 2d 756 (1970), this Court held that the offense of which this defendant was so convicted in 1963 is of such a nature that appointment of counsel for, or intelligent waiver thereof by, an indigent defendant is not required by the Sixth and Fourteenth Amendments to the United States Constitution. The defendant having failed to appeal therefrom, the judgment in the 1963 criminal action is deemed valid.

[2] The criminal offense of wilful nonsupport of an illegitimate child by a parent of the child may be repeated and, if it is, prosecution for the subsequent offense is not barred by the prosecution for the former offense on the theory of double jeopardy. *State v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857 (1952). Upon such subsequent prosecution of the alleged father, the question of paternity, necessarily determined against him in the former criminal action, need not be re-litigated, that question being *res judicata. State v. Ellis, supra.* In the two criminal actions there is identity of parties and identity of this issue. It is im-

material whether the same person swore out the two warrants. It is also immaterial whether the same witnesses testified at the two trials.

G.S. 49-14 authorizes the bringing of a civil action to establish the paternity of an illegitimate child within three years after the last payment by the alleged father for the support of the child. The present action was brought within that time. In such civil action, just as in a criminal action brought under G.S. 49-2, paternity must be proved beyond a reasonable doubt. G.S. 49-14(b). Such proceeding may be instituted by the mother. G.S. 49-16(1). "*Upon and after the establishment of paternity* of an illegitimate child *pursuant to G.S. 49-14,* the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother." G.S. 49-15. (Emphasis added.) The defendant contends that this statute requires a determination of the question of paternity in the civil action and that, on the issue of paternity, he was entitled to a jury trial, having demanded such trial in his answer.

[3] It is, unquestionably, the general rule in this jurisdiction that, in a civil action for damages, evidence of the defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the alleged liability in the civil action is not admissible, the defendant having entered a plea of "not guilty" in the criminal action. *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36 (1966). As Justice Parker, later Chief Justice, said in *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104 (1961): "The general and traditional rule supported by a great majority of the jurisdictions is that, in the absence of a statutory provision to the contrary, evidence of a conviction and of a judgment therein, or of an acquittal, rendered in a criminal prosecution, is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or of acquittal was rendered, or when there is a verdict of acquittal to constitute a bar to a subsequent civil action based on the same facts. While the same facts may be involved in two cases, one civil and the other criminal, the parties are necessarily different, for, whereas one action is prosecuted by an individual, the other is maintained by the State."

In *Taylor v. Taylor*, 257 N.C. 130, 125 S.E. 2d 373 (1962), this doctrine was somewhat limited, over the dissent of Justice Higgins. There the Court held a prior conviction of a husband on the charge of wilful abandonment of his wife without providing adequate support for her is a bar to his subsequent action for absolute divorce on the ground of the separation arising from such abandonment. Justice Bobbitt, later Chief Justice, speaking for the majority, said: "Technically, the parties in the criminal prosecution were different. Even so, the issue was identical, and the plaintiff, in the criminal action, had his day in court with reference to such issue. * * * While the conduct for which the plaintiff was convicted constitutes an offense against society, such conduct was made criminal to afford protection to the wilfully abandoned wife. In such criminal prosecution, the wife, although not technically a party, is the person upon whose testimony the State, in large measure, must rely; and the criminal prosecution is based on and arises from the rights and obligations subsisting between the prosecutrix (wife) and the defendant (husband)." The basis for the dissent by Justice Higgins was: "The first requisite to a valid plea of *res judicata* is identity of parties. (Citations omitted.) In the criminal case the State of North Carolina was the plaintiff. Mrs. Taylor may have been a witness, but she was not a party. *Res judicata* binds parties—not witnesses."

In virtually all, if not all, cases in which a civil action for damages grows out of criminal conduct of the defendant the purpose of the criminal statute is to discourage conduct likely to cause injury to the class of persons to which the plaintiff in the civil action belongs. For example, the statutes making speeding, driving on the wrong side of the road and driving while intoxicated (see *Beanblossom v. Thomas, supra)* criminal offenses are designed to protect other users of the highway from injury to their persons and damage to their property. Usually, the injured person, if he or she survives, is the principal witness for the State in a criminal prosecution. The present case, the Taylor case and the Beanblossom case cannot be distinguished on these grounds. Furthermore, in the prosecution of a parent for nonsupport of an illegitimate child, the State is acting, at least in part, for the protection of its own financial interest since it thereby seeks to prevent the child from becoming a public charge.

[4] This Court has said on numerous occasions that the question of paternity is "incidental to the prosecution for the crime of nonsupport." *State v. Green, supra; State v. Ellis, supra; State v. Robinson, supra; State v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462 (1944). The question of paternity is "incidental" to the criminal offense alleged only in the sense that proof of paternity is not proof of wilful nonsupport of the child. An affirmative answer to the question of paternity is, however, an indispensable prerequisite to the defendant's conviction on the criminal charge. G.S. 49-7. The finding by the court in the criminal action that the defendant is the father of Claudia Ann was, therefore, not a mere dictum or the determination of an insignificant matter. It was the judicial determination of an issue properly and necessarily before the court in the criminal proceeding to which the defendant was a party and in the trial of which he had his "day in court." The same may, however, be said of the questions of speeding, driving on the wrong side of the road and driving under the influence of intoxicating liquor which were involved in *Beanblossom v. Thomas, supra.* Thus, this is not a basis for distinction between the Taylor case, the Beanblossom case and the present case.

Technically, *Beanblossom v. Thomas, supra,* and *Trust Co. v. Pollard, supra,* did not involve the question of the conclusiveness, in a subsequent civil action, of the defendant's conviction in a prior criminal proceeding of the precise conduct which is the basis for the civil suit. Those cases involved the admissibility of evidence of such previous conviction, the basis of the objection to such evidence being the hearsay rule and the opinion rule, the former verdict being a statement of the first jury's opinion. However, a plea of *res judicata* must be supported by the introduction of evidence of the former judgment and it is hardly conceivable that the Beanblossom and Pollard cases can be distinguished from the present case on this ground.

In *Trust Co. v. Pollard, supra,* this Court cited *Briggs v. Briggs,* 215 N.C. 78, 1 S.E. 2d 118 (1939), as holding that a judgment in a criminal action for abandonment is not *res judicata* as to the wife's right to counsel fees and support, pending litigation of a suit for divorce thereafter instituted by the husband, the defendant in the criminal action. An examination of the Briggs case, however, indicates that the criminal proceeding, relied upon by the husband as a bar to the wife's right to counsel fees *pendente lite* in the divorce action, was determined in his

favor on the ground that the statute of limitations had barred such criminal action, not upon a determination in the husband's favor of the merits of the question of abandonment. Thus, the Briggs case does not support the proposition for which it is cited in *Trust Co. v. Pollard, supra,* and is not helpful in determining the present case.

In *Allen v. Hunnicutt,* 230 N.C. 49, 52 S.E. 2d 18 (1949), this Court held that, as of that time (G.S. 49-14, et seq., not then having been enacted), an illegitimate child could not maintain a civil action to establish paternity and to compel the father to furnish the child support on the basis of the alleged relationship alone. The Court, speaking through Justice Barnhill, later Chief Justice, said that in the absence of such a statute the child could not maintain such action because: "The duty of a putative father to support his illegitimate child [i.e., the duty created by G.S. 49-2] was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental." *Accord: Jolly v. Queen,* 264 N.C. 711, 142 S.E. 2d 592 (1965).

In the present case, the Court of Appeals said:

> "[T]he plaintiff wife, though not technically in control of a 1963 prosecution, was essential to its success as the prosecuting witness and in fact stood in the position of obvious beneficiary of its successful culmination. * * * In view of the unique nature of the two causes of action and the unique interrelationship of the State in the affairs of an illegitimate child and the mother of that child, the requisite privity of parties existed for purposes of mutuality and collateral estoppel. * * *
>
> "Notwithstanding *Beanblossom,* we hold that the rules articulated in *Ellis* and *Clouch* are applicable to subsequent civil actions for willful failure to support a minor child where paternity was fully addressed in the prior criminal prosecution for willful failure to support. This holding is necessarily limited to the peculiar hybrid nature of the particular cause of action raised in these cases."

In *King v. Grindstaff,* 284 N.C. 348, 200 S.E. 2d 799 (1973), four members of the same family were killed or injured in an automobile collision. The two injured survivors, the only surviving members of the family, sued and recovered dam-

ages for their own personal injuries. Thereafter, the administrator of the two deceased passengers sued for their wrongful deaths. The two survivors, who had previously recovered judgments for their own injuries, were the sole beneficiaries of any recovery in the wrongful death actions. The lower court allowed summary judgment for the plaintiff administrator on the questions of liability, on the basis of *res judicata,* leaving only the issue of damages for trial. This Court affirmed, saying:

> "Under a companion principle of *res judicata,* collateral estoppel by judgment, *parties and parties in privity with them*—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. * * *
>
> "To determine whether collateral estoppel applies in the present cases, it must first be decided whether the parties in these suits and those in the former Federal litigation are the same, or stand in privity to the parties in the former litigation. * * *
>
> " 'In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator.' * * * *Therefore,* we conclude that the requirement of identity of parties is met."

Thus, the determining factor in *King v. Grindstaff, supra,* was that the administrator, the plaintiff in the wrongful death action, was a nominal party only and had no beneficial interest in the action, the entire beneficial interest being in the survivors who were the plaintiffs in the former litigation. Thus, for all practical purposes, the parties to the two actions were the same.

"It is * * * well settled that the privity, which will create an estoppel by judgment against one not a party to the former action, denotes a mutual or successive relationship to the same right." *Kaylor v. Gallimore,* 269 N.C. 405, 408, 152 S.E. 2d 518 (1966). *Accord: Masters v. Dunstan,* 256 N.C. 520, 124 S.E. 2d 574 (1962); *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167 (1953); *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570 (1939); *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321 (1938).

Another apparent exception to the requirement of identity of parties is found in the case of a plaintiff who loses his action for damages for negligence against the driver of an automobile and thereafter sues the employer of the driver on the theory of *respondeat superior*. Having litigated the issue of the driver's negligence unsuccessfully, such plaintiff may not again litigate that issue against the employer. The principal is not in privity with the agent. 5 Strong, N. C. Index 2d, Judgments, § 36, p. 72. The basis for this apparent exception to the general rule is that the principal's liability, if any, is derived from and wholly dependent upon liability of the agent. See: *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 170, 105 S.E. 2d 655 (1958) ; *Leary v. Land Bank, supra.*

In *Crosland-Cullen Co. v. Crosland, supra,* the plaintiff first sued an insurance company to recover from it the proceeds of a policy of which the plaintiff was beneficiary, contending, against the defense of payment of the policy, that the insurance company had paid to one who claimed under a void assignment of the policy. In that action, judgment was rendered for the insurance company, i.e., that the assignment was valid and the payment to the assignee proper. Thereafter, the plaintiff sued the assignee on the ground that the assignee had received from the insurance company money which should have been paid to the plaintiff beneficiary. This Court held the second action was barred by the former judgment, saying this was an exception to the general rule requiring identity of parties and mutuality in determining a plea of *res judicata.* The Court, speaking through Justice Rodman, said the plaintiff having failed to establish any wrong done by the one primarily liable (the insurance company) could not thereafter hold the recipient of the money liable on the ground of money received which should have been paid to the plaintiff. In such case there would be the required privity between the successive defendants.

[5] In no sense is the State a mere nominal party in a criminal prosecution under G.S. 49-2 for wilful failure to support an illegitimate child. The State is not in privity with the mother or the child. Its interest is separate and distinct from hers. Its interest is in the prevention of the child's becoming a charge upon the State so as to require the State, itself, to support the child. The State's right to proceed under this statute does not, as a matter of law, require the consent of the mother or of the child to the bringing of the proceeding however important to

its case may be the mother's cooperation as a witness. A release by the mother would not bar the State's criminal action.

In *Shaw v. Eaves*, 262 N.C. 656, 138 S.E. 2d 520 (1964), the Court held that when an additional defendant is joined by an original defendant for contribution in an action *ex delicto*, the plaintiff and the additional defendant are not adversaries in law, and a judgment holding the original defendant entitled to contribution against the additional defendant does not make the question of the additional defendant's negligence *res judicata* in a subsequent action between him and the original plaintiff. The Court said, "Estoppel by judgment must be mutual," and "An estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him."

In the present case, the plaintiff mother swore out the warrant which initiated the criminal prosecution against the defendant and, presumably, was a witness for the State at the trial of that action. She was not, however, in control of the prosecution. The State was represented by its prosecuting attorney, not an attorney employed by the mother. She had no control of his handling of the trial. Had the criminal proceeding resulted in a finding that the defendant was not the father of Claudia Ann, the mother would not be barred thereby from bringing the present action. As Justice Higgins observed in his dissent in *Taylor v. Taylor, supra*, Estoppels by judgment run against parties, not witnesses. *Accord: Kaylor v. Gallimore, supra.*

[6] Thus, we conclude that, for the reason that the parties to the criminal and civil proceedings are not the same and the State and this plaintiff are not in privity, the defendant is not estopped in the present action to deny paternity of Claudia Ann. Until this question is determined in this civil action, the defendant may not properly be ordered herein to make payments for the future support of the child, or to reimburse the mother for expenses heretofore incurred by her in support of the child, or to pay an attorney's fee to the attorney for the mother. This action must, therefore, be remanded to the district court for determination by it of the question of paternity and, if that be determined adversely to the defendant, for the entry of such orders as may be appropriate concerning these other matters.

Since these questions will, necessarily, arise upon such further proceeding in the district court and the defendant, upon this appeal, has denied the authority of the district court to require him to reimburse the mother for such payments or to require him to pay a reasonable fee to the mother's attorney, we deem it advisable upon the present appeal to determine those matters also.

[7] If and when it is properly determined in this action that the defendant is the father of Claudia Ann, the "rights, duties, and obligations" of the plaintiff and the defendant with regard to the support of the child will be the same, and may be enforced in the same manner, as if she were the legitimate child of the plaintiff and the defendant. G.S. 49-15. Clearly, this statute contemplates that such rights may be determined and enforced in the action brought pursuant to G.S. 49-14 and does not contemplate the bringing of a separate action for that purpose pursuant to G.S. 50-13.1, et seq., which relates to the custody and support of legitimate children. G.S. 49-15 directs attention to G.S. Ch. 50 only for the purpose of determining what those rights and enforcement methods are.

[8] G.S. 50-13.4(b) provides:

> "(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother * * * shall be liable, *in that order,* for the support of a minor child. * * * " (Emphasis added.)

Thus, the statute imposes upon the father the primary duty to support the child, the mother's obligation being secondary. It is so declared, with reference to legitimate children in *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31 (1947), by Justice Winborne, later Chief Justice, speaking for this Court.

Thus, should it be properly determined, upon the retrial of this action, that the defendant is the father of Claudia Ann, the court may order the defendant to pay "to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child" (G.S. 50-13.4(d)) payments for the future support of Claudia Ann "in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case." G.S. 50-13.4(c).

The duty of the father of an illegitimate child to support such child is not created by the judicial determination of paternity. That determination is merely a procedural prerequisite to the enforcement of the duty by legal action. The father's duty to support his child arises when the child is born. However, prior to the enactment of G.S. 49-15 by the Session Laws of 1967, Ch. 993, effective October 1, 1967, the duty of the mother of an illegitimate child to support such child was equal to that of the father and enforceable in the same manner. G.S. 49-2.

[9, 10] A party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefor to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure. *Insurance Co. v. Gibbs,* 260 N.C. 681, 133 S.E. 2d 669 (1963); *Saieed v. Abeyounis,* 217 N.C. 644, 9 S.E. 2d 399 (1940); *Trust Co. v. York,* 199 N.C. 624, 155 S.E. 263 (1930). The liability of the father to reimburse the mother of an illegitimate child for expenditures reasonably incurred in the support of such child is a liability created by statute. G.S. 49-15. It is not a penalty or a forfeiture. Consequently, an action to enforce such liability is barred after three years. G.S. 1-52(2). Each such expenditure by the mother creates in her a new right to reimbursement. The present action was instituted by the mother on October 9, 1974. Consequently, her right herein to judgment requiring reimbursement by the defendant, assuming his paternity is established, is limited to reimbursement for expenditures incurred by her on and after October 9, 1971. Upon a proper determination by the district court that the defendant is the father of Claudia Ann, the district court may enter an order requiring the defendant to reimburse the plaintiff for reasonably necessary expenditures by her for the support of the child on and after October 9, 1971.

[11] G.S. 50-13.6 provides that in any action for the support of a minor child which, by virtue of G.S. 49-15, includes an illegitimate child whose paternity has been determined pursuant to G.S. 49-14, "The court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit," if the court finds as a fact that the party ordered to furnish support has refused to do so. We think the proper construction of this statute is that it applies to a proceeding to compel the future support of the child, not to a proceeding to

compel reimbursement for past payments made by a person secondarily liable for such child's support. We note that in the judgment of the district court presently before us for review the defendant was not ordered to pay fees to the plaintiff's counsel for services rendered in connection with the plaintiff's claim for such reimbursement for past support supplied by her to the child. The amount of fees to be awarded rests in the sound discretion of the district court.

The judgment of the Court of Appeals is, therefore, reversed, and the matter is remanded to that court for the entry by it of an order further remanding it to the District Court of Mecklenburg County for further proceedings consistent with this opinion.

Reversed and remanded.

Justice EXUM dissenting.

I dissent from that portion of the majority opinion which holds that the determination in the 1963 criminal action of the issue of defendant's paternity was not *res judicata* in this civil action. The Restatement of Judgments § 85(1) (1942) states:

> "Where a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is
>
> (a) bound by and entitled to the benefits of the rules of res judicata with reference to such of his interests as at the time are controlled by the party to the action;
>
> (b) not bound by or entitled to the benefits of the rules of res judicata with reference to his interests not controlled by the party to the action."

In this case a judgment was rendered in 1963 in an action brought under General Statute 49-2 for wilful failure of defendant to provide adequate support for his illegitimate child. The party who brought the action (the State of North Carolina) properly acted on behalf of the mother. The mother had a direct, personal pecuniary interest in the outcome of the criminal litigation; for if the father could not have been required to support this child the legal duty to provide support would have fallen upon her. N. C. Gen. Stats. 49-2, 49-4. The fact that the

State of North Carolina was acting on its own behalf as guardian of the public purse did not preclude it from acting also on behalf of the mother. Therefore under the principle stated by the Restatement the mother (plaintiff) is entitled to the benefits of the rules of *res judicata* with reference to such of her interests as were *at the time* controlled by the State of North Carolina. At the time, 1963, *all* of her interests in this litigation were controlled by the state. She had no civil remedy. *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126 (1956). Therefore she was both bound by and entitled to the benefits of *res judicata* with regard to questions of fact (here paternity) essential to the judgment which were actually litigated (here by plea of not guilty) and determined by the final judgment in 1963. The defendant is estopped by the criminal judgment to deny his paternity in the civil case.

Taylor v. Taylor, 257 N.C. 130, 125 S.E. 2d 373 (1962), which the majority overrules *sub silentio* is persuasive authority that there was sufficient mutuality of parties for the rules of *res judicata* to apply. *Taylor* is distinguishable only in that it involved a defensive use, while the instant case involves an offensive use, of the principle involved. But *King v. Grindstaff,* 284 N.C. 348, 200 S.E. 2d 799 (1973) seems to sanction the offensive use of the doctrine. *See* O. Max Gardner III, "Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff?" 52 N.C.L. Rev. 836 (1974).

Justices HUSKINS and MOORE join in this dissenting opinion.

BERT W. OESTREICHER IN HER CAPACITY AS TRUSTEE FOR RACHEL W. OESTREICHER (NOW RACHEL O. HASPEL) AND DAVE OESTREICHER II v. AMERICAN NATIONAL STORES, INC. A/K/A NATIONAL MANUFACTURE & STORES COMPANY, D/B/A JOHNSTON'S L & S FURNITURE COMPANY

No. 34

(Filed 17 June 1976)

1. **Appeal and Error § 6; Rules of Civil Procedure § 54— interlocutory order — all claims not adjudicated — substantial right — right of appeal — effect of Rule 54(b)**

The General Assembly did not intend to restrict the right of an immediate appeal from a judicial order affecting a "substantial right"

provided by G.S. 1-277 and G.S. 7A-27(d) by engrafting thereon the Rule 54(b) requirement that the trial judge make a finding that there "is no just reason for delay" in order for a party to appeal from an order adjudicating fewer than all the rights and claims of all the parties since Rule 54(b) is expressly inapplicable where an appeal is provided by "other statutes."

2. **Appeal and Error § 6— claims for compensatory and punitive damages and anticipatory breach — summary judgment on claims for punitive damages and anticipatory breach — right to appeal**

In an action to recover compensatory damages for breach of a lease agreement, punitive damages, and damages for anticipatory breach of the lease, plaintiff had the right to an immediate appeal from an order granting summary judgment for defendant on the claims for punitive damages and anticipatory breach since the order affected a "substantial right" of plaintiff to have all three claims tried at the same time by the same judge and jury if the claims were not subject to summary judgment.

3. **Damages § 11— breach of contract — fraud and deceit — punitive damages — sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim for relief for punitive damages based upon fraud and deceit by defendant in the breach of a lease agreement by intentionally understating its net sales over a continuing period of time so that plaintiff was deprived of rent in excess of $10,000 to which she was entitled under the terms of the lease.

4. **Contracts § 21; Landlord and Tenant § 6— covenant of peaceful occupancy — rent as percentage of sales — no requirement of occupancy — lessee's vacation of premises not anticipatory breach**

A lessee was not required to occupy the premises during the term of the lease by a provision in the lease that the lessor guarantees to the lessee peaceful and uninterrupted possession of the premises "so long as it occupies, complies with, and performs the covenants and conditions of the lease"; nor was a covenant of use or occupancy implied because the lease obligated the lessee to pay as rent a percentage of net sales over a certain amount in addition to a guaranteed minimum sum where use of the premises was not restricted to a high sales business that would activate the percentage rent provision, and the lessee had the right to transfer, assign or sublet to any business not competitive with the lessor's business. Since there was no express or implied covenant requiring the lessee to occupy the premises, the allegation that he vacated the premises prior to the expiration of the lease did not state a proper cause of action for anticipatory breach of contract.

5. **Attachment § 7— reduction of attachment bond — power of court**

Upon rendition of summary judgment for defendant as to claims for punitive damages and anticipatory breach of contract, with only a claim for breach of contract remaining, the trial judge had the right to exercise his discretionary power to reduce the bond substituted for attached property and thus keep the bond basically in proportion to the remainder of the case. G.S. 1-440.37.

6. Attachment § 7— reduction of attachment bond — absence of request for findings — presumption

Where plaintiff failed to request findings of fact to justify the modification of defendant's bond substituted for attached property, it is presumed that the trial judge found facts sufficient to support his order reducing the bond.

Justices LAKE, HUSKINS and EXUM concur in the result.

Chief Justice SHARP concurring and dissenting.

Justices BRANCH and MOORE join in the concurring and dissenting opinion.

ON petition for discretionary review of the decision of the Court of Appeals, 27 N.C. App. 330, 219 S.E. 2d 303, (opinion by Parker, J., concurred in by Morris, J., and Martin, J.) dismissing the appeal by plaintiff from summary judgment for defendant granted by *Seay, J.*, at the 24 March 1975 Session, ROWAN County Superior Court.

Plaintiff is the trustee of a trust which owns a building in Salisbury, North Carolina. On 1 July 1961, plaintiff, lessor, entered into a lease with L & S Furniture Company, lessee, for the premises for a period of ten years, with lessee having the option to renew the lease for an additional five years. Lessee agreed to pay a minimum rental plus five percent (5%) of the net sales above a stated amount.

On 17 June 1970, the lease was amended to recognize the defendant as the successor in interest to the former lessee and to renew the original lease upon essentially the same conditions for a five-year term ending 30 June 1976.

On 22 July 1974, defendant wrote to plaintiff advising that defendant would cease its Salisbury operations on or about 15 October 1974.

On 30 July 1974, plaintiff commenced action and applied for an order of attachment, posting bond for $80,000. On the same date, defendant's property was attached, and defendant filed an undertaking in the amount of $80,000, enabling it to retain the property.

Plaintiff filed a complaint alleging three causes of action: (1) Breach of contract, (2) punitive damages based on the continuing fraud involved in the breach of contract, (3) anticipatory breach of contract.

Defendant's motion for summary judgment was allowed regarding plaintiff's claims for relief for punitive damages and for anticipatory breach of contract, but overruled as to the first cause of action for breach of contract. Without giving a reason, the trial judge reduced defendant's bond to $15,000.

In connection with the motion for summary judgment, plaintiff filed a number of affidavits indicating that defendant had conducted a "going out of business sale"; that defendant was insolvent and would be going into bankruptcy; that defendant understated his total sales for previous years and, thus, underpaid the portion of his rent based upon a percentage of such sales; that defendant vacated the building; that there was a petition for involuntary bankruptcy filed against defendant, which was later withdrawn by agreement of the major creditors; and that the fair market value of the leasehold was nothing.

Other necessary facts will be related in the opinion.

Carlton, Rhodes & Thurston by Richard F. Thurston for plaintiff appellant.

Coughenour and Linn by Stahle Linn for defendant appellee.

COPELAND, Justice.

Did the Court of Appeals err in dismissing plaintiff's appeal because it was not a final judgment?

To properly evaluate this question, we must determine the true meaning of General Statutes 1A-1, Rule 54(b) which reads as follows:

> "(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment.* Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, how-

ever designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise *except as expressly provided by these rules or other statutes.* Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

Since the federal courts have had a similar type rule since 1931 and as amended in 1946 and 1961, we should examine their rule. 6 Moore's Federal Practice §§ 54.01[5], 54.01[6.-4] (2d ed. 1976).

The comparable federal rule is as follows:

"(b) Judgment upon multiple claims or involving multiple parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.) Rules of Civil Procedure for the United States District Courts, 28, App. U.S.C. Rule 54(b) (1970).

The history of the rule leads us to England. In *Metcalfe's Case,* 11 Coke 38, 77 Eng. Rep., 1193 (1615), it was held that the general rule would not permit a judgment to be appealed that had not completely disposed of the action. Our federal courts relied on the reasoning of this case for many years.

6 Moore's Federal Practice, *supra*, § 54.19. But *Metcalfe's Case* has continuing validity in the federal courts only insofar as "complete finality is warranted." 6 Moore's Federal Practice, *supra* at § 54.19, at 212.

At common law there was no appeal of right from the decision of any court, and the only way a decision could be reviewed was by a "writ of error or writ of false judgment." G.S. 1-277, Annot. 307 (1969). Prior to 1868 starting with the enactment in December, 1777 of Chapter 2 of the Laws of North Carolina §§ 1, 2, 4, 7, 82-89, decisions in North Carolina were generally reviewed by "writ of error," by "praying an appeal," or by "certiorari." In 1868 the legislature enacted the Code of Civil Procedure, which made a notable change. Writs of error were abolished, and appeals were no longer *prayed for* (and *allowed)* but *were taken.* Code of Civil Procedure, §§ 296, 299 (1868). Under the new Code of Civil Procedure, a judge had nothing to do with granting an appeal, for it was the act of the appealing party alone. *Campbell v. Allison,* 63 N.C. 568 (1869).

It was with this background that the North Carolina General Assembly adopted Rule 54(b) in 1967. It will be observed that our Rule 54(b) has one notable exception that is not included in the Federal Rule. The applicability of our Rule is limited by the language "except as expressly provided by these rules or other statutes." Except for this specific exception, the language of our Rule would not permit an appeal if fewer than all the claims are determined unless it is provided in the judgment that there "is no just reason for delay." *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Because the Rule 54(b) limitation on appealability is not applicable where other statutes expressly provide otherwise, we consider G.S. 1-277, which provides as follows:

> "(a) An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a *substantial right* claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

"(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." (Emphasis added.)

When the North Carolina General Assembly enacted the new Rules of Civil Procedure in 1967, it did not repeal General Statutes 1-277. In fact, it left the old statute intact as to subsection (a) and merely added subsection (b). Chapter 954 § 3 (j), 1967 Session Laws.

Our Court has consistently interpreted G.S. 1-277 so as to give any party to a lawsuit a right to an immediate appeal from every judicial determination which affects a *substantial right* of that party, or which constitutes a *final adjudication*, even when that determination disposes of only a part of the lawsuit.

In *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967), the Highway Commission sought to condemn property of defendants. There were two issues presented to the trial court: (1) What land was plaintiff taking in the action? and (2) What was the just compensation for the property taken? The trial court considered these questions separately and made a determination on the first issue adverse to plaintiff. Plaintiff duly excepted to the court's findings in this regard but did not immediately appeal. Rather, it continued to pursue the matter in superior court, and eventually the issue of damages was determined. Defendant excepted to the award of damages and appealed. At that time, plaintiff attempted to appeal the prior determination of the first issue.

Our Court, in an opinion by Justice Sharp (now Chief Justice), dismissed plaintiff's purported appeal because of its failure to perfect the appeal within the time required by the rules. However, in so doing, this Court set forth very clearly the meaning and application of G.S. 1-277 as follows:

"Appeals in civil actions are governed by G.S. 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right. Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will *work injury if not corrected before final judgment* is appealable. [Citation omitted.]

'[A] decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation' is final in nature and is immediately appealable. 4 Am. Jur. 2d, Appeal and Error, § 53 (1962)." (Emphasis added.) *Highway Commission v. Nuckles, supra* at 13.

In an opinion by Justice Huskins, our Court spoke on this general proposition in *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E. 2d 30, 34 (1975):

"Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. [Citations omitted.]"

In our examination of "other statutes" affecting Rule 54(b), we also note General Statutes 7A-27(d), which provides as follows:

"(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which (1) Affects a substantial right, or (2) In effect determines the action and prevents a judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals."

This statute, which is included in Chapter 7A, entitled "Judicial Department," was passed in 1967 by the same General Assembly that enacted Rule 54(b).

[1] In our case the judgment of Judge Seay did not have the effect of terminating the entire lawsuit and, thus, did not purport to adjudicate all the rights and claims of all the parties to the lawsuit. General Statutes 1-277 and 7A-27(d) seem to give a right of appeal if a "substantial right" is affected. But in order for these statutes to be applicable to our case, we must assume that the General Assembly in 1967 intended something by the use of the words "or other statutes" as set out in Rule 54(b). It seems obvious they intended these words to mean something because these words were not included in the Federal Rule. Certainly the General Assembly did not intend to restrict the right of appeal provided by G.S. 1-277 and 7A-27(d) by engrafting Rule 54(b) requirements upon them.

It seems to us, that the General Assembly in Rule 54(b) used the words "as expressly provided by these rules or *other statutes*" in order to avoid any conflict between Rule 54(b) and G.S. 1-277(a) and 7A-27(d). As a matter of fact, G.S. 1-277(a) has been a part of our law without amendment since 1868, and we assume the General Assembly did not intend to "sweep it under the rug."

Historically, our Court of Appeals has dismissed all appeals where fewer than all of the claims or fewer than all the parties were determined unless the trial court in its judgment provided "there is no just reason for delay." *Arnold v. Howard, supra.* Numerous cases have followed with the same result. The net effect of these decisions is that no interlocutory order or judgment in a multiple party or multiple claim situation is appealable unless the trial judge *expressly* determines in the judgment itself that there is "no just reason for delay." Thus, this requirement has left it to the trial judge, in effect, to certify that the judgment is a final judgment and subject to immediate appeal as per the express language of Rule 54(b). The Court of Appeals has interpreted Rule 54(b) to modify G.S. 1-277 and G.S. 7A-27(d), by engrafting upon the well recognized requirements of a "party aggrieved" who has been deprived of a "substantial right," the additional requirement of an "express finding" by the trial judge in the judgment that there is "no just reason for delay." We believe this interpretation is wrong.

In the first case on this subject decided by the Court of Appeals, *Arnold v. Howard, supra,* plaintiff filed a civil action against the Howards, original defendants, to recover the balance allegedly due on a promissory note. The Howards, in turn, filed answer and also filed a third party complaint against Clardy seeking indemnity. After pleadings were filed, the third-party defendant moved for summary judgment on the third-party complaint. This motion was granted, and the original defendants objected and excepted to the order and gave notice of appeal. The Court of Appeals dismissed the appeal on its own motion. In so doing, the Court of Appeals relied heavily on the interpretation by the federal courts of Rule 54(b):

> "Although the parties have raised no question concerning the matter, we note that the judgment from which the original defendants now purport to appeal adjudicates 'the rights and liabilities of fewer than all the parties' and

that it contains no determination that 'there is no just reason for delay.' Our Rule 54(b) is substantially similar to the Federal Rule 54(b) as that Rule was amended in 1961, and it is therefore appropriate to look to Federal decisions and authorities for guidance in applying our Rule. As those authorities point out, the need for Rule 54(b) arose from the increased opportunity for liberal joinder of claims and parties which the new Rules of Civil Procedure provided. [Citations omitted.] As described by the United States Supreme Court, under Rule 54(b), the trial court 'is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal.' *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 435, 100 L.Ed. 1297, 1306, 76 S.Ct. 895, 899 (1956). Under the Federal Rule 54(b) as amended in 1961 and under the North Carolina Rule 54(b), the trial court performs that function also in multiple-party actions as well as in multiple-claim actions. Under the North Carolina Rule, the trial court is granted the discretionary power to enter a final judgment as to one or more but fewer than all of the claims or parties, 'only if there is no just reason for delay and *it is so determined in the judgment.*' (Emphasis added.) By making the express determination in the judgment that there is 'no just reason for delay,' the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal. In the absence of such an express determination in the judgment, Rule 54(b) makes 'any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties,' interlocutory and not final. By express provision of the Rule, such an order remains 'subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties,' and such an order is not then 'subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.' G.S. 1-277 is not such an express authorization. *See* Comment to G.S. 1A-1, Rule 54(b)." *Arnold v. Howard, supra* at 258-59, 210 S.E. 2d at 493-94.

We believe the Court of Appeals fell into error because of the significant difference in the North Carolina and Federal

Rules. There is no exception in Federal Rule 54(b) for a right to appeal under "other statutes."

In addition, we believe the Court of Appeals in *Arnold* misconstrued the relationship between Federal Rule 54(b) and the appellate jurisdiction of the federal courts. The Federal Rule does not affect the jurisdiction of appellate courts; it merely expedites the issuance of *final* judgments by the district courts. In the absence of a statutory or judicially recognized exception, the federal appellate courts, as before the enactment of the Federal Rules, have jurisdiction, when and only when the trial court has made a final decision. *See* Wright and Miller, Federal Practice and Procedure: Civil §§ 2653, 2658 (1973).

As a matter of fact, in *Sears, Roebuck & Co. v. Mackey, supra,* 351 U.S. at 435, 437-38, 100 L.Ed. at 1306-07, 76 S.Ct. at 899-901, upon which the Court of Appeals relied in *Arnold,* the United States Supreme Court stated:

> "[Rule 54(b)] does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case . . . .
>
> * * *
>
> "The District Court *cannot,* in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291. But the District Court *may,* by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions . . . .
>
> * * *
>
> "Rule 54(b), in its amended form . . . does not supersede any statute controlling appellate jurisdiction. It scrupulously recognizes the statutory requirement of a 'final decision' under § 1291 as a basic requirement for an appeal to the Court of Appeals. It merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of by judicial decision."

Thus, the *Sears, Roebuck & Co. Case* makes it clear that Federal Rule 54(b) does not apply to orders that are not *final* under § 1291 of Title 28 of the United States Code but, never-

theless, are appealable, either as a result of some other statutory provision or as a judicially recognized exception to the final judgment rule. *See* Wright & Miller, *supra* § 2658. Federal Rule 54(b) is not an exception to the finality principle; it simply establishes a procedure that expedites review of each separable portion of a multiple claim or multiple party action that has been finally adjudicated. Even though the Federal Rule makes no express provision as ours does "to other statutes," federal courts have interpreted Federal Rule 54(b) as neither superseding or abrogating any other federal statute controlling appellate jurisdiction. *Sears, Roebuck & Co. v. Mackey, supra; see* Wright & Miller, *supra* §§ 2653, 2658.

We note that both plaintiff and defendant in their briefs suggest that the ends of justice require that we determine whether the trial court committed error in entering summary judgment against the plaintiff in the second and third causes of action. From a practical standpoint, it seems to us that justice requires that the appeal be allowed despite the fact that the trial judge failed to enter the words "there is no just reason for delay" in his judgment. This omission could have very well been an inadvertence on the part of the trial judge. He certainly intended that plaintiff be permitted to appeal, or otherwise he would not have entered the appeal entries on account of the language of Rule 54(b) and would have required plaintiff to seek certiorari.

Justice Ervin, speaking for our Court in *Raleigh v. Edwards*, 234 N.C. 528, 529, 530, 67 S.E. 2d 669, 671 (1951), said this:

> "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377; *Emry v. Parker*, 111 N.C. 261, 16 S.E. 236."

Our Court held in *Raleigh v. Edwards* that Trial Judge Sharp (now Chief Justice) was correct in permitting a party

claiming an interest in land sought to be condemned to intervene in the proceedings. The Court further held that a petitioner was not entitled to appeal from the order permitting intervention since the party can fully protect its legal rights by preserving exception to the order allowing intervention and appealing from any adverse judgment upon the merits. General Statutes 1-278. Thus, the Court concluded that this interlocutory order allowing intervention did not deprive the petitioner "of a substantial right which it may lose if the order is not reviewed before final judgment."

Webster's Third New International Dictionary at 2280 (1971) defines "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right."

[2] The causes of action that the plaintiff allege are related to each other. He seeks punitive damages in the second cause because of the alleged misconduct of defendant in the first cause of action. Judge Seay required plaintiff to try his first cause of action, relating to the alleged fraudulent failure of the defendant to pay proper rental. To require him possibly later to try the second cause of action for punitive damages would involve an indiscriminate use of judicial manpower and be destructive of the rights of both plaintiff and defendant. Common sense tells us that the same judge and jury that hears the claim on the alleged fraudulent breach of contract should hear the punitive damage claim based thereon. The third cause of action alleged an anticipatory breach of contract. This arose from the same lease contract that gave birth to the first and second causes. By the same token, the same judge and jury should hear the third cause along with the first and second ones, assuming the plaintiff's cause is not subject to summary judgment.

We believe that a "substantial right" is involved here. If the causes of action were not subject to summary judgment, plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury. The case falls squarely within the definition of "substantial right" as defined by Webster's, *supra*. *See also Highway Commission v. Nuckles, supra*. The Court of Appeals was in error in dismissing this appeal.

[1] We hold that the 1967 General Assembly did not restrict the right of appeal provided by G.S. 1-277 and 7A-27(d) by engrafting Rule 54(b) requirements upon them. We hold that Rule 54(b) where it refers to "or other statutes" is speaking in particular of General Statutes 1-277 and 7A-27(d).

The second question is whether the trial court erred in granting summary judgment dismissing plaintiff's claim for punitive damages.

Under the provisions of G.S. 1A-1, Rule 56, the party moving for summary judgment has the burden of clearly establishing that there *is no genuine issue as to any material fact* and that as a result he is entitled to a judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Pt. 2 Moore's Federal Practice, *supra* § 56.15[8], at 56-642; *accord, Singleton v. Stewart, supra.*

We must first determine whether or not defendants have carried the burden of proof so as to entitle them to summary judgment.

Plaintiff makes the following allegations in his complaint:

"1. Plaintiff herein incorporates all allegations and paragraphs in his first claim for relief.

"2. Upon information and belief plaintiff alleges that the defendant fraudulently and wilfully failed to pay plaintiff amounts due under the percentage provisions of paragraph 3 of the lease contract.

"3. Upon information and belief plaintiff alleges that defendant wilfully, fraudulently and inaccurately reported the net sales to the plaintiff over a continuing period of time.

"4. That by the defendant's continuing conduct the plaintiff has been deprived of substantial revenues in excess of the sum of $10,000.

"5. That plaintiff is entitled, by virtue of defendant's conduct, to punitive damages in the amount of $100,000."

It will be noted that in paragraph 1 plaintiff incorporates all allegations contained in the first cause of action for breach of contract. In paragraph 6 of the first cause, plaintiff refers to paragraph 3 of the lease contract. That paragraph provides a minimum yearly rental for the various periods of the lease contract. This ranges from an original $10,000 for the first 5 years to $14,500 for the next five years to $15,000 for the final 5-year period. Paragraph 3 further provides:

"The Lessee will pay the Lessor five (5) percent of net sales in excess of $240,000 per annum, including net sales made by any leased department owned by Lessee during the term of this lease. For the option period, if exercised, the Lessee will pay to the Lessor five (5) percent of the net sales in excess of $300,000 per annum, including net sales made by any leased department owned by Lessee during the term of the option."

In order to determine what "net sales" means, we must refer to paragraph 4 of the lease:

"4. That the term 'Net Sales' shall be construed to mean the entire gross sales of merchandise less returns, repossessions, discounts, finance charges on sales, and sales tax levied on sales during the term of this lease."

This lease contract also required that the lessee furnish to the lessor a statement each year giving a sales audit for the preceding year in order to calculate the five (5%) percent rental charge. Paragraph 5 further provided:

"The Lessor, at her expense, has the right to audit the records of the Lessee, if she so desires to verify the statement and computation of the percentage rental."

Plaintiff has in the first cause of action, which is made a part of the second cause for punitive damages, an allegation that "defendants have continually failed to honor the lease provisions in regard to the percentage provision of paragraph 3 by understating the amount of net sales revenues as defined by paragraph 4 of the said lease."

The plaintiff offered into evidence affidavits that showed that for a period of 9 years defendant had misinformed the

plaintiff of his net sales and that the trust was entitled to five (5%) percent of the total understatement of $224,663.92, which five (5%) percent amounts to $11,233.20.

Our Court has held as a general rule that punitive or exemplary damages are not awarded for breach of contract with the exception of a breach of a contract to marry. *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968).

However, in *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953), our Court addressed itself to the general proposition involved in our case. Plaintiffs sought damages for fraud arising from a contract arrangement and in addition sought punitive damages. The facts disclosed that the plaintiffs were aged Negroes without education and they were induced to enter a contract for the purchase of a lot that was actually 80 by 150 feet at a price of $2,000 by a false and fraudulent representation that the boundaries were 268 feet wide by 160 yards deep. Trial Judge Bone submitted issues to the jury for actual damages and punitive damages. The jury returned a verdict of $1,500 for each. Our Court in an opinion by Chief Justice Devin modified the judgment by striking out the judgment for punitive damages. Our Court had this to say on the subject:

> "[I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury and within reasonable limits, though the right to such an award does not follow as a conclusion of law because the jury has found an issue of fraud against defendant. There must be an element of aggravation accompanying the tortious conduct which causes the injury. Smart money may not be included in the assessment of damages as a matter of course simply because of an actionable wrong, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570." *Swinton v. Realty Co., supra* at 725, 73 S.E. 2d at 787.
>
> "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., supra* at 726, 73 S.E. 2d at 787.

Then the Court continued with this language:

"[W]e think the rule is that the facts in each case must determine whether the fraudulent representations alleged were accompanied by such acts and conduct as to subject the wrongdoer to an assessment of additional damages, for the purpose of punishing him for what has been called his 'outrageous conduct.'" 236 *Swinton v. Realty Co., supra* at 726, 73 S.E. 2d at 787.

The Court concluded that the facts in the case were not sufficient to warrant punitive damages, reasoning as follows:

"[T]here 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. Here fraud is not an accompanying element of an independent tort but the particular tort alleged." 236 *Swinton v. Realty Co., supra* at 727.

It is generally held that punitive damages are those damages which are given in addition to compensatory damages because of the "wanton, reckless, malicious, or oppressive character of the acts complained of." 22 Am. Jur. 2d, Damages § 236 (1965). Such damages generally go beyond compensatory damages, and they are usually allowed to punish defendant and deter others. 22 Am. Jur. 2d, *supra* § 236. It is generally held that punitive damages are recovered not as a matter of right, but only in the discretion of the jury. *Allred v. Graves,* 261 N.C. 31, 134 S.E. 2d 186 (1964); *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393 (1956). As a rule you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award. *Clemmons v. Insurance Co.,* 274 N.C. 416, 163 S.E. 2d 761 (1968); *Gaskins v. Sidbury,* 227 N.C. 468, 42 S.E. 2d 513 (1947).

Our Court in *Swinton v. Realty Co., supra, cited Saberton v. Greenwald,* 146 Ohio St. 414, 66 N.E. 2d 224 (1946). *See also*

Finance, Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E. 2d 654 (1975). The Supreme Court of Ohio in a four to three decision in *Saberton v. Greenwald* permitted punitive damages for fraudulent representation in the sale of a watch. The facts indicated the seller represented the watch to be new when in fact it had used works, which could not be made to keep good time. These had been put into a new case. The Ohio Court determined that the action sounds in tort rather than in contract, after restating the general principle that punitive damages are not recoverable in an action for breach of contract. The court quoted with approval the following language of 25 C.J.S. Damages § 120, at 1128-29 (1966):

> "[W]here the acts constituting a breach of contract also amount to a cause of action in tort, there may be a recovery of exemplary damages on proper allegations and proof. As sometimes stated, exemplary damages are recoverable for a tort committed in connection with, but independently of the breach of contract, where the essentials of an award of such damages are otherwise present, the allowance of such damages being for the tort and not for the breach of contract. In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse, or gross negligence which amounts to an independent tort."

It is further stated in 25 C.J.S., *supra* § 120, at 1128:

> "Where the requisite aggravated circumstances are present, exemplary damages may be allowed in tort cases even though the tort incidentally involves a contract."

Our Court in *Swinton v. Realty Co., supra,* seems by dicta to adopt the general philosophy as suggested in 25 C.J.S., *supra* § 120, by the use of the following language:

> "[W]e think the rule is that the facts in each case must determine whether the fraudulent representations alleged were accompanied by such acts and conduct as to subject the wrongdoer to an assessment of additional damages, for the purpose of punishing him for what has been called his 'outrageous conduct.'" *Swinton v. Realty Co., supra* at 726, 73 S.E. 2d at 787.

[3] We believe that the allegations contained in the first claim for relief in the complaint are couched in language alleging a

breach of the lease contract, but at the same time allegations of fraud and deceit are obvious from the manner in which the breach is alleged. Plaintiff charges that by intentional understatement of the gross sales defendant substantially reduced the rental to which plaintiff was entitled under the contract. Certainly the second cause, which incorporates the first one, smacks of tort. Plaintiff alleges that "defendant willfully, fraudulently and inaccurately reported the net sales." It seems to us that the overall allegations bring the plaintiff within the rationale of *Swinton v. Realty Co., supra.*

In cases involving fraud, our Court has consistently used language such as the following:

> "Punitive damages are never awarded, except in cases when there is an element either of fraud, malice, . . . or other causes of aggravation in the act or omission causing the injury." *Holmes v. The Railroad Co.,* 94 N.C. 318, 323 (1886); see *Clemmons v. Insurance Co.,* 274 N.C. 416, 163 S.E. 2d 761 (1968); *Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497 (1967); *Van Louven v. Motor Lines,* 261 N.C. 539, 135 S.E. 2d 640 (1964).

It seems to us that in view of the purpose for which punitive damages are assessed the plaintiff has stated a proper cause of action. In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the lease contract required him to pay in the first place. If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits. If he is caught, he has only to pay back that which he should have paid in the first place. See 31 N.C.L. Rev. 473 (1953).

We believe that in this type of contract case with substantial tort overtones emanating from the fraud and deceit the better rule would require that defendant be punished by permitting plaintiff to recover punitive damages. By virtue of such punishment, plaintiff could at least receive expenses he incurred in the litigation.

We conclude that the court erred in granting summary judgment for defendant in the second claim for relief seeking punitive damages. The case is now only in the pleading stage,

and it remains to be seen whether or not the plaintiff will be able to sustain his allegations with proof. John C. McCarthy, Punitive Damages in Bad Faith Cases (1976) (involving generally insurance type cases).

The next question that we must decide is whether the trial court erred in granting defendant's motion for summary judgment as to plaintiff's claim for damages resulting from an alleged anticipatory breach of the lease contract.

In the part of his complaint relating to this cause, plaintiff incorporates the allegations of the first two claims above discussed and in paragraph 2 alleges:

> "Upon information and belief plaintiff alleges that defendants are anticipatorily about to breach the lease contract agreement by vacating the premises prior to the expiration of the said lease contract agreement option . . . , as shown in a letter marked 'Plaintiff's Exhibit C' attached hereto . . . . "

"Exhibit C" was a letter advising plaintiff on 22 July 1974 that defendant intended to vacate the premises described in the lease contract on or about 15 October 1974. Shortly thereafter on 31 July 1974, plaintiff filed attachment proceedings in Rowan County Superior Court against defendant. Plaintiff filed supporting affidavits to the effect that he had tried to rent the premises to various firms in the area but had been unsuccessful. Plaintiff filed further affidavits to the effect that defendant conducted a going-out-of-business sale at his Salisbury and Charlotte locations; that on 14 November 1974 defendant mailed him a letter to the effect that the keys to the building would be turned over to him; and that in January 1975 the keys were delivered to plaintiff. The affidavit also indicated that all utilities were terminated on or about 18 November 1974, and that on 30 January 1975 plaintiff received a letter marked Affidavit Exhibit 11 indicating that defendant at that time was being overseen by his creditors, that his liabilities were well in excess of his assets, that he was insolvent and that neither defendant nor his committee of creditors would be responsible for any rent after 31 January 1975. About 31 January 1975, plaintiff received a letter to the effect that defendant's petition for bank-

ruptcy filed 16 October 1974 had been withdrawn. The affidavit of plaintiff dated 22 March 1975 had the following language:

> "That the defendant is current in its rent pursuant to said lease only because a bond is in force securing any judgment rendered in this action."

This affidavit along with all the other affidavits of plaintiff and defendant were before Judge Seay when he entered a judgment on 26 March 1975. With regard to the third cause of action, the court entered the following:

> "[T]he plaintiff seeks to recover the rent due for the remainder of the term of the lease in question because of anticipatory breach of the lease by the defendant in giving notice of its intention to vacate the premises prior to the expiration of the term of the lease; and it further appearing to the Court and the Court finding as a fact that there is no requirement in the lease that the defendant occupy the premises during the term of the lease."

Thereupon, the trial court entered a summary judgment for defendant for the second and third causes of action and denied summary judgment for the first cause of action. The court reduced defendant's undertaking in the attachment proceedings from $80,000 to $15,000.

Appeal entries were entered by Judge Seay on 4 April 1975 in the usual language without using the clause referred to in Rule 54(b), "there is no just reason for delay."

4 Corbin on Contracts, § 959 (1951) defines anticipatory breach as follows:

> "An anticipatory breach of contract by a promisor is a repudiation of his contractual duty before the time fixed in the contract for his performance has arrived. Such a repudiation may be made either by word or by act." See also 11 Williston on Contracts, § 1312 (3d ed. 1968).

Plaintiff contends that defendant had a duty under the lease contract to occupy the demised premises and conduct a business therein because of the following language in the contract dated 1 July 1961:

> "2. That the Lessor covenants and agrees to put the Lessee in possession of said premises at the beginning of

said term and guarantees to the Lessee, peaceful and uninterrupted possession thereof SO LONG AS IT OCCUPIES, complies with, and performs the covenants and conditions of this lease." (Emphasis added.)

[4] The only reference in the lease contract to defendant's occupying the premises is that referred to in paragraph 2 above. Since defendant has continued to pay the minimum rent on the premises as required by the lease agreement, the sole question is whether the lease itself gives plaintiff a cause of action for defendant's notice of intent to vacate the premises. It seems to us that the portion of the lease relied upon by plaintiff as establishing defendant's duty of occupancy is in fact a statement of plaintiff's obligations to the defendant. A proper construction of the language seems to say that plaintiff guarantees defendant's right to peacefully occupy the premises during the term of the lease.

[4] Without a provision in the lease requiring defendant to occupy the premises, it appears that plaintiff fails to state a proper cause of action for anticipatory breach of contract unless we can read a duty to occupy into the contract by looking at it "from its four corners" and determining there is an implied covenant to do business.

Paragraph 1 of the lease provides:

"1. That for the consideration, and upon the terms and conditions hereinafter set forth, the Lessor hereby leases unto the Lessee, for the operation of a retail furniture business and kindred lines, and any other retail or wholesale business not competitive with Oestreicher-Winner in their present line of business, and which does not violate any local ordinance, the following described premises. . . . "

The fact that the purpose for which the lease was entered was not restricted to a high sales type business that would tend to produce net sales over $240,000 or $300,000 so as to promote activation of the rent provisions for 5% of net sales over these amounts further indicates that the parties did not intend to impose a duty to occupy and conduct business.

Paragraph 13 of the lease provides:

"13. . . . The Lessee has the right to transfer, or assign this lease, or to sublet any part of the leased premises

provided the business to whom the property may be leased or sublet is not competitive with Oestreicher-Winner in their present line of business, during the first ten (10) years of this lease."

That the lessee had the right for the first 10 years of the lease to transfer, assign or sublet the lease so long as the business was not competitive with Oestreicher-Winner is further indication that the parties did not intend to impose a duty to occupy and conduct a high sales business so as to promote activation of the rent based on net sales.

This kind of case has been litigated in other jurisdictions under varying factual situations providing varying results. See cases cited in the following: 1 Friedman on Leases, §§ 6.9-6.11 (1974); 40 A.L.R. 3d 971 (1971); 32-39 A.L.R. 2d Later Case Service 728-730 (1969); 38 A.L.R. 2d 1115-1116 (1954); 170 A.L.R. 1117-1121 (1947).

Our Court in *Jenkins v. Rose's Stores, Inc.*, 213 N.C. 606, 197 S.E. 174 (1938) has had occasion to deal with this subject. In this case the lease contract provided for an annual rental of 5 percent of gross sales, with a guaranteed minimum annual rental of $2,400. The lease contract commenced in 1933 and was renewed for 1934, 1935 and 1936. $2,400 ($200 per month) has been paid for 1936 without prejudice to other rights. Plaintiff contended that a balance of $1,248.18 was due for 1936. Defendant contended that the $2,400 paid was a full settlement for that year.

The pertinent part of the lease dealing with this controversy is as follows:

"(1) The lessors (the plaintiffs) do hereby demise and let unto the lessee (the defendant) and the lessee agrees to take and pay for, as hereinafter provided, for a period of one (1) year, beginning the 1st day of January, 1933, and ending the 31st day of December, 1933, the following described premises . . . . (2) The lessee shall have and hold said property with the privilege of quiet and unmolested possession for the term of one (1) year, as above set forth, for which the lessee agrees to pay as rental five percent (5%) of the gross sales made by the store operating in said building during the twelve months from January 1, 1933, to December 31, 1933; the lessee guarantees the

lessors a minimum rental of two thousand and four hundred ($2,400.00) dollars for said term of one year, which shall be paid in monthly installments of two hundred dollars ($200.00) per month, at the end of each month, said minimum rental of $2,400.00 to cover the rental of 5% on the first forty-eight thousand dollars ($48,000.00) of sales made by the store in said building, from January 1, 1933, to December 31, 1933, and upon the expiration of said term if said sales shall have exceeded $48,000.00, the lessee shall account to the lessors for and pay over to them the sum of five percent (5%) on any sales in excess of $48,000.00 so that the total rent paid shall represent 5% on all sales made by the store in said building during the term of this lease."

Defendant retained the premises under this lease through 1936 and paid plaintiff rents for said years in the sums of $3,126.88, $3,609.07, $3,648.18 and $2,400.00, respectively. In 1936 defendant did not operate a store on the premises but conducted its business in another location in the same town. Plaintiff based his claim for additional rent on the basis of the rent paid for the previous year, 1935. Plaintiff contended that under the lease defendant was bound to conduct a store on the premises with reasonable diligence and that its failure to do so was a breach of the contract of lease. The lower court, after finding facts, rendered judgment in the amount of $1,061.38, this being 5 percent of the average gross sales for the years 1933, 1934 and 1935, after deducting $2,400.00. Our Court reversed and held that the lease failed to show any agreement requiring defendant to operate a store within the demised premises. The Court further held that the lease showed that plaintiffs protected their interests by requiring a minimum rental and that plaintiff would get this whether defendant operated the store at a loss or at a profit. Defendant contended there was an implied covenant, but our Court held that this was not so. In an opinion by Justice Schenck, speaking for our Court, it was said:

"The rule applicable to the duty of a tenant to occupy or use the premises is thus stated in the annotations of 46 A.L.R., at page 1134: 'Apart from the question of liability for waste, it seems that the tenant is under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they

would be used for the particular purpose to which they seemed to be adapted or constructed.' " *Jenkins v. Rose's Stores, Inc., supra* at 609.

This case seems to be almost on "all-fours" with our case. We are thus controlled by it and hold that there was no implied covenant to do business under the terms of this lease where the use of the premises is not restricted to a high sales business that would activate the percentage rent provision and the lessee may transfer, assign or sublet to any business not competitive with lessor's business.

Finally, plaintiff contends the court erred in reducing defendant's original undertaking from a bond of $80,000 to a bond of $15,000.

At the outset we find the record quite fragmentary. The only entry in the record on this subject after execution of defendant's undertaking of $80,000 was that made by Judge Seay in his summary judgment order:

> "IT IS FURTHER ORDERED that the amount of the defendant's undertaking in the attachment proceeding herein be reduced to Fifteen Thousand Dollars."

Plaintiff excepted to this and assigns it as error. Plaintiff made no motion to require the trial judge to find the facts concerning the bond reduction.

[5] When this matter was heard, Judge Seay had before him all the pleadings in the case, as well as all the affidavits that had been offered by both sides. Presumably he took all these into consideration in arriving at the summary judgment entered, as well as the reduction in defendant's bond. Upon rendition of summary judgment for defendant as to the second and third causes of action, with only the first cause remaining, Judge Seay had the right to exercise his discretionary power to reduce the bond substituted for the attached property and, thus, keep the bond basically in proportion with the remainder of the case. *See* G.S. 1-440.37.

In *Millhiser v. Balsey*, 106 N.C. 433, 435, 11 S.E. 314, 315 (1890), our Court set forth the proper procedure for perfecting an appeal upon rendition of a judgment vacating a warrant of attachment and like judgments such as the vacation or modifica-

tion of a bond substituted for the attached property pursuant to G.S. 1-440.39:

> "In this and like cases, it is the province of the Judge in the Court below to hear the evidence, usually produced before him in the form of affidavits, find the facts and apply the law arising thereupon. *Pasour v. Lineberger*, 90 N.C., 159 and the cases there cited. If a party should complain that the Court erred in so applying the law, then he should assign error and ask the Court to state its findings of the material facts in the record, so that he might have the benefit of his exceptions, on appeal to this Court. In that case, it would be error if the Court should fail or refuse to so state its findings of fact, and the law arising upon the same.
>
> "Such practice affords the complaining party reasonable opportunity to have errors of law, arising in the disposition of incidental and ancillary matters in the action, corrected by this Court, while, in very many cases, it lessens the labor of the Court below, expedites proceedings in the action and saves costs."

[6] Since plaintiff failed to request findings of fact to justify the modification of defendant's bond, it is presumed that the trial judge found facts sufficient to support his order, and this is not reviewable on appeal. *Lumber Co. v. Buhmann*, 160 N.C. 385, 75 S.E. 1008 (1912). Plaintiff apparently acquiesced in the discretion exercised by the trial judge and cannot be heard to complain now. Error must be shown by the party alleging it. *Lumber Co. v. Buhmann, supra.*

The court finds no error in the reduction of defendant's undertaking to $15,000.

The result is as follows:

(1) The opinion of the Court of Appeals dismissing the appeal is reversed.

(2) The order of the trial judge in entering summary judgment for defendant as to the second cause of action is reversed.

(3) No Error in the order of the trial judge in entering summary judgment for defendant as to the third cause of action.

(4) No Error in the reduction of defendant's undertaking to $15,000.

Justices LAKE, HUSKINS, and EXUM concur in the result.

Chief Justice SHARP concurring and dissenting.

I concur in the majority's decision that the Court of Appeals has misconstrued G.S. 1A-1, Rule 54(b). The majority opinion correctly states, "Certainly the General Assembly did not intend to restrict the right of appeal provided by G.S. 1-277 and 7A-27(d) by engrafting Rule 54(b) requirements upon them." Indeed, Rule 54(b) makes appealable judgments which were not appealable prior to its enactment.

Under G.S. 1-277 a partial summary judgment which determined fewer than all of the claims in a multiple-claim action would not be immediately appealable unless the order affected a substantial right. This is true because such an order would not finally determine the entire action—there would still be claims remaining in the case. Under G.S. 1-277 the general rule is that " 'an appeal will not lie until there is a final determination of the whole case. It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant.' " *State v. Childs*, 265 N.C. 575, 578, 144 S.E. 2d 653, 655 (1965). *See Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950).

All Rule 54(b) did was to restrict the unit to which the finality concept would be applied. In other words, it allows the trial judge to authorize an appeal from a judgment that finally determines a claim for relief even though there are other claims remaining in the action. The only additional requirement that must be met is that there is no just cause for delay. The same order or judgment would not necessarily be appealable under G.S. 1-277 unless it also affected a substantial right. Thus Rule 54(b) has the effect of increasing the avenues of appellate review. Final judgments on fewer than all the claims are now immediately appealable if the trial judge determines that there is no just cause for delay, regardless of whether those judgments affect substantial rights as that term has been previously defined. This is what I believe the comment to Rule 54(b) means when it says:

"In considering this section, it should be remembered that § 1-277 was left intact except as modified by this section. In other words appeals will continue to lie only when a 'party aggrieved' has been deprived of a 'substantial right,' or from

a final judgment. The modification here is that when there is no just reason for delay and when there is an express determination to that effect, the unit to which the finality concept shall be applied is by this rule made a smaller one. Thus, if two claims are presented to the trial court and one of them is the subject of a disputed ruling, an appeal will lie if the ruling would have been appealable in an action involving that claim alone and if the judge makes the requisite determination." N. C. Gen. Stats., Vol. 1A at p. 700.

I also agree that in any claim for relief in which issues of compensatory and punitive damages are properly for the jury both issues should be tried at the same time by the same judge and jury, and that to require them to be tried separately at different times would violate a substantial right. In such a situation, however, multiple claims are not involved. "[W]hen plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented and subdivision (b) [of Rule 54] does not apply." 10 C. Wright & A. Miller, Federal Practice and Procedure § 2657 (1973).

Further, in my view, this case involves no issue of punitive damages. The complaint in the present action purports to allege three (3) separate claims for relief, all relating to defendant's alleged failure to perform its obligations as plaintiff's lessee.

In the portion captioned "first claim for relief," plaintiff alleges she was entitled to receive as rent in addition to a guaranteed minimum amount, a percentage of the net sales; that defendant, by understating the amount of its net sales had failed to comply with its obligation; and that, by reason of said failure, defendant is indebted to plaintiff in an amount in excess of $10,000.00 plus interest.

In the portion captioned, "second claim for relief," plaintiff alleges, upon information and belief, that defendant "wilfully, fraudulently and inaccurately reported the net sales to the plaintiff over a continuing period of time," thus depriving plaintiff of substantial revenues in excess of $10,000.00; and on account of defendant's conduct plaintiff is entitled to recover punitive damages in the amount of $100,000.00.

In the portion captioned, "third claim for relief," plaintiff alleged she was damaged in the amount of $30,000.00 plus interest, costs, and legal fees, because defendant closed its store

in breach of the contract and vacated the leased premises prior to the expiration of the term. This third claim is referred to as one for an "anticipatory breach."

It is noted that plaintiff does not allege that defendant has failed to pay any portion of the guaranteed minimum rental.

Recovery on plaintiff's "first claim for relief," that is, for defendant's failure to meet its contractual obligations, is prerequisite to *consideration* of her "second claim for relief." Both relate to whether defendant has paid in full the rental it was obligated to pay—in excess of the guaranteed minimum rental —based on its net sales during the period defendant conducted its business in the leased premises.

I agree with that portion of the Court's opinion which holds that defendant was not obligated to remain in possession and carry on business in the leased premises until the expiration of the term of the lease. Hence, I agree that summary judgment for defendant on the "third claim for relief" was properly entered.

I dissent from that portion of the Court's opinion which holds that in her "second claim for relief" plaintiff has stated "a proper cause of action for punitive damages." In my opinion, these allegations concerning the recovery of punitive damages fail to state a claim upon which relief can be granted, and I agree with Judge Seay that from the affidavits and pleadings it affirmatively appears that plaintiff cannot prove entitlement to punitive damages. *See Hardy v. Toler,* 288 N.C. 303, 218 S.E. 2d 342 (1975); *Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497 (1967). I therefore dissent from the majority decision reversing summary judgment for defendant on the so-called "second cause of action."

No decision has come to my attention which holds that a plaintiff is entitled to recover punitive damages on account of a defendant's failure to pay what he is obligated by contract to pay. Moreover, the cases cited in the Court's opinion are in full accord with my view.

In *King v. Insurance Co.,* 273 N.C. 396, 159 S.E. 2d 891 (1968), the order from which the plaintiff appealed allowed the defendant's motion to strike from the complaint the allegations concerning the recovery of punitive damages and the prayer therefor. The defendant's motion to dismiss the appeal was overruled on the ground the order was in the nature of a judg-

ment sustaining a demurrer for failure to allege facts sufficient to constitute a cause of action for punitive damages.

In *King,* the plaintiff sued his liability insurance company for compensatory and punitive damages. He alleged the defendant had wilfully breached its contractual obligations by refusing to defend a counterclaim which had been asserted against the plaintiff in an automobile collision case and by failing to pay the judgment obtained against the plaintiff on the counterclaim.

The allegations upon which the plaintiff based his right to recover punitive damages were as follows: He referred to the defendant's conduct as "aggravated fraud." He referred to the defendant's breach of contract as "wilful," "intentional," in "wanton disregard of the rights of the plaintiff," and as "calculated . . . to hamper, prevent and/or impair the plaintiff's legal position" in the automobile collision case.

The opinion of Justice Lake states: "With the exception of a breach of promise to marry, punitive damages are not given for breach of contract. *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *Richardson v. R. R.,* 126 N.C. 100, 35 S.E. 235; Restatement of the Law, Contracts, § 342. See also: Williston on Contracts, Rev. Ed., § 1340; Sutherland on Damages, 4th Ed., § 390; Sedgwick on Damages, 9th Ed., § 603; McCormick on Damages, § 81; Hale on Damages, p. 318; 22 Am. Jur. 2d, Damages, § 245; 25 C.J.S., Damages, § 120; Annot., 84 A.L.R. 1345." *Id.* at 398, 159 S.E. 2d at 893. The Court concluded: "The complaint in the present action, including the allegations striken by the order of the superior court, alleges only a breach of contract by the defendant." *Id. See* J. McCarthy, Punitive Damages in Bad Faith Cases, § 2.29 (1976).

We are not considering a factual situation in which it is alleged that a party was induced to enter into a contract by reason of false and fraudulent representation. Such a factual situation was involved in *Saberton v. Greenwald,* 146 Ohio St. 414, 66 N.E. 2d 224, 165 A.L.R. 599 (1946); *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785 (1953), referred to in the Court's opinion.

In *Swinton,* the plaintiff alleged, and the verdict established, that defendants induced the plaintiff to purchase a lot of land 80 by 150 feet at the price of $2,000.00 by falsely and fraudulently representing that the boundaries of the lot as

designated and pointed out by the defendants embraced an area "268 feet wide and 160 yards deep." Answering separate issues, the jury awarded the plaintiff actual damages of $1,500.00 and punitive damages at $1,500.00. The defendant appealed from a judgment that the plaintiff recover in accordance with the verdict. This Court modified the judgment by striking therefrom the allowance of punitive damages. The opinion of Chief Justice Devin states: "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. . . . We do not think the law requires that an additional amount for punishment should be meted out in this action." *Id.* at 727, 73 S.E. 2d at 788.

As in *King*, the epithets used to describe the defendant's conduct are insufficient to constitute a claim for punitive damages. We note that G.S. 1A-1, Rule 9(b) provides: "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." As we said in *Mangum v. Surles*, 281 N.C. 91, 96, 187 S.E. 2d 697, 700 (1972), "Rule 9(b) codifies the requirement previously existing in our State practice that the facts relied upon to establish fraud, duress or mistake must be alleged."

In the present case plaintiff has alleged and shown only an intentional breach of contract. Her second claim for relief does not adequately allege an action for fraud or deceit but merely realleges the underlying basis of her contract action.

Justices BRANCH and MOORE join in this opinion.

STATE OF NORTH CAROLINA v. JAMES VERNON SMITH

No. 47

(Filed 17 June 1976)

1. Jury § 7— ten peremptory challenges for State — error not prejudicial

Though there was a violation of G.S. 9-21(b) in allowing the State ten instead of nine peremptory challenges, the error was not

prejudicial to defendant, particularly where defendant failed to object or otherwise bring the error to the attention of the court and also failed to exhaust his own peremptory challenges.

2. **Constitutional Law § 29; Jury § 5— excusal of jurors not challenged by either party**

Failure of the trial court to require formal challenges by the State before excluding 27 prospective jurors was not prejudicial error.

3. **Constitutional Law § 29; Jury § 5— excusal of jurors not challenged by State**

The trial court did not err in excusing six prospective jurors without formal challenge by the State where each of those jurors expressed serious reservations as to his ability to render an impartial verdict based solely on the evidence presented at trial.

4. **Constitutional Law § 29; Jury § 5— erroneous excusal of juror — no prejudice to defendant**

The erroneous excusal of a prospective juror does not entitle the adverse party to a new trial so long as there is no systematic exclusion and only those who are competent and qualified to serve are actually empaneled; this is especially so where the defendant fails to exhaust his peremptory challenges.

5. **Criminal Law § 87— leading questions — allowance discretionary**

Rulings by the trial judge on the use of leading questions are discretionary and reversible only for abuse of discretion.

6. **Criminal Law § 87— leading questions — guidelines for allowance**

Situations in which leading questions are permissible are when the witness is hostile or unwilling to testify, has difficulty in understanding the question because of immaturity, age, infirmity or ignorance, or where the inquiry is into a subject of delicate nature such as sexual matters, the witness is called to contradict the testimony of prior witnesses, the examiner seeks to aid the witness's recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, the questions are asked for securing preliminary or introductory testimony, the examiner directs attention to the subject at hand without suggesting answers, and the mode of questioning is best calculated to elicit the truth.

7. **Criminal Law § 169— hearsay testimony — no motion to strike — similar evidence admitted without objection**

Defendant waived the benefit of his objection to hearsay testimony where he made no motion to strike, requested no curative instructions, and elicited evidence of the same or similar import on cross-examination.

8. **Homicide § 4— first degree murder — premeditation and deliberation — definitions**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Premeditation may be defined as thought beforehand for some length of time,

and deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose.

9. **Homicide § 18— premeditation and deliberation — circumstances to consider**

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) want of provocation on the part of deceased, (2) conduct of defendant before and after the killing, (3) the dealing of lethal blows after deceased has been felled and rendered helpless, (4) the vicious and brutal manner of the killing, and (5) the number of shots fired.

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

Evidence in a first degree murder prosecution was sufficient to be submitted to the jury where it tended to show that two of defendant's companions quarreled with deceased when they took him home on the night of the shooting; an hour later, defendant and his two companions returned to deceased's home, enticed the unarmed victim to come outside, and then, without warning, opened fire upon him with a shotgun and defendant's .25 automatic pistol, discharging at least three shots and fatally wounding him with a shotgun; they immediately returned to defendant's trailer and defendant was driven to his father's home where he concealed the shotgun; and after learning of one of his companion's arrest, defendant told one witness to check his car for shells, ordered another witness to dispose of his .25 automatic pistol, and instructed both witnesses to say nothing of the events which had transpired, warning one of them that she, like the deceased, might be killed if she divulged any information to the investigating authorities.

11. **Criminal Law § 157— defense counsel's argument — inclusion in record on appeal**

The argument of defense counsel should be included in the record on appeal when the district attorney's argument is challenged.

12. **Criminal Law §§ 102, 116— statement that evidence uncontradicted — no comment on defendant's failure to testify**

Where contradictions in the State's evidence, if such existed, were not shown by the testimony of others or by cross-examination of the State's witnesses themselves, the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify. G.S. 8-54.

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

Imposition of the death penalty upon a conviction for first degree murder was not unconstitutional.

DEFENDANT appeals from judgments of *Wood, J.*, September 1975 Session, STOKES Superior Court.

Defendant was indicted in separate bills for murder and conspiracy. The first bill charges that on 24 January 1975 defendant feloniously, willfully, and of his malice aforethought, did kill and murder Lindsey Winfred Hall in Stokes County. The second bill charges that on 24 January 1975 defendant unlawfully, willfully, and feloniously conspired with Harold Linwood Jordan and William Brady Tilley to feloniously assault and inflict serious injury upon Lindsey Winfred Hall with firearms. The cases were tried together without objection.

The State's evidence tends to show that on 24 January 1975 James Vernon Smith, Brady Tilley, Willa Dean Hicks and Gail Bullins were drinking together at defendant's trailer in Stokes County. In the late afternoon they were joined by Larry Hodges, Harold Jordan and Lindsey Winfred Hall. Between 5:30 and 7:00 p.m. Willa Dean Hicks was taken home and was replaced by Julia Pruitt. Around 9 p.m. Larry Hodges went to bed with Gail Bullins in the back bedroom of defendant's trailer. Harold Jordan and Brady Tilley took Lindsey Winfred Hall home around 10:30 p.m. in Jordan's truck. Mrs. Hall heard the truck arrive, recognized it by its sound, and heard loud voices outside her trailer home. After the truck left Lindsey Winfred Hall entered his trailer home and told his wife that Harold Jordan wouldn't be coming there anymore. When Mrs. Hall asked why, he replied, "Didn't you hear us fighting?"

The State's evidence further tends to show that when Brady Tilley and Harold Jordan returned to defendant's trailer after taking Winfred Hall home, defendant James Vernon Smith went into the room where Larry Hodges and Gail Bullins were sleeping and asked to borrow Hodges' car. Hodges gave his keys to defendant and cautioned him not to wreck the car. The defendant, Harold Jordan and Brady Tilley thereupon left the trailer and at that time defendant had a .25 automatic pistol in his belt.

Larry Hodges' car was white and had a stripe down the side. Around 11:30 p.m. Mrs. Winfred Hall, who had not yet retired, observed car lights coming into the driveway of her trailer home. She observed that the car was white and appeared to have a stripe down the side. Someone blew the horn, "and it was a real funny sounding horn." She could not hear anything that was being said outside, but "it sounded like somebody was just barely in a whisper talking and a trunk lid

slammed. . . . It was mumbled-like voices in a whisper. . . . I could not tell how many people were there." When the horn was blown a second time, she awakened her husband and told him someone was outside. Lindsey Winfred Hall got up, looked outside, seemed to grow frightened, finally pulled on his pants and went outside. As he passed through the door Mrs. Hall heard the car backing out of the driveway and heard three shots. One bullet penetrated the wall in the bedroom where she was sitting. She immediately ran outside and found her husband lying on his back at the end of the driveway. When she reached him he said, "They shot me." He was taken to the hospital and pronounced dead on arrival. An autopsy revealed that death was caused by multiple gunshot wounds, apparently as a result of buckshot from a shotgun blast to the chest.

Defendant James Vernon Smith, Harold Jordan and Brady Tilley returned to defendant's trailer "somewhere around 11:30 p.m." Defendant asked Julia Pruitt to drive him to his father's house, which she did. There, he concealed a shotgun under the mattress of a bed. The following day, 25 January 1975, defendant learned that Brady Tilley had been arrested, whereupon he told Larry Hodges to inspect his car for shells. Hodges did so but found none. Defendant also told Hodges to "keep quite about it." Later in the day defendant gave the .25 automatic pistol to Julia Pruitt and told her to take it home. She took it to her home and concealed it in a closet. She saw defendant again on the night of 27 January 1975, and defendant wanted to know what she had told the investigating SBI agent. He warned her that the same thing that happened to Winfred Hall could happen to her if she said anything. Julia next saw defendant on 30 January 1975 when he told her to get rid of the .25 automatic pistol. She wrapped it in a paper bag and threw it in some bushes behind her home. Some weeks later she told SBI Agent Johnson about the pistol and, acting on the information she furnished, Agent Johnson recovered it.

The Larry Hodges vehicle, a white car with a stripe down the side, was driven to Mrs. Hall's trailer and the horn was blown. Mrs. Hall testified that the horn sounded like the one she heard the night her husband was killed.

Two shell casings were found on the ground near the Hall trailer. Markings on these shell casings were compared with the markings of the shells which had been test-fired in defendant's .25 automatic pistol. Based on similarity of the markings, SBI

Agent Hurst testified that in his opinion the two shell casings found near the Hall trailer had been fired by defendant's .25 automatic pistol.

Defendant Smith offered no evidence. Harold Jordan and Brady Tilley were granted separate trials.

The jury convicted defendant of (1) murder in the first degree and (2) conspiracy to commit a felonious assault with a firearm upon Lindsey Winfred Hall. He was sentenced to death for the murder and to imprisonment for ten years for the conspiracy. He appealed to the Supreme Court alleging errors discussed in the opinion.

Clarence W. Carter and Stephen G. Royster, attorneys for defendant appellant.

Rufus L. Edmisten, Attorney General; Isaac T. Avery III, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant first contends the trial court committed prejudicial error in allowing the State to challenge peremptorily ten prospective jurors in violation of G.S. 9-21(b) which provides that "[i]n all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more." The record reveals that the court clerk was keeping the record of peremptories exercised by both the State and the defendant and, due to an erroneous count, informed the prosecution that the State had used five peremptory challenges when in fact it had used six. The State thereafter exercised four additional challenges when it was only entitled to three. Even so, prejudicial error is not shown and this contention cannot be sustained.

Although there was a violation of the statute in allowing the State ten peremptory challenges, under the facts of this case the error was not prejudicial to defendant. Defendant not only failed to object or otherwise bring the error to the attention of the court but also failed to exhaust his own peremptory challenges. This indicates he was apparently satisfied with the jury ultimately empaneled. Under these circumstances the error was harmless and too insignificant to require a new trial. *See State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sen-*

tence reversed 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). This assignment is overruled.

[2] During the course of jury selection the trial court, pursuant to voir dire examination conducted by the State, or by the court itself, or both, excused twenty-seven prospective jurors without a formal challenge for cause by the State. Defendant first argues that such action by the court constitutes prejudicial error. In the alternative, he argues that even if the court did not err in excusing certain jurors without a challenge by the State, seven of the twenty-seven jurors excused were nevertheless improperly excluded upon an insufficient showing of cause for challenge. These contentions constitute defendant's second and third assignments of error.

G.S. 9-15(a) provides in pertinent part that during the selection of the jury "it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged." Relying on this statute defendant contends the trial court erred by excusing various jurors without a formal challenge by either party. We think not.

Matters relating to the conduct of a criminal trial are largely within the sound discretion of the trial judge so long as defendant's rights are afforded him. *See State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970). "It has long been established in this State that it is the right and duty of the court to see that a competent, fair and impartial jury is empaneled and, to that end, the court, in its discretion, may excuse a prospective juror *without a challenge by either party.* [Citations omitted.]" (Emphasis added.) *State v. Atkinson, supra.* It is obvious that the trial court, in doing so here, was merely attempting to expedite the selection of the jury which, nevertheless, was so extensive that it covers nearly 150 pages of the record before us. Defendant interposed no objection to this procedure, *see State v. Atkinson, supra; State v. Ward,* 9 N.C. 443 (1823), and upon this record has failed to show any abuse of discretion with respect to the challenged conduct of the court. We hold, therefore, that the failure of the trial court to require formal challenges by the State before excluding these prospective jurors was not prejudicial error.

[3] Likewise without merit is defendant's contention that the trial court, without formal challenge by the State, improperly

excused six prospective jurors without a sufficient showing of cause by the State. Defendant argues that, of the twenty-nine jurors excused by the court, these six were excused improperly because there was "no showing of extreme partiality or prejudice" on their part. Our examination of the record reveals, however, that in the course of the voir dire, the jurors who were excused by the court had expressed serious reservations regarding their ability to return a verdict of guilty because of (1) their relationships with the defendant or the murder victim, or (2) their inability to grasp the possibility that more than one person may be responsible for the same crime, or (3) their skepticism with respect to the sufficiency of circumstantial evidence to support a conviction in a capital case. "The trial judge is empowered and authorized to regulate and supervise the selection of the jury to the end that both defendant and the State receive the benefit of a trial by a fair and impartial jury." *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975). Thus it is that questions concerning the competency of a juror are within the sound discretion of the trial judge whose rulings thereon will not be disturbed on appeal absent abuse of discretion or error of law. *State v. Young, supra; State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51 (1975); *State v. Vinson, supra; State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796, *cert. denied* 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973); *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289, *cert. denied* 409 U.S. 1043, 34 L.Ed. 2d 493, 93 S.Ct. 537 (1972); *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698 (1972). We hold that the trial court in the instant case had ample reason, on its own motion, to excuse these jurors, each of whom expressed serious doubts as to his ability to render an impartial verdict based solely on the evidence presented at trial.

[4] Even if one or more of these jurors were improperly excused, which is not conceded, this error was not prejudicial. Defendant failed to object to any juror exclusion challenged by this assignment, and "it has been settled in this State since as long ago as *State v. Ward,* 9 N.C. 443, that an irregularity in forming a jury is waived by silence of a party at the time of the court's action. . . . 'He shall not by consent of this kind, take a double chance' on acquittal by the jury so selected or a new trial because of such irregularity in the selection." *State v. Atkinson, supra.* A criminal defendant has the right to an impartial jury but not necessarily to one of his choice. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). Thus the

erroneous excusal of a prospective juror does not entitle the adverse party to a new trial so long as there is no systematic exclusion and only those who are competent and qualified to serve are actually empaneled. This is especially so where, as here, the defendant fails to exhaust his peremptory challenges.

The same reasoning applies with equal force to defendant's argument that the court, on its own motion, should have excused one juror who stated that he would find it embarrassing to return a verdict of not guilty by reason of his previous relationship, not disclosed, with the district attorney. Defendant did not challenge this juror, for cause or peremptorily, although defendant at this point had several unused peremptory challenges. Thereafter, he stated that he was satisfied with the jury as then constituted. This fact alone belies defendant's belated attack upon the competency of this juror and renders harmless any error alleged in this respect.

Defendant has shown no abuse of discretion or error of law on the part of the trial judge in excusing, on his own motion, those prospective jurors whose exclusion constitutes defendant's second and third assignments of error. Likewise defendant has shown no prejudicial error in the court's failure to excuse the one juror he now contends should have been excused. These assignments are overruled.

Defendant's fourth assignment is grounded on his contention that the trial court improperly excused five prospective jurors by reason of their general opposition to capital punishment and without a showing that they were irrevocably committed before the trial began to vote against conviction regardless of the evidence. We find, however, that the record does not support defendant's position.

The record reflects that four of the jurors embraced by this assignment indicated on voir dire that their views regarding the death penalty were such that they could not make an impartial decision as to defendant's guilt or that, notwithstanding the evidence, they would be unable to return a verdict of guilty. These four jurors (Richard Moran, Daniel E. Fulk, Donald Gray Stone and Ernest Posey) were therefore properly excused. *See State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Bernard,* 288 N.C. 321, 218 S.E. 2d 327 (1975); *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). Robert Bullins was excused by the court by reason of his apparent inability to convict upon circumstantial evidence in a capital case rather than as a result of his views on capital punishment. Excusal of this venireman for cause rested in the sound discretion of the trial judge. Moreover, defendant made no objection, did not exhaust his peremptory challenges, and has made no showing of prejudice. Defendant had no vested right to this particular juror, and when no systematic exclusion is shown defendant's right is only to reject jurors prejudiced against him. He has no right to select a jury prejudiced in his favor. *State v. Monk, supra.*

Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), relied on by defendant, involved a systematic exclusion of *all* veniremen opposed to capital punishment by the *intentional* application of an *improper standard.* Not so in the case before us. Moreover, defendant here did not object to the exclusion of Robert Lee Bullins, failed to exhaust his peremptory challenges, and advised the court he was satisfied with the jury that was empaneled. "This is strong evidence that no juror was empaneled who was prejudiced against defendant. In fact, this record does not disclose a vestige of evidence that a juror was empaneled who was not qualified and competent to serve." *State v. Bernard, supra. See State v. Ward, supra.* For the reasons stated, defendant has shown no prejudicial error in the jury selection process and his fourth assignment of error is therefore overruled.

By his fifth assignment of error defendant contends the trial court erred in permitting the district attorney over objection to propound twelve leading questions to certain State's witnesses. Mrs. Hall, wife of the deceased, testified regarding her observations of the automobile which was driven into her yard shortly before her husband was shot, and related matters. In the course of this testimony the district attorney asked Mrs. Hall the following questions to which Exceptions 33, 34, 35 and 36 were taken:

1. "Q. Could you, was it close enough so the lights of the car were not exposed?

A. Yes, sir."

2. "Q. He [the deceased] was near what we might refer to as the side ditch?

A. Yes, sir."

3. "Q. Did the bullet come through at the time the shots were fired?

A. Yes, sir."

4. "Q. And it [the car] had a stripe down the side?

A. Yes, sir."

Mrs. Brenda Nance Oakley, a neighbor of the deceased, testified that sometime before midnight she heard three closely spaced shots, the first of which sounded the loudest. The district attorney then asked, but the witness did not answer, the following question to which Exception 39 was taken:

5. "Q. Louder than the other two?"

Gail Bullins testified she and defendant went to visit Julia Pruitt "a couple of days after" Mr. Hall was killed. In the course of her testimony she remembered Larry Hodges had a white car and the district attorney asked her the following questions to which Exceptions 41 and 42 were taken:

6. "Q. Well did you ask him—Let me ask you whether you welcomed the visits from the group—"

7. "Q. With a stripe down the side of it?

A. Yes."

Larry Hodges testified that between 9:00 and 9:30 p.m. he and Gail Bullins retired to a bedroom in defendant's trailer. Sometime later defendant and Brady Tilley came into the bedroom to borrow Hodges' car. Hodges gave them the car keys and a few minutes later heard the car start. Hodges stated that he didn't know exactly what time he heard the engine start and the district attorney then asked the following question to which Exception 43 was taken:

8. "Q. Was it around eleven o'clock when they came into the bedroom?

* * * *

A. I don't know, . . . I would say . . . between ten-thirty and eleven, that is what I would guess but I don't know."

Peewee Smith, a Stokes County Deputy Sheriff, described the sound of the horn on Larry Hodges' car as "real faint."

The following exchange then occurred and is the basis for defendant's Exception 44:

9. "Q. Larry Hodges has testified on some occasion that the car was carried to the home of Mrs. Hall for the purpose of conducting some sort of an experiment?

MR. CARTER [attorney for defendant]: Objection to the leading.

MR. SCOTT [district attorney]: I was going to ask if he knows about that and if Larry was telling the truth about it.

COURT: Overruled.

MR. CARTER: Objection to testifying.

COURT: Overruled. Go ahead.

EXCEPTION NO. 44"

The witness Ravon Collins, a deputy sheriff, testified concerning the difference in appearance of a shotgun as the witness observed it on January 27 and April 21, 1975. He stated that on January 27 the barrel of the weapon was shiny with dark powder particles scattered through the barrel. On April 21 the barrel had a duller shine and the powder in the barrel appeared dry and lighter in color. The district attorney then asked the following question to which defendant's Exception 45 was taken:

10. "Q. Looking at it now has it visibly changed in condition since that time?

MR. CARTER: Objection to the leading.

COURT: Overruled

EXCEPTION NO. 45

A. Since that time it appears to have gotten a duller look down the barrel with the powder becoming lighter in color."

Lindsey Watkins, a Rockingham County Deputy Sheriff, testified that Ray Hall gave him two .25 caliber cartridge hulls and what appeared to be a copper jacket of a lead projectile, which items were found outside the victim's trailer on the morning of his death. Watkins and another deputy surrendered these

items to SBI Agent Terry Johnson on 27 January 1975. The following exchange then occurred:

11. "Q. And the ones that you turned over to Mr. Johnson were the same and identical ones turned over to you by Mr. Ray Hall?

A. Yes.

MR. CARTER: Objection to the leading.

COURT: Overruled.

EXCEPTION NO. 46.

MR. SCOTT: Just saving a little time."

The final question encompassed by this assignment and alleged to be leading occurred during the testimony of Frederick Mark Hurst, Jr., an SBI agent. Agent Hurst testified regarding comparisons he made between the cartridge casings (State's Exhibit 10) found outside the victim's trailer and cartridge casings obtained by test-firing an identical type of ammunition from State's Exhibit 12, a .25 caliber pistol which previously had been placed in defendant's possession shortly before the victim was killed. The district attorney then asked the following question:

12. "Q. Have you ever seen two .25 automatic pistols of this type leave the same mark on the same extracted shell?

MR. CARTER: Objection to the leading.

COURT: Overruled.

EXCEPTION NO. 47

A. As far as the individual characteristics, no, sir."

[5] Rulings by the trial judge on the use of leading questions are discretionary and reversible only for abuse of discretion. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967); *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965); *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353 (1953); *State v. Beatty,* 226 N.C. 765, 40 S.E. 2d 357 (1946); 1 Stansbury's North Carolina Evidence § 31 (Brandis rev. 1973). Defendant concedes this to be the general rule but contends the court abused its discretion to his prejudice in permitting the questions challenged by this assignment. This contention is without merit.

[6] Situations in which leading questions are permissible are summarized by Justice Branch, writing for the Court in *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974), as follows:

> "The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth. [Citations omitted.]"

The twelve questions encompassed by this assignment fall within the enumerated guidelines and we perceive no abuse of discretion on the part of the trial judge with respect to any of them. Defendant's fifth assignment of error is overruled.

Defendant's sixth assignment of error is grounded on the contention that the trial court expressed an opinion as to the facts and displayed an attitude of partiality throughout the trial. We have examined the portions of the record embraced by this assignment, Exceptions 9, 21, 30 and 40, and find nothing which merits discussion. None of the complaints covered by these exceptions could have affected the outcome of the trial when measured by any reasonable standard. Defendant's sixth assignment of error is overruled.

[7] Defendant next contends that the trial court erred in admitting certain hearsay testimony by the wife of the deceased. Mrs. Hall testified she heard Harold Jordan's truck pull up outside her trailer. Someone got out of the truck and then she heard loud voices. After the truck left, her husband knocked on the door, she unlocked it, and her husband entered the trailer. He paced back and forth through the kitchen and living room for five or six minutes before joining his wife in the bedroom. When

he came into the bedroom, he acted as if he were angry about something. She stated that he sat down on the bed, shrugged his shoulders, and said, "Well, Heavy [Harold Jordan] won't be coming down here any more." The following exchange then occurred:

"MR. SCOTT: Heavy won't be coming any more?

A. That is what he said.

MR. SCOTT: Anything else?

A. I asked why and he said, didn't you hear us fighting, and I said, no, I had the television on and he said, you could not hear us fighting? He said they wanted to go and rob a place—

MR. CARTER: Objection to what he said, your Honor.
EXCEPTION NO. 32

(Questions continued by District Attorney Scott:)

MR. SCOTT: Don't say what they wanted him to do. That was about it, wasn't it?

A. Yes, sir."

Failure by the court to exclude as hearsay the testimony of Mrs. Hall constitutes defendant's seventh assignment of error.

It is not clear whether defendant's objection "to what he said" (Exception No. 32) was directed only to the statement "he said they wanted to go and rob a place" or, in addition, was intended to embrace the statement "he said, didn't you hear us fighting, and I said, no, I had the television on and he said, you could not hear us fighting?" In any event, Mrs. Hall had twice stated without objection that her husband asked if she could not "hear us fighting," and the objection was apparently triggered by her final statement regarding a robbery. Thus the thrust of the objection was addressed to the statement regarding a robbery rather than the statement regarding a fight. The district attorney apparently interpreted defendant's objection in this manner for he admonished the witness, "Don't say what they wanted him to do."

Nevertheless, it seems clear that the testimony in question was offered to show the truth of the matters asserted—that a

fight had erupted among the deceased and the persons who had driven him home. This testimony was therefore hearsay and should have been excluded. 1 Stansbury's North Carolina Evidence § 138 (Brandis rev. 1973), and cases there cited.

Even assuming, however, that defendant's objection and Exception No. 32 embraced Mrs. Hall's testimony concerning her husband's statement regarding a fight, the record reflects that defendant neither moved to strike Mrs. Hall's answer nor requested the court to instruct the jury to disregard it. Such silence in the face of the district attorney's instructions to Mrs. Hall—"Don't say what they wanted him to do"—indicates defendant was satisfied with that admonition concerning the robbery statement and regarded as harmless that portion of the testimony which referred to a fight.

The record also reveals that defendant elicited testimony concerning the fight during his cross-examination of Mrs. Hall. The evidence in the record is in narrative form but it is evident that the questions on cross-examination were general in nature and tended to amplify and reiterate, rather than explain and impeach, the testimony concerning a fight which Mrs. Hall had previously related on direct examination. The general rule is that when evidence is admitted over objection and the same evidence is thereafter admitted without objection, the benefit of the objection is lost. *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975); *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973). The absence of a motion to strike or a request for curative instructions, coupled with the fact that defendant elicited evidence of the same or similar import on cross-examination, waived the benefit of the objection. Even so, we have examined the record in its entirety and conclude that any error in the admission of this evidence was harmless beyond a reasonable doubt. We see no reasonable possibility that a different result likely would have ensued had the challenged evidence been excluded. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Defendant's seventh assignment of error is overruled.

By his eighth assignment of error, defendant contends the trial court erred in denying his motion to dismiss the charge of murder in the first degree. More particularly, he argues

that there was insufficient evidence of premeditation and deliberation to carry the first degree charge to the jury.

[8] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. McCall,* 289 N.C. 512, 223 S.E. 2d 303 (1976); *State v. Davis,* 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied* 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971). "Premeditation may be defined as thought beforehand for some length of time. 'Deliberation means . . . an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose. . . .' [Citation omitted.]" *State v. Davis, supra.*

[9] Ordinarily, premeditation and deliberation are not susceptible of direct proof and usually must be established by proof of circumstances from which premeditation and deliberation may be inferred. *State v. Davis, supra; State v. Patterson, supra; State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Van Landingham, supra; 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, *cert. denied* 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). "Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) Want of provocation on the part of the deceased [citation omitted]; (2) the conduct of defendant before and after the killing [citation omitted]; (3) the dealing of lethal blows after deceased has been felled and rendered helpless [citation omitted]; (4) the vicious and brutal manner of the killing [citation omitted]; (5) the number of shots fired [citation omitted]." *State v. Davis, supra; accord, State v. Van Landingham, supra.*

[10] In our opinion the evidence in this case gives rise to these permissible inferences: (1) Tilley and Jordan quarreled with Hall when they took him home on the night of the shooting; (2) an hour later, defendant, Tilley and Jordan returned to Hall's home, enticed the unarmed victim to come outside and then, without warning, opened fire upon him with a shotgun and defendant's .25 automatic pistol, discharging at least three

shots and fatally wounding him with the shotgun; (3) they immediately returned to defendant's trailer and defendant was driven to his father's home where he concealed the shotgun; (4) after learning of Tilley's arrest defendant told one witness to check his car for shells, ordered another witness to dispose of his .25 automatic pistol, and instructed both witnesses to say nothing of the events which had transpired, warning one of them that she, like the deceased, might be killed if she divulged any information to the investigating authorities.

Considering the evidence in the light most favorable to the State, and giving the State the benefit of all reasonable inferences arising therefrom, we are of the opinion that the evidence was sufficient to permit, but not require, the jury to find that defendant, after premeditation and deliberation, formed a fixed purpose to kill Mr. Hall and thereafter accomplished that purpose. Thus the charge of first degree murder was properly submitted to the jury. *See State v. Davis, supra; State v. Van Landingham, supra; State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Walters, supra.* This assignment cannot be sustained.

Under his ninth assignment of error defendant lists fifteen excerpts from the district attorney's argument to the jury as improper and contends the trial court erred when it failed to censure, *ex mero motu,* these alleged improprieties and give appropriate curative instructions to the jury. We discuss only excerpts Nos. 1, 2, 4, 6, 8, 9, 14 and 15, all of which allegedly violate G.S. 8-54. The others are too innocuous to require discussion.

G.S. 8-54 in pertinent part provides:

> "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, but his failure to make such request shall not create any presumption against him."

Defendant offered no evidence. Many witnesses were examined on behalf of the State. From time to time throughout his jury argument, the district attorney argued: (1) That defendant "would have you believe that he did not participate at all"; (2) that Mrs. Hall "was on the stand for a considerable time

and nobody pointed a finger of accusation at her, not even on cross-examination"; (3) that, referring to the victim, "the evidence is uncontradicted, bear that in mind, that he not only didn't have a weapon, there was not one in his house"; (4) that "this testimony is uncontradicted as is every bit of the State's evidence"; (5) that "there is not a scintilla of evidence from any source that anybody was ever on the scene except Brady Tilley and Harold Jordan and J. V. Smith"; (6) that, referring to the testimony of Julia Pruitt, "J. V. left there with the automatic, the pistol stuck in his belt, and ladies and gentlemen, throughout this thing I ask you to remember that this evidence is uncontradicted"; (7) that "Brady Tilley and Harold Jordan are still there and then the uncontradicted evidence is that the group sat down there at the table and they were strangely quiet"; and finally, (8) that "I ask you to decide the case on the evidence that you have before you and ask that you remember that it is uncontradicted." Defendant contends the quoted remarks constituted improper comment on his failure to testify, tended to accentuate the significance of his silence, and that the failure of the court *on its own motion* to censure such argument and give curative instructions was prejudicial error requiring a new trial.

[11] We note at the outset that defense counsel did not object to the remarks at the time nor was the attention of the court called to them. Counsel afterwards excepted when he prepared the record on appeal. We further note that defendant, having offered no evidence, had the closing argument to the jury. This afforded counsel an opportunity to attack the credibility of the State's witnesses and to answer effectively the remarks of the prosecuting attorney. The argument of defense counsel is not contained in the record on appeal, as it should be when the district attorney's argument is challenged, *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975), but it is reasonable to assume that counsel fully utilized that opportunity.

At common law, in both England and America, parties were not competent witnesses and were not permitted to testify. When that barrier was removed in this jurisdiction in 1881 by the enactment now codified as G.S. 8-54, it was provided that failure of the accused to utilize the privilege to testify should not "create any presumption against him." *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61, *cert. denied* 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45 (1960). "When the rules of evidence were

changed by the section mentioned in this respect, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. But it was not the purpose, in enacting the law, to restrict the officer prosecuting for the State from making a comment upon the testimony that would have been legitimate before the passage of the act, and in which no direct reference was made to the right of the prisoner, or his failure to exercise it. The prisoner's personal privileges are enlarged by the provisions of the law. The right of the State to conduct the prosecution according to the usual practice, through its officers, so as to aid the jury in arriving at the truth, was not intended to be, and is not abridged in consequence of his refusal to become a witness in his own behalf." *State v. Weddington,* 103 N.C. 364, 9 S.E. 577 (1888); *accord, State v. Winner,* 153 N.C. 602, 69 S.E. 9 (1910).

In *State v. Hooker,* 145 N.C. 581, 59 S.E. 866 (1907), exception was taken to the prosecuting attorney's comment that "none of the evidence as testified to by the State's witnesses has been contradicted, and no one had said that it was not true." Held: "This could not be taken as criticism upon the failure of the defendant to put himself upon the stand." Although the trial judge refused to stop the solicitor's argument, he charged the jury that defendant's failure to take the stand could not be considered to his prejudice and if the jury had understood the solicitor as meaning to comment on that fact, the comment should be disregarded. Here, we note parenthetically, there was no objection to the prosecutor's argument. Moreover, except for a small excerpt relating to the seventh assignment of error, the charge of the court is not set out in the record. Where the charge is not in the record it will be presumed that the court charged correctly *on all phases* of the case with respect to both the law and the evidence. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965); *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781 (1961). Portions of the charge not brought forward are deemed without error. *State v. Sears,* 235 N.C. 623, 70 S.E. 2d 907 (1952); *State v. Brown,* 226 N.C. 681, 40 S.E. 2d 34 (1946). In fact, the record contains a stipulation that no contention is made that error was committed in the charge.

Referring to G.S. 8-54, Chief Justice Stacy, writing for the Court in *State v. Tucker,* 190 N.C. 708, 130 S.E. 720 (1925), said:

> "In passing, we observe, however, that this statute does not restrict the prosecuting attorney from making such comments upon the evidence and drawing such deductions therefrom as would have been legitimate before the passage of the act, for, while enlarging the rights of the defendants, the statute did not abridge the privileges of the prosecution."

[12] So it is here. Contradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify. *State v. Walker, supra; State v. Tucker, supra; State v. Weddington, supra.* See Annotation: Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify, 14 A.L.R. 3d 723 (1967), where numerous cases on the subject are collected and discussed. While the authorities are divided, many cases support the conclusion that a bare statement to the effect that the State's evidence is uncontradicted is not an improper reference to the defendant's failure to testify. *State v. Winner, supra,* and *State v. Weddington, supra,* are cited in support of this view. Defendant's ninth assignment of error is overruled.

By his tenth assignment, defendant contends that the trial court erred in denying his motion to set the verdict aside in that there was insufficient evidence to support a finding of premeditation and deliberation on the part of defendant. Since we have previously considered this contention in defendant's eighth assignment of error, it is overruled without further discussion.

[13] Defendant's final contention, that imposition of the death penalty is constitutionally impermissible, has been considered and rejected by this Court in numerous recent decisions. *State v. Warren,* 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. McCall, supra; State v. Davis, supra; State v. Williams,* 289 N.C. 439, 222 S.E. 2d 242 (1976); *State v. Alford,* 289

N.C. 372, 222 S.E. 2d 222 (1976). We adhere to the views expressed in these cases. Defendant's eleventh assignment is therefore overruled.

We allowed defendant's motion to bypass the Court of Appeals on his conviction of conspiracy to commit felonious assault. Defendant has brought forward no assignment of error specifically directed to this conviction. Even so, we have carefully considered the entire record and find no reason in law to disturb the verdict and judgment on the conspiracy charge.

In the trial and judgments below, we find

No error.

STATE OF NORTH CAROLINA v. THURMAN LEE STRICKLAND

No. 60

(Filed 17 June 1976)

1. **Homicide § 21— premeditation and deliberation — sufficiency of evidence**

The evidence was sufficient to support a jury verdict that defendant killed his mother and grandmother with premeditation and deliberation where it would support findings by the jury that defendant told the occupants of his grandmother's house a fabricated story that his son had been kidnapped by masked men and that in order to get his son back he had been instructed to bind the occupants so that the masked men could rob them, defendant had previously purchased handcuffs and restraining straps, defendant placed handcuffs and straps on a handyman who was in the house and attempted to suffocate him by placing a plastic bag on his head, the handyman heard defendant's mother pleading with defendant to call the law and defendant reply that he had "done gone too far," defendant placed handcuffs on his mother and grandmother, defendant thereafter suffocated his grandmother with a pillow and shot and killed his mother, and defendant left a note to his girl friend stating that he knew she would not understand and that he thought "this might be a way out."

2. **Assault and Battery § 14— assault with deadly weapon with intent to kill — placing plastic bag over head**

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill where it tended to show that defendant placed a plastic bag over the victim's head and taped it around the victim's neck with the intent to suffocate the victim while his hands were handcuffed behind him.

3. Criminal Law § 102— time since use of death penalty — remark by district attorney during jury selection

In this prosecution for first degree murder, the district attorney's remark during jury selection that "nobody has died in the death chamber since 1961" did not constitute prejudicial error where (1) the district attorney was countering a prospective juror's statement that the death penalty was applied unfairly so as to discriminate against blacks and the poor, (2) the clear import of the district attorney's statement was that there had been no recent discriminatory use of the death penalty in North Carolina because it has not been used at all in this State in thirteen years, and (3) there was no implied suggestion that the death penalty would not be applied in the future or to a particular defendant on trial; furthermore, defendant waived his right to object to the remark by his failure to object at trial.

4. Criminal Law § 75— non-custodial questioning — absence of Miranda warnings — admissibility of statements

The evidence on *voir dire* supported the trial court's determination that defendant was not in custody when he was questioned by an officer at a hospital where he had been taken by ambulance for treatment of a bullet wound; therefore, the *Miranda* warnings and accompanying waivers were not required as a prerequisite to the admissibility of defendant's statements to the officer.

5. Constitutional Law § 36— death penalty — constitutionality

It was not error for the trial judge to enter judgments of death upon defendant's conviction in two cases of first degree murder.

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

ON *writ of certiorari* to the Superior Court of ONSLOW County pursuant to General Statute 7A-32(b). Thurman Lee Strickland was tried at the June 24, 1974 Session of Onslow Superior Court on two indictments charging the murders of Thelma Strickland and Addie Letson, and an indictment charging an assault on one William Chappell with a deadly weapon with intent to kill, all allegedly occurring on February 20, 1974. He was found guilty on all charges, sentenced to death in each murder case and to eight years imprisonment in the assault case. His appeal was not perfected in time. A writ of certiorari was sought and allowed by this Court on June 2, 1975. Defendant's motion to bypass the Court of Appeals in the assault case was allowed on June 4, 1975. This case was docketed and argued as No. 25 at the Fall Term 1975.

The State's evidence may be summarized as follows: Defendant was a vacuum cleaner salesman who lived in Goldsboro.

In the afternoon or evening of February 19, 1974, defendant telephoned the deceased Addie Letson's home in Quail Haven, Onslow County, and left a message with Chappell that he would come there late that evening with his employer to spend the night. Defendant's employer never made any such arrangement with defendant nor was such an arrangement usual. Addie Letson was defendant's grandmother. The deceased, Thelma Strickland, defendant's mother, and the daughter of Mrs. Letson, was living temporarily with Mrs. Letson at this time and was present in the Letson home. Also living in the Letson home was the victim Chappell, a long time helper and handyman of Mrs. Letson.

Defendant, separated from his wife, spent the evening of February 19 until 11:15 p.m. at his girl friend's home in Goldsboro. He arrived at Mrs. Letson's home about 1:00 a.m. on February 20 carrying in his hand a brown paper sack. Defendant, his mother, grandmother, and Chappell, watched television until 2:30 a.m.

At that time, defendant told them all: His son, Lee, who generally lived with defendant's estranged wife in Garner, but who had been recently living with defendant, had been kidnapped by two masked men. These men had accosted defendant and Lee at defendant's home in Goldsboro and forced him and his son to drive to defendant's trailer on Emerald Isle where they now held the boy. In order to get the child back he had been instructed by these men to bind, gag, and blindfold all three occupants of the Letson home. The kidnappers would appear at 3:00 a.m., bring the boy Lee and take money from the home.

Defendant then proceeded, with Chappell's cooperation, to handcuff Chappell from the rear, place restraining straps loosely around his ankles, and put Chappell on his bed in his bedroom. Later Chappell heard the two women talk about hiding their money and rings. They were in the front part of the house and handcuffed. Chappell could hear but not see what occurred. He heard the two women ask defendant on several occasions to call law enforcement officers. Twice he heard defendant speak as if he were calling the Sheriff's office requesting assistance.

Shortly before 6:00 a.m. defendant returned to Chappell's room, taped his lips, placed a plastic bag over his head and taped it around his neck so tightly that Chappell could not

breathe. He advised Chappell that the kidnappers would not be there until 6:00 a.m. Defendant left. Chappell was able to remove the bag from his head by rubbing it against the bedposts and was able to release his leg straps. He was still handcuffed from the rear.

Chappell heard Thelma Strickland pleading with defendant to call the law. Defendant said, "Ma, I've done gone too far." Chappell also heard someone say, "do not put that pillow on her, you know she can't stand it." At that point Chappell managed to escape and ran to a neighbor's house. The Sheriff was called from this house at 6:53 a.m. When sheriff's deputies arrived they did not go in immediately but observed the house as they waited for assistance. They saw no one enter or leave the house. One deputy heard a shot. They saw the dining room door open and heard a woman's voice call for help. As they approached the house defendant was found lying in the driveway with a superficial bullet wound in his thigh. He said his mother and grandmother were dead and that masked men who had just left in a big car had shot at the deputies. No one to the knowledge of the deputies had shot at them. They had not seen a car leaving the premises.

The body of Mrs. Letson was found face down on her daughter's bed with her hands cuffed behind her. The cause of her death was suffocation. The body of Mrs. Strickland was found dead in the den. She had been shot five times with a .22 caliber weapon in the head, neck, chest and abdomen. She was handcuffed from the front. A pillow was found nearby in which there was a bullet hole and powder burns. The cause of her death was a gunshot wound to the head. Defendant's .22 pistol was found in the den with six empty cartridges. A loaded .32 pistol was also found. At least two of the bullets found in Mrs. Strickland and the bullet in defendant's thigh had come from defendant's weapon.

There was further evidence that no person or vehicle had gone to defendant's trailer at Emerald Isle during the evening or early morning of February 19-20, and that defendant's son was never kidnapped.

The State introduced two statements given by defendant to police officer Woodward which, broadly, were similar to his testimony at trial but inconsistent therewith in some important details. Two statements made to defendant's aunt while defend-

ant was in jail were also admitted without objection. They, likewise, were, broadly speaking, similar to his trial testimony but again incomplete or inconsistent therewith in some imporant details.

Defendant offered evidence which may be summarized as follows: He had a reputation for being a person of good character in his community. On the evening of February 19 he reached his home in Goldsboro about 11:15 p.m., having come from his girl friend's home. The doorbell rang. A masked man wielding a pistol appeared and claimed to have kidnapped his son Lee. The masked man collected three sets of handcuffs from defendant's kitchen table, some plastic bags from the kitchen cabinet, and some restraining straps from the kitchen counter. Defendant said he had bought the handcuffs earlier that afternoon for the purpose of locking the gate to his home and the restraining straps to secure a trailer tarpaulin and some camping equipment.

They got in defendant's car. A second masked man was in the back seat of this car. Defendant was instructed to and did drive to his trailer at Emerald Isle, where he was told his son would be. Upon arrival there his son was not present. Defendant was then instructed to go to his grandmother's house and bind, gag and blindfold the occupants. His abductors told him they would appear about 6:00 a.m. to rob the occupants of whatever money was available.

From the time of defendant's arrival at his grandmother's home defendant's testimony roughly parallels the State's evidence until he put the plastic bag on Chappell's head. Defendant claimed he placed the bag on loosely so that Chappell could breathe. He testified further that after handcuffing and otherwise binding Chappell, his grandmother, and his mother, he determined to shoot it out alone with the masked men after he got his son. At 6:00 a.m. he looked out and saw a car drive by. He then wrote a note to his girl friend which said, "Denise, I know you won't understand but I love you so much. I thought this might be a way out. Time is out. Thurman."

He then went out the door trying to find a vantage point outside the house from which to meet the men. No place seemed right. When he came back in the house a man suddenly came from behind a bar toward him, struck him, took his .22 pistol and threw his grandmother's .32 pistol on a desk. He was pushed

into his mother's bedroom and saw her at the foot of the bed. She said, "Where is Lee?" His grandmother stood up; a second masked man stood up and grabbed her. He was carried into the living room. He heard his mother call out his name and a voice say "Don't do that." Out the window defendant saw a sheriff's car pass. The masked man released him and went back in the den. Defendant heard several shots. Defendant ran back into the bedroom. In a struggle over a gun defendant was shot in his thigh. He looked and saw his grandmother dead. Defendant called Swansboro police officers on the phone. While on the phone he saw his mother sitting in a chair and she would not respond. He crawled out the door and yelled for help. Two officers approached and rendered assistance.

Defendant admitted telephoning the Letson home on February 19, but testified that he talked with his mother and advised her only that he might drop by late that evening. He denied mentioning that his boss would be with him. He testified further that he initially told the occupants of the Letson home the kidnappers would be present at 3:00 a.m. rather than 6:00 a.m. in order to gain their early attention and cooperation and that he faked two telephone calls to the Sheriff's office to pacify his mother and grandmother.

Rufus L. Edmisten, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the State.

Roland C. Braswell, Attorney for Defendant.

EXUM, Justice.

I

[1] Defendant by assignment of error number 9 argues that there was insufficient evidence to carry the case to the jury on the issues of premeditation and deliberation and that the trial court erred in not allowing his motion for nonsuit on the two first degree murder charges.

In considering 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. Hankerson,* 288 N.C. 632, 636, 220 S.E. 2d 575, 580 (1975); *State v. Cutler,* 271 N.C. 379, 382, 156 S.E.

2d 679, 681 (1967). The elements of premeditation and deliberation in a first degree murder case "are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide." *State v. Patterson*, 288 N.C. 553, 559, 220 S.E. 2d 600, 606 (1975).

Leaving aside the interesting question whether defendant's version of the facts would, even if true, have constituted a defense to the murder charges, we hold there was ample evidence from which the jury could find that defendant not only killed his mother and his grandmother but did so with premeditation and deliberation.

With regard to significant facts there were enough inconsistencies between defendant's pre-trial statements to investigating Deputy Woodward and his aunt and his testimony at trial, and even between portions of his trial testimony for the jury to conclude that defendant's bizarre tale of being under the influence of two unknown abductors was an utter fabrication designed solely to cover up his complicity in the crimes. With regard to the purchase of the handcuffs and other restraining devices, defendant first told Woodward that these devices were given to him by his abductors. In a second statement to Woodward he said he bought them the day before at a police supply store in Kinston and that both the handcuffs and the straps were purchased for the purpose of locking a chain link fence gate at his home in Goldsboro. On direct examination at trial defendant did not state clearly how he acquired these devices but left the unmistakable impression that he had been given them by his abductors. He said, "I related [to his mother, grandmother, and Chappell] that the two men had come to my house and what they had told me, what they told me I had to do. I showed them the instruments that I had been given, at that point Shorty turned and the handcuffs were placed on him and he went into the bedroom and laid down." This was defendant's only reference to his acquisition of these instruments in a lengthy direct examination which covered in great detail other aspects of the case. On cross-examination, however, he conceded that he purchased the devices in Kinston on the afternoon of February 19—the handcuffs for the purpose of locking his gate and the straps to use in securing certain camping equipment.

Despite Chappell's testimony that defendant had called the Letson home on the afternoon of February 19 to advise that he

and his boss would come in late that night, defendant omitted any discussion of this fact during his direct testimony. It was not until cross-examination on the point that he conceded that he called the house that afternoon, talked with his mother, and told her only that he would possibly be coming over between 12:00 midnight and 1:00 a.m.

Defendant's direct examination purports to cover the crucial events of February 19 before arrival at his girl friend's home with this statement: "On February 19 I worked that day. The first part of the morning I worked in the community where I lived and in the afternoon I worked over in Lenoir County. Between six and seven o'clock that evening I had gone over to [his girl friend's home]."

In defendant's first statement to Woodward he said that his masked abductors carried him directly from his home in Goldsboro to his grandmother's home in Onslow County where they instructed him to go in, bind the occupants of the home, and to await their return at 6:00 a.m. In his second statement to Woodward he said he went first to his trailer on Emerald Isle with the masked men and then from Emerald Isle to Mrs. Letson's home, apparently alone.

In his direct testimony defendant stated that his abductors indicated en route from Goldsboro to Emerald Isle that they were going to rob *him* and that it was not until the threesome arrived at Emerald Isle that he was instructed to go to his grandmother's home in Onslow County were the robbery would take place. On cross-examination, however, his testimony was that the masked men told him en route from Goldsboro to Emerald Isle that they were going to rob the occupants of his grandmother's home and what he was to do there.

In the context of other evidence already referred to the jury could well have inferred from defendant's statement to his mother, "Ma, I've done and gone too far," and from the note he left his girl friend that he was premeditating and deliberating at that time upon the killings. The jury could also have inferred that defendant began premeditating and deliberating the killings when he purchased the restraining devices on the afternoon of February 19. Neither the State nor the jury were bound to accept defendant's explanation of their purchase given either at trial or in his pre-trial statements which the State offered against him. The State is not bound by exculpatory portions of

a defendant's pre-trial statement offered against him at trial 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); *accord, State v. Hankerson, supra.* The State's evidence as to what occurred in the early morning hours at the Letson home, given by the victim Chappell and investigating officers who arrived at the scene, together with defendant's inconsistent statements and evasiveness about the purchase itself tend to throw a different light on the circumstances of the homicide from that suggested at times by the defendant.

In short the evidence of defendant's guilt of two murders in the first degree is plenary. This assignment of error is overruled.

[2] By assignment of error number 10 defendant complains of the refusal of the trial court to allow his motion for nonsuit as to the charge of assault with a deadly weapon with intent to kill William Chappell. The indictment alleges that defendant:

> "did feloniously assault William Kenneth Chappell with a deadly weapon, to wit: a plastic bag, with the felonious intent to kill and murder the said William Kenneth Chappell, the said plastic bag being a deadly weapon by the manner of its use in that the Defendant placed the plastic bag over the head and face of William Kenneth Chappell and closed the open end of said plastic bag tightly with tape around the neck of William Kenneth Chappell, all the while the said William Kenneth Chappell's hands were handcuffed behind him."

These allegations are precisely what the evidence of the State tended to show. Chappell testified that defendant:

> "put a piece of tape each way across my mouth and he then rolled out some tape and then he put the bag over my head, and then he put the tape around the bag on my neck and he pulled up the left part of the bag and asked me if I could breathe and I said yes Thurman I can breathe, and with that he clapped it down around my neck and he went out and turned the lights off and closed the door. At that point I was still handcuffed and laying on my back.
>
> * * *
>
> "At that point I was not in a position to breathe."

In light of the fact that Mrs. Letson died by suffocation this is substantial evidence from which a jury might find that defendant placed the bag over Chappell's head and "clapped it down around [his] neck" with intent to suffocate him to death. This evidence also permits the jury to find that the bag was a deadly weapon. A deadly weapon is not one which must kill but one which under the circumstances of its use is likely to cause death or great bodily harm. *State v. Smith,* 187 N.C. 469, 121 S.E. 737 (1924). This assignment is overruled.

Defendant's assignment of error number 11 refers to the trial court's "failure to grant the defendant's motion for judgment of acquittal notwithstanding the verdict." This motion is not recognized in our criminal practice. Even if it were, we suppose it would raise the same legal question as presented by defendant's motions for judgment as of nonsuit at the close of all the evidence upon which, as we have said, the trial court properly ruled against defendant. This assignment is overruled.

II

[3] During the jury selection process the following colloquy between the district attorney and prospective juror Harvey A. Lewis occurred:

> "Q. Could you sit as a juror in these cases and listen to the evidence of the witnesses and the law that the court will charge to the jury and render a fair and impartial verdict based solely and entirely upon that?
>
> "A. I think I can. I have to qualify that statement. Since you did say that this is one that there is a possibility of capital punishment, then I feel, although I do believe in capital punishment, but under the manner in which it has been administered, I don't think it has been fair, that would be my only qualification.
>
> "Q. You mean the manner in which it has been administered is not fair.
>
> "A. From the statistics that those people that have been tried say for a capital crime, it seems as though the black, poor is the ones that it has been administered to more.
>
> "Q. *Are you familiar in this state that nobody has died in the death chamber since 1961, that's thirteen years ago?* (Emphasis supplied.)

"A. Yes, I am. Because of the administration of it, I hope that North Carolina will do away with the death penalty instead life imprisonment with no chance of parole.

"Q. That might have something to do with your verdict then in this case, your feelings about it?

"A. It might. At this time, I'm not sure.

"Q. According to what you have just stated with respect to your feelings about punishment and the fact that it is done unfair and other things that you have stated, do you think it would be possible for you to sit on this jury and render a verdict in this case that would mean the death sentence?

"A. It might seem prejudice, I'm not sure.

"Q. Now there is no race involved in this case.

"A. I understand that.

"Q. This is all the same race.

"A. I wasn't talking about the racial prejudice. I'm talking about there is also the status of the defendant that might or might not enter in. I will be as fair as I can.

"MR. BRITT: I believe the State will excuse this juror."

Defendant contends that the statement by the prosecutor that "nobody has died in the death chamber since 1961" was prejudicial error, relying on *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975). A similar contention was made in *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975). In *Miller* the district attorney in closing argument told the jury that the only thing wrong with capital punishment was its lack of use and it could not be an effective deterrent to crime when no one had been executed in this State for twelve years. In that case we upheld the conviction and distinguished *Hines.* We said, 288 N.C. at 601-602, 220 S.E. 2d at 340:

"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.' 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 co-defendants 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."

As in *Miller*, the questioning here by the district attorney was not designed to ease the feelings of the jury as it embarked upon its serious task. The thrust of his remark was not, as it was in *Hines*, that since no one had been recently executed, perhaps the defendant on trial would likewise escape this fate. Instead the district attorney was countering prospective juror Lewis' statement that the death penalty was applied unfairly so as to discriminate against blacks and the poor. The thrust and clear import of the district attorney's statement was that there had been no recent *discriminatory* use of the death penalty in North Carolina because in fact it has not been used at all in this State for some thirteen years. There was no implied suggestion, as there was in *Hines*, that the death penalty would not be applied in the future or to the particular defendant on trial. There was consequently no error prejudicial to defendant in this incident.

We note also that defendant, again unlike the defendant in *Hines*, made no objection to the remark at trial. Had he then found it objectionable and said so, the trial judge would have then had an opportunity to inquire of those jurors who heard the remark as to what impression, if any, it made upon them and to correct such misleading impressions, if any, as may have been made. Under these circumstances defendant's failure to object waived his right to object and therefore to complain further on appeal. The general rule is that "[a]n objection not made in apt time is waived." *State v. Davis* and *State v.*

Fish, 284 N.C. 701, 713, 202 S.E. 2d 770, 778 (1974); *cf.* Rule 10(b)(1), North Carolina Rules of Appellate Procedure, 287 N.C. 671 (1975).

Where, however, the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, "counsel's failure to make timely objection will not waive defendant's right to object. *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953)." *State v. White*, 286 N.C. 395, 403, 211 S.E. 2d 445, 450 (1975), and cases therein discussed. Although we held in *Hines* that a mere sustaining of the objection by the trial judge did not cure the error, this was not to say that the prejudicial effect of the district attorney's remark in *Hines* could not have been cured by appropriate instructions of the trial judge. Appropriate curative instructions might be effective to remove the prejudice of a *Hines* type remark. The jury could, for example, be told that it should not interpret this kind of remark to mean that the penalty of death may not be exacted upon its return of a guilty verdict and that it must act upon the assumption that upon its return of such a verdict the defendant will, as a matter of law, be sentenced to die and will, as a matter of fact, be executed in keeping with that sentence. *Cf. State v. White, supra.*

Another exception to the waiver rule, not applicable here, is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. *State v. McCall*, 289 N.C. 570, 223 S.E. 2d 334 (1976).

In capital cases this Court has applied the waiver rule only as an alternative ground for finding no error when, substantively, no error was apparent. *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Sanders*, 276 N.C. 598, 610, 174 S.E. 2d 487, 496 (1970), death sentence reversed 403 U.S. 948. In keeping, however, with the now settled practice of the 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 . . . accused . . . . " *State v. Fowler*, 270 N.C. 468, 469, 155 S.E. 2d 83, 84 (1967), the Court has relaxed the waiver rule at least as regards motions to strike specific por-

tions of testimony on grounds other than those raised by a general objection to the entire testimony. *State v. Patterson,* 288 N.C. 553, 567, 220 S.E. 2d 600, 611 (1975) (no substantive error found) ; *State v. Fowler, supra* (substantive error ground for new trial). The Court has uniformly in capital cases overlooked failure to support alleged errors by appropriate exceptions and assignments of error in instances where no objection at trial was required. *State v. Buchanan,* 287 N.C. 408, 215 S.E. 2d 80 (1975) ; *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952) ; *State v. Herring,* 226 N.C. 213, 37 S.E. 2d 319 (1946).

A defendant, however, in a capital case who fails to make even a general objection at trial when doing so could have saved the trial from error runs a high risk of waiving his right to complain on appeal where the incident complained of is not patently erroneous, or if erroneous, not patently prejudicial.

III

[4] Between 7:00 a.m. and 8:00 a.m. on February 20 defendant was taken by a Swansboro Rescue ambulance to the Onslow Memorial Hospital for treatment of his bullet wound. Shortly after 8:00 a.m. Woodward questioned defendant at the hospital extensively about the incident then under investigation. Defendant unsuccessfully at trial challenged the admissibility of defendant's statement to Woodward made at this time. By his assignment of error number 8 defendant contends the trial judge committed error in admitting this statement on the ground that defendant was actually in custody and, therefore, entitled to be warned of his rights as required by *Miranda v. Arizona,* 384 U.S. 436 (1966). Woodward admitted that no such warnings were given before he questioned defendant at this time.

Upon objection to Woodward's relating defendant's statement, the trial judge properly excused the jury to conduct a *voir dire* inquiry. On *voir dire,* consisting entirely of the testimony of Woodward, the evidence was that Woodward had been instructed by his superior "to go to the hospital that a victim was coming in that had been shot and for me to interview him to see if I could find out what happened. So to me he was a victim, he was definitely not a suspect of the crime." Woodward further testified that at this time defendant was not in custody. Later that day after the investigating officers, including Woodward, had compared defendant's initial statement to

Woodward with Chappell's version of what happened, defendant did become a prime suspect and was taken into custody from the hospital by Woodward at 3:00 p.m. on February 20. While in custody he was fully advised of his rights, affirmatively waived them, and made other statements. Their admissibility is not challenged. Upon this evidence the trial judge found and concluded in part as follows:

"2. The defendant arrived at the hospital in the emergency vehicle, he was not in custody, and was not under any police surveillance at that time.

"3. That the defendant was not suspected as a party to the crime at the time Officer Woodward interviewed him in the emergency room at the hospital at which time he made a statement.

* * *

"The Court concludes that the first statement was a noncustody interrogation and that the defendant's rights were in no way violated."

After the trial judge's findings and conclusions were made, however, the *voir dire* was reopened to permit the district attorney to place in the record Woodward's testimony regarding the precise warnings which were given to defendant in the afternoon at the sheriff's office. On further cross-examination by defense counsel at this stage of the *voir dire* the following exchange occurred:

"MR. BRASWELL: Mr. Woodward, I assume that if he had told you he was going on home, you would have let him go home?

"A. No, sir.

"MR. BRASWELL: So he didn't have any right to go or not to go with you, it was go or be carried, is that right?

"A. I asked him first. If he had refused, then I would have took him in custody, yes, sir.

"MR. BRASWELL: He knew that, did he not?

"A. I don't know what he knew, I wish I could testify as to what he knows."

Defendant strenuously argues that this testimony demonstrates conclusively that defendant was in fact in custody when he made

his first statement to Woodward at the hospital. Counsel may have intended by his questions to refer to the morning at the hospital but it is patently clear from the record that Woodward in his replies was referring to that afternoon when, as he had earlier testified, "I came back to the hospital and arrived . . . at approximately three p.m. . . . and then we took him into custody. . . . I asked him to come and go with me to the Sheriff's office."

In any event the trial judge's findings that the defendant was not in custody at the hospital when first questioned by Woodward are clearly supported by some competent evidence, if not by all the evidence. The defendant not being in custody at that time, the *Miranda* warnings and accompanying waivers were not required as a prerequisite to the admissibility of defendant's statement. *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971).

IV

By assignments of error numbers 1 through 7 defendant challenges various rulings by the trial judge during the trial which he contends improperly admitted into evidence certain illustrative exhibits, allowed leading questions and conclusory testimony, constituted expressions of opinion regarding the evidence in violation of General Statute 1-180, and unduly limited the defendant's right of cross-examination. We have carefully examined each of these assignments. They are all totally without merit and are overruled without discussion.

V

Defendant's assignment of error number 12 is to the trial judge's failure to allow defendant's motion for new trial for errors committed and because the verdicts were contrary to the weight of the evidence. That aspect of this motion dealing with errors committed is purely formal. We have already dealt with the substance of it. The second aspect of this motion is addressed to the discretion of the trial judge. He acted well within that discretion in denying this motion. This assignment of error is overruled.

VI

[5] Finally defendant complains that it was error for the trial judge to enter judgments of death in the murder cases. This

Court has considered and a majority has consistently rejected all of defendant's arguments on this point and does so here. *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976) and cases cited therein; *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). However inasmuch as the crime was committed on February 20, 1974, before the effective date of N. C. Sess. Laws 1973, c. 1201 § 1 amending General Statute 14-17, Chief Justice Sharp, and Justices Copeland and Exum dissent from that portion of this opinion affirming the imposition of the death sentences and vote to remand for the imposition of sentences of life imprisonment. See their dissenting opinions in *State v. Williams,* 286 N.C. 422, 434-441, 212 S.E. 2d 113, 121-125 (1975).

No error in the trial.

Death sentences sustained by majority vote.

ROBERT J. GRIFFIN AND WIFE, FRANCES C. GRIFFIN v. WHEELER-LEONARD & CO., INC.; LONNIE E. WHEELER; M. D. FLETCHER, JR. AND WIFE, BONNIE T. FLETCHER, AND M. D. FLETCHER CONSTRUCTION COMPANY, INC.

No. 71

(Filed 17 June 1976)

1. **Sales § 5; Vendor and Purchaser § 6— statements by real estate agent — no express warranty**

Statements by a real estate agent that water in the crawl space of a house he was attempting to sell plaintiffs was "probably" left over from construction and that it "should" dry up in a short time now that everything was covered over and water couldn't get in there anymore were insufficient to constitute an express warranty that water in the crawl space would cause no problems.

2. **Sales § 5; Vendor and Purchaser § 6— statement by real estate agent — no express warranty**

A statement by a real estate agent that the contractor who built a house the agent was attempting to sell plaintiffs "was a good contractor and he built good homes and that they were substantial" did not constitute an express warranty that the house would be constructed in a workmanlike manner.

3. **Fraud § 3— concealment of material fact**

Where there is a duty to speak, the concealment of a material fact is equivalent to fraudulent misrepresentation.

4. **Fraud § 12; Vendor and Purchaser § 6— cause of water accumulation — nondisclosure by real estate agent — insufficient evidence of fraud**

The evidence did not entitle plaintiffs to have submitted to the jury an issue of fraudulent nondisclosure by defendant real estate agent of the cause of water accumulation in the crawl space under a house where there was no evidence that the agent knew that the house had been constructed so that there would, or likely would, be a continuing water problem in the crawl space, and all the evidence tended to show that, at the time of the transactions with plaintiffs, the agent thought the water accumulation was a mere incident of construction and, once dried out, there would be no further water accumulation under the house.

5. **Sales § 6; Vendor and Purchaser § 6— sale of house — implied warranty of builder-vendor**

In every contract for the sale of a recently constructed dwelling or a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held impliedly to warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction.

6. **Sales § 6; Vendor and Purchaser § 6— sale of house — implied warranty — visible defects**

The implied warranty of a builder-vendor does not extend to defects of which the purchaser had actual notice or which are or should be visible to a reasonably prudent man upon an inspection of the dwelling.

7. **Sales § 6; Vendor and Purchaser § 6— sale of house — breach of implied warranty — damages**

Where there is a breach of the implied warranty of a builder-vendor, the vendee can maintain an action for damages for such breach either (1) for the difference between the reasonable market value of the subject property as impliedly warranted and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty.

8. **Sales § 17; Vendor and Purchaser § 6— breach of implied warranty by builder-vendor — sufficiency of evidence**

Plaintiffs' evidence was sufficient for the jury on the issue of breach of implied warranty by the builder-vendor of a house sold initially to plaintiffs where it tended to show: water accumulated in the crawl space under the house; an extended period of wet weather and heavy rains had preceded plaintiff's purchase of the house; plaintiffs relied on a statement by the real estate agent that the water was probably left over from construction and should dry up shortly after the rain stopped; the water accumulation was actually caused by inadequate waterproofing of the foundation to cope with water

drainage caused by poor porosity of the soil where the house was built; the top window sashes of several windows would not stay up properly; water passed underneath the garage door whenever it rained fairly hard; and a dwelling with the aforesaid defects did not meet the standard of workmanlike construction then prevailing in the county.

9. **Sales § 6; Vendor and Purchaser § 6— contract of purchase — provision not exclusion of implied warranty**

A provision in a contract of purchase of a dwelling "that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties hereto" did not constitute an agreement between the builder-vendor and the purchaser that no implied warranty was applicable to their transaction.

10. **Sales § 6; Vendor and Purchaser § 6— wife of builder-vendor — no liability for implied warranty**

While the wife of the builder-vendor of a dwelling signed the deed of conveyance to plaintiffs as a grantor and vendor of the property, no issue arose as to her liability for any breach of the implied warranty of a builder-vendor where the record contained no evidence that she was in the construction business or had any part in building the dwelling.

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

ON *certiorari* to review the decision of the Court of Appeals, reported in 22 N.C. App. 323, 206 S.E. 2d 313 (1974), which found no error in the judgment entered by *Chief District Court Judge Moore* on 22 October 1973, District Court of DURHAM County, docketed and argued as Case No. 72 at the Fall Term 1974.

Plaintiffs instituted this action for damages allegedly sustained in connection with their purchase of a new residence, constructed on Lot 9, Block A, Section II of Bluestone Estates, a subdivision in Durham County containing approximately 99 lots.

At one time all the land in Bluestone Estates was owned by W. F. Construction Company, "a land development corporation to hold land and to sell it for the purpose of constructing houses, new homes." The W. F. Construction Company is not a party to this suit. At all times pertinent to this litigation, defendant Lonnie E. Wheeler was the president of W. F. Construction Company and owned one-half of its stock. The other half was owned by defendant M. D. Fletcher, Jr. (Fletcher),

who was also a corporate officer. On 13 November 1970 title to the lot on which the house in suit was built (Lot No. 9) was in Fletcher and wife, Bonnie T. Fletcher. Fletcher, who described himself as a "builder of good quality homes" and "in the construction business on a full-time basis," built the house which he and his wife conveyed to plaintiffs by deed dated 18 December 1970. The money from that sale went to Fletcher and his wife.

Defendant Wheeler-Leonard & Company, Inc. (Wheeler-Leonard, Inc.) is a "broker of insurance and real estate." It had no interest in the residence which defendants Fletcher sold plaintiffs. However, as the W. F. Construction Company's sales agent for all the new houses in Bluestone Estates, it negotiated the sale to plaintiffs through its employee, defendant Lonnie E. Wheeler (Wheeler). For his services Wheeler-Leonard, Inc. received a commission of 5% on the purchase price. Wheeler, a salaried employee, owned one-third of the stock of Wheeler-Leonard, Inc.

Plaintiffs alleged that, after occupying the residence in suit, they discovered construction defects which rendered its value substantially less than the purchase price. They based their claim against Fletcher and wife (builder-vendors) upon a breach of implied warranty. As against Wheeler-Leonard, Inc. and Wheeler (brokers), their asserted claim rests upon express warranty and "misrepresentation." Plaintiffs alleged a claim against "M. D. Fletcher Construction Company, Inc." for negligence in the construction of the house on Lot No. 9. The record, however, suggests that there is no such corporation as "M. D. Fletcher Construction Company, Inc." and that Fletcher built the residence in suit "acting as a sole proprietorship."

At the close of plaintiffs' evidence, upon the motion of Mr. Blackwell M. Brogden, attorney for all the defendants, the court dismissed the action against "M. D. Fletcher Construction Company, Inc." Plaintiffs did not appeal that ruling.

Plaintiffs' evidence tended to show the following facts:

In November 1970 plaintiff Robert J. Griffin (Griffin) moved his family from Southern Valley, Nevada, to Durham County, North Carolina. In the course of seeking a residence in a development convenient to the Research Triangle Park (where he worked), Griffin met Wheeler about 12 November

1970. Wheeler then showed him the house in Bluestone Estates which he later purchased. The house was one-story with a crawl space underneath. Griffin testified:

"The first time I was there . . . [w]e did look under the crawl space. Under the crawl space it was wet, very wet. There was standing water underneath the house. . . . It had been very wet and rainy. They told me that it had rained constantly for almost the entire month. Mr. Wheeler wasn't with me when I looked at the crawl space. He was inside the house. You can't look into the crawl space of the house from the inside of the house. The property is sloped and the crawl space entrance is on the low side of the house in the back. I did make a comment to Mr. Wheeler about what I saw in the crawl space. When I got back into the house, I asked him about the water underneath and he just made the comment that it was probably left over from construction and that it should dry up in a short time now that everything was covered over and water couldn't get in there any more."

. . . .

"He said it was merely left over from construction and that it would probably dry up. I asked him questions on quality of the house and how these things were done in North Carolina. The warranties, guarantees, and things like that, and he responded in the affirmative to all of my questions."

. . . .

"I asked him about the contractor who built the house and he said the contractor was a good contractor. There was a big sign there that said Fletcher Construction Company. . . . He said he was a good contractor and he built good homes and that they were substantial."

On the following day plaintiffs obtained the key from Wheeler's office and made a thorough inspection of the house in question. Wheeler was not with them on this occasion. Thereafter they decided to buy it and, on 13 November 1970, they signed a contract to purchase the property for $29,400.00, provided they would be able to secure the necessary financing. Prior to signing the contract of purchase, plaintiffs discussed with Wheeler a list of uncompleted items which they had prepared on their second inspection of the premises. The house had not been shown to them as completed. "There were still some construction things to do. But the house was 99 per cent or

more complete." The list of eighteen uncompleted items (none of which are now in issue) was incorporated in the contract as "Attachment # 1" in a paragraph headed "Other conditions."

Plaintiffs, Griffin and wife, signed the contract on the lines indicated for "buyer" and, on the line designated "seller," Wheeler signed "W. F. Construction Company by Lonnie E. Wheeler, Pres." (Wheeler testified that he was then inadvertent to the fact that he had previously deeded Lot No. 9 to Fletcher and wife.) This contract of purchase, on the standard printed form used by Wheeler-Leonard, Inc., contained the following provision:

"Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties hereto."

Griffin further testified that, at the time of signing the contract in Wheeler's office:

"I mentioned the water under the house and I also mentioned the fact that there was no light in the upstairs. I don't know if that's on this list [Attachment # 1] or not, but there should be a light in the attic and there was not. We mentioned that and we mentioned clean up of the property where there had been construction. This list was supposed to be completed construction items. This was not objections we had to other things. When we mentioned the water to Mr. Wheeler again, he mentioned that it should dry up. He made no statements about the water that we had observed under the crawl space of the house other than it should dry up shortly as soon as the—it had been raining constantly and the back yard also was one giant mud puddle, but I couldn't see any problem with this, because it had been raining. I mean everything around here was saturated and so I saw nothing wrong with that."

About two days after the purchase contract was signed, plaintiffs moved into the house under an agreement to pay $4.00 per day rent until the transaction was closed. The transaction was closed on 28 December 1970. The deed to plaintiffs, dated 18 December 1970, was signed by M. D. Fletcher, Jr., and wife, Bonnie T. Fletcher, as the owners in fee of the property. It was acknowledged and recorded on 28 December 1970.

Thereafter, for more than two years prior to the institution of this action on 3 August 1972, plaintiffs were in frequent communication with defendants Wheeler and Fletcher, and with Fletcher's construction foreman, Micky Ellis, with reference to remedying defects in the property, several of which were not on the list of items listed in Attachment # 1 to the purchase contract. However, at no time did plaintiffs ever have any contact with Mrs. Fletcher. For almost a year nothing was done. In consequence of an inspection by the county building inspector, Fletcher put vents in the attic, where the temperature was 123° on a 78° day, and drainage tile was placed around the foundation of the house.

Notwithstanding, water puddled continuously in the crawl space under the house and constituted plaintiffs' number-one problem. In consequence of perpetual dampness beneath the house the humidity inside the house was always exceptionally high. Water condensed on the windows to the extent that it streamed off the windowsills. In April 1971 Griffin wrote Fletcher that "a stream ran through a hole on the low side of the [foundation] wall the last couple of times it rained." Surfacing water and gas from septic tanks also created problems. Effluent from plaintiffs' septic tank and the one next door ran across plaintiffs' yard. Green alga grew in its wake. Construction debris remained in the backyard, which was still unlandscaped.

At the trial Griffin testified that all defects had then been corrected "except the water problem underneath the house and the situation where water runs underneath the garage door every time it rains fairly hard, and the window sashes were still loose." (The upper sash would fall when the window was unlocked or the lower sash was raised.) Moisture remained in the crawl space despite some efforts by defendants in January 1972 and March 1973 to correct the condition.

Griffin further testified that before moving to North Carolina, while living in Nevada, he had become a licensed real estate salesman and, working part-time, he had "sold maybe 15-20 houses." In Southern Nevada, which has a very dry climate, he had never seen houses constructed with crawl spaces similar to those in the Durham area. Further, he did not know about the poor porosity of the clay subsoil in the southern part of Durham County and the special water drainage problems in the

Bluestone Estates area until after he had moved into the house in suit.

Griffin's complaint to the Durham-Chapel Hill Builders' Association Ethics Committee on 20 November 1971 caused its chairman, Mr. Stewart Pickett, to talk with Wheeler and to "ride by the property." The testimony of Mr. Pickett, an experienced general contractor who had been building residences in the Durham-Chapel Hill area for the past fifteen years, tended to show:

The house had obviously not been completed in its final details at the time he rode by on 22 November 1971. In response to a second written complaint from Griffin advising him that the defects in his residence had not been remedied in early 1973, Pickett examined the crawl space and observed that "there was a moisture problem." A couple of weeks before the trial he again inspected the property and found dampness in the crawl space although it had not rained for several weeks. Finding no evidence of a spring or other source of subterranean water, he concluded that surface water runoff drained into the crawl space through or under the foundation wall. He outlined the measures he would take to prevent water from getting under the house and estimated the necessary work would cost approximately $2,200.00. He further testified that moisture in the crawl spaces beneath a dwelling will cause the floors to swell, create condensation problems in the walls and in the attic, and make the windows sweat so that water will run down on the windowsills. If not corrected, such moisture will eventually cause the floor system to mildew, a situation which brings in termites and other insects. If the moisture is severe enough it may eventually cause the roof line to buckle.

Plaintiffs' witness Wynne, the Durham County Building Inspector during the years 1970, 1971, and 1972, testified that he had made the preliminary inspection of the footings and framing of the Griffin residence when it was under construction; that final inspections are not made until after the property is occupied. In response to complaints from Griffin, who was then occupying the dwelling, he visited the property and found "some things that needed to be taken care of." In consequence he went to Fletcher's office and told him that "some things that needed to be taken care of were vents on the outside of the eaves of the house, underneath that, and then

they had dampness underneath the house in the crawl space." Fletcher told Wynne that he had already ordered the vents and that he was going to take steps to correct the moisture in the crawl space.

Inspector Wynne further testified that Section 17 of the North Carolina Uniform Residential Building Code ("in full force and effect in Durham County in the year 1970") provides: "Where the finished grade under the building is lower than the outside finished grade, adequate provisions must be made for drainage." Wynne stated that the crawl space under plaintiffs' house was below the outside finished grade; that Section 17 of the Building Code also provides that if the building inspector deems it necessary to do so, foundation walls below adjacent ground levels shall be rendered waterproof or dampproof as conditions require; and that he had not required Fletcher to take any particular precautions as a result of his inspection of the footings and the framing of the Griffin house.

Defendant Fletcher, who had been in the full-time construction business for seven years, was called by plaintiffs as an adverse witness. He testified in substance as follows:

He first saw plaintiffs a few days after the purchase contract was signed. Before the transaction was closed, he went with them to the property in order to go over the list of items to be completed; that nothing was said about water in the crawl space; that he knew the porosity of the soil in the Bluestone Estates area was very poor, but he saw no reason to discuss that with the Griffins. Specifically he said: "Yes, it is fair to say that the porosity of the soil in the Bluestone Estates area is such that it doesn't really absorb water as well as some other areas in Durham County. It is the worst area in Durham County. It's true it's the worst area for septic tanks in Durham County."

When asked why he did not tell plaintiffs about the poor porosity Fletcher replied, "I didn't feel this was my job to tell them it was the worst area in Durham County. . . . The septic tank . . . had been installed. How did I know it was going to work or wouldn't, or would give problems later? I didn't know. It was put in in accordance with Durham County specification. . . . This particular lot the percolation test did pass, and that was the reason I was permitted . . . to build this house. . . . Yes, it is true that sometimes, even when the property passes

a percolation test, you still have problems with the septic tank. Yes, I have had septic tank problems with a few houses in other areas of Bluestone Estates before I met the Griffins."

After plaintiffs moved into the house Fletcher became aware that water was accumulating under their house. He testified: "I do admit, in part, that after the Griffins moved into the house there was water coming through the foundation wall and into the crawl space. I'm not admitting that water was coming through the foundation wall. I don't know where it was coming from. I admit there was dampness and water under the house; I admit that. Yes, after a heavy rain, standing water. Well, I didn't measure it for depth. I don't know how deep it was. It was standing in puddles." In substance, Fletcher agreed with Mr. Pickett's itemization of the damages which moisture in the crawl space beneath a house could cause.

Fletcher testified that on two different occasions he had work done to correct the drainage problem. This work included putting a drain below the footings and waterproofing the foundation walls as he would have done a full basement. Finally, in January or February 1973, he dug a ditch around the house deeper than the footings and installed a "french drain" of pipe and rock, which was supposed to take the water to the back of the lot.

Fletcher said that he had built most of the houses located in the Bluestone Estates subdivision on a speculative basis, and defendant Wheeler, through his real estate company, Wheeler-Leonard, Inc., was the real estate agent who sold the houses on commission. Fletcher had built houses to VA, FHA or conventional loan specifications, depending on how he thought the house would be financed upon sale. He further stated that he had been taken off the approved builders' list for FHA and VA financing. He acknowledged familiarity with the North Carolina Uniform Building Code, specifically those provisions relating to waterproofing and damp-proofing of crawl space areas.

Defendant Wheeler, a licensed real estate broker, testifying for himself, gave testimony which tended to show:

When he accompanied plaintiffs on their first inspection visit to the property there were no discussions about water under the house or anything like that, and he made no war-

ranties of any kind. When the purchase contract was signed on 13 November 1970 he made no representations, inducements or warranties, and there was no mention of water in the crawl space. There was only a discussion of the several items listed on Attachment # 1 to the contract form. He further testified: "No, at no time was I an agent of M. D. Fletcher, Jr. I was not his agent in the construction business. I acted in no capacity other than as officer of this corporation."

Defendant Wheeler further testified that it is a fairly usual occurrence to get water in a crawl space during the construction of a house, indicating that could have been taken as the explanation of the presence of water there when plaintiffs first inspected the house. He specifically denied making any statement to plaintiffs about the problem of water in the crawl space until after they had moved into the house. He said that, about ten days before the transaction was closed, Griffin called him on the telephone and asked "what the water was under there" and he told him, " 'Mr. Griffin, I don't know. It could be because it is coming from the rainy weather. I don't know, but let's let it dry up. Let it dry up and if it doesn't dry up, then call me back.' He did in January."

Wheeler also conceded that he knew the Bluestone Estates area was one of the worst in Durham "with respect to the porosity of the soil," and that he had not told plaintiffs "they were looking at a house in an area of the county that had known septic tank problems and known problems with respect to the porosity of the soil." Ordinarily, Wheeler testified, upon getting construction loans for speculative houses built by Fletcher in Bluestone Estates, title to the lot remained in the W. F. Construction Company, the developer of the subdivision. However, through some inadvertence in handling the construction loan papers on the Griffin house property, the lot had been deeded to Fletcher and his wife. They were, therefore, the record owners at the time of the sale to plaintiffs.

At the close of all the evidence, plaintiffs moved under G.S. 1A-1, Rule 15(b) to amend their complaint to allege (1) that they had entered into a contract with W. F. Construction Co., Inc., to purchase the house which was deeded to them by Fletcher and wife, and (2) that the house was built by M. D. Fletcher, Jr., acting as a sole proprietorship instead of by M. D. Fletcher Construction Company. The motion to amend was denied. Motions by defendants Wheeler-Leonard & Co., Inc.,

Lonnie E. Wheeler, M. D. Fletcher, Jr., and wife, Bonnie T. Fletcher, for directed verdicts were allowed.

Upon plaintiffs' appeal, the Court of Appeals sustained the directed verdicts for defendants on the ground that, having failed to establish that the house was unfit for habitation, plaintiffs had failed to establish their right to recover. We allowed certiorari.

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

Blackwell M. Brodgen for defendant appellees.

SHARP, Chief Justice.

Plaintiffs base their contention that the Court of Appeals erred in affirming the trial court's directed verdict for defendants Lonnie E. Wheeler, Wheeler-Leonard Co., Inc., M. D. Fletcher, Jr., and wife, Bonnie T. Fletcher upon the following grounds:

First, the evidence tending to establish a breach of an express warranty by Wheeler and Wheeler-Leonard, Inc., was sufficient for submission to the jury.

Second, the evidence tending to show a fraudulent nondisclosure of material facts by Wheeler and Wheeler-Leonard, Inc., while acting as broker for Fletcher in negotiating the sale of residential property to plaintiffs was sufficient to take that issue to the jury.

Third, there was substantial evidence of a breach of implied warranty by defendants Fletcher and wife, entitling plaintiffs to go to the jury on that issue.

The foregoing contentions will be considered in the order listed.

According to plaintiff Griffin's testimony, prior to the signing of the purchase contract, Wheeler made the following statements with reference to water in the crawl space and the ability and reputation of the contractor who built the house:

"I did make a comment to Mr. Wheeler about what I saw in the crawl space. When I got back into the house, I asked him about the water underneath and he just made the comment that

it was probably left over from construction and it should dry up in a short time now that everything was covered over and water couldn't get in there any more."

"I asked him questions on quality of the house and how these things were done in North Carolina. The warranties, guarantees, and things like that, and he responded in the affirmative to all of my questions."

In response to a question about the contractor who built the house, Wheeler told Griffin that "he was a good contractor and he built good homes and that they were substantial."

We need not consider whether the admission of some or all of the foregoing testimony violated the rule against the admission of parol evidence which contradicts the terms of a written instrument (the purchase contract) since it was admitted without objection by defendants. *See* 2 Stansbury's N. C. Evidence § 251, n. 2 (Brandis Rev. 1973).

Although denying that prior to the signing of the purchase contract he had made any statement regarding the water problem in the crawl space, Wheeler testified that a few days after the signing of the contract and before the closing of the transaction, in a telephone conversation, Griffin had asked him about the water under the house, and he had replied, "Mr. Griffin, I don't know. It could be because it is coming from the rainy weather. I don't know, but let's let it dry up. Let it dry up and if it doesn't dry up, then call me back."

Are these statements, if made by Wheeler, sufficient (1) to constitute an express warranty that the residence he was attempting to sell plaintiffs, when completed, would be constructed in a workmanlike manner and, specifically, that water in the crawl space underneath the house would create no problems and (2) to support recovery by plaintiffs against Wheeler, Wheeler-Leonard, Inc., or the Fletchers, if a breach is shown? (As to an agent's liability on contracts entered into on behalf of his principal see *Howell v. Smith*, 261 N.C. 256, 134 S.E. 2d 381 (1964); *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375 (1946).) Taking plaintiffs' evidence as true and considering it in the light most favorable to them (as we are required to do in considering the sufficiency of the evidence to withstand the motion for a directed verdict, *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Kelly v. Har-*

vester Co., 278 N.C. 153, 179 S.E. 2d 396 (1971)), we conclude that the answer is No.

[1] Wheeler's statements, even assuming he was authorized to make them, were not sufficient to constitute an express warranty, on his own behalf, on behalf of Wheeler-Leonard, Inc., or on behalf of the Fletchers. All that Wheeler said with reference to water in the crawl space was that it was "probably" left over from construction and that it "should" dry up in a short time now that everything was covered over and water couldn't get in there any more. Thus, Wheeler did not expressly say, nor did his words reasonably imply, that he personally assumed a contractual obligation by warranting a dry crawl space.

[2] The statement attributed to Wheeler, that the contractor who built the house "was a good contractor and he built good homes and that they were substantial," likewise falls far short of constituting an express warranty with respect to the house which plaintiffs purchased. This statement amounted to no more than a general testimonial that the contractor built good, substantial homes. Indeed, the statement did not specifically refer to the particular house which plaintiffs purchased. We would have to strain unduly to find in Wheeler's statement a contractual warranty with respect to plaintiffs' house. *Cf.* N. C. Gen. Stat. § 25-2-312 (2) which provides: "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he had a specific intention to make a guaranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Compare Performance Motors, Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972).

[3] With reference to the alleged fraud of defendant Wheeler, it is well settled that where there is a duty to speak the concealment of a material fact is equivalent to fraudulent misrepresentation. *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962); *Brooks v. Ervin Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960). *See also* 4 Strong's N. C. Index 2d, *Fraud* § 3 (1968) and Annot., *Liability of Vendor's Broker or Agent to Purchaser for Misrepresentation as to, or Nondisclosure of, Physical Defects of Property Sold,* 8 A.L.R. 3d 550 (1966).

Plaintiffs rely upon *Brooks v. Ervin Construction Co., supra,* a case in which the defendant-builder had sold the plaintiffs a house and lot. The defendant had constructed the house over a large hole which it had filled with debris and then covered over with clay. The defendant knew, or should have known, that a house built on "disturbed soil" will settle and material damage result. In reversing a judgment of nonsuit, this Court said: "Since this defect in the lot and the house built centered over it was not apparent to plaintiffs and not within the reach of their diligent attention and observation, defendant was under a duty to disclose this information to plaintiffs. Plaintiffs' evidence makes out a case of actionable fraud sufficient to carry the case to the jury." *Id.* at 219, 116 S.E. 2d at 458.

[4] The Brooks case, however, does not require a reversal of the directed verdict in favor of Wheeler and Wheeler-Leonard, Inc. In this case defendant Wheeler did not build the Griffin house. There is no evidence whatever that Wheeler *knew* that the Griffin house had been constructed so that there would, or likely would, be a continuing water problem in the crawl space. The fact that Wheeler knew the condition of the soil in Bluestone Estates and knew of its poor porosity does not mean that he knew the house had, in fact, not been properly constructed to allow for that condition. Plaintiffs' own witness, Pickett, testified that the foundation of the house could have been constructed so that there would have been no continuing water problem beneath the house. Further, he outlined the measures which could still be taken to eliminate this condition and gave his estimate of their costs.

Had plaintiff shown (1) that, at the time he signed the contract with plaintiffs, defendant Wheeler knew, or had reason to believe, that the builder had not properly waterproofed the foundation of the house, and (2) that defendant Wheeler had withheld this fact from plaintiffs, such nondisclosure would have come within the rule applied in the Brooks case. However, all the testimony bearing upon this point, that offered by plaintiffs as well as by defendants, tended to show that, at the time of his transactions with plaintiffs, Wheeler thought the water accumulation underneath the house was a mere incident of construction and, once dried out, there would be no further water accumulation under the house.

We hold that the evidence adduced did not entitle plaintiffs to have the issue of misrepresentation by Wheeler and Wheeler-

Leonard, Inc., submitted to the jury. Whether the evidence in the record was sufficient to have supported an amendment of the complaint and submission of the issue of fraudulent nondisclosure as against defendant Fletcher is not before us. Plaintiffs neither sought to amend their complaint before trial to allege such a theory against Fletcher; nor do they presently contend that the issue was tried below by the implied consent of the parties as provided in N. C. Gen. Stat. § 1A-1, Rule 15(b).

The third question is whether the issue of defendants Fletchers' liability to plaintiffs for the alleged breach of implied warranty should have been submitted to the jury.

This question is answered by our decision in *Hartley v. Ballou,* 286 N.C. 51, 209 S.E. 2d 776 (1974), a case which was pending on appeal in this Court, but undecided, at the time the Court of Appeals rendered its decision in the instant case. *Griffin v. Wheeler-Leonard & Co.,* 22 N.C. App. 323, 206 S.E. 2d 313 (1974).

[5] The rule adopted by this Court as governing implied warranty in the sale of a dwelling by the builder-vendor was stated by Chief Justice Bobbitt as follows:

"[I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee." *Id.* at 62, 209 S.E. 2d at 783.

[6, 7] The implied warranty of the builder-vendor does not, of course, extend to defects of which the purchaser had actual notice or which are or should be visible to a reasonably prudent man upon an inspection of the dwelling. Where, however, there is a breach of the implied warranty, the vendee can maintain an action for damages for such breach "either (1) for the dif-

ference between the reasonable market value of the subject property as impliedly warranted and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty." *Id.* at 63, 209 S.E. 2d at 783.

[8] All the evidence tended to show that an extended period of wet weather and heavy rains had preceded plaintiffs' purchase of the property. As Griffin testified ". . . it had been raining constantly, and the backyard also was one giant mud puddle . . . everything around here was saturated"; so he "saw nothing wrong" with Wheeler's statement that the crawl space "should dry up" shortly after the rain stopped. Under all the circumstances here disclosed we cannot say as a matter of law that plaintiffs could not have reasonably acted on this assumption.

Although plaintiffs were unware of the admittedly poor porosity of the soil in the Bluestone Estates Subdivision, the condition of the soil was not the latent defect here involved but the absence of adequate construction measures to cope with that condition of the soil so as to prevent rainfall from puddling beneath the house. The condition of the foundation of the house and lack of sufficient waterproofing were defects which a jury could find would not have been discernible to a reasonably prudent person upon inspecting the property at the time of negotiating its purchase. Furthermore plaintiffs' evidence tended to show that at the time of trial two other defects—the failure of the top window sashes of several windows to stay up properly and the passage of water underneath the garage door whenever it rained "fairly hard"—had not been corrected. In addition there was evidence sufficient to go to the jury that a dwelling with these defects did not meet the standard of workmanlike construction then prevailing in Durham County. Thus, the jury could find the house was neither free from major structural defects nor constructed in a workmanlike manner and that therefore it did not meet the prevailing standard of workmanlike quality. Failure to meet this standard would constitute a breach of the implied warranty regardless of whether the house could be deemed "livable."

[9] Finally, we consider the effect of the last paragraph in the purchase contract, executed on a standard contract form published by the North Carolina Association of Realtors. Plain-

tiffs signed this contract as "buyer," and the signature on the "seller" line is "W. F. Construction Co., Inc., by Lonnie E. Wheeler, Pres." The last paragraph is as follows: "Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties hereto." Defendants contend that since the list of items on Attachment # 1 to the contract did not include water in the crawl space and in the garage or loose window sashes that they have no responsibility for these defects.

The implied warranty here under consideration, applicable to a dwelling sold by a builder, arises by operation of law, not by specific factual agreement between the parties. Without question, however, a builder-vendor and a purchaser could enter into a binding agreement that such implied warranty would not apply to their particular transaction.

Does the language in the last paragraph of the purchase contract constitute an agreement between defendant Fletcher and plaintiffs that no implied warranty is applicable to their transaction? The answer is clearly No.

On its face this last paragraph purports to exclude only those "representations or inducements" which are not set out in the written contract. The implied warranty of workmanlike quality of construction does not exist by reason of a representation or inducement made by the builder-vendor, nor does it exist by reason of a representation or inducement made by the builder's sales agent, the real estate broker. Instead, it exists *by operation of law.*

The words, "this contract contains the entire agreement between all parties hereto" may be regarded as sufficient to exclude a matter which one of the parties might contend was *in fact* agreed to prior to the signing of the contract. However, standing alone, these words are not sufficient to exclude an *implied warranty,* which is applicable only by operation of law. Such an exclusion, if desired by the parties to a contract for the purchase of a residence, should be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intended such result. *Cf.* N. C. Gen. Stat. § 25-2-316.

Further, it is relevant to note that defendant Fletcher (builder-vendor) was not one of the "parties" to the purchase

contract. He did not sign the contract and nowhere in it is there any reference to him.

[10] In summary, we hold that plaintiffs were entitled to go to the jury on the issue whether defendant M. D. Fletcher, Jr., breached the implied warranty of a builder-vendor. While defendant Bonnie T. Fletcher also signed the deed of conveyance to plaintiffs as a grantor and vendor of the property, the record contains no evidence that she was in the construction business or had any part in building the residence on Lot No. 9. Therefore, no issue arose as to her liability for any breach of the implied warranty of a builder-vendor.

As to defendants Lonnie E. Wheeler, Wheeler-Leonard & Co., Inc., and Bonnie T. Fletcher, the decision of the Court of Appeals is affirmed. As to defendant M. D. Fletcher, Jr., the judgment of the Court of Appeals is reversed. Accordingly, the cause is remanded to the Court of Appeals for entry of a judgment vacating the judgment of the trial court as to defendant M. D. Fletcher, Jr., and remanding the cause to the District Court for trial *de novo* as to him.

Affirmed in part;

Reversed in part;

Remanded.

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

STATE OF NORTH CAROLINA v. GEORGE W. PHIFER; CHARLES WHARTON, ALSO KNOWN AS HILLARY BOYCE; AND JOHNNY RAY LAWRENCE

No. 11

(Filed 17 June 1976)

1. Criminal Law § 92— consolidation — propriety

Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other.

2. Criminal Law § 92— consolidation of cases against three defendants — no error

Defendants' contention that their cases should not have been consolidated because some of the testimony of certain witnesses referred to defendants as a group rather than singling out particular defendants is without merit, since the record discloses that when referring to defendants as "they," the witnesses were using the term to include each of the defendants.

3. Criminal Law §§ 48, 92— statement by one defendant — silence of other two defendants — implied admission — consolidation proper

A statement made by one defendant in the presence of the two other defendants who remained silent was admissible against the silent defendants as an implied admission; therefore, the rule of *Bruton v. U. S.*, 391 U.S. 123, did not apply and did not require exclusion of the statement or separate trials of defendants.

4. Jury § 7— jurors' death penalty views — questioning proper

The trial court did not err in allowing prospective jurors to be questioned concerning their beliefs about capital punishment and to be advised that death is the penalty in first degree murder convictions.

5. Jury § 7— juror's death penalty views — exclusion for cause

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.

6. Jury § 7; Criminal Law § 158— jurors excluded for cause — presumption as to regularity in exclusion

Where the record simply disclosed that 57 jurors were excluded for cause as a result of their answers to questions concerning their death penalty views, it is assumed that the trial court excused only those jurors who indicated that they could not vote for conviction which would result in imposition of the death penalty.

7. Homicide § 20— photograph of deceased — admissibility for illustration

Defendant was not prejudiced by the admission into evidence of a photograph of deceased showing the fatal wound since such evidence illustrated the testimony of witnesses, and the jury was instructed that the photograph was admitted for illustrative purposes only.

8. Criminal Law § 50— opinion evidence — expertise of witness required

The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies.

9. Criminal Law § 50— opinion testimony — admissibility

The trial court in a first degree murder prosecution did not err in allowing (1) a witness who was in charge of the mobile crime laboratory of the SBI to give an opinion as to whether or not washing

the hands would destroy any possibility of a valid gun residue test, (2) an employee of the SBI, who admittedly was not a fingerprint expert, to explain the difference between a latent lift and a fingerprint, and (3) various witnesses to make observations and statements of fact which did not amount to expressions of opinion.

10. Searches and Seizures § 1— probable cause to stop and search vehicle

Where an officer had been notified by the State Highway Patrol radio dispatcher that a bank robbery and shooting had taken place and that a maroon Cadillac bearing N. J. license plates had been seen outside the bank, and the officer shortly thereafter saw a car answering this description traveling away from the scene of the crime, the officer had sufficient probable cause to stop the vehicle and search it for contraband and weapons as it sat on the side of the road.

11. Homicide § 20; Searches and Seizures § 2— consent to search vehicle — admissibility of money found therein

The trial court in a first degree murder case did not err in allowing into evidence money seized during a search of defendant's car where the court determined that defendant gave police officers permission to search his vehicle after he had been fully advised of his *Miranda* rights.

12. Homicide § 21— murder in perpetration of robbery — sufficiency of evidence

Evidence was sufficient for the jury in a first degree murder case where it tended to show that all three defendants arrived at Junior Peterson's trailer shortly after 8:00 a.m. on the day of the crime, defendant Phifer asked Mary Peterson for an old stocking, defendant Lawrence was carrying a shaving kit which contained, among other items, a .32 caliber revolver, the three defendants left the trailer about 8:55 a.m. in a maroon Cadillac bearing N. J. license plates, the car was later identified as belonging to defendant Boyce, a bank employee was shot with a .32 caliber pistol and the Southern Bank and Trust Company's Pantego branch was robbed shortly after 9:00 a.m., a dark-colored Cadillac with N. J. plates was parked at the bank at the time, the three defendants returned to the trailer at approximately 9:20 a.m. in the maroon Cadillac carrying a white plastic bag containing a large amount of money, and defendant Phifer, in the presence of the other defendants, told Mary Peterson that they had robbed a bank and "that dumb woman picked the phone up and screamed."

13. Homicide § 30— first degree murder — failure to instruct on lesser offense — no error

Where the evidence was sufficient to place all three defendants at the scene of the homicide, and no evidence was adduced showing that one or more of the defendants merely counseled or procured the crimes, the trial court properly denied defendants' request for an instruction on accessory before the fact.

14. Homicide §§ 2, 25— three defendants — responsibility of all for acts of one

In a prosecution of three defendants for first degree murder, the trial court correctly stated the rule that each defendant need not

do every act necessary to constitute the crime, but that two or more persons may act together with a common purpose to commit a crime and thereby be held responsible for the acts of the others.

15. Criminal Law § 114— jury instructions — no expression of opinion

The trial court did not express an opinion in violation of G.S. 1-180 by (1) reminding the jury that they should apply the law he gave them equally to all defendants, (2) relating his instructions concerning the credibility of interested witnesses and accomplices to the evidence in the case, (3) reminding the jurors of the length of the trial and the inconvenience it had caused them and expressing his appreciation to the jurors for their service, and (4) explaining to the jurors the consequences of a hung jury and encouraging them to agree on a verdict without surrendering their convictions.

16. Criminal Law § 99— handcuffing defendants outside jury's presence — no expression of opinion

The handcuffing of defendants while the jury was out deliberating on the verdict did not constitute an impermissible expression of opinion on the part of the trial judge or influence the jurors to the prejudice of defendants.

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

Imposition of the death penalty upon a conviction for first degree murder was constitutional.

APPEAL by defendants under G.S. 7A-27(a) from *Smith, S.J.*, at the 9 June 1975 Term of BEAUFORT Superior Court.

Defendants were charged in separate bills of indictment, proper in form, with the first degree murder of Dorothy Cuthrell. On pleas of not guilty, the cases were consolidated for trial over objection of defendants. The jury returned verdicts of guilty as charged as to each defendant. Defendants appealed from judgments imposing sentences of death.

Evidence for the State tended to show the following: About 8:00 a.m. on 24 January 1975, defendants came to the trailer home of their friends, Augustus "Junior" Peterson and Mary Holliway Peterson, located on Highway 264 in the Leachville section of Beaufort County near the Hyde County line. "Junior" was not at home, having left earlier that morning. Defendant Phifer asked Mary Peterson if she had any old stockings and was told she did not. At the time, defendant Lawrence had a blue shaving kit containing a revolver, rubber gloves, tape and some wire. Defendants left the trailer at approximately 8:55 a.m. in a maroon Cadillac, returning about 9:20 a.m. In response to a question from Mary Peterson, defendant Phifer

stated that they had robbed a bank and further said, "That dumb woman picked the phone up and screamed." Phifer then dumped the contents of a white plastic bag he had been carrying onto a bed, revealing several stacks of money with wrappers around them. Later, defendant Wharton, also known as Hillary Boyce (hereinafter called Boyce), left the trailer in the maroon Cadillac. Defendants Phifer and Lawrence left together with "Junior" Peterson and Leroy Ormond in Peterson's white Cadillac.

Dorothy Cuthrell, teller for the Southern Bank and Trust Company's Pantego branch, was found shortly after 9:00 a.m. on 24 January lying on the floor of the bank with her ankles taped together and a bullet wound in her chest. Mrs. Cuthrell later died as a result of the wound. Approximately $8,635.00 was taken from the bank. A witness who walked by the bank shortly after 9:00 a.m. observed a dark-colored Cadillac bearing New Jersey license plates parked in front of the bank.

Defendants Phifer and Lawrence were apprehended at approximately 10:30 a.m. when the car in which they were traveling was stopped by a highway patrolman. Defendant Boyce, driving the maroon Cadillac, was stopped shortly thereafter by Mr. Phillips, a License and Theft Officer of the Department of Motor Vehicles. Another officer with Phillips asked Boyce for his registration card and his driver's license, which he produced. These were made out to Hillary R. Boyce, Jersey City, New Jersey. Sergeant Ake of the State Highway Patrol arrived a few minutes later and told defendant that his car matched the description of the car seen at the scene of the crime and asked defendant to go with him to Washington "to get it straightened out." Boyce agreed to drive his car to the Beaufort County Courthouse in Washington. They left with Sergeant Ake in his car in front and S.B.I. Agent Newell in his car behind. At Plymouth, Sergeant Ake left his car and rode to Washington with Boyce. At the courthouse, Boyce consented to a search of his car. A large sum of money was found behind a cardboard panel in the trunk.

On the afternoon of 24 January 1975, a black shaving kit was found on the side of a dirt road four miles from "Junior" Peterson's trailer and beside a field farmed by Peterson. The kit contained a cassette tape, a screwdriver and other small tools, an empty plastic bag marked "Delfin" rubber gloves, and other miscellaneous items.

Defendants offered no evidence.

Other facts necessary to decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten, Senior Deputy Attorney General James F. Bullock, and Associate Attorney William H. Guy for the State.

Charles W. Ogletree for defendant Lawrence; Thomas E. Archie for defendant Wharton, also known as Hillary Boyce; and William R. Peel for defendant Phifer, appellants.

MOORE, Justice.

[1] Before defendants were arraigned, the State moved to consolidate the cases for trial. Defendants objected, and in the absence of the jury arguments were made on the motion. The motion was then allowed. Defendants assign this as error. The State's motion was addressed to the sound discretion of the trial judge. Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. *State v. Taylor,* 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); G.S. 15A-926(b)(2). The exercise of discretion by the trial judge will not be disturbed absent a showing that defendant has been denied a fair trial by the order of consolidation. *State v. Taylor, supra; State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972).

[2] Defendants first contend that their cases should not have been consolidated because some of the testimony of certain witnesses refers to defendants as a group rather than singling out particular defendants. However, an examination of the record discloses that when referring to defendants as "they," the witnesses were using the term to include each of the defendants. Hence, there was no need to point out each defendant individually. In further support of their objections to consolidation, defendants cite *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). In interpreting *Bruton,* Justice Sharp (now Chief Justice), speaking for the Court in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), said:

> ". . . [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)* [250 N.C. 113, 108 S.E. 2d 128 (1959)], 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 [246 N.C. 157, 97 S.E. 2d 876 (1957)]."

[3] In instant case, witness Peterson testified without objection that when the three defendants returned around 9:20 a.m. she met them at the door of the trailer and asked defendant Phifer, "What happened?" Phifer replied that they had robbed a bank and further stated, "That dumb woman picked the phone up and screamed." Since Phifer did not take the stand, neither Lawrence nor Boyce was able to cross-examine him about his statements. However, under the circumstances in which the statement was made, we hold that it was properly admissible against defendants Boyce and Lawrence and that *Bruton* does not apply. The record reveals that the three defendants were together and were entering the trailer when Mary Peterson asked Phifer what had happened. Both Lawrence and Boyce were in a position to hear the statement and said nothing in denial. Thus, the statement by Phifer is admissible against Lawrence and Boyce as an implied admission.

The general rule concerning implied admissions was aptly stated by Justice Branch in *State v. Spaulding,* 288 N.C. 397, 219 S.E. 2d 178 (1975), as follows:

"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. 2d

638; *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. . . ."

Defendants also cite *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45 (1942), and *State v. Cotton,* 218 N.C. 577, 12 S.E. 2d 246 (1940), in support of their position that the cases should not have been consolidated. Both of these cases are factually distinguishable from the cases here. *State v. Bonner, supra,* involved a situation in which the codefendant's statement did not incriminate himself but included a full account of all the circumstances pertaining to the robbery-murder of the victim by his codefendants. *State v. Cotton, supra,* involved the testimony of a wife against her husband which, under C.S. 1802 (now G.S. 8-57), was not competent. For a discussion of these two cases as bearing upon the question of consolidation, *see State v. Jones, supra.* Absent a showing that defendants have been denied a fair trial by the order of consolidation, the cases were properly consolidated for trial. This assignment of error is overruled.

It is stipulated that fifty-seven prospective jurors were excused by the court upon challenge of the State for their answers to the following questions:

"1. 'Would it be impossible for you under any circumstances, even though the State satisfied you beyond a reasonable doubt of the defendants' guilt of the charge, would it be impossible for you no matter what the evidence was, to bring in a verdict of guilty when you knew it carried the death penalty?'

"2. 'Would it be impossible for you under any circumstances, where even though you were convinced beyond a reasonable doubt of the defendants' guilt, for you to return a verdict of guilty, where you knew the death penalty would be imposed?' "

[4] Defendants first contend that the prospective jurors should not have been questioned concerning their beliefs about capital punishment and should not have been advised that death is the penalty in first degree murder convictions.

In *State v. Britt,* 285 N.C. 256, 267, 204 S.E. 2d 817, 825 (1974), Justice Branch, speaking for the Court, said:

"It is well established by our decisions and the decisions of the federal courts that in a capital case both the

> State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. [Citations omitted.] A prospective juror's response to such inquiry by counsel may disclose basis for a challenge for cause or the exercise of a peremptory challenge. The extent of the inquiries, of course, remains under the control and supervision of the trial judge."

See also G.S. 15-176.3 which expressly provides that in a capital case the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime.

Defendants further contend that the exclusion of these jurors because of their views on capital punishment deprived defendants of their Sixth Amendment right to a jury which reflects a fair and representative cross-section of the community, in that jurors with scruples against the imposition of the death penalty form a coherent and sizeable group in most communities from which juries are selected. Defendants cite *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), and other federal cases in support of their position.

Counsel for defendants, in their brief, state that they are not inadvertent to *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), and numerous similar decisions. Defendants contend, however, that these decisions are wrong and should be overruled.

[5] As stated in defendants' brief, 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. *See State v. Bock,* 288 N.C. 145, 217 S.E. 2d 513 (1975); *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). *See also Whitherspoon v. Illinois, supra.* We adhere to these decisions.

[6] It is impossible to determine from the record in the case at bar why the jurors excluded for cause were in fact excluded. The record does not reveal what the answers to the stipulated

questions actually were nor does it show any systematic exclusion of prospective jurors who voiced only general objections to the death penalty. The record simply disclosed that fifty-seven jurors were excluded for cause as a result of their answers to these questions. On the record before us, we must assume that the trial judge excused only those jurors who answered the stipulated questions in the affirmative. *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Dew,* 240 N.C. 595, 83 S.E. 2d 482 (1954). There is a presumption of regularity in the trial. In order to overcome that presumption, it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal. *State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Sanders,* 280 N.C. 67, 185 S.E. 2d 137 (1971). *Accord, State v. Hilton,* 271 N.C. 456, 156 S.E. 2d 833 (1967). An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court. *State v. Young, supra; State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *State v. Duncan,* 270 N.C. 241, 154 S.E. 2d 53 (1967). No such error is made to appear in this case. This assignment is overruled.

[7] By a series of assignments of error, defendants claim they were prejudiced by the introduction of improper evidence. First, defendants contend that State's Exhibit No. 1, a photograph of the deceased showing the fatal wound, added nothing to the evidence presented by the State, and was only introduced for the purpose of inflaming the jury. Defendants further contend that while Dr. West identified the photograph, he did not use it to illustrate his testimony.

The photograph was used to illustrate the testimony of the witnesses Flowers and Wise who testified concerning the position of the body of the deceased at the scene, and the location of the wound which they observed. The trial judge, when the photograph was offered into evidence, specifically instructed the jury that it was offered and received for one purpose and one purpose only, and that was to illustrate the testimony of the witness concerning what he observed if, in fact, they found that it did illustrate his testimony, and that it was not to be used for any other purpose. In his charge to the jury, the trial judge repeated and elaborated upon this instruction.

There was nothing gory or gruesome about the photograph. It simply showed a small hole in the chest area of the deceased

at the point of entry for the bullet which Dr. West testified caused her death. No objection was made to Dr. West's testimony concerning this photograph. It was competent to illustrate the testimony of Flowers and Wise. *State v. Young, supra; State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972).

[8] Defendants next contend that the trial court erred in allowing witnesses to speculate, give unqualified opinions, and draw conclusions. Ordinarily, opinion evidence of a nonexpert witness is not admissible because it is the province of the jury to decide what inferences are warranted by the testimony. *State v. Peterson,* 225 N.C. 540, 35 S.E. 2d 645 (1945), overruled on other grounds in *State v. Hill,* 236 N.C. 704, 73 S.E. 2d 894 (1953). The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Hairston and State v. Howard and State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); 1 Stansbury, N. C. Evidence § 133, p. 431 (Brandis Rev. 1973).

[9] Specifically, defendants contend that the witness James Bailey was allowed to give an opinion as to "whether or not washing the hands would destroy any possibility of a valid gun residue test." Mr. Bailey was in charge of the mobile crime laboratory of the State Bureau of Investigation, and because of the nature of his job and the experience which he had had, he was better qualified than the jury to form an opinion on this matter.

Mr. Louis Young, an employee of the State Bureau of Investigation, although admittedly not a fingerprint expert, was allowed to explain "the difference between a latent lift and a fingerprint." His employment and experience qualified him to make this comparison. *See State v. Crowder, supra.*

Defendants in present case did not request a finding by the trial court that either the witness Bailey or the witness Young was qualified as an expert. In the absence of such request, the finding is deemed implicit in the ruling admitting

opinion testimony. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969).

Defendants objected to the testimony of witness Phillips that Boyce's car had stopped and was preparing to back up and go another road as being speculative or opinion testimony. This statement was a mere observation, did not involve an ultimate question to be determined by the jury, and was not prejudicial to defendants.

The contradictory testimony of the witness Mary Peterson, in identifying the caliber of the pistol which she had earlier seen in Lawrence's shaving kit, that "I'd say maybe it was a thirty-two, I know it was, you know, it was too small for a twenty-two," went only to its weight and not its admissibility.

The testimony of S.B.I. Agent Newell that he saw a hard object in a sink at Mary Peterson's home that looked as if it had been burned was not opinion evidence but simply a statement of fact. So was the testimony of Mary Peterson that she attempted to burn the plastic bag which had contained the money defendants brought to her home and that she had then put the remainder of the bag in the sink.

This series of assignments is overruled.

The next assignment of error is based upon defendant Boyce's contention that he was unlawfully taken into custody and that the purported permission to search his car was coerced. He contends, therefore, that the money found as the result of the search of his car was the fruit of an illegal search and his objection to its admission into evidence should have been sustained.

G.S. 15A-401(b)(2), in part, provides:

"Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony. . . ."

It is not required that a felony be shown actually to have been committed. It is only necessary that the officer have reasonable ground to believe that such an offense has been committed. *State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974); *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954); *Draper*

v. United States, 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959).

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . [T]he evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d, Arrest § 44 (1962). *State v. Shore, supra; State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971).

Probable cause "may be based upon information given to the officer by another, the source of such information being reasonably reliable." *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970). *State v. Shore, supra.*

[10, 11] In present case, Officer Phillips had been notified by the State Highway Patrol radio dispatcher that the bank robbery and shooting had taken place and that a maroon Cadillac bearing New Jersey license plates had been seen outside the bank. Based upon this information, when Officer Phillips shortly thereafter saw the car answering this description traveling away from the scene of the crime, he had sufficient probable cause to stop the vehicle and search it for contraband and weapons as it sat on the side of the road. *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925). Given this right to seize and search the car on the open road, Officer Phillips would also have been justified in taking the car to his headquarters and having it searched there without first obtaining a warrant. *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *Texas v. White,* 423 U.S. 67, 46 L.Ed. 2d 209, 96 S.Ct. 304 (1975). Officer Phillips would further have been fully justified in arresting defendant Boyce under North Carolina procedures. *State v. Harrington,* 283 N.C. 527, 196 S.E. 2d 742 (1973); *State v. Alexander,* 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). Boyce's car could have been involuntarily searched on the side of the road or at the Beaufort County Courthouse and Boyce himself arrested. However, in instant case defendant Boyce *voluntarily* agreed to drive his car to Washington and there, after having been fully advised of his *Miranda* rights, gave Sergeant Ake and Federal Bureau of Investigation Agent Fanning permission to search his car. The

trial court, after finding facts, concluded that the permission to search was freely, understandingly, and voluntarily given. Such search renders competent the evidence thus obtained. *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. den.,* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966); *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961). This assignment is without merit.

Next, defendants assign as error the failure of the trial judge to direct the jury to disregard inadmissible evidence. The alleged error pertains to two questions to which defendants objected. The first of these, relating to the contents of the shaving kit which the evidence tended to show had been discarded by defendants, was as follows:

> ". . . I do recall that there were several papers and a driver's license inside.
>
> Q. All right, go ahead.
>
> A. There was a slip, a slip of paper in there that I recall was from a radio shack in New York——."

The other question, pertaining to a piece of yellow plastic found on the Pantego bank floor on January 24, was as follows:

> "Q. Would you describe it as it appears to you now, what it is?
>
> A. It's a portion of a piece of yellow glove."

Defendants' objections to each of these questions were sustained. Assuming that the objections had been overruled, we do not see how defendants could have been prejudiced. Furthermore, defendants made no request that the judge instruct the jury to disregard these questions or answers. If defendants wanted fuller instructions as to the evidence or contentions, they should have so requested. Their failure to do so now precludes them from assigning this as error. *State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970).

No reason or argument is stated or authority cited in support of the assignment alleging error in the introduction of various exhibits. Under Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure, this assignment is deemed abandoned.

[12] Defendants contend that their motions as of nonsuit should have been granted for the reason that the State failed to prove that each of the defendants was present when the fatal shooting occurred. This contention is without merit. Upon motion as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Nonsuit should be denied when there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Caron,* 288 N.C. 467, 219 S.E. 2d 68 (1975); *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). In the case at bar, the uncontradicted evidence tended to show that all three defendants arrived at Junior Peterson's trailer shortly after 8:00 a.m. on 24 January 1975. Defendant Phifer asked Mary Peterson for an old stocking and defendant Lawrence was carrying a shaving kit which contained, among other items, a .32-caliber revolver. The three defendants left the trailer about 8:55 a.m. in a maroon Cadillac bearing New Jersey license plates, later identified as belonging to defendant Boyce. Mrs. Cuthrell was shot with a .32-caliber pistol and the Southern Bank and Trust Company's Pantego branch robbed shortly after 9:00 a.m. A dark-colored Cadillac with New Jersey license plates was parked at the bank at that time. The three defendants returned to the trailer at approximately 9:20 a.m. in the maroon Cadillac, carrying a white plastic bag containing a large amount of money. Defendant Phifer, in the presence of the other defendants, told Mary Peterson that they had robbed a bank and "[t]hat dumb woman picked the phone up and screamed." This evidence was sufficient to support the conclusion on the part of the jury that the three defendants were together and acting in concert at the time of the robbery and shooting. The motions for judgments as of nonsuit were properly overruled.

[13] Defendants next argue that the trial court refused to instruct the jury that they might find one or more of the defendants guilty as accessories before the fact, contending that since the State had not shown that all three were present at the bank, the court should have instructed the jury to consider whether one or more of the defendants merely procured the robbery and murder but was not present at the commission of the crimes. It is well established that the trial court is under a duty to instruct on lesser included offenses when, and only

when, there is evidence tending to show the commission of such lesser offenses. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969). In instant case, the evidence was sufficient to place all three defendants at the scene of the crime; no evidence was adduced showing that one or more of the defendants merely counseled or procured the crimes. In the absence of such evidence, the request for an instruction on accessory before the fact was properly denied.

[14] By their next assignment of error, defendants contend that the trial court erred in instructing the jury on the burden of proof as to each defendant. However, an examination of the judge's charge on this issue reveals that defendants' contentions are baseless. The trial judge correctly stated the rule that each defendant need not do every act necessary to constitute the crime, but that two or more persons may act together with a common purpose to commit a crime and thereby be held responsible for the acts of the others. The trial judge then explained the elements of armed robbery and the operation of the felony murder rule. *See State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972); *State v. Hairston and State v. Howard and State v. McIntyre, supra.* When these instructions are read as a whole, as they must be, *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), the trial judge correctly defined the applicable law, applied this law to the facts of the case and clearly instructed the jury that the State must prove each defendant's guilt as to every element of the offense beyond a reasonable doubt, either by proving that a particular defendant committed all essential elements of the crime or "acted in concert" with another defendant who did. This assignment of error is overruled.

[15] Defendants bring forward several assignments of error concerning alleged violations of G.S. 1-180. First, defendants contend that the trial judge suggested the defendants were equally guilty by instructing that "justice requires that everyone who is charged with the same crime, be treated in the same way and have the same law applied to them." Obviously, the able trial judge was simply reminding the jury that they should apply the law he gave them equally as to all defendants. Defendants further contend the trial judge suggested that the crimes charged had undoubtedly been committed and that Mary Holliway Peterson and Leroy Ormond were accomplices or accesso-

ries to the crimes. To the contrary, the judge merely instructed the jury that "there was some evidence as I remember, and again take your recollection of the evidence, that there was some evidence *which tended to show* that the witness Mary Holliway Peterson and Leroy Ormond were accomplices or accessories in the commission of a crime charged in this case." (Emphasis added.) The trial judge here was merely relating his instructions concerning the credibility of interested witnesses and accomplices to the evidence in the case.

Defendants also argue that the trial judge expressed his opinion concerning the guilt of the defendants by reminding the jurors of the length of the trial and the inconvenience it had caused them. The judge, however, was only expressing his appreciation to the jury for their service and went on to say, "I would hope that you will take whatever time you feel is necessary until such time as you can agree on your verdict." Defendants additionally contend that the trial judge pressured the jury to continue their deliberations when they reported they could not agree. Here, the trial judge was only attempting to explain to the jurors the consequences of a hung jury. On two occasions during these final instructions, he stated: ". . . I do want to emphasize the fact that it is your duty to do whatever you can to reason the matter over together as reasonable men and women and to reconcile your differences if that is possible without the surrender of anyone's conscientious convictions." No undue pressure appears. *See State v. Accor and State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972).

[16] Finally, defendants complain that they were handcuffed while the verdicts were read and the jury polled and that this "shackling" amounted to an expression of opinion by the judge on their guilt and could have influenced the jurors' verdicts. Defendants correctly acknowledge that the conduct of the trial is within the sound discretion of the trial judge, especially as regards maintaining order in the courtroom. *See State v. Rhodes,* 290 N.C. 16, 224 S.E. 2d 631 (1976); *State v. Spaulding, supra.* The jury was out deliberating when defendants were handcuffed. We do not see how the handcuffing of defendants in the absence of the jury constituted an impermissible expression of opinion on the part of the trial judge or influenced the jurors to the prejudice of the defendants. These assignments are overruled.

[17] By their last assignment of error, defendants attack the death sentence as being illegal and unconstitutional for the reason that capital punishment in North Carolina is still imposed in a selective and arbitrary manner that violates the rule of *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). These contentions have been considered and rejected by this Court in many cases in recent years. Further discussion would be merely repetitious. *See State v. Bush,* 289 N.C. 159, 221 S.E. 2d 333 (1976), and cases cited therein.

Due to the seriousness of the charges and the gravity of the punishment imposed, we have carefully examined and considered all of defendants' assignments of error. An examination of the entire record discloses that defendants have had a fair trial, free from prejudicial error. The judgments imposed must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. GREGORY JAMES TAYLOR

No. 48

(Filed 17 June 1976)

1. **Criminal Law § 29— mental capacity to stand trial — sufficiency of evidence to support determination**

The evidence was sufficient to support the trial court's determination that defendant had the mental capacity to stand trial for first degree murder where a psychiatrist testified for the State that in his opinion defendant would be able to assist counsel in the preparation of his defense, the other expert witnesses did not contradict this opinion, and defendant testified that he was aware of the nature of the charges against him and could talk to his counsel from day to day so that counsel could understand the happenings on the day of the crime. G.S. 15A-1001 *et seq.*

2. **Criminal Law § 50— presentation of expert testimony**

Expert testimony may be presented to the jury through the testimony of an expert based on his own personal knowledge and observation or through testimony of an expert based on a hypothetical question addressed to him in which the pertinent facts are assumed to be true.

3. **Criminal Law § 52— hypothetical questions**

A hypothetical question should include only facts supported by the evidence already introduced or those facts which a jury might logically infer therefrom, and the question should not contain repetitious, slanted or argumentative words or phrases.

4. Criminal Law § 52— hypothetical question — assumption inferred from evidence — non-vital assumption not supported by evidence

In a hypothetical question asked a psychiatrist as to defendant's ability to distinguish between right and wrong at the time of a murder committed during a robbery, the assumption that defendant concealed a weapon under a coat worn by him for that purpose could be inferred from the evidence, and the erroneous assumption that defendant provided a wig to conceal the identity of an accomplice was not of such vital nature as to require a new trial.

5. Criminal Law § 52— expert testimony — hypothetical questions

A hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper and the expert's answer to such a question will be excluded; however, it is not necessary to include in the hypothetical question all the evidence bearing upon the fact to be proved, since the adversary has the right to present other phases of the evidence in counter-hypothetical questions so as to supply omitted facts and to ask the expert on cross-examination if his opinion would have been modified by the inclusion of such omitted facts.

6. Criminal Law §§ 52, 63— ability to distinguish right from wrong — hypothetical question — no reference to history of mental illness

The omission of any reference to defendant's history of mental illness and prior judicial commitments in a hypothetical question asked a psychiatrist as to defendant's ability to distinguish right from wrong at the time of the crime did not constitute reversible error.

7. Criminal Law § 75— in-custody statements — mental capacity

The record as a whole in this murder prosecution, including testimony by an officer and by two psychiatrists, showed that defendant possessed sufficient mental capacity to make in-custody statements voluntarily and understandingly and supported the trial court's determination that defendant did voluntarily and understandingly make such statements.

8. Criminal Law § 63— accused's mental condition — non-expert testimony

A non-expert witness may testify as to his opinion of an accused's mental condition when the witness has had reasonable opportunity to observe the person and to form an opinion based on such observations.

9. Criminal Law § 93— admission of in-custody statements in rebuttal

The trial judge did not err in admitting defendant's in-custody statements as a part of the State's rebuttal evidence.

10. Criminal Law §§ 5, 112; Homicide § 28— insanity — instructions on burden of proof

In a prosecution for first degree murder, the trial court's instruction placing on defendant the burden of proving to the jury's satisfaction that he was legally insane at the time the crime was

committed, and the court's failure to instruct that the State had the burden of proving defendant's sanity beyond a reasonable doubt, did not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684.

11. **Criminal Law §§ 5, 111— defense of insanity — instructions on commitment procedures for criminally insane**

Where defendant interposed a defense of insanity to a charge of first degree murder, the trial court erred in the denial of defendant's request for an instruction setting out the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness.

APPEAL by defendant from *Kirby, J.*, 15 September 1975 Schedule A Criminal Session of MECKLENBURG Superior Court.

Defendant was indicted and tried upon a bill of indictment charging that ". . . Gregory James Taylor . . . on the 24th day of January, 1975, with force and arms . . . feloniously, willfully, and of his malice aforethought, did kill and murder Betty Flood Moore."

Defendant was arrested upon a warrant charging him with the murder of Mrs. Moore. Upon motion of defendant's court-appointed attorney filed 25 January 1975 and pursuant to G.S. 122-91, defendant was committed to Dorothea Dix Hospital on 27 February 1975 for a period not to exceed sixty days for observation to determine if he was mentally competent to stand trial. By letter dated 14 March 1975, Dr. James Groce, staff psychiatrist at Dorothea Dix Hospital, advised the Clerk of Superior Court of Mecklenburg County that "In our opinion Gregory Taylor is able to conduct his defense to the end that any available defense may be presented." Defendant was thereupon returned to Mecklenburg County and the Grand Jury returned a true bill couched in the language of G.S. 15-144. On 2 September 1975, a pretrial hearing was conducted pursuant to the provisions of G.S. 122-83 and G.S. 122-84. After hearing medical testimony including testimony of four psychiatrists, Judge Snepp found facts and concluded as a matter of law that defendant had capacity to proceed within the meaning of North Carolina General Statutes 15A-1001 *et seq.* The judge ordered that the Sheriff of Mecklenburg County take care that medications prescribed for defendant would be administered as directed.

Upon being arraigned defendant, through his court-appointed attorney, entered pleas of not guilty and not guilty by reason of insanity.

The State's evidence tended to show that at about noon on 24 January 1975, Mart Moore was in the back of his grocery store, the Homestead Grocery, located on Rozzelles Ferry Road in Mecklenburg County when he heard his wife, Betty Flood Moore, call his name. He came to the front of the store and observed two black men beside the cash register. Defendant pointed a shotgun toward him and said, "Don't do anything foolish." Mr. Moore asked what he wanted and defendant, without provocation, shot and fatally wounded Betty Flood Moore. The two men then ran from the store. Mr. Moore, who had previously seen defendant in his place of business, testified that defendant wore a white turtleneck shirt and his companion wore a burgundy shirt, sunglasses and a wig. At trial, Mr. Moore positively identified defendant as the man who shot and fatally wounded his wife.

Barry Gulley testified that he saw two black males run from the Homestead Grocery store on 24 January 1975. One of the men, wearing a white sweater, ran into the grounds of the Leaksville Mill. The other man, wearing a burgundy sweater and sunglasses, ran into a parking lot behind the mill. He saw them drop something in a ditch which he later found to be a shotgun and a wig. James McKinney Campbell saw defendant at the Leaksville Mill around noon and defendant asked him how to get through the mill.

Dennis Weathers testified that on 24 January 1975 he saw defendant, who at that time asked him to take him to "the mill on Rozzelles Ferry Road to pick up some money." Defendant was dressed in a trench coat with a sweater under it. He later picked up Larry Davis who was wearing a burgundy or red sweater. They then proceeded to the mill where both Taylor and Davis left the car. Taylor ran back to the car about fifteen minutes later. He was not wearing the trench coat and was pulling off the sweater as he ran. He threw the sweater on the ground, entered the car and said he had "to get away from here." As they drove toward town, Taylor said that he and Davis had gone into the store to take some money. He asked the lady for money and she refused. He turned to leave, but when she reached under the counter, he shot her with a shotgun.

The State also introduced into evidence Exhibits 11 and 12—two written statements which were signed by the defendant and defendant's sister, Thelma Moore.

We will more fully consider the statements introduced into evidence and the proceedings concerning defendant's ability to stand trial in the opinion.

The defendant offered evidence which was mainly directed to his lack of mental capacity. Defendant's mother, Eunice Taylor, stated that her son was twenty-one years old and that he had returned from New York about two years ago. Before going to New York, he was a normal boy but on his return, he did very strange things such as making motions as if he was playing a guitar when he did not have a guitar. He had a strange look in his eyes and he thought that she was against him. He told the witness's grandson that he thought his mother was a monster. His actions caused her to become afraid of him. He was hospitalized in Charlotte Memorial Hospital because of his condition for a period of about one month and he was later committed to Broughton Hospital where he remained for a short time. He was given medication which seemed to help him. She stated that in her opinion defendant did not know the difference between right and wrong on 24 January 1975.

Defendant's father, Willie James Taylor, also testified as to defendant's mental condition. He stated that his son said that he heard voices and that he was in a war with his father and family and that his mother was an enemy. He saw defendant on 25 January 1975 and in his opinion defendant did not know what he was doing.

Defendant's sister, Thelma Moore, related instances of defendant's strange behavior similar to those related in the testimony of her parents. She also testified that she accompanied defendant to the Law Enforcement Center on 25 January 1975 where he made two statements to police officers in her presence. She stated that she saw defendant sign these statements after they were reduced to writing and that she also signed each of the statements.

Mrs. Lynn Asprogiannis, the Chief Head Nurse at the Mecklenburg County Jail, testified that she first observed defendant when he was in custody in 1973. At that time, she administered the prescribed drugs, Stelazine and Thorazine. He was seen again on 30 June 1975 and she again administered drugs as prescribed. He was thereafter transferred to Dorothea Dix and upon his return to the Mecklenburg County Jail, she was directed to continue giving him Thorazine and Stelazine.

She stated that he was hyperactive and talkative on the occasions she saw him.

Dr. Mildred Keene, admitted as an expert in the field of psychiatry, stated that she first examined defendant in August 1973. She testified that defendant said that he was hearing voices and he appeared to be in a psychotic condition. Defendant remained at Charlotte Memorial Hospital under her care until 28 September 1973. She diagnosed his condition as being schizophrenia, paranoid type. His mother returned him to the hospital on 9 August 1974 and at that time, he was oriented as to time, place and person but was still hallucinating. Upon Dr. Keene's recommendation, he was readmitted to the hospital where he remained until 21 August 1974. He was treated by administering the drugs of Stelazine and Thorazine. In her opinion, defendant could be lucid on one day and disoriented the next day. She recommended involuntary commitment for a long term of treatment.

Dr. William Isaac Jones, an expert in family medicine, observed defendant in Wilmith Hospital during the periods 6 September 1974 to 13 September 1974. His opinions as to defendant's condition and the treatment which he administered were compatible with Dr. Keene's testimony as to her diagnosis and treatment of defendant.

In rebuttal, the State offered the testimony of Dr. James Gregg Groce, a staff psychiatrist at Dorothea Dix Hospital, who was qualified as an expert in the field of psychiatry. He testified that defendant was in Dorothea Dix Hospital from 28 February 1975 until 20 March 1975. He interviewed defendant several times and during the same period defendant was given physical and psychological tests. Defendant's score of 78 on an IQ test was two points below the normal range. It was Dr. Groce's opinion that defendant suffered from schizophrenia, paranoid type. However, he stated that based on his examination of defendant and his knowledge of the incident for which he was in custody, it was his opinion that defendant knew what he was doing and knew the difference between right and wrong at the time the alleged crime was committed on 24 January 1975.

Defendant called Thelma Moore in surrebuttal and she testified that after some initial interrogation on 25 January

1975, a police officer made a circular motion beside his head and said, "Your brother is kind of off," and she said "Yes."

The jury returned a verdict of guilty of murder in the first degree. Defendant appealed from judgment imposing a sentence of death.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Paul L. Whitfield for the defendant appellant.

BRANCH, Justice.

Defendant assigns as error Judge Snepp's ruling that defendant had the mental capacity to stand trial.

[1] Pursuant to motion of defense counsel, a pretrial hearing to determine defendant's competency to stand trial was conducted on 2 September 1975. At this hearing, defendant's mother, Eunice Taylor, and his father, Willie James Taylor, testified as to defendant's unusual and strange behavior for a period of about two years preceding the hearing. Their testimony at this time was consistent with their testimony offered at trial in defendant's behalf as related in our statement of facts. Both of these witnesses additionally testified that in his and her respective opinions their son did not understand the nature of these proceedings and was not able to assist counsel in presenting his defense.

Dr. Mildred Keene's testimony at this hearing was in essence consonant with her testimony at trial as summarized in our statement of facts. She did not give an opinion as to whether defendant was mentally competent to stand trial.

Dr. Robert D. Cox, an expert in the field of psychiatry, stated that he treated defendant during September 1974. In his opinion, defendant's unusual behavior "was most likely a drug-induced psychosis." He related that defendant's condition "cleared up" over a period of about three weeks when he was treated with an anti-psychotic drug called Haldon. Dr. Cox gave no opinion as to defendant's competency to stand trial.

Dr. James Gregg Groce, after testifying to facts substantially in accord with his testimony at trial as summarized in our statement of facts, stated:

> . . . I believe he can assist you in that he was able to relate to me fairly fully, and at times including trivial

> detail, what was going on at the time and his thinking at the time, his actions at the time, and I feel that that is the most important part of assisting you in his defense. He does have difficulty with his thinking but I don't feel that it is so severe that he would be unable to participate in the preparation of his defense.

Defendant testified that he knew that he was accused of murder and that he was going to be tried for it. He said that he was able to help his lawyer and "could talk to you [his counsel] today and tomorrow about what happened on 24 January 1975, so that you [counsel] will understand it."

Judge Snepp, after finding facts consistent with the evidence, concluded that defendant had capacity to proceed within the meaning of G.S. 15A-1001 and thereupon ordered the Sheriff of Mecklenburg County "to take especial care that the medications prescribed for the defendant are administered as directed and that the defendant actually take such medications." G.S. 15A-1003, in part, provides:

> (a) If a defendant is found to be incapable of proceeding, the court must enter an order directing the initiation of proceedings for judicial hospitalization, and the court's order is a sufficient basis for the initation of those proceedings.

In *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305, Justice Lake, speaking for the Court, stated:

> The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458; Strong, N. C. Index 2d, Criminal Law, § 29; 21 AM. JUR. 2d, Criminal Law, § 65. When, as here, this question is properly raised before the defendant pleads to the indictment, it should be determined prior to the commencement of the trial, as was done in this instance. *State v. Propst, supra,* at page 69. It may be determined by the trial court with or with-

> out the aid of a jury. *State v. Propst, supra,* at page 68. When the court, as here, conducts the inquiry without a jury, the court's findings of fact, if supported by evidence, are conclusive on appeal. *State v. Squires,* 265 N.C. 388, 144 S.E. 2d 49. . . .

In instant case, Dr. Groce, an expert in psychiatry, unequivocally stated that in his opinion defendant would be able to assist counsel in the preparation of his defense. Defendant testified that he was aware of the nature of the charges against him, and that he could talk to his counsel from day to day so that counsel could understand the happenings of 24 January 1975. The other expert witnesses did not contradict the crucial opinion given by Dr. Groce and, in fact, the only contradiction of Dr. Groce's expert opinion came from defendant's mother and father. We hold that the court's findings of fact were supported by the evidence and the findings in turn supported Judge Snepp's conclusions and ruling that defendant had the capacity to proceed within the meaning of G.S. 15A-1001 *et seq.*

Defendant next assigns as error the overruling of his objection to the admission of certain portions of Dr. Groce's expert opinion. He first challenges the form of the following hypothetical question:

> Dr. Groce, let me ask you a question. If the jury should find as the following facts: One, that the defendant joined with two other persons to travel to another location, that he carried a large and heavy weapon in a concealed manner, that he wore clothes especially to conceal the weapon, that he provided a wig to conceal the identity of a partner, that he attempted to commit an armed robbery, that he warned a storekeeper, "Don't do anything foolish," that he fired a single-shot weapon then fled because the storekeeper was armed, that he threw down the weapon and left the clothes used to conceal it, that he concealed himself in a nearby mill, that he asked directions calmly how to escape, that he took off identifying clothes, that he left a get-a-way car in a remote location, that he answered questions of another as to what he had done and why, and that he concealed himself until the following day, do you have an opinion satisfactory to yourself, based upon your medical knowledge and experience, as to whether or not the defendant could or might have had the capacity to

distinguish between right and wrong at the time of, and in respect to the matter under investigation?

[2, 3] Expert testimony may be presented to the jury through the testimony of an expert based on his own personal knowledge and observation or through testimony of an expert based on a hypothetical question addressed to him in which the pertinent facts are assumed to be true, or rather, assumed to be found by the jury. *State v. David*, 222 N.C. 242, 22 S.E. 2d 633. However, a hypothetical question should include only facts supported by the evidence already introduced or those facts which a jury might logically infer therefrom. Questions should not contain repetitious, slanted or argumentative words or phrases. *Petree v. Duke Power Co.*, 268 N.C. 419, 150 S.E. 2d 749; *Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705; 3 Strong, North Carolina Index 2d, *Evidence* § 49 at 681.

[4] Defendant first argues that the hypothetical question erroneously assumed that defendant concealed a weapon under a coat worn for that purpose and that defendant provided a wig to conceal the identity of an accomplice. The State's witness Dennis Weathers, who drove defendant to the scene of the crime, stated that defendant wore a coat over his sweater and that he did not see a shotgun. He testified that as Taylor left the car, he put his hand in his coat "as if indicating he was holding some kind of weapon." Weathers further testified that when defendant returned to the car, he said that he had shot a woman with a shotgun and "he had it under his coat all the time." This evidence would be sufficient for the jury to logically infer that defendant wore the coat for the purpose of concealing the shotgun. Admittedly there was no evidence in the record at the time the hypothetical question was asked concerning the provision of a wig to conceal the identity of an accomplice. We have held that the incorporation into a hypothetical question of an assumed finding as to a *vital fact* of which there was no evidence is ground for a new trial. *State v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425. In our opinion, the erroneous assumption as to the furnishing of a wig to an accomplice by defendant in the hypothetical question was not of such vital nature as to require a new trial.

[6] Defendant further attacks the form of the hypothetical question on the ground that it made no reference to defendant's extensive history of mental illness and to his prior judicial commitments.

[5] The general rule is that a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper and the expert's answer to such a question will be excluded. However, it is not necessary to include in the hypothetical question all the evidence bearing upon the fact to be proved. The adversary has the right to present other phases of the evidence in counter-hypothetical questions so as to supply omitted facts and to ask the expert on cross-examination if his opinion would have been modified by the inclusion of such omitted facts. *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89; *State v. Stewart*, 156 N.C. 636, 72 S.E. 193.

[6] We concede that the challenged hypothetical question was not a model question, however, the deficiencies in the form of the question do not constitute reversible error.

[7] Defendant next assigns as error the rulings of the trial judge admitting into evidence defendant's in-custody statements.

When the State offered Officer Crowell's testimony concerning an inculpatory statement made to him by defendant, counsel for defendant objected and the trial judge then properly conducted a *voir dire* hearing in the absence of the jury to determine the admissibility of the evidence. Defendant concedes that the *voir dire* hearing was properly conducted, that the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, and a host of our own decisions were properly given. In this connection, Officer Crowell, on his direct examination, testified that at the time he gave defendant the warnings and during the period of interrogation "He was completely rational, seemed to be. . . . [T]he defendant appeared to understand what I was talking about during the time I was talking to him. He was coherent in his answers that he gave to me when I asked him questions. The answers that he gave me were responsive to the questions that I asked him." Officer Crowell was the sole *voir dire* witness and his testimony was entirely in accord with the above-quoted direct testimony. At the conclusion of the testimony, the trial judge, *inter alia*, concluded:

> . . . [T]hat said verbal warning of his Miranda rights and his written Waiver of Right to Remain Silent and Right to Counsel During Interview were understandingly and

voluntarily given and the defendant was under no compulsion to either answer in the affirmative as to his understanding of his constitutional rights or as to his signature on the Waiver of Right to Remain Silent and Right to Counsel During Interview, and the Court therefore concludes that any statements made by the defendant to the investigating officers was voluntary.

Defendant, however, relying on *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742, contends that the trial judge failed to consider the entire record in his determination of the voluntariness of defendant's in-custody statements. In *Thompson,* we said:

> . . . [T]here was ample evidence that the procedural safeguards required by *Miranda* were employed by the officers upon the taking of the statements from defendant. Nevertheless, we must still determine whether, under all of the surrounding circumstances, defendant voluntarily and understandingly made the inculpatory statements.
>
> * * *
>
> The fact that the defendant was youthful and that he made the challenged statements in the presence of police officers does not render the statements inadmissible, absent mistreatment or coercion by the officers. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561; *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738. Neither does a subnormal mentality, standing alone, render a confession incompetent if it is in all other respects voluntarily and understandingly made. If a person has the mental capacity to testify and to understand the meaning and effect of statements made by him, he possesses sufficient mentality to make a confession. Nevertheless, his mental capacity, or his lack of it, is an important factor to be considered in determining the voluntariness of a confession. . . .

Dr. Groce testified that, in his opinion, defendant knew the difference between right and wrong on 24 January 1975. Dr. Mildred Keene who testified that defendant suffered from schizophrenia, paranoid type, also stated that on the occasions that she observed defendant he seemed to be oriented as to time, place and person. Further, she was of the opinion that defendant might be oriented on one day and disoriented on the next day.

Diagnosis of a defendant's mental condition as being schizophrenia, paranoid type, does not, standing alone, excuse him from legal responsibility for his criminal conduct. *State v. Potter,* 285 N.C. 238, 204 S.E. 2d 649. The above-summarized medical testimony bears upon whether defendant could have understandingly and voluntarily made these challenged statements. In addition to the medical testimony, there was non-expert testimony concerning defendant's ability to understand and relate at the time and place the inculpatory statements were made.

[8, 9] It is well recognized that a non-expert witness may testify as to his opinion of an accused's mental condition when the witness has had reasonable opportunity to observe the person and form an opinion based on such observations. *State v. Matthews,* 226 N.C. 639, 39 S.E. 2d 819; *State v. Nall,* 211 N.C. 61, 188 S.E. 637; *State v. Keaton,* 205 N.C. 607, 172 S.E. 179. Officer Crowell had ample opportunity to observe and talk with defendant before, during and after the time the challenged statements were made. It is noted that Dr. Groce's medical opinion related to 24 January 1975 and the non-expert testimony was based upon observations made on 25 January 1975. Further, we think it is significant that defendant's sister who was present at the time the statements were made and who was called as a witness failed to testify that defendant appeared to be disoriented or that he did not appear to understand the warnings given him or the consequences of the statements that he made. Thus, the trial judge's findings of fact were supported by the evidence and we are, therefore, conclusively bound by these findings. *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363. Neither do we find error in the fact that this evidence was admitted as a part of the State's rebuttal evidence. Admission of evidence in rebuttal, even when the evidence is properly admissible in chief, rests within the trial judge's sound discretion and his ruling thereon will not be disturbed absent a showing of gross abuse of that discretion. *State v. Foster,* 284 N.C. 259, 200 S.E. 2d 782; *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71. We hold that the trial judge did not err in admitting defendant's in-custody statements as a part of the State's rebuttal evidence.

[10] Defendant, relying upon *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881, contends that the trial judge erred in instructing the jury that defendant had the burden of

proving, to the satisfaction of the jury, that he was legally insane at the time the offense was committed. He further argues that the trial judge should have charged the jury that the State had the burden of proving beyond a reasonable doubt that defendant was sane at the time the offense was allegedly committed. These identical contentions were fully considered and rejected in the recent case of *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595. We reaffirm the reasoning and holding set forth in *Hammonds*. See also *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176.

[11] Finally, defendant contends that the court erred in denying his request to instruct the jury as to the provisions of G.S. 122-84.1.

In compliance with the provisions of G.S. 1-181 and before the judge began his instructions, defense counsel, *inter alia*, filed the following prayer for special instructions:

REQUEST FOR JURY INSTRUCTION

THE DEFENDANT respectfully requests this Court to charge the jury substantially as follows:

The provisions of North Carolina General Statutes, Section 122-84.1, copy of which is attached hereto and is incorporated herein by reference.

/s/ PAUL L. WHITFIELD
Attorney for Defendant

Sec. 122-84.1. Acquittal of defendant on grounds of mental illness; procedure.—(a) Upon the acquittal of any criminal defendant on grounds of mental illness, the trial court shall order the defendant held under appropriate restraint pending a hearing on the issue of whether the defendant is mentally ill and imminently dangerous to himself or others, as these terms are defined in Article 5A of this Chapter. The hearing shall be conducted in accordance with the provisions of G.S. 122-58.7 except that the hearing shall be held in a public courtroom and need not be closed to the public. Evidence adduced at the trial of the defendant on the criminal charges on the issue of mental illness shall be admissible at the hearing. If the hearing cannot be conducted prior to the termination of the ses-

sion of court in which the criminal trial was had, it shall be calendared in the district court in the same county within 10 days. If the court finds that the defendant-respondent is mentally ill and imminently dangerous to himself and others, it shall order him committed to a regional psychiatric facility designated by the Division of Mental Health Services for a period of not more than 90 days. The defendant shall thereafter be considered as though he had been committed initially under the provisions of Article 5A of this Chapter. If the court finds that the defendant is not mentally ill and imminently dangerous to himself or others, it shall order his discharge.

(b) The provisions of this section supersede those provisions of G.S. 122-84 which prescribe the procedures to be used in the case of a defendant acquitted of a criminal charge by reason of mental illness. (1973, c. 1437, s. 1.)

The trial judge did not instruct on the provisions of G.S. 122-84.1.

The question here presented is not a case of first impression. In the case of *State v. Bracy*, 215 N.C. 248, 1 S.E. 2d 891, the defendant was indicted for first-degree murder. His counsel argued the provisions of the statute which provided for the detention of a defendant in a State hospital and his discharge on certain conditions following a verdict of not guilty by reason of insanity. On the other hand, the solicitor argued that defendant would go free if the jury returned a verdict of not guilty by reason of insanity. Neither made any objection to the other's argument. Defense counsel requested the court to instruct according to his argument and his request was declined. On appeal, this Court found no error in the judge's ruling and quoted, with approval, the following from *State v. Matthews*, 191 N.C. 378, 131 S.E. 743:

". . . 'The jury has fully discharged its duty, and performed its functions, under the law of this State, when its members have sat together, heard the evidence, and rendered their verdict accordingly. As the judge must not invade the true office and province of the jury by giving an opinion in his charge, either in a civil or criminal action, as to whether a fact is fully or sufficiently proven (C.S.,

564), so the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law.' "

The identical question presented by this assignment of error was considered and decided in *State v. Hammonds, supra.* In *Hammonds,* the district attorney in his final argument to the jury told the jury that defendant would be back in his community if found not guilty by reason of insanity. The trial judge, without further elaboration, instructed the jury to disregard this remark. Prior to the court's charge, defendant submitted a written prayer for instruction explaining the procedure for commitment in the event of an acquittal on the ground of insanity. Defendant duly excepted to the trial judge's refusal to give the requested instructions. Justice Moore, speaking for a unanimous Court, after extensively reviewing the pertinent cases in this and other jurisdictions, in part, stated:

> . . . To allow a jury to speculate on the fate of an accused if found insane at the time of the crime only heightens the possibility that the jurors will fall prey to their emotions and thereby return a verdict of guilty which will insure that defendant will be incarcerated for his own safety and the safety of the community at large. In the case before us, there could be no doubt in the jurors' minds that defendant murdered Mr. Capel. There was considerable evidence that defendant was incapable of knowing right from wrong at the time he killed Mr. Capel, and also evidence that his mental condition would worsen with age. The jury's questions on a recommendation of mercy indicate their sympathy for defendant's condition. However, an overriding fear for the safety of the community could well have dictated their verdict in the absence of any information that defendant could be committed to a mental hospital if found not guilty by reason of insanity. The atmosphere was one of confusion and of uncertainty. To insure fairness to defendant and to get the trial back "on an even keel," the trial judge, upon request by defendant, should have instructed the jury on the consequences of a verdict of not guilty by reason of insanity.
>
> We hold, therefore, that, upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out

in substance the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness. The failure to give such instruction in this case was prejudicial error, entitling defendant to a new trial. *To the extent this opinion is in conflict with State v. Bracy,* [215 N.C. 248, 1 S.E. 2d 891], *that decision is modified.* . . . (Emphasis ours.)

The holding in *Hammonds* squarely controls this assignment of error and upon authority of that case, this assignment of error is sustained. For failure of the trial judge to give the requested instruction, there must be a

New trial.

STATE OF NORTH CAROLINA v. MICHAEL LEOPOLD PEPLINSKI

No. 84

(Filed 17 June 1976)

1. **Homicide § 4— felony-murder — no necessity that defendant inflict fatal wound**

It is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot; rather, when several persons aid and abet each other in an attempt to perpetrate a robbery, and while so engaged, one of them fatally wounds the victim, all being present, each is guilty of murder in the first degree.

2. **Homicide § 21— felony-murder — attempted robbery — sufficiency of evidence**

Evidence in this felony-murder prosecution was sufficient to raise reasonable inferences which would support jury conclusions that defendant shared in the criminal intent to rob the victim and that he, by overt acts, took part in the attempted robbery of the victim where such evidence tended to show that defendant gained entrance to the victim's home by making false representations, he attempted to incapacitate the victim's wife by the use of tear gas at the time one Larry Clark was engaged in an attempt to rob her husband, defendant assisted Clark in his attempt to rob the victim by spraying him with tear gas, before fleeing the premises defendant twice asked Clark if he had obtained the victim's pocketbook, and defendant concealed himself in a nearby wooded area until he was discovered and taken into custody by police officers two days after the killing.

3. **Constitutional Law § 36; Homicide § 31— felony-murder — death sentence constitutional**

The imposition of the death penalty in a felony-murder case is not cruel and unusual punishment prohibited by the U. S. and N. C. Constitutions.

4. **Criminal Law § 87— leading question defined**

A leading question is a question which suggests the answer desired, and frequently a question which may be answered by "yes" or "no" is regarded as leading.

5. **Criminal Law § 87— leading questions — no error**

The trial court in a felony-murder prosecution did not err in allowing the State to ask the victim's wife leading questions concerning her husband's habit of carrying large amounts of cash.

6. **Criminal Law § 73— hearsay testimony by victim's wife — no prejudice**

Even if testimony by the murder victim's wife that she heard she hit defendant when she fired her gun in his direction sixteen times was hearsay, defendant was not prejudiced by its admission, since there was other competent evidence positively identifying defendant as one of the men who was fleeing the scene of the attempted robbery and murder and in whose direction the witness fired her gun, and defendant was later found within a quarter of a mile of the crime scene with three bullet wounds in his body.

7. **Criminal Law § 90— impeachment of own witness — showing of prior inconsistent statements**

A district attorney may not discredit a State's witness by eliciting evidence that the witness had made prior statements inconsistent with or contradictory of his testimony; however, the general rule is that improper conduct of counsel is cured when the trial judge sustains the adversary's objection and instructs the jury not to consider it, but this general rule does not apply when the conduct is so gross and prejudicial that no curative action by the trial judge could remove its prejudicial impact from the minds of the jury.

8. **Criminal Law § 90— attempted impeachment of own witness by State — curative instructions — no prejudice**

Where the district attorney attempted to discredit his own witness by showing prior contradictory statements, but the only evidence elicited through the district attorney's attempts to impeach his own witness was that the witness had previously stated that he was going to tell the truth when he was called to testify, there was little evidence of prejudice to defendant; moreover, any prejudice which did arise was cured by the trial court's prompt rulings and curative instructions.

9. **Criminal Law §§ 102, 116— defendant's failure to testify — permissible jury argument for district attorney**

G.S. 8-54 does not prohibit the district attorney from making comments upon the evidence and drawing such deductions therefrom

as were legitimate before the passage of the statute so long as no direct reference is made to the right of the defendant to testify and his failure to do so; in other words, the statute enhanced the rights of defendants but did not abridge the privileges of the prosecution.

10. Criminal Law §§ 102, 116— all evidence offered by State — district attorney's argument not prejudicial

Defendant was not prejudiced by the district attorney's references to the fact that the State offered all the evidence in this case, particularly in light of the fact that defendant did not object to those portions of the district attorney's argument or call them to the trial judge's attention so that he might have given proper cautionary instructions.

APPEAL by defendant from *Godwin, J.*, June 1975 Session of ROBESON Superior Court.

The State's evidence, in substance, tended to show that on 18 January 1975 a locksmith in Fayetteville, North Carolina, made a key for a 1973 yellow station wagon bearing Florida license plates. The key was received by an employee of defendant who delivered it to a woman identified as Doris Peplinski. Doris Peplinski drove the station wagon to a house which she shared with defendant and upon arrival, she found defendant Peplinski, David Locklear and Larry Clark in the house. She gave the keys to defendant and left with Tina Aprile who had come to the house in Doris's automobile. After lunch, the two women returned to the house and found that the three men and the yellow station wagon were gone. On the following morning, after Doris had telephoned defendant, the two women drove to Bennettsville, South Carolina, where they joined Peplinski, Locklear and Clark at a restaurant. They all spent the night in a motel room in Bennettsville and afterwards Doris Peplinski, at the request of defendant, reserved the room for an additional night. The two women returned to Fayetteville leaving the station wagon with the men.

David Locklear testified that he, Larry Clark and Peplinski returned to North Carolina on 20 January 1975 so that Clark could collect a debt from Hudler Hunt who lived near Rowland, North Carolina. Upon arriving at the Hunt home at about 6:30 p.m., he remained in the station wagon while the other two men went to the Hunt dwelling. He then heard shots and saw Clark and Peplinski run toward the car. He tried to back the station wagon up but ran into a ditch. He was fright-

ened and fled into the woods where he remained until his arrest on the following day at about 3:00 p.m.

Mrs. Hudler Hunt testified that she and her husband were watching TV at about 6:30 p.m. on 20 January 1975 when she heard the doorbell ring. Upon going to the door, she observed a white man and an Indian. At this point, defense counsel objected and Judge Godwin, after conducting a *voir dire* hearing concerning the admissibility of identification evidence, ruled the evidence to be admissible. When the jury returned, Mrs. Hunt identified defendant as the white man who came to her home on 20 January 1975. She stated that upon observing these men, she did not open the door but returned to the den. Her husband then picked up a weapon and went outside. Defendant Peplinski came into the den and said that he wanted to use the telephone. He explained that he was a chain gang guard and that he needed to get help because an inmate in his custody had escaped at David Miller's station. She became suspicious and left the den because she knew there was a telephone at David Miller's station. Upon reaching the porch, defendant came up behind her and sprayed her with tear gas. She pulled her shirt up over her head and at that time heard the defendant ask the Indian, "Have you got his pocketbook?" Defendant then began spraying the tear gas toward her husband and at that time, both her husband and the Indian began to shoot. She saw her husband fall. Defendant left the porch and asked the Indian, "Did you get it?" The Indian replied, "No, let's get the hell out of here, I'm hit." She returned to the house, obtained her rifle and fired it toward the men sixteen times. She then called a neighbor to help her move her husband's body.

Deputy Sheriff Hubert Stone testified that he and other officers went to the Hudler Hunt home on 20 January 1975 in response to a call. Officer Stone observed that Mr. Hudler Hunt was dead. He then found the dead body of an Indian man, later identified as Larry Clark, in a nearby hogpen. A .32-20 seven-shot revolver containing seven "empty hulls" was found in the dead man's hand. He also found a 1973 Chevrolet station wagon near the Hunt yard with one of its rear wheels in a ditch. The engine was running and the headlights were on. He observed blood on the outside and inside of the station wagon and he further noted a small hole about the size of a .22 bullet hole "about halfway of the top of the car." He related that David Earl Locklear was apprehended in a nearby swamp at about

3:00 p.m. on the next day and that defendant Peplinski was found and arrested in a wooded area about a quarter of a mile from the Hunt home on Wednesday, 22 January 1975. Peplinski had three bullet wounds in his body.

Dr. Marvin Thompson, an expert in pathology, testified that he examined the body of Hudler Hunt on 21 January and found four bullet wounds in the body. He removed two bullets from the body and stated that in his opinion, Hudler Hunt died as a result of multiple gunshot wounds "with subsequent hemorrhage."

An S.B.I. firearms expert testified that in his opinion, the bullets removed from Mr. Hunt's body were fired from the revolver found in Larry Clark's hand.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree and defendant appealed from judgment imposing the death penalty.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., and Associate Attorney Elizabeth C. Bunting, for the State.

J. H. Barrington, Jr., attorney for defendant appellant.

BRANCH, Justice.

Defendant, by his first assignment of error, challenges the imposition of the death penalty on two grounds. He first argues that the death penalty cannot be imposed because the evidence discloses neither an intent to rob or murder deceased nor any overt act on his part from which such an intent can be inferred. We disagree.

[1] "Any murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed to be murder in the first degree and shall be punished with death." G.S. 14-17. It is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot. In this jurisdiction, it is well settled that when several persons aid and abet each other in an attempt to perpetrate a robbery, and while so engaged, one of them fatally wounds the victim, all being present, each is guilty of murder

in the first degree. *See State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533.

[2] The State offered evidence tending to show that: (1) Defendant gained entrance to the Hunt home by making false representations, (2) he attempted to incapacitate Mrs. Hunt by the use of tear gas at the time Larry Clark was engaged in an attempt to rob her husband, (3) he assisted Larry Clark in his attempt to rob Mr. Hunt by spraying Mr. Hunt with tear gas, (4) before fleeing the premises, defendant twice asked Larry Clark if he had obtained Mr. Hunt's pocketbook, (5) defendant concealed himself in a nearby wooded area until he was discovered and taken into custody by police officers two days after the killing. In our opinion, this evidence was sufficient to raise reasonable inferences which would support jury conclusions that defendant shared in the criminal intent to rob Mr. Hunt and that he, by overt acts, took part in the attempted armed robbery of Hudler Hunt.

[3] Secondly, defendant contends by this assignment of error that the imposition of the death penalty in a felony-murder case is cruel and unusual punishment prohibited by the United States and North Carolina Constitutions. In the recent case of *State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607, Chief Justice Sharp, quoting from *State v. Fox, supra,* stated:

> "When a murder is 'committed in the perpetration or attempt to perpetrate any . . . robbery, burglary or other felony,' G.S. 14-17 declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. . . . Furthermore, when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." . . .

The authorities cited by defendant do not persuade us that we should abandon the holdings in *Woodson* and the long line of cases which support it.

This assignment of error is overruled.

[4, 5] Defendant by his Assignment of Error No. 2 contends that the trial judge erred in overruling his objections to leading

questions. The exceptions upon which this portion of this assignment of error is based relate to the following:

> Q. Was your husband in the habit of carrying lots of cash on him or not, Mrs. Hunt?
>
> MR. HIGH: Object.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes.
>
> Q. (By Mr. Britt): About how much cash did he normally carry?
>
> MR. BARRINGTON: Object.
>
> THE COURT: Overruled.
>
> Q. (By Mr. Britt): Go ahead.
>
> A. About six or seven thousand dollars.
>
> This constitutes defendant's exception number 18 (R p——)
>
> * * *
>
> Q. (By Mr. Britt): Did he or not carry that kind of money in public, Mrs. Hunt?
>
> A. Had it in his pocketbook.
>
> THE COURT: His pocketbook?
>
> THE WITNESS: Yes, sir.
>
> Q. (By Mr. Britt): And where was his pocketbook?
>
> A. In his pocket, left rear pocket.
>
> This constitutes defendant's exception number 19 (R p——)

In 1 Stansbury's North Carolina Evidence § 31, at 83 (Brandis Rev. 1973), we find the following:

> . . . A leading question is a question that suggests the answer desired, and frequently a question that may be answered by "yes" or "no" is regarded as leading.

Leading questions have also been defined as those which embody a material fact which admit of an answer a simple "yes"

or "no." 81 Am. Jur. 2d *Witnesses* § 429, at 438. Only the first and third questions above quoted appear to be leading questions. The vice in these questions is that they embody a fact which could be answered by a simple "yes" or "no" and suggest to the witness the answer desired. Even so, it is well established in this jurisdiction that whether counsel may ask a leading question is a matter within the discretion of the trial judge and his ruling thereon will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225; *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6; *Ducker v. Whitson,* 112 N.C. 44, 16 S.E. 854; 81 Am. Jur. 2d *Witnesses* § 430, at 438, 439. We find no abuse of discretion in Judge Godwin's rulings.

[6] By this assignment of error, defendant also contends that the trial judge erred by overruling counsel's objection and motion to strike hearsay testimony. During her testimony, the witness Mrs. Hudler Hunt testified that she obtained her rifle and fired sixteen times. Immediately after this testimony, the record shows the following:

. . . Do you know whether or not you hit anybody?

A. I don't know it, but I heard it.

Q. You heard it. What did you hear?

A. I heard—

MR. BARRINGTON: Object to what she heard.

THE COURT: Just a moment. Say again. You heard what?

THE WITNESS: That I hit Peplinski.

MR. HIGH: Object. Move to strike, your Honor.

THE COURT: The objection is overruled. Motion denied.

"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." . . .

Hearsay evidence, unless it falls within one of the recognized exceptions to the hearsay rule, is inadmissible.

1 Stansbury's North Carolina Evidence § 138, at 458, 460 (Brandis Rev. 1973).

The above-quoted testimony is ambiguous in that it might be interpreted to mean that the witness actually heard the shot hit defendant. In that case, it would not come within the hearsay rule. On the other hand, the testimony could be interpreted to mean that someone told the witness that she had hit defendant. Under the latter interpretation, the evidence would clearly be hearsay. Assuming, *arguendo,* that the testimony did violate the hearsay rule, we discern little prejudice to defendant. He was positively identified as one of the men who was fleeing the scene of the attempted robbery and in whose direction Mrs. Hunt fired sixteen times. He was found within a quarter of a mile of the Hunt residence in a wooded area with three separate bullet wounds in his body. Under these circumstances, whether defendant was wounded by Mrs. Hunt or someone else would add little to the State's other evidence showing that defendant was present and aiding and abetting in an attempted armed robbery in which Hudler Hunt was fatally wounded. In our opinion, the evidence admitted by the trial judge's discretionary rulings on the leading questions and his ruling on the alleged hearsay evidence was not of such import as to raise a reasonable possibility that the evidence contributed to defendant's conviction.

Defendant's Assignment of Error No. 2 is overruled.

Defendant attacks the argument of the district attorney and the manner in which he examined the State's witness, David Earl Locklear.

During the direct examination of the witness Locklear, the following exchange took place:

> Q. Well, did you tell the officers anything about going there to rob Hudler Hunt?
>
> MR. BARRINGTON: Object.
>
> MR. HIGH: Object.
>
> THE COURT: The objection is sustained. Ladies and Gentlemen, you will not consider a question put to the witness as evidence. It is not evidence and, therefore, you will not consider it as evidence, the question that has just been put to the witness.

Q. (By Mr. Britt): Do you remember talking to me this morning before Court?

A. Talking to you this morning?

Q. Yes, sir.

A. Yes, sir.

Q. Do you remember talking to me Sunday down here at my office for about two hours?

A. Yes, sir.

Q. Do you remember telling me what you were going to testify to? Sir?

A. Yes, sir.

Q. What did you tell me you were going to testify to?

MR. HIGH: Object.

MR. BARRINGTON: Object. If the Court please, it seems—

THE COURT: I am assuming that your objection is based upon the proposition that in your view the District Attorney is attempting to challenge his own witness?

MR. HIGH: This is a State's witness.

THE COURT: I understand whose witness he is. I understand your objection and am going to try to resolve it. Read the question back, please, Mr. Storms.

(Last question read by Reporter.)

THE WITNESS: I told him I—

MR. BARRINGTON: Wait.

THE COURT: Just a moment. Overruled. He may answer the question: "What did you tell me you were going to testify to?"

Q. (By Mr. Britt): Go ahead.

A. That I was coming in the courtroom and asked me what I was going to testify to, about the truth of what they had told me to say. The officers. That is, Hubert Stone, Frank Johnson and Mr. Joe Freeman Britt.

Q. Let me see if I understand you, David Earl. Are you saying that Hubert Stone sitting here—

A. That's right.

Q. —and I believe Frank Johnson—

A. Frank Johnson.

Q. —the SBI Agent was there and I was there?

A. That's right, sir.

Q. And my assistant, Mr. Martin McCall, was there?

A. That's right.

Q. And you are saying we told you to come in here and tell a lie and—

MR. BARRINGTON: Objection.

THE WITNESS: Well, you—

THE COURT: Just a moment. I'm going to rule on the objection.

The objection to the question put is sustained. You may not answer the last question put to you by the District Attorney. You may answer the original question that he put to you, which, as I understand you have not yet answered; and the Reporter will read that question again back to you. It had to do with his question regarding what you told him you were going to testify.

Now, you wait and listen to the Reporter read the question back to you. If you don't understand it, let it be known.

(Requested question read by Reporter.)

THE COURT: You may answer that question.

THE WITNESS: I was going to testify to the truth.

MR. BRITT: May I proceed, your Honor.

THE COURT: Yes, sir. Let me interrupt to inquire if you think that your direct examination will continue some time?

MR. BRITT: In view of the recent developments, I think not.

MR. BARRINGTON: Object to the comment.

THE COURT: Objection is sustained. You will not consider the last comment made by counsel.

This constitutes defendant's exception number 12 (R p——)

MR. BRITT: If it please the Court, the State would move at this time that the Court declare David Earl Locklear a hostile witness so that the State can cross examine him about previous statements.

At this point, Judge Godwin conducted an extended *voir dire* on the question of whether the witness would be declared a hostile witness. At the conclusion of the *voir dire* hearing, David Earl Locklear returned to the witness stand and resumed his testimony before the jury at which time the following occurred:

I am the same David Earl Locklear who was on the witness stand yesterday. I have seen State's Exhibit 2 which is sealed up. In that envelope I find a seven-shot Russian revolver, which I have seen before. The last time I seed it it belonged to Larry Clark.

Q. Okay. That's what you told me on Sunday; is that correct?

MR. HIGH: Object.

THE COURT: Sustained.

Q. (By Mr. Britt): All right. Now, you made statements about this case to the officers on the day after you were arrested; haven't you?

A. No, sir.

Q. Huh?

A. No, sir.

Q. Never made a statement to Mr. Hubert Stone sitting here?

MR. HIGH: Object.

MR. BARRINGTON: Object.

THE COURT: Sustained.

Q. (By Mr. Britt): Did you ever made a statement, then, to Mr. Frank Johnson, sitting here?

MR. HIGH: Object.

MR. BRITT: What is the ruling?

THE COURT: The question is: Did he ever make a statement?

MR. BRITT: Yes, sir.

THE COURT: You may say yes or not (sic).

THE WITNESS: No.

Q. (By Mr. Britt): You never made a statement to this officer sitting here?

MR. BARRINGTON: Object.

MR. HIGH: Object.

THE COURT: Sustained.

Q. (By Mr. Britt): Have you ever made a statement to me before yesterday when you were in Court, concerning this case?

MR. BARRINGTON: Objection.

THE COURT: Overruled.

THE WITNESS: No, sir.

THE COURT: His answer is in.

Q. (By Mr. Britt): Let me ask you this: Are you a defendant charged with murder also in this lawsuit?

MR. HIGH: Object.

THE COURT: Sustained.

Q. (By Mr. Britt): Are you a defendant charged with conspiracy to commit armed robbery in this lawsuit?

MR. BARRINGTON: Object.

MR. HIGH: Object.

THE COURT: Sustained.

MR. BRITT: Take the witness.

THE COURT: Just a moment. Ladies and gentlemen, I have heretofore reminded you—I do so again—and you will bear in mind throughout the remainder of this trial that unanswered questions put to a witness do not constitute evidence. Evidence is the answer of a witness to a question put by counsel. Any question which has been put to this witness to which an objection was interposed and which objection was sustained, does not constitute evidence and you may not so consider it.

The record does not disclose the trial judge's ruling declaring whether the witness was a hostile witness; however, the ensuing questions and rulings before the jury indicate that the ruling was adverse to the State's position.

[7] It is still the well-established law in this jurisdiction that a district attorney may not discredit a State's witness by eliciting evidence that the witness had made prior statements inconsistent with or contradictory of his testimony. *State v. Pope,* 287 N.C. 505, 215 S.E. 2d 139; *State v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561. However, the general rule is that improper conduct of counsel is cured when the trial judge sustains the adversary's objection and instructs the jury not to consider it. This general rule does not apply when the conduct is so gross and prejudicial that no curative action by the trial judge could remove its prejudicial impact from the minds of the jury. *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283.

In *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93, the defendant was prosecuted on the charges of kidnapping, rape and crime against nature. On cross-examination, the State asked the defendant if he had not tried to gain entrance into a woman's house in another county on the pretext of seeing the house as an interested possible purchaser. The court instructed the jury not to consider the question but to strike it from their minds. Finding no prejudicial error, we stated:

. . . We hold, however, that the court's prompt action in sustaining defendant's objection to the question and in excusing the jury and instructing the solicitor not to ask

further questions along that line, coupled with the court's specific instruction to the jury not to consider the question but to strike it from their mind, was sufficient to remove any possibility of error.

In *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453, 458 (1970), Justice Sharp quoted with approval from *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):

> ". . . '[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.,* 120 N.C. 94, 26 S.E. 629.' Accord, *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; 2 Strong, N. C. Index 2d Criminal Law § 96 (1967)."

[8] In instant case it is obvious that the district attorney was *attempting* to discredit his own witness by showing prior contradictory statements. However, the only evidence elicited by the district attorney through his ill-advised attempts to impeach his own witness was that the witness had previously stated that he was going to tell the truth when he was called to testify. We find little evidence of prejudice to defendant since the witness seemed to get the better of this exchange. Any prejudice arising from this portion of the district attorney's examination was cured by the able trial judge's prompt rulings and curative instructions.

[10] We next turn to defendant's contention that prejudicial error resulted from the following portion of the district attorney's argument:

> Now, the facts are pretty simple in this case. Every scintilla of evidence adduced in this courtroom, in this lawsuit, was put on by the State of North Carolina. Every bit of it.
>
> * * *
>
> . . . You see, the way the case has developed, the State presenting all the evidence in this case, I find myself in a position of being sandwiched on the arguments, double teamed. . . .

G.S. 8-54, in part, provides:

> . . . 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. . . .

[9] We have held that the effect of this statute is to prohibit the district attorney from commenting on defendant's failure to testify. *State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132; *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125. Nevertheless we recognize that the statute does not prohibit the district attorney from making comments upon the evidence and drawing such deductions therefrom as were legitimate before the passage of the statute so long as no direct reference is made to the right of the defendant to testify and his failure to do so. This statute enhanced the rights of defendants but did not abridge the privileges of the prosecution. *State v. Smith,* 290 N.C. 148, 226 S.E. 2d 10; *State v. Weddington,* 103 N.C. 364, 9 S.E. 577 (1889).

In *State v. Smith, supra,* the district attorney, in his argument, said "I ask you to decide the case on the evidence that you have before you and ask that you remember that it is uncontradicted." Then defendant contended that this remark was an improper remark on the defendant's failure to testify and that the failure of the trial judge to censor the argument and give curative instructions on his own motion was prejudicial error. Rejecting this contention, this Court speaking through Justice Huskins, in part stated:

> . . . Contradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify. . . .

See State v. Walker, 251 N.C. 465, 112 S.E. 2d 61, *cert. denied* 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45; *State v. Hooker,* 145 N.C. 581, 59 S.E. 866.

[10] We believe that jurors are men and women of sufficient intelligence and capacity to observe trial proceedings so as to

know when only the State has offered evidence. The remark that the State put on all of the evidence may be just as easily interpreted to refer to the absence of testimony by witnesses other than defendant.

The district attorney's statement that "the way the case has developed, the State presenting all of the evidence, I find myself in a position of being sandwiched on the arguments" was a reference by the district attorney to the fact that the failure of defendant to offer *any* evidence gave defense counsel the last argument. Neither of these statements was a *direct* reference to defendant's right to testify or his failure to exercise this right.

If a district attorney improperly comments on a defendant's failure to testify, this error may be cured by a withdrawal of the remark or by a statement of the court that it was improper, followed by an instruction to the jury to disregard it. *State v. McCall, supra; State v. Monk, supra.* Here defendant did not object to this portion of the district attorney's argument or call it to the trial judge's attention so that he might have given the proper cautionary instructions. Nevertheless, in his charge to the jury, Judge Godwin fully charged that the burden was on the State to prove every element of the crime beyond a reasonable doubt and further instructed:

> The defendant has offered no evidence during the trial of this case and I mention that fact for one purpose and one alone and that is to afford me this additional opportunity to remind you that he had no obligation to do so; that the law imposes upon him no burden of proof; that he has a perfect right to decide upon the strategy of his own trial; that he has a perfect right to decide—to rely upon what he may consider to be the weakness of the State's case; that the sole burden of proof is upon the State to satisfy you of the truth of the charges, unaided by the defendant, and that you may not hold that against this defendant, the fact that he did not offer evidence. You may not punish any man for doing a lawful thing, a thing that he has a right to do.

Under these circumstances, we find no prejudicial error in the district attorney's references to the fact that the State offered all the evidence in this case. Neither do we find any substantial prejudice to defendant flowing from the district attorney's

argument that the witness J. L. Sams, an officer whose duties included the apprehension of fugitives, knew Larry Clark. Although there seems to be some confusion as to the basis of the trial judge's instructions, he unequivocally told the jury not to consider this remark. We perceive little prejudice in this argument since it related indirectly to the character of an alleged confederate rather than the defendant. In our opinion, the cautionary instructions and the judge's charge removed any possible prejudice to defendant.

Finally, in light of the overwhelming evidence against this defendant, any errors growing out of the district attorney's arguments and examination of the witness David Earl Locklear were harmless error beyond a reasonable doubt. *Schneble v. Flordia,* 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; *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289.

We feel compelled to note that except for the trial judge's prompt rulings and cautionary instructions and the overwhelming evidence against this defendant, the district attorney's continued attempts to cross-examine his own witness could well have needlessly required a new trial.

Examination of this entire record reveals no error warranting a new trial.

No error.

STATE OF NORTH CAROLINA v. MARCUS B. SHRADER III

No. 7

(Filed 17 June 1976)

1. **Homicide § 4— killing in perpetration of felony — first degree murder**

The killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or foreseeably dangerous to human life, is murder at common law.

2. **Homicide § 4— when killing is in perpetration of felony**

A killing is committed in the perpetration of a felony when an unbroken chain of events leads from such felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction.

3. Homicide § 21— homicide in perpetration of robbery and kidnapping — absence of intent to fire pistol

Where all the evidence showed an unbroken chain of events leading from a kidnapping of the victim to a bank robbery and thence to the shooting of the victim with a pistol, the killing of the victim was murder in the first degree even if defendant's testimony that he did not intend to fire the pistol is taken as true.

4. Homicide § 12— indictment — first degree murder — premeditation and deliberation or perpetration of felony

An indictment for murder in the form prescribed by G.S. 15-144 was sufficient to support a verdict of guilty of murder in the first degree if the jury found from the evidence, beyond a reasonable doubt, that defendant killed the deceased with malice and after premeditation and deliberation or that he killed deceased in the perpetration of a robbery or of a kidnapping.

5. Criminal Law § 23; Homicide § 13— guilty plea to capital crime — public policy

Public policy, established by previous decisions of the Supreme Court, precludes the acceptance of a plea of guilty to a crime for which the penalty is death; this policy, however, does not preclude the State from offering evidence of a confession, voluntarily and lawfully made by the accused, nor does it preclude the accused from testifying voluntarily at his trial or the jury from considering matters to which he testified in arriving at its verdict that he is guilty of a capital crime.

6. Criminal Law § 23; Homicide § 13— guilty plea to kidnapping — no guilty plea to first degree murder

In a prosecution for first degree murder wherein the evidence tended to show that the killing was committed in the perpetration of a robbery and kidnapping, the acceptance of defendant's plea of guilty of kidnapping at the close of all the evidence was not tantamount to the acceptance of a plea of guilty of first degree murder in violation of public policy precluding the acceptance of a plea of guilty to a capital crime.

7. Criminal Law § 66— in-court identification — admissibility

The trial court did not err in the admission of an in-court identification of defendant where the evidence on *voir dire* supported findings by the court that the in-court identification of defendant by the witness was not tainted by any extraneous or unlawful or impermissible suggestion by anyone, or by photographs exhibited to him by the police, to whom the witness had given an accurate description of defendant prior to his seeing such photographs.

8. Criminal Law § 34— evidence of other crimes

Nothing else appearing, the State cannot, through its own witnesses, offer evidence tending to show the defendant has committed another distinct, independent, separate offense having no relation to the crime charged, except its tendency to show his disposition to commit a crime of the nature of the one for which he is on trial.

9. Criminal Law §§ 34, 89— evidence of other crimes — rebuttal of impeachment of witness

Where the nature of defendant's cross-examination of a witness for impeachment purposes in a kidnapping and murder trial was such as to suggest to the jury that the witness, independent of the defendant, had been involved in other kidnappings and murders, the State was entitled, for the purpose of rebutting this impeaching evidence, to show on redirect examination that defendant was the kidnapper and murderer on the other occasion; furthermore, defendant's failure to object to the introduction of such evidence on redirect examination was a waiver of his right to do so, and the admission of such evidence, even if incompetent, is not ground for a new trial.

10. Criminal Law § 87; Witnesses § 1— competency of witness — promise of State not to prosecute for certain crimes

In this prosecution for kidnapping and murder, defendant's stepdaughter was not incompetent as a witness on the ground that she had been promised, in exchange for her testimony as a witness for the State, that she would be charged only with the offense of aiding and abetting in the kidnapping of the victim and would not be prosecuted for her murder.

11. Criminal Law § 101— allowing jury access to news sources — instructions by court

The trial court in a kidnapping and murder case did not err in allowing the jury access to television and other news sources where the court instructed the jury not to discuss the case with anyone and not to read about the case in the newspapers or watch or listen to anything about it on television or radio, and where there was no indication of any misconduct on the part of any juror or any disregard of the court's instructions.

12. Constitutional Law § 36— death penalty — constitutionality

The death penalty for first degree murder does not constitute cruel and unusual punishment.

APPEAL by defendant from *Fountain, J.*, at the 2 December 1974 Criminal Session of ONSLOW.

The defendant was brought to trial upon two indictments, one charging him with the murder of Cheryl Potter Boyd, the other charging him with kidnaping her. To each indictment he originally entered a plea of not guilty. At the conclusion of all of the evidence, he changed his plea to the kidnaping charge to a plea of guilty. This was done after an extensive interrogation by the court, in the absence of the jury, in which the court fully explained the possible consequences of such plea with reference to the charge of murder, and after the court ascertained that the defendant's decision to change his plea was made by him voluntarily, after full consultation with his coun-

sel and with understanding of its consequence upon the charge of kidnaping and its possible consequence on the charge of murder.

The court thereupon instructed the jury that by reason of the defendant's change of his plea, the charge of kidnaping was no longer for their consideration, as such, but, by such plea, the defendant was not to be deemed to have admitted the fact of kidnaping insofar as it related to the murder charge. In its instructions to the jury on the murder charge, the court fully instructed the jury as to the law relating to murder committed in the perpetration of kidnaping, as to the elements of kidnaping and as to the burden of proof resting upon the State with reference to the commission of a murder in the perpetration of a kidnaping. The defendant assigns as error the acceptance by the court of the defendant's plea of guilty to the charge of kidnaping but makes no assignment of error as to the charge of the judge to the jury.

The evidence for the State consisted of the testimony of the defendant's stepdaughter, who testified that she was his companion throughout the series of events and an eyewitness to the kidnaping and the shooting of Mrs. Boyd, the testimony of another witness identifying the defendant as the companion of Mrs. Boyd during the brief interval between her kidnaping and her death, the testimony of other witnesses identifying photographs of a masked bank robber using Mrs. Boyd as a hostage as photographs of the defendant, the testimony of numerous expert witnesses and a large number of exhibits.

If true, the State's evidence was ample to show:

The defendant and his stepdaughter, for some ten days prior to 16 August 1974, drove about the vicinity of Camp Lejeune, where he was stationed as a member of the Marine Corps, and the Town of Jacksonville, looking for a car to use in a bank robbery. While so driving in the late morning of 16 August 1974, they observed Mrs. Cheryl Potter Boyd, previously unknown to them, park her car in the parking lot of the post office in Jacksonville. At the defendant's direction the stepdaughter parked beside Mrs. Boyd's car.

When Mrs. Boyd emerged from the post office and reentered her car, the defendant, armed with a .45 caliber automatic pistol, got out of his car and entered the car of Mrs.

Boyd. Thereupon, Mrs. Boyd drove her car from the parking lot, the defendant directing his stepdaughter to follow, which she did. They proceeded to another parking lot where, at the defendant's direction, the stepdaughter handed him a parachute bag from which he removed a green ski mask, a blue jacket with red and yellow stripes, a white pillow case and brown gloves. The stepdaughter remained in the second parking lot in the defendant's automobile. Mrs. Boyd's car left the parking lot, Mrs. Boyd driving and the defendant riding therein.

Within a few moments, Mrs. Boyd, accompanied by a man wearing a green ski mask and a blue jacket with red and yellow stripes, carrying a white pillow case and brandishing a .45 caliber pistol, entered the North Carolina National Bank in Jacksonville. Mrs. Boyd was obviously frightened. The defendant compelled three tellers of the bank to put money of the bank into the pillow case. A portion of the money placed therein by the tellers consisted of bills, known as "bait money," the serial numbers of which were recorded by the bank. Cameras in the bank, activated by the tellers, took photographs of the robbery. Persons acquainted with the defendant identified the photographs of the robber, wearing the green ski mask, as photographs of the defendant.

The robber and Mrs. Boyd then left the bank, she being compelled by the robber to accompany him, entered her automobile and drove away. They returned to the parking lot where the defendant's stepdaughter awaited them, Mrs. Boyd driving. The Boyd car then left the parking lot, the defendant directing his stepdaughter to follow. They proceeded to an alley in the rear of the A & P store in Jacksonville where both cars stopped adjacent to each other. Mrs. Boyd threw out the keys to her car. The defendant then got out of the Boyd car on the passenger side, threw his gloves into his own automobile, driven by the stepdaughter, then turned around and shot Mrs. Boyd with the .45 caliber pistol, got into his own car, driven by the stepdaughter, carrying the white pillow case. They drove to yet another point at which the defendant had previously parked a van owned by him and in which he had earlier changed from his military uniform to the clothes worn during the above mentioned events. Reentering the van, he changed back into his military uniform and returned to the Marine Base.

The robbery of the bank occurred at 1:30 p.m. A police alarm was immediately activated. At approximately 2 p.m., Mrs.

Boyd's car was discovered by police officers at the rear of the A & P store. Mrs. Boyd was in the driver's seat. She was dead, having sustained a bullet wound in or near the right eye. The motor of her car was still warm. The cause of her death was the bullet wound, death apparently being instantaneous. The fatal bullet was recovered from Mrs. Boyd's head and was identified by a ballistics expert as having been fired from the defendant's pistol. A fingerprint made by the defendant's right ring finger, pointing downward, was found on the outside of the glass of the window of Mrs. Boyd's car on the passenger side, this glass being almost completely rolled down.

Packages of money in substantially the total amount taken from the bank were found in the freezer in the defendant's home. These included the "bait money" placed in the pillow case at the robber's direction by two of the bank tellers.

At the conclusion of the State's evidence, the defendant's counsel, in the absence of the jury, advised the court that the defendant, contrary to the advice of his counsel, insisted upon taking the witness stand. Having ascertained from the defendant's counsel that this was contrary to their advice and that they had fully and completely conferred with the defendant concerning his right to testify and his right not to testify, the court interrogated the defendant and ascertained that, notwithstanding the advice of his counsel, he desired to testify. He did so, his testimony being the only evidence for the defendant. His testimony was to the following effect:

On the morning of 16 August 1974, after parking his van and therein changing from his military uniform to civilian clothes, he and his stepdaughter drove about in his automobile, the stepdaughter driving. Observing Mrs. Boyd, whom he did not know, entering the post office, the defendant told his stepdaughter, "I'm going to take that girl, I'm going to rob a bank." They, thereupon, parked beside Mrs. Boyd's automobile.

When Mrs. Boyd returned to her automobile, the defendant got out of his car with his .45 caliber pistol in his hand, opened the door of Mrs. Boyd's car and slid into the passenger seat. He told Mrs. Boyd: "Stay calm, you're going to be all right, you're not going to get hurt. You and I are going to rob a bank." Mrs. Boyd was frightened.

At the defendant's direction, Mrs. Boyd drove out of the post office parking lot, the defendant's stepdaughter following

in his car. They drove to another parking lot where the two vehicles again parked side by side. At the defendant's direction, the stepdaughter handed to the defendant a parachute bag containing a blue jacket, gloves, a ski mask and a pillow case.

At the defendant's direction, Mrs. Boyd then drove to the bank. He put on the ski mask and, with his pistol in his hand, directed Mrs. Boyd to precede him into the bank, which she did. There he directed the three tellers to put their money in the pillow case and directed all other persons in the bank to remain still. These directions were followed. Taking the pillow case, now containing the money, the defendant handed it to Mrs. Boyd and, taking her by the arm and trying to calm her fears, he directed Mrs. Boyd out of the bank and into her car. He also entered the car and, with the pistol in his lap, directed Mrs. Boyd to drive away, which she did, following his direction.

They returned to the parking lot at which they had left the defendant's stepdaughter and proceeded from there, with the stepdaughter following in the defendant's car, to the alley where both cars were brought to a stop. At the defendant's direction, Mrs. Boyd turned off the engine of her car and, also at his direction, threw her keys out of the window. The defendant raised his hand and as Mrs. Boyd started to turn around, "her head jumped back, like that [demonstrating]. Her head was still in the air. She was smiling when she was turning back and her hand dropped down to her lap and her body started to shake [demonstrating], tremors, I had seen it before and I knew she was dead. Didn't hear a gun shot." He looked at the pistol and the safety was off.

The defendant got out of Mrs. Boyd's car, carrying the pillow case with the money, entered his car and he and the stepdaughter drove away, returning to the place where he had previously parked his van, which he entered and therein changed back to his military uniform.

The defendant testified: "I did not mean for her to die then, I shot her at that time but I didn't want her to die, not then. I did not mean to shoot her, not then, but when I first saw her. I did not deliberately shoot Cheryl Boyd. I didn't form an intent to destroy the girl. I knew I was going to rob a bank. She didn't behave the way she was supposed to behave. Things didn't go right at the bank. When she threw the keys out I

was just confused. I just wanted to get to Debbie [the stepdaughter] and get the hell out of there." The defendant expressed concern for his stepdaughter and his desire to absolve her from all complicity in the events of the morning on the ground that she was simply doing what he had told her to do. He further testified that the investigating officers told him of his constitutional rights and he understood them. He consented to the search of his house by these officers, through which search they discovered the pistol. (A subsequent search pursuant to a search warrant disclosed the money in the freezer.)

The defendant testified that he had been having sexual relations with his stepdaughter for approximately two years but denied her earlier testimony that he raped her when she was 12 years of age. He further testified: "I don't know why I robbed the NCNB bank. It was mostly the girl. When I first saw her I knew what I was going to do. I knew I was going to destroy her. Killing her was my primary thinking. She was an example of my wife. * * * I am responsible for the abduction of Cheryl Potter Boyd. I did the bank robbery at NCNB. I didn't deliberately shoot her. I initially intended to destroy her. I changed my mind at the bank. I couldn't go through with it. It was on and off. I was coming apart."

On cross-examination, the defendant testified that he knew it was against the law to kidnap and to rob a bank, that murder is a capital crime and that he was kidnaping Mrs. Boyd at the post office and at that time he "was going to destroy her." He further testified on cross-examination: "The girl was frightened. I told her what to do and it didn't work out that way. I had no intention about killing her from part way through the bank robbery. It was a matter of her behavior. She was frightened. That was one of the reasons. There were others." He acknowledged his ownership of the pistol, identified by the State's evidence, as the weapon from which the fatal bullet was fired.

Defendant's trial counsel having ceased to practice law, Donald P. Brock was appointed to represent him on appeal.

Rufus L. Edmisten, Attorney General, by Lester V. Chalmers, Jr., Assistant Attorney General, for the State.

Donald P. Brock for defendant.

LAKE, Justice.

[1-3] The killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or foreseeably dangerous to human life, is murder at common law. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1950); *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891); *Regina v. Horsey*, 3 Fost. & F. 287 (Kent Assizes, 1862); *Regina v. Serne*, 16 Cox Crim. Cas. 311 (1887); Harno Cases and Materials on Criminal Law and Procedure, 318 (Callaghan, 1939); 40 C.J.S., Homicide, § 21 (1944). Kidnaping and robbery are such felonies. *State v. Streeton, supra; State v. Jarrette*, 284 N.C. 625, 651, 202 S.E. 2d 721 (1974); *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974). A killing is committed in the perpetration of a felony when an unbroken chain of events leads from such felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. *State v. Thompson, supra;* 40 Am. Jur. 2d, Homicide, § 73 (1968). In the present case, the evidence, both that for the State and that for the defendant, shows an unbroken chain of events leading from the kidnaping to the robbery and thence to the shooting of Mrs. Boyd. Thus, even if the defendant's testimony that he did not intend to fire the pistol is taken as true, the killing of Mrs. Boyd was murder, there being no statute of this State changing the definition of murder from that of the common law. A murder committed with premeditation and deliberation *or* in the perpetration of a kidnaping *or* in the perpetration of a robbery is murder in the first degree. G.S. 14-17. The prescribed punishment for such a murder is death by asphyxiation. G.S. 14-17.

[4] The indictment for murder under which the defendant was charged is in the form prescribed by G.S. 15-144. It alleges that the defendant "feloniously, wilfully, and of his malice aforethought, did kill and murder Cheryl Potter Boyd contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Such an indictment is sufficient to support a verdict of guilty of murder in the first degree if the jury finds from the evidence, beyond a reasonable doubt, that the defendant killed the deceased with malice and after premeditation and deliberation *or* that he killed her in the perpetration of a robbery or of a kidnaping. The evidence is ample to support a verdict on each of these three

theories. The jury was instructed completely and accurately upon each of them. The defendant assigns no error in the charge to the jury.

[6] The defendant contends that the trial court erred in accepting his plea of guilty to the charge of kidnaping. It is the defendant's contention that, when the defendant, at the close of all the evidence, changed his plea as to the charge of kidnaping from "not guilty" to "guilty," this was tantamount to his entering a plea of guilty to first degree murder because of the above mentioned rules of law.

As Justice Sharp, now Chief Justice, said in *State v. Watkins,* 283 N.C. 17, 30, 194 S.E. 2d 800 (1973), after noting a lack of statutory authority to sustain the rule promulgated by our predecessors on this Court that an accused will not be permitted to plead guilty to a crime for which the penalty is death, "It has long since become the public policy of this State." Nevertheless, there is no merit in this contention of the defendant. Kidnaping is not a crime punishable by death. Indeed, no punishment has yet been imposed upon the defendant for the crime of kidnaping. He was sentenced to death for the crime of murder in the first degree. He did not plead guilty of that offense.

[5] The public policy upon which the defendant relies is simply that no person shall be put to death in this State for a crime until he has been duly indicted therefor and, at a trial, conducted pursuant to law, evidence has been introduced sufficient to support a finding of every element of the offense and a duly constituted jury, properly instructed upon the law, has found from the evidence, beyond a reasonable doubt, that he has committed each element of such offense. A plea of guilty, when accepted, being the equivalent of a conviction, no evidence of guilt is required and no verdict of a jury is required as a prerequisite to the imposition of a lawful sentence. Thus, the said public policy, established by our predecessors on this Court, precludes the acceptance of a plea of guilty to a crime for which the penalty is death. This policy, however, does not preclude the State from offering evidence of a confession, voluntarily and lawfully made by the accused, nor does it preclude the accused from testifying voluntarily at his trial or the jury from considering matters to which he testified in arriving at the verdict that he is guilty of a capital crime.

In the present case, the defendant, voluntarily, contrary to the advice of his counsel, and after careful interrogation by

the court in the absence of the jury, testified. His testimony corroborated the evidence introduced by the State in virtually every particular. There was no error in permitting him to do so, or in permitting the jury to consider his testimony in arriving at its verdict. The court carefully and correctly instructed the jury that the defendant's plea of guilty to the offense of kidnaping did not absolve the jury from the necessity of finding, beyond a reasonable doubt, that the offense of kidnaping had been committed, in order for the jury to reach a verdict of guilty of murder in the first degree on the theory that the murder occurred in the perpetration of the felony of kidnaping. No error is assigned with reference to instructions of the court on this or any other matter. We find no error therein.

[6] It was not error to accept the defendant's plea of guilty of the offense of kidnaping and thus to withdraw that charge, as a separate criminal offense, from the jury's consideration, but had this been error, it would clearly be harmless in view of the defendant's own testimony describing in detail the kidnaping and the events leading in an unbroken chain therefrom to the death of Mrs. Boyd.

[7] The State's witness Hines identified the defendant in court as the man he saw in Mrs. Boyd's automobile with her as they passed him while he was stopped waiting to make a left turn at an intersection only minutes before her death. In the absence of the jury, the court conducted a voir dire and found the in-court identification of the defendant by this witness was not tainted by any extraneous or unlawful or impermissible suggestion by anyone, or by photographs exhibited to him by the police, to whom this witness gave an accurate description of the defendant prior to him seeing such photographs. The evidence on the voir dire supports the findings of the judge and there was no error in admitting the in-court identification of the defendant by this witness. The defendant virtually so concedes in his brief in view of our decision in *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1976). Even if there had been error in the admission of this evidence, it pales into insignificance and is clearly harmless in view of the defendant's own testimony describing the kidnaping of Mrs. Boyd, the robbery of the bank and his compelling her to drive from the bank to the place where she was shot. There is no merit in this assignment of error.

On cross-examination of the defendant's stepdaughter, the defendant's counsel attempted to discredit her testimony by showing she had been promised that, in exchange for her testimony, she, herself, would be charged only with aiding and abetting in the kidnaping of Mrs. Boyd. She testified in the course of such cross-examination, "I am not worried about being charged with two other kidnapings and two other murders." She acknowledged that a note exhibited to her by the cross-examining counsel revealed her involvement in the kidnap-murder of two other girls. On redirect examination by the district attorney, she testified that she had made a statement to the officers on the day she was arrested concerning "the other two murders and kidnapings" and directed the officers to places where evidence of those crimes might be found. Her statement concerning these other murders and kidnapings was introduced in evidence. It was to the effect that, in her company, two weeks prior to the kidnaping and killing of Mrs. Boyd, the defendant had kidnaped and murdered two other girls, these crimes being described in substantial detail. The defendant assigns the admission of this evidence on redirect examination as error.

[8, 9] It is, of course, true that, nothing else appearing, the State cannot, through its own witnesses, offer evidence tending to show the defendant has committed another distinct, independent, separate offense having no relation to the crime charged, except its tendency to show his disposition to commit a crime of the nature of the one for which he is on trial. *State v. Carey,* 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Patterson,* 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). However, the nature of the defendant's cross-examination of this witness for the purpose of impeaching her credibility was such as to suggest to the jury that the witness, independent of the defendant, had been involved in other kidnapings and murders. On redirect examination, for the purpose of rebutting this impeaching evidence, the State was entitled to show that the defendant was the kidnaper and murderer on the other occasion. *State v. Patterson, supra.*

Furthermore, the record does not show any objection to this evidence on the redirect examination of the stepdaughter. The failure to object to the introduction of the evidence is a waiver of the defendant's right to do so, and the admission of such evidence, even if incompetent, is not ground for a new

trial. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. Howell*, 239 N.C. 78, 79 S.E. 2d 235 (1953).

[10] The defendant next contends that "the trial court erred in allowing the testimony of Debra Brown" (the stepdaughter of the defendant). The basis of this contention is that she testified on cross-examination by the defendant that she had been promised, in exchange for her testimony as a witness for the State, that she, herself, would be charged only with the offense of aiding and abetting in the kidnaping of Mrs. Boyd and would not be prosecuted for her murder. The record discloses no motion to suppress the testimony of this witness and no motion to strike her testimony, or any objection on the ground of her competence as a witness. Furthermore, this assignment of error has no merit for the reason that the witness was competent. The defendant virtually so concedes in his brief in the light of our decision in *State v. Woodson*, 287 N.C. 578, 215 S.E. 2d 607 (1975), which clearly so holds.

[11] The defendant further contends that the trial court erred in "allowing the jury access to TV and other news sources." The record shows that when recessing for the night, the court instructed the jury not to discuss the case with anyone, not even among themselves, and directed them: "Please don't listen to anything about it. If there be anything on the radio or on the local TV about it, just cut it off until you think that part of it would be over. Don't read anything about it in the newspapers. In all due respect to whomever may write the newspaper or the TV or radio people, you have heard everything that has happened here. They can't tell you anything that you don't know from what has developed in this evidence. So just keep your mind free and open about the case until you have heard all of the evidence, the arguments of counsel, and the charge of the court." In this we see no error. The defendant concedes in his brief that he is unaware of any misconduct on the part of any juror or any disregard of the instructions of the trial court. In the absence of any indication to the contrary, the jurors are presumed to have complied with the instructions of the court. *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). The record discloses no objection by the defendant to this instruction or any request for further instruction or action by the court in this respect.

[12] The defendant, acknowledging that we have repeatedly ruled to the contrary, contends that it was error to sentence the defendant to death for the reason that such sentence constitutes cruel and unusual punishment. Further discussion of this contention would be needlessly repetitious of our former decisions. See: *State v. Bush,* 289 N.C. 159, 221 S.E. 2d 333 (1976); *State v. Woodson, supra; State v. Jarrette, supra; State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973).

Finally, the defendant in his brief requests us to consider all assignments of error made in his statement of the case on appeal, whether brought forward in the brief or not. We have done so and have also carefully considered the entire record. We find no merit in any assignment of error and no error in the record which would entitle the defendant to a new trial. The record, in its entirety, discloses a carefully planned and coldly executed murder of a young woman, unknown to the defendant, seized and used as a shield or hostage in the bank robbery and, when she was no longer useful to the defendant for that purpose, murdered in cold blood in order to eliminate a witness who could identify him as the robber. The defendant has had a fair trial free from any substantial error.

No error.

STATE OF NORTH CAROLINA v. KATHARINE MARIE ATWOOD

No. 21

(Filed 17 June 1976)

1. **Criminal Law § 164— sufficiency of evidence — review on appeal**

In a criminal case on appeal the court reviews the sufficiency of all the evidence to sustain the verdict, notwithstanding defendant failed to move for nonsuit at the conclusion of all the evidence. G.S. 15-173.1.

2. **Automobiles § 3— driving while license suspended — requirements for conviction**

A driver of an automobile must have actual or constructive knowledge of the suspension or revocation of his driver's license in order for there to be a conviction under G.S. 20-28(a).

3. Automobiles § 3— driving while license suspended — notice of suspension mailed — presumption

For purposes of a conviction for driving while license is suspended or revoked, mailing of the notice under G.S. 20-48 raises only a *prima facie* presumption that defendant received the notice and thereby acquired notice of the suspension or revocation.

4. Automobiles § 3— notification by driver of address change — inapplicability to charge of driving while license suspended

G.S. 20-7.1, which imposes a duty on licensees to notify the Division of Motor Vehicles within 60 days of each change of address, is not applicable to this case for driving while license was suspended, since the offense occurred in 1974 but the statute did not become effective until 1 July 1975.

5. Automobiles § 3— driving while license suspended — insufficient notice of suspension to defendant — nonsuit proper

In a prosecution of defendant for driving while her license was suspended, defendant's motion for nonsuit should have been granted where the evidence tended to show that the Department of Motor Vehicles mailed defendant one letter notifying her of her license suspension, but that letter was returned to the Department marked unclaimed by the post office, no further attempt was made at notification of defendant, when defendant was stopped by a police officer for driving while her license was suspended, she informed him that her address was different from that listed for her by the Department, defendant also told the officer that she did not know her license had been suspended, and defendant's mail was not forwarded by the post office from her address which the Department of Motor Vehicles had after her second permanent move within one year.

Justice EXUM concurring.

APPEAL of right by defendant pursuant to G.S. 7A-30(2) to review decision of the Court of Appeals reported in 27 N.C. App. 445, 219 S.E. 2d 521 (1975) (opinion by Hedrick, J., Britt, J., concurring, Martin, J., dissenting), upholding judgment of *Albright, J.*, at the 3 March 1975 Session of FORSYTH Superior Court.

Defendant was tried upon a warrant charging her with unlawfully and willfully operating a motor vehicle on a public street or public highway while her license was suspended, a misdemeanor under G.S. 20-28.

The State's evidence tends to show the following facts:

At approximately 4:00 a.m. on 19 October 1974 J. G. George of the State Highway Patrol observed defendant Katharine Marie Atwood enter a car and drive it on University

Parkway, a public highway. After running a license check and verifying his belief that defendant's license had been suspended, he stopped her and issued her a citation. The State introduced defendant's driver's license record showing among other things that (1) defendant was convicted on 18 June 1974 of speeding 60 m.p.h in a 45 m.p.h. zone (occurrence date: 11 June 1974), and was convicted on 28 August 1974 of speeding 70 m.p.h. in a 55 m.p.h. zone (occurrence date: 1 August 1974); (2) on 23 September 1974 defendant was mailed an order to notify her of the suspension of her driving license for two offenses of speeding over 55 m.p.h., to be effective from 3 October 1974 to 2 December 1974; and (3) the suspension order was returned unclaimed on 2 October 1974. The State's witness J. G. George testified on cross-examination that defendant told him she resided at Cedardale Lane in King, N. C., when he stopped her. He also testified that she told him that "she did not know her license was suspended and that no one had been in touch with her."

The order to notify defendant of the suspension stated that pursuant to G.S. 20-16(d) the Department of Motor Vehicles (hereinafter referred to as "the Department") would afford defendant a hearing within 20 days after receipt of a written request. The order also stated that defendant was not entitled to operate a motor vehicle during the period of suspension pending the hearing. In an addendum to the record counsel stipulated that "it is the established policy of the Division of Motor Vehicles [the new name for the Department effective 1 July 1975] to grant a Preliminary Hearing, in all discretionary matters, upon request and the order of suspension or revocation is rescinded until such time as the Preliminary Hearing is conducted."

Defendant's motion for dismissal at the close of the State's case was denied.

Defendant's evidence tends to show the following facts:

On 19 October 1974 she was driving her car on Cherry Street or University Parkway when Officer George stopped her. The car was registered in her name. She did not know that her license had been suspended and had received no communication that her license had been suspended. She testified that she had an idea that she was going to lose her license but

did not make any effort to check when she would lose her license since she believed she would receive notice in the mail.

The Department's records for defendant, which were part of the State's evidence, indicated that her license was issued on 1 March 1973 and her address on 23 September 1974, the date the notice of suspension was mailed, was 646 McCreay Street, Winston-Salem, North Carolina. Defendant testified that she lived at the above address before January, 1974, residing there when her license was issued. She stated that she moved to 710 Hanes Avenue, Winston-Salem, N. C., and lived there from January, 1974 until she moved to Cedardale Lane, King, N. C., at the end of August 1974. She continued to live at King until the time of the trial. She testified that she filled out a change of address card when she moved to Hanes Avenue and mailed it to the Post Office. She received one forwarded letter at Hanes Avenue. When she moved in August to King, she again filled out a change of address card and mailed it to the Post Office. She stated that she did not receive much mail and had received no mail forwarded to her King address. She never sent a change of address notice to the Department.

The jury returned a verdict of guilty, and defendant was sentenced to thirty (30) days of imprisonment suspended for two years on payment of a fine of $200.00 and costs. Defendant appealed, and the Court of Appeals affirmed.

Attorney General Rufus L. Edmisten by Associate Attorney James Wallace, Jr., for the State.

Herman L. Stephens for defendant appellant.

COPELAND, Justice.

Defendant's appeal presents the following question:

1. Did the trial court commit prejudicial error in denying defendant's motion for nonsuit?

[1] The only motion for dismissal made by defendant was at the close of the State's evidence. By introducing evidence, she waived this motion. G.S. 15-173. In a criminal case, however, on appeal the court reviews the sufficiency of all the evidence to sustain the verdict, notwithstanding defendant failed to move for nonsuit at the conclusion of all the evidence. G.S. 15-173.1. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974).

Defendant contends that the evidence was insufficient for a valid conviction under G.S. 20-28(a) for driving while her license was suspended because the State failed to prove beyond a reasonable doubt every fact necessary to constitute the crime. She contends that the State must prove a lawful suspension of her license. She argues that there was no showing of her license being lawfully suspended at the time of her arrest because the license was not suspended in accordance with the procedural due process required by the Fourteenth Amendment of the United States Constitution. In particular, she contends that requirements of procedural due process were not met because she had no actual notice of the proposed suspension and of her right to an opportunity to be heard prior to the effective date of the purported suspension and because she, in fact, had no opportunity to be heard prior to the effective date of the purported suspension.

The State contends that procedural due process does not require actual notice and that the constructive notice given in this case was adequate. The State contends that the constructive notice given was sufficient to provide an opportunity for defendant to have a hearing. The State argues that if defendant had properly submitted a change of address form with the Department then defendant would have had notice and an opporunity for a prior hearing if she had requested one. Notice was mailed on 23 September 1974 and would have been complete under G.S. 20-48 upon the expiration of four days. Since suspension was not effective until 3 October 1974, notice would be complete so that she might request and receive a hearing as much as six days before the suspension.

According to stipulation, the established policy of the Department is upon request to grant a preliminary hearing in a discretionary matter such as this and to rescind the order of suspension until such time as the preliminary hearing is conducted. In this regard, it might be noted that there was no evidence that defendant or others in her position were aware of this policy. G.S. 20-16(d) merely provides that a preliminary hearing shall be held within 20 days of receipt of request. The notice to defendant failed to disclose this policy of the Department when it stated that defendant was not entitled to operate a motor vehicle during the period of suspension pending the hearing.

We have previously held that a conviction under G.S. 20-28(a) requires that the State prove beyond a reasonable doubt (1) the operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked. *State v. Cook*, 272 N.C. 728, 158 S.E. 2d 820 (1968); *State v. Blacknell*, 270 N.C. 103, 153 S.E. 2d 884 (1967); N.C.P.I.—Crim. 271.10 (October 1974).

[2, 3] However, we believe that the legislature also intended that there be actual or constructive knowledge of the suspension or revocation in order for there to be a conviction under this statute. We reach this conclusion for the reason that G.S. 20-16(d) requires the Department to provide notice and an opportunity for a hearing in order for there to be a lawful suspension. For purposes of a *conviction* for driving while license is suspended or revoked, mailing of the notice under G.S. 20-48 raises only a prima facie presumption that defendant received the notice and thereby acquired knowledge of the suspension or revocation. See *Willis v. Davis Industries*, 280 N.C. 709, 186 S.E. 2d 913 (1972); *Mill Co. v. Webb*, 164 N.C. 87, 80 S.E. 232 (1913). Thus, defendant is not by this statute denied the right to rebut this presumption.

[4] G.S. 20-7.1, which imposes a duty on licensees to notify the Division of Motor Vehicles within 60 days of each change of address, is not applicable to this case since it did not become effective until 1 July 1975. This statute leaves unchanged the fact that there is no duty imposed on the licensee to notify the Division of Motor Vehicles until 60 days after a move. Thus, because of the rapid mobility of society, this 60 days provision may render it impractical for adequate notice to be given to numerous violators. We conclude that it would be more practical if the time limit for giving notice of a change of address were substantially less.

In determining the question of judgment as of nonsuit, we consider all the evidence in the light most favorable to the State. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Furthermore, "the defendant's evidence which explains or makes clear the evidence of the State may be considered" as well as "defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's *evidence*." (Emphasis supplied.) *State v. Bruton*, 264 N.C. 488, 499, 142 S.E. 2d 169, 176

(1965); *accord, State v. Blizzard,* 280 N.C. 11, 16, 184 S.E. 2d 851, 854 (1971).

"If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense . . . , the motion for nonsuit should be allowed." *State v. Cutler, supra* at 383, 156 S.E. 2d at 682.

In *State v. Carter,* 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961) we stated:

> "And when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed." [Citation omitted.]

[5] The State's evidence as to notice tended to show that the Department mailed one letter to defendant on 23 September 1974 to notify her of the suspension of her operator's license from 3 October 1974 to 2 December 1974. On 2 October 1974 the letter was returned to the Department, which marked it "ORDER UNCLAIMED." No further attempt was made by the Department to notify defendant of her suspension. On cross-examination the State's own witness testified that defendant told him she resided at Cedardale Lane in King when he stopped her and that "she did not know her license was suspended and that no one had been in touch with her."

Defendant's evidence in explanation of the State's evidence indicates that she did not live at the address to which the Department mailed the notice. She testified that she had moved twice since holding that address and that she had submitted change of address cards to the Post Office upon both moves. Her first move was within the same city. The fact that the notice was returned unclaimed indicates that pursuant to the regulations of the Post Office it discontinued forwarding defendant's mail from her first address after her second permanent move within one year. 39 C.F.R. § 158.2 (1974). Also, defendant testified that she had no notice or knowledge of suspension of her license.

Thus, all the evidence indicates that defendant had no notice or knowledge of suspension of her license. The evidence completely rebuts the prima facie presumption that the notice mailed to defendant's McCreay Street address was actually received. The lack of actual notice and resulting knowledge

removes the criminal character from defendant's conduct, and the court should have granted a nonsuit.

State v. Teasley, supra, is distinguishable from the present case because in *Teasley* defendant offered no evidence to rebut the prima facie presumption that notice was received upon the mailing, whereas here all the evidence rebuts that presumption.

On account of our disposition of the nonsuit issue it is unnecessary to consider defendant's contention as to the charge of the court.

Reversed.

Justice EXUM concurring.

I agree with the Court that the State's evidence negated defendant's culpability. I add these additional observations:

General Statute 20-28(a) does not specify whether one must operate a motor vehicle *knowing* that his license has been suspended before he commits a violation of the section. Our traditional rule, however, is that when the General Assembly does not specify whether guilty knowledge, or *mens rea,* is required, the necessity of its existence will nonetheless be implied. *State v. Welch,* 232 N.C. 77, 59 S.E. 2d 199 (1950); *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93 (1950); *State v. Powell,* 141 N.C. 780, 53 S.E. 515 (1906); *accord, Sweet v. Parsley,* [1969] 1 All E.R. 347 (House of Lords); *see* A. Loewy, Criminal Law in a Nutshell § 7.04B (1975).

The rule was first announced in *State v. Powell, supra,* where defendant had been convicted of retailing intoxicating liquor. The trial judge refused to admit evidence that defendant honestly and reasonably thought that what he sold was not alcoholic in nature. For this error this Court ordered a new trial holding that such evidence ought to be received and the jury properly instructed upon it. In a lengthy and well-reasoned opinion Justice Connor made these points: (1) General defenses to criminal liability are, as a matter of statutory construction, read into criminal statutes. (2) If the courts did not recognize these defenses then courts and statutes alike should be abated as public nuisances. (3) While ignorance of the law is no defense to a criminal accusation, mistake of fact is a complete

defense. (4) Punishment of one who acts under an honest and reasonable mistake of fact would serve as no deterrent to crime but would inflict a grievous injustice and would shock the moral sense of the community. (5) This defense has been applied to regulatory offenses as well as more heinous crimes. (6) The objection that the presence of the defense would facilitate evasions of the statute was rejected. (7) The State need not initially prove guilty knowledge. The burden is on the defendant to raise the issue of an honest and reasonable mistake of fact. (It is now, of course, uncertain whether *Mullaney v. Wilbur,* 421 U.S. 684 (1975) would require the State to prove knowledge beyond a reasonable doubt once the issue is properly presented. *Compare State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975) (self-defense and heat of passion) *with State v. Hammonds,* 290 N.C. 1, 224 S.E. 2d 595 (1976) (insanity).)

In *State v. Welch, supra* at 80, 59 S.E. 2d at 202, Justice Ervin said with reference to a claim of mistake of fact, "[i]t is axiomatic at common law that a crime is not committed if the mind of the person doing the act is innocent. The statutes relating to the unlawful transportation of intoxicating liquor are to be construed in the light of this common law principle, and the existence of guilty knowledge on the part of the accused is to be regarded as essential to criminality, even though it is not required by the statutes in express terms."

In *Poultry Co. v. Thomas,* 289 N.C. 7, 15, 220 S.E. 2d 536, 542 (1975) we recently said of another traffic violation:

> "G.S. 20-150(c) is a safety statute enacted by the Legislature for the public's common safety and welfare. The statute does not contain the words 'knowingly,' 'willfully' or any other words of like import. It was the obvious intent of the Legislature to make the performance of a specific act a criminal violation and to thereby place upon the individual the burden to know whether his conduct is within the statutory prohibition."

That, however, was a civil case in which the only issue was whether plaintiff could recover from a negligent defendant when plaintiff passed at an intersection within city limits without knowledge or reason to know that he was within city limits. Criminal liability was not in issue. This difference is crucial. The only North Carolina criminal case cited by the majority in *Poultry Co.* was *State v. McLean,* 121 N.C. 589, 28 S.E. 140

(1897), which really involved ignorance of law rather than mistake of fact. *Poultry Co.* may be further distinguished in that the offense there considered, even if criminal, was a petty one punishable at most by a fine of $100 and imprisonment in jail for 60 days. N. C. Gen. Stat. 20-176(b). A violation of General Statute 20-28(a), however, is a general misdemeanor punishable by two years imprisonment, or a fine of not less than $200, or both. We said in *Poultry Co.*, "[w]e would not extend the rationale of this rule [due process does not require guilty knowledge] beyond petty offenses involving light punishment nor . . . to any crime involving moral delinquency." 289 N.C. at 15, 220 S.E. 2d at 542.

There are, of course, well recognized limits to a mistake of fact defense. It is not, for example, generally available to negate an element of a crime which merely aggravates what would otherwise be criminal or immoral conduct. *State v. Wade,* 224 N.C. 760, 32 S.E. 2d 314 (1944) (rape of a child under 12—mistake as to age is no defense); *Regina v. Prince,* 13 Cox Crim. Cas. 138 (Cr. App. 1875) (abduction of girl under age of 16 without father's consent—mistake as to age is no defense).

While allowing mistake of fact as a defense where the legislature is silent as to the requirement of guilty knowledge is perhaps contrary to the trend of recent authority in other states and England, *see* cases cited in *Poultry Co. v. Thomas, supra* at 13-14, 220 S.E. 2d at 541; *Regina v. Miller,* [1975] 2 All E.R. 974 (Ct. App. Crim. Div.), I believe to do so accords more with the ends of justice and well-reasoned North Carolina decisions to which I have already referred.

Mistake of fact as a defense does not seem to be required by the Federal Constitution. *United States v. Balint,* 258 U.S. 250 (1922); *Cf. United States v. Park,* 421 U.S. 658 (1975). Whether strict criminal liability of a substantial nature *when expressly mandated by the General Assembly* would be violative of the Law of The Land Clause of the North Carolina Constitution, Article 1 § 19, need not now be determined. See *Comm. v. Koczwara,* 397 Pa. 575, 155 A. 2d 825 (1959), for persuasive authority that such an enactment would be unconstitutional.

Applying the foregoing principles to a prosecution under General Statute 20-28(a) where the suspension or revocation

was a discretionary act, I believe that when the State proves beyond a reasonable doubt that defendant was operating a motor vehicle on a public highway while his license was lawfully suspended or revoked, notice of such suspension or revocation having been given pursuant to General Statutes 20-16 and 20-48, nothing else appearing, the jury should be instructed to find the defendant guilty. Guilty knowledge, in other words, is not a necessary element of the crime to be proved in the state's case in chief. Neither is receipt of notice necessary in order for the suspension or revocation to be effective or lawful. Defendant's lack of knowledge of the suspension or revocation is a mistake of fact defense which ordinarily is raised by defendant.

Where, however, as here, the State's own evidence is that defendant drove honestly and reasonably without knowledge of the suspension or revocation, nonsuit is proper because the State has made out a mistake of fact defense. In a case where only the defendant's evidence tends to prove an honest and reasonable mistake of fact, the State should not be nonsuited. Rather the issue of mistake of fact should be presented to the jury upon proper instructions. Important on this issue would be the rebuttable presumption that a duly mailed notice of suspension or revocation was duly received. While proof of mailing of the notice and the expiration of four days thereafter is proof of a valid suspension or revocation, N. C. Gen. Stats. 20-16, 20-48, this proof may or may not satisfy a jury, even with the presumption, that defendant actually knew of the suspension if his evidence tends to show he did not.

R. W. WATKINS, CLAIMANT v. CITY OF WILMINGTON, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 90

(Filed 17 June 1976)

1. Master and Servant § 94— workmen's compensation — review of findings by Full Commission

In reviewing the findings made by a deputy commissioner or by an individual member of the Industrial Commission when acting as a hearing commissioner, the Commission may review, modify, adopt, or reject the findings of fact of the hearing commissioner.

2. **Master and Servant § 56— workmen's compensation — whether accident arises out of employment**

Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Industrial Commission is conclusive if supported by any competent evidence; otherwise, not.

3. **Master and Servant § 56— workmen's compensation — fireman on duty — injury while repairing vehicle during lunch hour**

Plaintiff fireman's act in assisting the cleaning of the oil breather cap from a fellow employee's car during the lunch period was a reasonable activity, and injuries received by plaintiff when gasoline poured on the breather cap caught fire arose out of and in the course of his employment as a fireman, where plaintiff was required by his employer to remain at the fire station during his entire twenty-four-hour tour of duty, firemen often made minor repairs to their automobiles during their lunch hour, this practice was well known and allowed by plaintiff's superiors, and repairs of a minor nature to personal automobiles were to an appreciable extent a benefit to the fire department in that by keeping their automobiles in working condition the firemen could use them to report for duty when they were off duty in the event of an emergency.

APPEAL by defendants under G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 28 N.C. App. 553, 221 S.E. 2d 910 (1976), affirming the award of the North Carolina Industrial Commission granting plaintiff compensation.

Plaintiff seeks compensation from his employer, City of Wilmington, and The Travelers Insurance Company, the employer's compensation insurance carrier, for alleged injury by accident arising out of and in the course of his employment.

Jurisdictional facts were stipulated.

The initial hearing was before Deputy Commissioner W. C. Delbridge. Based upon all competent evidence adduced at hearing, Deputy Commissioner Delbridge found facts as follows:

"1. Plaintiff is a male, age 26, and was on October 18, 1973, and approximately five and one-half years prior thereto employed with the defendant employer as a fireman. When on active tour of duty plaintiff's hours were from 8:00 a.m. to 8:00 a.m., then the plaintiff was off duty for the next 24 hours. He sleeps at the fire station and eats at the fire station during his 24 hours tour of duty. When the plaintiff is off duty he is nevertheless on

call if an emergency should arise. He drives his personal car to and from work and uses it to report to duty in an emergency at times when he is off duty.

"2. On October 18, 1973, the plaintiff was on his tour of duty at the No. 3 Fire Station in Wilmington, North Carolina. A fellow employee had taken the oil breather cap off the motor of his 1965 Chevrolet automobile and was attempting to clean it. This was during the lunch time. The plaintiff came by and inspected the oil breather cap and found it to be dirty and clogged up. It was decided that they would put gasolene on the oil breather cap and set it on fire in order to clean same. The cap was placed on the ground and some gasolene was put on the oil breather cap, and it was set on fire. After the fire had gone out the oil breather cap did not appear to be clean. The plaintiff decided to put some more gasolene on the oil breather cap, and as he started to pour the gasolene on the oil breather cap there was an explosion, and the plaintiff was burned about the face, hands, and arms.

"3. Plaintiff was taken to the hospital by a fellow employee who used his own car to carry the plaintiff to the hospital.

"4. Dr. Horace Moore saw the plaintiff at the hospital. Plaintiff gave a history to the doctor that he sustained flash burns resulting from pouring gasolene on a hot oil cap. Examination of the plaintiff revealed first and second degree burns on the face and upper extremities and third degree burns of the left arm. Plaintiff was treated for the burns and skin grafts were made to the left arm. Dr. Moore treated the plaintiff from October 18, 1973, through December 18, 1973. It was Dr. Moore's opinion that the plaintiff had reached maximum improvement as of January 1, 1974.

"5. The rules and regulations of the fire department, Article 5, Section LX 11 do not permit repairs to personal property by firemen while on duty at any fire station except with permission of the assistant chief in charge.

"6. The Chief of the Wilmington Fire Department testified that the firemen were allowed to make minor repairs on their own personal small equipment while on

duty and were allowed to do minor repair work on their personal automobiles. There was no objection to this. This was corroborated by the plaintiff's Captain, Theodore Rhodes.

"7. It was the custom and practice of firemen in Wilmington while on duty at the premises of the defendants' No. 3 Fire Station to make Minor repairs to their personal automobiles at lunch time, and this practice was well known to the plaintiff's superiors, and they made no objection, and in fact, allowed the firemen to make such repairs.

"8. The repairs of a minor nature to personal automobiles were to an appreciable extent a benefit to the fire department in that keeping their automobiles in working condition they could use said automobiles to report to duty when they were off duty in case of an emergency.

"9. Plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on October 18, 1973.

"10. Plaintiff was out of work due to the injury sustained on October 18, 1973, from said date to December 3, 1973.

"11. As a result of the injury in question, the plaintiff has sustained bodily disfigurement which was viewed by the undersigned and is described as follows:

[Here, the Commissioner described in detail the nature and extent of the injury.]

"12. As a result of the injury in question, the plaintiff has suffered bodily disfigurement as hereinabove described which is permanent and serious and is such as would tend to hamper plaintiff in his earnings and in seeking employment, that proper and equitable compensation for said disfigurement is $2,000.00."

The Deputy Commissioner then concluded that plaintiff sustained his injury by accident arising out of and in the course of his employment and awarded compensation for temporary total disability, disfigurement, medical expenses, attorney's fees and costs.

Pursuant to defendants' notice of appeal and application for review, the case was heard by the Full Commission (Com-

mission) as provided by G.S. 97-85. The Commission, Commissioners Vance and Stephenson concurring, and Chairman Robert S. Brown dissenting, adopted and affirmed the opinion and award of Deputy Commissioner Delbridge. On appeal, the Court of Appeals, Chief Judge Brock dissenting, affirmed the opinion and award of the Commission.

Marshall, Williams, Gorham & Brawley by A. Dumay Gorham, Jr., for defendant appellants.

Addison Hewlett, Jr., for plaintiff appellee.

MOORE, Justice.

[1] On appeal, defendants assign as error the deputy commissioner's Findings of Fact Nos. 6, 7, 8 and 9 for the reason that they were not supported by competent evidence. In reviewing the findings found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner, the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner. The Commission is the fact-finding body under the Workmen's Compensation Act. *Lee v. Henderson & Associates,* 284 N.C. 126, 200 S.E. 2d 32 (1973); *Brewer v. Trucking Co.,* 256 N.C. 175, 123 S.E. 2d 608 (1962); G.S. 97-85. Here, the facts found by the deputy commissioner were adopted by the Commission as its own. Under G.S. 97-86, this award became conclusive and binding as to all questions of fact.

The only injury which is compensable under the Workmen's Compensation Act is an "injury by accident arising out of and in the course of the employment." G.S. 97-2(6). In interpreting this statute, our Court, in *Conrad v. Foundry Company,* 198 N.C. 723, 726, 153 S.E. 266, 269 (1930), stated:

> ". . . The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. [Citations omitted.] There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. [Citation omitted.] . . ." *See Lee v. Henderson & Associates, supra.*

Unquestionably, in present case, plaintiff's injury by accident occurred "in the course of" his employment. It occurred on 18 October 1973 when, as required by the terms of his employment, he was on duty at the No. 3 Fire Station in Wilmington, North Carolina. As stated in 1 Larson, Workmen's Compensation Law § 24.00 (1972), "[w]hen an employee is required to live on the premises, either by his contract of employment or by the nature of the employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. . . ."

The determinative question in present case is whether plaintiff's injury arose "out of" his employment. This Court, in *Robbins v. Nicholson,* 281 N.C. 234, 238-39, 188 S.E. 2d 350, 354 (1972), said:

> "An accident occurring during the course of an employment . . . does not *ipso facto* arise out of it. The term 'arising out of the employment' is not susceptible of any all-inclusive definition, but it is generally said that an injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.' *Perry v. Bakeries Co.,* 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). . . ." *See also Lee v. Henderson & Associates, supra.*

Together, the phrases "arising out of" and "in the course of" are used in an attempt to separate work-related injuries from non-work-related injuries. Both tests are part and parcel of the single problem of determining the relationship between injury and employment.

> "In practice, the 'course of employment' and 'arising out of employment' tests are not, and should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other." 1 Larson, Workmen's Compensation Law § 29.00 (1972).

In *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955), this Court said:

> "The Act 'should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation,' *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591; but 'the rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched,' *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760."

[2] Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not. *Lee v. Henderson & Associates, supra; Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963).

In the case of *Lee v. Henderson & Associates, supra*, plaintiff, a salesman employed by a cabinet manufacturer, worked in his employer's shop during his training period and obtained permission from his superiors to build a doghouse for his own use from scrap material during working hours when he had nothing else to do. Each of the employer's salesmen was required to work in the shop every third Saturday. While on duty in the shop one Saturday, plaintiff had cut some cabinet parts. During a lull, he resumed work on his uncompleted doghouse and injured himself with an electric saw. A practice or custom had been established by the employer allowing its employees to use its equipment for personal projects. This Court, speaking through Chief Justice Bobbitt, stated:

> "The rule applicable when the employee has been directed, *as part of his duties,* to remain in a particular place or locality until directed otherwise or for a specified length of time, has been well stated by the Court of Appeals of New York in *Davis v. Newsweek Magazine,* 305 N.Y. 20, 28, 110 N.E. 2d 406, 409 (1953), as follows: 'In those circumstances, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.' . . ."

In *Stubblefield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882 (1970), an employee of an electrical construction com-

pany was fatally injured on the premises of the Cherokee Brick Company. While awaiting the return of his foreman, the employee was standing in a room where several conveyor belts were in operation. The employee, while using his idle time to knock dust and pieces of brick from the conveyor rollers with a pair of pliers, came into contact with the conveyor and received fatal injuries. Compensation was awarded.

In *Guest v. Iron & Metal Co., supra,* the employee went to a filling station to use the free air facilities in order to repair a tire for his employer. While there, the filling station operator asked the employee to assist him in pushing an automobile off the filling station premises. The employee was injured when he was struck by another automobile while pushing the stranger's automobile. We held that the injuries to the employee arose "out of and in the course of" his employment and were therefore compensable since the employee's acts were to an appreciable extent for the benefit of his employer. We further stated:

> " 'Acts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established.' Schneider, 7 Workmen's Compensation Text, sec. 1675."

In *Bellamy v. Manufacturing Co.,* 200 N.C. 676, 158 S.E. 246 (1931), the claimant, an employee in the spinning department, was required to remain in the mill for a half hour after work therein had stopped. During this period she was injured by accident while riding in an elevator to another floor of the

mill for the purpose of seeing about getting her friend a job in the mill. Again, compensation was awarded.

In present case, the hearing commissioner and the Commission found as a fact that it was the custom with firemen of the Wilmington Fire Department to make minor repairs to their automobiles during their lunch break, that plaintiff's superiors knew of this and made no objection, and that these repairs were to an appreciable extent a benefit to the fire department.

Article 25, Sec. LX11, of the Rules and Regulations of the Wilmington Fire Department, states that permission of the assistant chief on duty should be obtained before a fireman may repair his personal automobile. Plaintiff in this case did not obtain express permission of the assistant chief before attempting to clean his fellow employee's oil breather cap. However, as *Larson* states:

> "The most frequent ground for rejecting violation of rules as a defense, whether under the safety rule or wilful misconduct defense, is the lack of enforcement of the rule in practice. Habitual disregard of the rule has been made the basis of rejecting the defense in cases presenting such widely varied practices as . . . using gasoline for cleaning. . . ." 1A Larson, Workmen's Compensation Law § 33.30 (1973).

In *Parsons v. Swift & Co.*, 234 N.C. 580, 68 S.E. 2d 196 (1951), the deceased employee was employed to haul filler in a wheelbarrow at his employer's fertilizer plant. He was killed while attempting to move a tractor on the employer's premises. The employer had established a rule that no one should operate the tractors except those employees specifically directed to do so. The deceased was not specifically directed to drive the tractor. However, he had moved tractors under similar circumstances on previous occasions, as had other employees who were not specifically directed to operate tractors. We held the injury to be compensable even though the deceased had violated his employer's rule. *See Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850 (1947).

In present case, the Chief of the Wilmington Fire Department stated: "We allow a man to do minor things to his automobile—no big overhaul—and he is supposed to get permission

to do anything of any degree. But to check his tires, check his oil, the battery or some minor thing during a lunch period, we don't have any objection to him doing that."

Captain Rhodes of the Wilmington Fire Department stated: "During the lunch hour firemen who are on duty, if they wish, are allowed to check their automobiles, but as far as doing any work on them they are not allowed to do any work on them. They are not allowed to do any *major work. It would be all right to do some little incidental thing.*" (Emphasis added.)

[3] In the case at bar there was competent evidence to support the hearing commissioner's findings adopted by the Commission that plaintiff was required by his employer to remain at the fire station during his entire twenty-four-hour tour of duty, that firemen often made minor repairs to their automobiles on the fire station premises during their lunch hour, and that this practice was well known to and was allowed by plaintiff's superiors. There was further competent evidence to support a finding that repairs of a minor nature to personal automobiles were to an appreciable extent a benefit to the fire department in that by keeping their automobiles in working condition the firemen could use them to report to duty when they were off duty in the event of an emergency, and also to support the finding that plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on 18 October 1973. Such findings are conclusive on appeal. *Lee v. Henderson & Associates, supra; Stubblefield v. Construction Co., supra; Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950) : *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320 (1944).

We hold, therefore, that plaintiff's act in assisting in the cleaning of the oil breather cap from a fellow employee's car during the lunch period was a reasonable activity, and that the risk inherent in such activity was a risk of the employment. This reasonableness is attested by the fact that such practice was well known to plaintiff's superiors who made no objection but, in fact, specifically allowed firemen to make such minor repairs during their lunch hour.

Other assignments of error have been considered and are without merit.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JOHNNY McMORRIS

No. 39

(Filed 17 June 1976)

1. **Burglary and Unlawful Breakings § 8; Criminal Law §§ 102, 138— counsel's statement of punishment to jury — refusal error**

Defendant in a first degree burglary case is entitled to a new trial where the court denied defense counsel's motion to be allowed to inform the jury that conviction would necessarily result in the imposition of a life sentence, since such denial was an unwarranted and prejudicial restriction on defendant's right to argue fully the "whole case" as permitted by G.S. 84-14.

2. **Criminal Law §§ 102, 138— counsel's statement of punishment to jury — impermissible argument**

A defendant should not be permitted to argue that because of the severity of the statutory punishment the jury ought to acquit, to question the wisdom or appropriateness of the punishment, or to state the punishment provisions incorrectly; nor should either the State or the defendant be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons.

3. **Criminal Law §§ 161, 166— assignment of error to signing of judgment — no argument in brief — nothing presented for review**

In a first degree burglary and second degree rape case where defendant assigned as error the signing of the judgment in each case, but no argument was presented in defendant's brief on this point, neither the assignment of error nor the appeal itself presented anything for review. N. C. Rules of Appellate Procedure, Rule 28.

APPEAL of right pursuant to General Statute 7A-27(a) from a judgment in 75-CR-16882 sentencing defendant to life imprisonment upon conviction for burglary in the first degree. Defendant was tried before *Ferrell, J.*, at the October 27, 1975 Criminal Session of BUNCOMBE County Superior Court. Defendant was also convicted of second degree rape in 75-CR-16881 and sentenced to 16-20 years imprisonment to be served concurrently with the life sentence for burglary. We allowed defendant's motion to by-pass the Court of Appeals on the rape conviction.

Rufus L. Edmisten, Attorney General, by James Wallace, Jr., Associate Attorney, for the State.

Peter L. Roda, Public Defender for the 28th Judicial District, for the defendant.

EXUM, Justice.

I

[1] After the close of the evidence, defense counsel, in the jury's absence, moved to be allowed to inform the jury that conviction of burglary in the first degree would necessarily result in the imposition of a life sentence. The motion was denied by the trial court. The State and defendant stipulate that "the fact that a conviction of first degree burglary carried a mandatory life sentence was not mentioned by anyone in his argument." Defendant assigns as error the denial of this motion. This assignment is sustained.

We begin discussion with the last sentence of General Statute 84-14: "In jury trials the whole case as well of law as of fact may be argued to the jury." The origins of this provision are obscure but in *State v. Miller*, 75 N.C. 73, 74 (1876) Justice Reade said:

> "Some twenty five years ago a circuit judge restrained a lawyer from arguing the *law* to the *jury*, suggesting that the argument of the law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury."

The law which this provision allows to be argued must of course be the law applicable to the facts of the case. *State v. Crisp*, 244 N.C. 407, 94 S.E. 2d 402 (1956). The whole *corpus juris* is not fair game.

In a real sense the sanction prescribed for criminal behavior is part of the law of the case. Indeed, the dispute in jurisprudential circles is whether the sanction for its violation is the *only* thing which distinguishes law from custom. *See* H. L. A. Hart, The Concept of Law, Chapters 1 and 2 (1961).

It is, consequently, permissible for a criminal defendant in argument to inform the jury of the statutory punishment

provided for the crime for which he is being tried. In serious felony cases, at least, such information serves the salutary purpose of impressing upon the jury the gravity of its duty. It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration. "Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. G.S. 84-14; *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 245." *State v. Britt,* 285 N.C. 256, 273, 204 S.E. 2d 817, 829 (1974). See also General Statute 15-176.9 which provides that:

> "When a case will be submitted to a jury on a charge for which the penalty involves the possibility of the loss of a motor vehicle driver's license, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

This general rule applies with even greater force to a case, such as this, where the consequence of conviction is a mandatory life sentence. Denial of permission to counsel to so inform the jury was an unwarranted and prejudicial restriction on defendant's right to argue fully the "whole case" as permitted by General Statute 84-14. For this error defendant is entitled to a new trial in 75-CR-16882, the burglary case.

[2] This does not mean that a defendant should be permitted to argue that because of the severity of the statutory punishment the jury ought to acquit; to question the wisdom or appropriateness of the punishment; or to state the punishment provisions incorrectly. *State v. Britt, supra; State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974). Nor should either the State or the defendant be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947).

Recently we held it was not error to refuse to permit defendant "an opportunity to *argue* to the jury the *question* of punishment for [first degree] burglary." *State v. Hedrick,* 289 N.C. 232, 221 S.E. 2d 350 (1976). In *Hedrick,* however, as carefully noted in the opinion, the record before us did not put defendant's point so clearly as the record we now consider does.

Hedrick's contention was that since the district attorney had told the jury that first degree burglary was no longer punishable by death, he should be allowed "to argue the question of punishment" as a matter of fairness and to avoid any possible juror confusion on the point. The record in *Hedrick,* though, disclosed no request by defendant to state simply that a life sentence would be imposed, no ruling by the trial court, no statement on the point by the district attorney and no evidence of any jury confusion. Neither was General Statute 84-14, upon which we base this decision, cited to the court or relied on by Hedrick. The Court in *Hedrick* understood defendant's position to be that he should be permitted to argue that the mandatory sentence was unduly severe or inappropriate.

In *State v. Rhodes,* 275 N.C. 584, 591, 169 S.E. 2d 846, 851 (1969) this Court expressly disapproved a statement in *State v. Garner,* 129 N.C. 536, 40 S.E. 6 (1901) to the effect that juries in noncapital cases were entitled to be informed of the punishment prescribed for the crime charged. *Garner, Rhodes* and the authorities upon which *Rhodes* relied, however, dealt with statements regarding punishment made by trial judges in their jury instructions. These cases were not concerned with jury arguments by counsel nor General Statute 84-14. The carefully considered and well documented opinion by Justice, now Chief Justice, Sharp in *State v. Rhodes, supra,* represents this Court's most comprehensive discussion of the trial judge's duty relative to informing the jury regarding possible punishments in noncapital cases.

In capital cases the right of the State or the defendant to inform the jury of the consequences of a verdict of guilty is prescribed by General Statute 15-176.3 which reads:

> "When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime";

and General Statute 15-176.5 which reads:

> "When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

The judge's duty in capital cases is now prescribed by General Statute 15-176.4 and *State v. Britt, supra.* The statute reads:

> "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."

We held in *State v. Britt, supra* at 272, 204 S.E. 2d at 828:

> "Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of their possible verdicts."

Before the effective date of General Statute 15-176.4 (July 1, 1974) and before *Britt,* this Court had said in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), that jury instructions on punishment in capital cases should not thereafter be given since the punishment of death would thereafter be mandatory rather than a matter for jury determination. After *Waddell* the Court soon held that it was not error for the trial judge to refuse to inform the jury that a mandatory sentence of death would result from a conviction of the then capital crime of rape or first degree burglary. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). General Statute 15-176.4 and our holding in *Britt* modified the Court's statement in *Waddell* and its holding in *Henderson.*

The legislature has not yet spoken regarding the judge's duty to inform the jury of the mandatory life sentence in those noncapital cases where it must be imposed. The references in *Rhodes* to "noncapital" cases were to cases where punishment

was left to the trial judge's discretion. There were no crimes for which the punishment was a mandatory life sentence at the time *Rhodes* was decided. *State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534 (1973) cert. denied 414 U.S. 1132, furthermore, was a rape case in which both the crime and the trial occurred after the United States Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972) and before this Court's decision in *Waddell. Washington* held that it was not error to fail to instruct the jury that life imprisonment was the punishment for rape when the trial court did, incorrectly, instruct that upon a verdict of guilty the defendant would be sentenced to death. Whether the trial judge should tell the jury in a proper case that upon conviction a mandatory life sentence will be imposed is still an open question. It could hardly be error to do so.

II

[3] Defendant assigns as error the signing of the judgment in each case. No argument is presented in the brief on this point other than a reiteration of prior arguments and a submission to the Court to review the record and determine whether error has been committed.

Under former practice an appeal itself or an exception to the signing of the judgment presented for review errors committed on the face of the record proper. 1 Strong's North Carolina Index 3rd, Appeal and Error § 26 (1976). In a criminal case the record proper then consisted of the organization of the court, the indictment, plea, verdict and judgment. In rare cases in the exercise of its general supervisory powers the Court has considered the sufficiency of the evidence to support the verdict, when there was a total lack of proof of an element of the crime charged. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972).

The procedure is somewhat different for cases in which notice of appeal was given on and after July 1, 1975, because the new North Carolina Rules of Appellate Procedure, 287 N.C. 671 (1975), apply. Rule 9 abandons the former distinction made between the "record proper" and the "settled case on appeal." Instead, the single concept of "record on appeal" is used, the composition of which is governed by Rule 9(b). Rule 28 specifies that briefs are "to define clearly the questions presented to the reviewing court and to present the arguments and au-

thorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented . . . . " Although review is also normally limited to questions which are based on exceptions and assignments of error found in the record on appeal the proviso to Rule 10(a) allows review of questions formerly presented by the appeal itself or an exception to the judgment (such as the sufficiency of the indictment, subject matter jurisdiction, and regularity of the judgment) "when such question is properly raised in the brief." General Statutes 15-173 and 15-173.1 allow the question of the sufficiency of the evidence to be argued on appeal even in the absence of appropriate exceptions in the record or motions in the trial court. This does not negate the requirement of Rule 28 that even this question must be presented and argued in the brief in order to obtain appellate review of it.

In this case defendant makes no argument in his brief specifically related to this assignment and cites no authority for his proposition that the court erred in signing the judgment. Neither this assignment of error nor the appeal itself, therefore, presents anything for review. Since, however, defendant was obviously relying on our former rules we have considered what used to be called the "record proper" and find it to be regular in all respects. This assignment of error is overruled.

For reasons set out earlier defendant is entitled to a new trial on the first degree burglary charge. There is no error in the second degree rape conviction.

In 75-CR-16882 (burglary)—NEW TRIAL.

In 75-CR-16881 (rape)—NO ERROR.

STATE OF NORTH CAROLINA v. ALFORD JONES

No. 29

(Filed 17 June 1976)

1. **Homicide § 4— homicide in perpetration of robbery — first degree murder**

A murder committed in the perpetration of, or attempt to perpetrate, a robbery is murder in the first degree and punishable by death.

2. **Constitutional Law § 36; Homicide § 31— felony-murder — death penalty constitutional**

G.S. 14-17 denoting the types of homicides which constitute murder in the first degree and providing that the punishment therefor be death is constitutional.

3. **Homicide § 20— photographs of clothing admitted — subsequent admission of clothing — no error**

Articles of clothing worn by a homicide victim were admissible in the trial of his assailant, even though photographs of the victim's clothing had been previously admitted for illustrative purposes.

4. **Homicide § 21— gunshot wound — treatment with drug — reaction to drug as cause of death — sufficiency of evidence of homicide**

The State's evidence was sufficient to show beyond a reasonable doubt that the death of deceased was proximately caused by shotgun pellets fired into his chest by defendant where such evidence tended to show that prior to the robbery-homicide the victim was 60 and suffered from a chronic lung disease which left his lungs black, very fibrous and scarred; on 6 January 1975 defendant shot him in the left chest with a sawed-off shotgun inflicting wounds over an area of 12 to 13 inches; the pellets penetrated the skin and muscles of the chest wall, puncturing the left lung and permitting air to leak into the space between the lung and chest wall; the lung partially collapsed; the injury to the lungs caused a severe infection; to arrest the infection it was necessary for the attending physicians to administer antibiotics in the form of sulfa drugs, including a drug called gantrisin; the victim had a hypersensitivity to gantrisin and developed myocarditis, an inflammation of the heart which can be fatal; the inflammation of the victim's heart was the immediate cause of his death and was a natural and direct result of the gunshot wound he sustained.

5. **Homicide § 21— inflicting injury — negligent treatment or neglect — sufficiency of evidence of murder**

If it be conceded *arguendo* that a victim's death immediately resulted from improper or unskilled treatment by attending physicians, that is no defense to a charge of homicide against one who has inflicted a dangerous wound which necessitated the treatment, since neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was *the sole cause of death.*

DEFENDANT appeals from judgment of *Webb, J.*, 17 March 1975 Criminal Term, LENOIR Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of William B. Turner, Sr., on 6 January 1975 in Lenoir County.

The State's evidence tends to show that defendant and two accomplices named Randolph Jackson Freeman and Jessie Ray

Harris met at a trailer in Kinston on the late afternoon of 6 January 1975 and agreed "to go to the country to get some money . . . by armed robbery." With Freeman driving, the three men rode into the country looking for stores they could rob. They were armed with a .22 caliber pistol and a sawed-off shotgun, both furnished by defendant. When they arrived at the first grocery store it was closed. They drove on to a second store but, observing many cars and people there, decided it was too crowded to rob. They returned to Kinston and rode around looking for someone to rob. On Willow Street they saw a man leave a house and enter a white Ford. Defendant said he might be an insurance man and told the driver to follow him. They followed the "insurance man" down Willow Street. When he stopped at a trailer home and entered, defendant and Jessie Ray Harris left the car and told Randolph Freeman to wait for them around the corner. Defendant at that time was armed with the sawed-off shotgun and Jessie Ray Harris with the .22 caliber pistol. Defendant and Harris put some black silk cloth over their faces and waited until the "insurance man" came out. In about three minutes he left the trailer and started for his car. The two robbers converged upon him as defendant leveled the shotgun at the man. The victim started "to go in his pocket for his gun" and defendant shot him in the chest with the sawed-off .410 shotgun. The two robbers then fled and were picked up by Randolph Freeman.

The foregoing is a brief summary of the testimony of Randolph Freeman and Jessie Ray Harris, both of whom pled guilty to second degree murder and conspiracy to commit armed robbery and testified for the State.

The "insurance man" was later identified as William B. Turner, Sr. At the time he was shot he was making his rounds, collecting insurance premiums. He made his way to a nearby house and sought help. An ambulance was called and Mr. Turner was taken to Lenoir Memorial Hospital in Kinston. He was suffering from shotgun wounds in the chest and died on 27 January 1975.

Dr. Sylvanus W. Nye, an expert in the field of pathology, performed an autopsy upon the body. Wounds on the left chest were spread over an area of 12 to 13 inches, scattered in a random pattern. Pellets were found in the wounds beneath the skin and in the muscles of the chest wall. The lung was torn so that air leaked into the space between the lung and the chest

wall. In the course of medical treatment a tube had been inserted by the surgeon into the chest cavity to evacuate air that had collected there. The right lung was fully expanded but the left lung was partially collapsed due to air leakage where a pellet had torn the lung.

Mr. Turner had been treated with sulfa drugs, including a drug called gantrisin which had been administered the day before he died. It was Dr. Nye's opinion that Mr. Turner had a hypersensitivity to gantrisin and developed myocarditis, an inflammation of the heart which can be fatal. Dr. Nye testified: "The man had chronic lung disease. The injury to his lungs had caused a severe infection. He was still producing purulent sputum and they needed another antibiotic agent to try to control the chronic infection in his lung." In the opinion of Dr. Nye, that was the reason gantrisin was administered to Mr. Turner. When asked to state his opinion as to the cause of death, Dr. Nye said: "The inflammation of his heart was the immediate cause of his death. I would say the immediate cause of his death was a natural and direct result of the gunshot wound he sustained on January 6, 1975."

Defendant offered no evidence. The jury convicted him of murder in the first degree, and he was sentenced to death. He appealed to the Supreme Court and assigns errors discussed in the opinion.

Leland M. Heath, Jr., attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; Edwin M. Speas, Jr., Special Deputy Attorney General; Elizabeth C. Bunting, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendant moved to quash the bill of indictment on the ground that G.S. 14-17 is unconstitutional. Denial of the motion constitutes his first assignment of error.

While the constitutionality of a statute under which a defendant is prosecuted may be challenged by a motion to quash, *State v. Fredell,* 283 N.C. 242, 195 S.E. 2d 300 (1973); *State v. Atlas,* 283 N.C. 165, 195 S.E. 2d 496 (1973), the motion in this case is merely an extension of the argument that the death penalty constitutes cruel and unusual punishment proscribed by the Eighth Amendment to the Federal Constitution.

Article XI, section 2 of the Constitution of North Carolina reads as follows:

> "The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

G.S. 14-17 reads, in pertinent part, as follows:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."

[1] Application of the felony-murder rule contained in the quoted enactment of the General Assembly supplants the necessity for proof of an intentional killing with malice after premeditation and deliberation. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). Thus a murder committed in the perpetration of, or attempt to perpetrate, a robbery is murder in the first degree and punishable by death. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974).

[2] The constitutionality of G.S. 14-17 has been upheld by this Court in many recent decisions, including *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). Unless further review is required by legislative enactment or by the Supreme Court of the United States, this assignment has been the subject of final judicial determination in this State.

[3] Defendant contends the trial court erred by permitting articles of clothing worn by the deceased to be offered in evidence and passed among the members of the jury. Photographs of the victim's clothing had been previously admitted for illus-

trative purposes, and defendant argues admission of the articles themselves merely inflamed the jury against him. This constitutes defendant's second assignment of error.

This assignment is without merit. Articles of clothing worn by the victim at the time the crime was committed are competent evidence, and their admission has been approved in many decisions. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599 (1970); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971); *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645 (1958); *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949), *cert. denied* 340 U.S. 835, 95 L.Ed. 613, 71 S.Ct. 18 (1950); *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653 (1946); *State v. Wall,* 205 N.C. 659, 172 S.E. 216 (1934); *State v. Fleming,* 202 N.C. 512, 163 S.E. 453 (1932); *State v. Vann,* 162 N.C. 534, 77 S.E. 295 (1913). *See* 1 Stansbury's North Carolina Evidence § 118 (Brandis rev. 1973), and cases cited therein.

The fact that photographs of articles of clothing worn by the deceased on the night he was shot had been previously offered in evidence does not make the clothing itself inadmissible. In *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972), it was argued that the introduction of certain items of clothing unnecessarily tended to inflame the minds of the jurors so as to deny defendant a fair trial because certain stipulations had been entered into between the State and defendant regarding the circumstances of the death. Held: Such items of evidence were admissible as tending to shed light upon the crime notwithstanding the stipulations of counsel.

So it is here. The victim, William B. Turner, Sr., was shot in the chest and the clothing through which the shots passed was admissible to show the location of the wounds and was strong evidence on the issue whether the death of the deceased was proximately caused by the infliction of the shotgun wounds. The blood-covered items of clothing were relevant and shed light upon the extent of the bleeding and the seriousness of the wounds suffered by the deceased. Defendant's second assignment is overruled.

Defendant moved for nonsuit at the close of the State's evidence. His motion is grounded upon the contention that the

evidence is insufficient to establish a causal relation between the victim's death and the gunshot wounds inflicted upon him by defendant. Denial of the motion constitutes defendant's third and final assignment of error.

To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death. *See State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952); *State v. Everett,* 194 N.C. 442, 140 S.E. 22 (1927). Criminal responsibility arises only if his act caused or directly contributed to the death. *State v. Luther,* 285 N.C. 570, 206 S.E. 2d 238 (1974); *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694 (1958). *See* 40 Am. Jur. 2d, Homicide §§ 13 and 15 (1968), and cases cited therein. "[T]he act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is a natural result of the criminal act." *State v. Minton, supra; accord, State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132 (1955).

[4] When tested by these rules, the State's evidence in this case suffices to show beyond a reasonable doubt that the death of William B. Turner, Sr., was proximately caused by the shotgun pellets fired into his chest by defendant. The State's evidence is sufficient to support the following findings: Prior to the robbery the victim was sixty years of age and suffered from a chronic lung disease which left his lungs black, very fibrous and scarred. On 6 January 1975 defendant shot him in the left chest with a .410 gauge sawed-off shotgun inflicting wounds over an area of 12 to 13 inches. The pellets penetrated the skin and the muscles of the chest wall, puncturing the left lung and permitting air to leak into the space between the lung and the chest wall. This caused a partial collapse of the left lung due to air leakage. The injury to the lungs caused a severe infection which was producing purulent sputum. To arrest the infection it was necessary for the attending physicians to administer antibiotics in the form of sulfa drugs, including a drug called gantrisin. Mr. Turner had a hypersensitivity to gantrisin and developed myocarditis, which is an inflammation of the heart that can be fatal. The inflammation of Mr. Turner's heart was the immediate cause of his death and was a natural and direct result of the gunshot wound he sustained on 6 January 1975. These permissible findings are fully supported by the expert testimony of Dr. Nye. It necessarily follows that the evidence was sufficient to carry to the jury the question whether

the shotgun wounds inflicted upon the deceased by the defendant were the proximate cause of death. *See State v. Bartlett,* 257 N.C. 669, 127 S.E. 2d 241 (1962). *See also State v. Parrish,* 251 N.C. 274, 111 S.E. 2d 314 (1959); *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956).

[5] The fact that the gantrisin caused myocarditis which, in turn, was the immediate cause of death, affords defendant no sanctuary. If it be conceded *arguendo* that the victim's death immediately resulted from improper or unskilled treatment by attending physicians, that is no defense to a charge of homicide against one who has inflicted a dangerous wound which necessitated the treatment. Neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was *the sole cause of death. See* 40 Am. Jur. 2d, Homicide, § 19 (1968), and cases cited therein; Annot., 100 A.L.R. 2d 769 (1965). Where, as here, gunshot wounds inflicted by the accused are a contributing cause of death, defendant is criminally responsible therefor. Defendant's third assignment of error is overruled.

The record discloses a senseless and unprovoked killing committed during the attempted perpetration of an armed robbery. Defendant stands properly convicted of this crime following a fair trial before an impartial jury. The verdict and judgment must therefore be upheld.

No error.

IN THE MATTER OF: JUDGE JOSEPH P. EDENS

No. 82

(Filed 17 June 1976)

1. Judges § 7— misconduct in office — proceeding before Judicial Standards Commission

A proceeding before the Judicial Standards Commission is neither criminal nor civil in nature but is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges.

2. **Judges § 7— wilful misconduct in office**

Wilful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith; it is more than a mere error of judgment or an act of negligence, and while the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present.

3. **Judges § 7— conduct prejudicial to administration of justice that brings judicial office into disrepute**

Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.

4. **Judges § 7— misconduct in office — motives — results of conduct**

Whether the conduct of a judge may be characterized as prejudicial to the administration of justice that brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers.

5. **Judges § 7— conduct prejudicial to administration of justice that brings judicial office into disrepute — constitutionality of phrase**

The phrase "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" is not unconstitutionally vague or overbroad.

6. **Judges § 7— misconduct in office — matters considered**

In determining whether conduct of a judge constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute, consideration should be given to the traditions, heritage, and generally recognized practices of the courts and the legal profession, the common and statutory law, codes of judicial conduct, and traditional notions of judicial ethics.

7. **Judges § 7— misconduct in office — ex parte disposition of criminal case outside courtroom — censure by Supreme Court**

A district court judge, upon recommendation of the Judicial Standards Commission, is censured by the Supreme Court for wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute because of his disposition of a criminal case outside the courtroom when the court was not in session and without notice to the district attorney who was prosecuting the docket when the matter was not on the printed calendar for disposition, since the judge's action (1) improperly precluded the district attorney from participating in the disposition, (2) improperly removed the proceeding from the public domain, and (3) violated Canon 3(A)(4) of the North Carolina Code of Judicial Conduct.

Justice LAKE did not participate in the decision of this matter.

In re Edens

APPEARANCES:

Simpson, Baker & Aycock by Gene Baker, for Judge Joseph P. Edens, respondent.

Rufus L. Edmisten, Attorney General, by Millard R. Rich, Jr., Deputy Attorney General, and Special Counsel James E. Scarbrough, Associate Attorney for Judicial Standards Commission.

ORDER OF CENSURE

This matter is before the Court upon the Recommendation of the Judicial Standards Commission (Commission) filed with us on February 3, 1976, that Judge Joseph P. Edens, a judge of the General Court of Justice, District Court Division, Twenty-Fifth Judicial District (Respondent), be censured for "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," as these phrases are used in Article IV, Section 17(2) of the North Carolina Constitution and General Statute 7A-376 (1974 Cum. Supp.). Having considered the record in the matter consisting of the verified complaint and answer filed with, the evidence heard by, the findings of fact, conclusions, and Recommendation made by the Commission, together with the briefs and arguments before us for Respondent and Commission, we note the following procedure before and findings of the Commission and we make the following conclusions of law and order of censure:

PROCEDURE BEFORE AND FINDINGS OF THE COMMISSION

1. This proceeding was instituted before the Commission in July, 1975, by the filing of a verified complaint which alleged that Respondent had engaged in wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that on February 20, 1975, in Criminal Case No. 74-CR-18186 pending in Catawba County, wherein a defendant was charged with driving a motor vehicle under the influence of intoxicating liquor, Respondent accepted a plea of guilty and entered judgment under the following circumstances:

> "(a) the plea of guilty was not taken in open court in the presence of the defendant, the assistant district attorney and the prosecuting officer; (b) the plea of guilty was

taken without prior notice to the assistant district attorney; (c) the judgments signed by the Respondent were signed out of the presence of the defendant, assistant district attorney and prosecuting officer; (d) the judgments were signed by Respondent when court was not in session and in places where court is not held; and (e) the judgments were signed without prior notice to the assistant district attorney."

2. Respondent filed a verified answer which, in part, alleged as follows:

"a. This answering respondent denies any wilful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

"b. This respondent denies that the plea of guilty was not taken in open court; this respondent was in the basement Courtroom, Newton, North Carolina, when the plea of guilty to the charge was tendered to the Court by Mr. Matthews.

"c. This respondent admits that neither the defendant nor the assistant district attorney nor the prosecuting officer were present when the plea of guilty was taken.

"d. This respondent admits accepting the guilty plea without prior notice to the assistant district attorney. The plea of guilty was to the exact charge.

"e. This answering respondent admits signing both judgments out of the presence of the defendant, assistant district attorney and prosecuting officer. This respondent dictated one judgment in the Clerk's office to Mrs. Lemons and signed same and left for the day. This respondent had no reason to suspect that the judgment written by Mrs. Lemons on the Uniform Traffic Citation that this respondent signed outside the courthouse was any different from the one that this respondent had dictated several minutes earlier in the Clerk's office.

"f. This respondent admits signing the first judgment in the Clerk's office in Newton, North Carolina and signing the Uniform Traffic Citation moments later just outside the Courthouse in Newton, North Carolina."

3. Upon due notice, Respondent was accorded a full adversary hearing before the Commission on October 9, 1975, at which time he was represented by counsel. The Commission considered pertinent portions of the pleadings, the sworn testimony of Mrs. Anne Lemons, Deputy Clerk, Catawba County, a statement made by Respondent on April 22, 1975, to one Dallas A. Cameron, Jr., an investigator for the Commission, which statement was tendered at the hearing by Respondent, together with certain exhibits which included the affidavit and warrant and a judgment signed by Respondent on a Uniform Traffic Citation in Criminal Case No. 74-CR-18186 in Catawba County.

4. Upon this evidence the Commission found certain facts as follows:

"6. That on February 20, 1975, Respondent presided over a criminal session of the District Court of Catawba County. That said session was held in the basement of the County Building in Newton, North Carolina.

"7. That on February 20, 1975, Deputy Clerk of Superior Court Mrs. . . . Lemons was present at said criminal session presided over by respondent. That Mrs. Lemons kept the records of the Court during said session. That at said Session, the State was represented by Assistant District Attorney Robert Grant.

"8. That criminal case #74CR18186, wherein the defendant was Henry Conner Coan, Jr., was not on the printed calendar for disposition on February 20, 1975 and no proper motion in said case was before the judge. That the Court papers for said case were not in the courtroom on said date but were in the Clerk's office on the main floor of said building.

"9. That on February 20, 1975, Assistant District Attorney Robert Grant announced in open court that he was through with the docket and Mrs. . . . Lemons thereupon left the courtroom and returned to the District Clerk's office on the main floor of said building.

"10. That Mrs. . . . Lemons had been in the Clerk's office only a few minutes after she had left the District Court when the respondent and Mr. Phillip Matthews, an attorney of Catawba County, approached her and requested her to pull the official file in case #74CR18186. That Mrs.

Lemons secured said file from the court records in said office and respondent instructed Mrs. . . . Lemons to enter a Judgment for Prayer for Judgment Continued for six months which Mrs. Lemons did.

"11. That the entry of Prayer for Judgment Continued for six months was made by Mrs. Lemons in the presence of respondent and Phillip Matthews but not in the presence of defendant Henry Conner Coan, Jr., nor in the presence of the Assistant District Attorney Robert Grant.

"12. That said Judgment was entered in the office of the Clerk and not in open court when court was in session and when no proper motion in said case was before the Judge.

"13. That said Judgment was entered without the prior knowledge or consent of the Assistant District Attorney who had prosecuted the docket on February 20, 1975, to wit, Robert Grant.

"14. That immediately upon the entry of the aforesaid Judgment in Case #74CR18186, respondent left the office of the Clerk. That in two or three minutes thereafter Mrs. . . . Lemons informed Attorney Phillip Matthews that she needed the respondent's signature on the bottom of the citation because such citation form had to be sent to the North Carolina Department of Motor Vehicles in Raleigh. That immediately Phillip Matthews left the office of the Clerk with said form and he returned with it to the Clerk's office within three minutes with the signature of the respondent thereon. That said Judgment reads 'Prayer for Judgment continued for Six Months on payment of Cost.' That Phillip Matthews then paid the cost to Mrs. . . . Lemons. That respondent had signed said form outside the courthouse. That a certified copy of said form was entered into evidence in this cause."

CONCLUSIONS OF LAW AND ORDER OF CENSURE

1. The Commission's findings are supported by the evidence. We affirm these findings.

[1] 2. "This proceeding is neither criminal nor civil in nature. It is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to

maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges." *In re Crutchfield,* 289 N.C. 597, 602, 223 S.E. 2d 822, 825 (1975).

3. In his petition for a hearing before this Court filed pursuant to Rule 2 of the Rules For Supreme Court Review of Recommendations of The Judicial Standards Commission, 289 N.C., Vol. 9, No. 6, Supreme Court Advance Sheets (hereinafter Rules For Supreme Court Review), Respondent contends first, that there was no legislative authority to create the Commission since the constitutional amendments authorizing its creation had not become effective when the enabling legislation was enacted and second, that the proceedings before the Commission are violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Respondent, however, makes no argument on these points in his brief and cites no authority in support of them. He has, consequently, abandoned these contentions making it unnecessary for this Court to address itself to them. *See* Rule 2(d) of the Rules For Supreme Court Review and Rule 28, Rules of Appellate Procedure, 287 N.C. 671, 741 (1975).

[2] 4. Wilful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present. *See generally, Spruance v. Commission on Judicial Qualifications,* 13 Cal. 3d 778, 532 P. 2d 1209, 119 Cal. Rptr. 841 (1975); *Geiler v. Commission on Judicial Qualifications,* 10 Cal. 3d 270, 515 P. 2d 1, 110 Cal. Rptr. 201 (1973), cert. denied, 417 U.S. 932; *In re Haggerty,* 257 La. 1, 241 So. 2d 469 (1970). This phrase is not unconstitutionally vague or overbroad. *Keiser v. Bell,* 332 F. Supp. 608 (E.D. Pa. 1971).

[3-5] 5. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *Geiler v. Commission on Judicial Qualifications, supra* at 284, 515 P. 2d at 9, 110 Cal. Rptr. at 209 (1973). Whether the conduct of a judge may be so characterized

"depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Crutchfield, supra* at 603, 223 S.E. 2d at 826. This phrase is not unconstitutionally vague or overbroad. *See Parker v. Levy,* 417 U.S. 733 (1974).

[6] 6. In applying the criteria above described, consideration should be given to the traditions, heritage, and generally recognized practices of the courts and the legal profession, the common and statutory law, codes of judicial conduct, and traditional notions of judicial ethics. While not necessarily determinative these may be usefully consulted to give meaning to the constitutional and statutory prohibitions. *See In re Crutchfield, supra,* and cases cited therein.

7. It is not clear from the Commission's findings whether Respondent authorized the entry of a "Prayer for Judgment continued for Six Months on payment of Cost." It is clear that he at least authorized the entry of a "Prayer for Judgment Continued for six months." His acceptance of a guilty plea and his authorization of this latter entry constituted a disposition, even if not a final one, of the case. It is more than a mere continuance of the matter; although a continuance would itself be a disposition, albeit not final, of the case.

[7] 8. A criminal prosecution is an adversary proceeding in which the district attorney, as an advocate of the state's interest, is entitled to be present and be heard. Respondent's disposition of Criminal Case No. 74-CR-18186, without notice to the district attorney who was prosecuting the docket when the matter was not on the printed calendar for disposition, improperly excluded the district attorney from participating in the disposition.

9. The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. *See* N. C. Const., Art. I, § 18. "The public, and especially the parties, are entitled to see and hear what goes on in the courts." *Raper v. Berrier,* 246 N.C. 193, 195, 97 S.E. 2d 782, 784 (1957). Respondent's disposition of Criminal Case No. 74-CR-18186 outside the courtroom when court was not in session improperly removed the proceeding from the public domain where it belonged and made it instead a private matter between him and counsel for the defendant.

10. Canon 3(A)(4) of the North Carolina Code of Judicial Conduct, 283 N.C. 771, 772, provides that "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Respondent's disposition of Criminal Case No. 74-CR-18186 violated this Canon.

11. We conclude that Respondent's disposition of Criminal Case No. 74-CR-18186 constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that it (1) improperly precluded the district attorney from participating in the disposition; (2) improperly removed the proceeding from the public domain; and (3) violated Canon 3(A)(4) of the North Carolina Code of Judicial Conduct. For this conduct Respondent ought to be censured in accordance with the Recommendation of the Judicial Standards Commission.

Now, therefore, it is ORDERED that Judge Joseph P. Edens be and he is hereby censured by this Court.

Done by the Court in Conference this 17th day of June, 1976.

EXUM, Justice
For the Court.

Justice LAKE did not participate in the decision of this matter.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ENTERPRISES, INC. v. NEAL

No. 155 PC.

Case below: 29 N.C. App. 78.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976.

HEATH v. BD. OF COMRS.

No. 140 PC.

Case below: 29 N.C. App. 185.

Petition by defendant Bd. of Comrs. for discretionary review under G.S. 7A-31 allowed 17 June 1976.

IN RE WILL OF EDGERTON

No. 154 PC.

Case below: 29 N.C. App. 60.

Petition for discretionary review under G.S. 7A-31 denied 17 June 1976.

JOHNSON v. AUSTIN

No. 163 PC.

Case below: 29 N.C. App. 415.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 June 1976.

KOEHRING CO. v. MARINE CORP.

No. 201 PC.

Case below: 29 N.C. App. 498.

Petition by defendant Indemnity Co. for discretionary review under G.S. 7A-31 denied 21 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

MARKHAM v. SWAILS

No. 161 PC.

Case below: 29 N.C. App. 205.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 June 1976. Motion of defendants to dismiss appeal for failure to comply with Rule 36 allowed 17 June 1976.

RIVERS v. RIVERS

No. 156 PC.

Case below: 29 N.C. App. 172.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976.

SHERMAN v. MYERS

No. 136 PC.

Case below: 29 N.C. App. 29.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 June 1976. Appeal dimissed ex mero motu for lack of substantial constitutional question 17 June 1976.

STATE v. CARLTON

No. 92.

Case below: 28 N.C. App. 573.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976.

STATE v. CRAWFORD AND MOSES

No. 157 PC.

Case below: 29 N.C. App. 421.

Petition by defendant Crawford for discretionary review under G.S. 7A-31 denied 17 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. FAIR

No. 151 PC.

Case below: 29 N.C. App. 147.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 17 June 1976.

STATE v. GRADY

No. 150 PC.

Case below: 29 N.C. App. 421.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 June 1976.

STATE v. GRAHAM

No. 152 PC.

Case below: 29 N.C. App. 234.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 June 1976.

STATE v. JOHNSON

No. 137 PC.

Case below: 29 N.C. App. 141.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 June 1976.

STATE v. MATTHEWS AND EVANS

No. 158 PC.

Case below: 29 N.C. App. 186.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 June 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. MITCHELL AND WHITAKER

No. 109 PC.

Case below: 29 N.C. App. 4.

Petition by defendant Whitaker for discretionary review under G.S. 7A-31 denied 17 June 1976.

STATE v. PAIVA

No. 141 PC.

Case below: 29 N.C. App. 186.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 June 1976.

STATE v. RAINES

No. 160 PC.

Case below: 29 N.C. App. 303.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 June 1976.

SWAIM v. VESTAL

No. 144 PC.

Case below: 29 N.C. App. 186.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 June 1976.

WILSON v. TURNER

No. 138 PC.

Case below: 29 N.C. App. 101.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 June 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

YOW v. NANCE

No. 185 PC.

Case below: 29 N.C. App. 419.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 June 1976.

STATE OF NORTH CAROLINA v. COLEMAN COVINGTON, JAMES McEACHIN, DAVID WAYNE NICHOLSON AND LEROY RICHARDSON

No. 9

(Filed 14 July 1976)

1. **Criminal Law § 66— in-court identification — view of defendant in prior court proceedings**

The viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so "unnecessarily suggestive and conducive to irreparable mistaken identification" as would deprive defendant of his due process rights.

2. **Criminal Law § 66— in-court identification — failure to make findings of fact**

The trial judge did not commit prejudicial error in failing to make findings of fact when he denied defendants' motion to suppress the in-court identification testimony of three State's witnesses after a *voir dire* hearing where there was no conflicting evidence on the *voir dire* hearing, defendants merely elicited on cross-examination the fact that the State's witnesses had observed defendants in courtroom proceedings on one or more occasions subsequent to the crime, there is nothing in the record to show any improper pretrial confrontation and the record discloses clear and convincing evidence that the identification testimony was of independent origin based on the witnesses' observations of defendants at the time of the crime.

3. **Criminal Law § 73— statements by victim — competency as part of res gestae**

In a prosecution for murder committed in the perpetration of armed robbery, testimony that at the time or just before one defendant stabbed the witness and fatally wounded the victim, the victim stated, "Please don't kill her. She's give you all of her money," was properly admitted as part of the *res gestae*.

4. **Conspiracy § 5; Criminal Law § 79— conspiracy — declarations of coconspirators**

When the State shows a *prima facie* conspiracy, the declarations of the coconspirators in furtherance of the common plan are competent against each of them even where defendants are not formally charged with a criminal conspiracy.

5. **Conspiracy § 5; Criminal Law §§ 73, 79— statement by defendant — admissibility against coconspirators — res gestae**

Where the State's evidence showed that defendants were carrying out a plan or an agreement to commit an armed robbery when the deceased was killed, a statement made by one defendant just before he stabbed deceased, "That white sonofabitch ought to have been

dead," was admissible against the other defendants as a statement made in furtherance of the conspiracy; furthermore, such statement was also admissible as part of the *res gestae.*

6. **Homicide § 25— felony-murder — instructions on proximate cause of death**

In a prosecution for murder committed in the perpetration of a robbery, the trial court did not err in failing to instruct the jury that in order to find defendant guilty it must find that the robbery was the proximate cause of the victim's death, the court having correctly instructed the jury that the State must prove beyond a reasonable doubt that defendant stabbed the victim while committing the crime of robbery and that the stabbing of the victim proximately caused his death.

7. **Homicide § 21— murder in perpetration of robbery — sufficiency of evidence of defendant's guilt**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder where it tended to show that the victim was killed while defendant and his three codefendants were engaged in the perpetration of an armed robbery and that defendant not only was taking part in the armed robbery but that he also physically participated in the killing of the victim.

8. **Criminal Law § 102— jury argument**

Counsel must be allowed wide latitude in the argument of hotly contested cases and may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case; whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and an appellate court will not review the exercise of such discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury.

9. **Criminal Law § 102— jury argument — expression of own knowledge and beliefs**

Counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence.

10. **Criminal Law § 102— jury argument — duty of court to censor**

It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene *ex mero motu.*

11. **Criminal Law § 102— jury argument — statement that deceased had been "living, breathing human being" — rights of victims**

In a first degree murder prosecution the district attorney's argument that deceased had been "a living, breathing human being, just like you and just like me, and he is gone forever now" was within the bounds of the record evidence, and there was no gross impropriety in the district attorney's statement that "everybody is concerned about the rights of the defendants . . . When in God's name are we going to start getting concerned about the rights of the victims?"

12. Criminal Law § 102— jury argument — duty of counsel to "sway your mind from justice" — curative instruction

While the district attorney's argument that defense counsel "are supposed to do everything they can to sway your mind from justice in this case and get their clients off if they can" was improper, the trial judge's prompt action in instructing the jury to disregard this argument removed any possibility of prejudice.

13. Homicide § 15— health of decedent — testimony by decedent's wife

In a prosecution for first degree murder committed in the perpetration of a robbery, testimony by decedent's wife that he was in good health when he left home on the date of the crime was competent to show that defendant died from wounds he received on the day of the robbery, and medical testimony subsequently offered by the State did not render such testimony incompetent.

14. Criminal Law § 114— corroborative evidence — instructions — consistency of statements and testimony — no expression of opinion

The trial court did not express an opinion in violation of G.S. 1-180 when he stated in his instructions that statements made by two witnesses to a deputy sheriff were consistent with the testimony given by the witnesses in the courtroom where the court's further instructions made it clear that it was for the jury alone to determine whether the deputy sheriff's testimony was consistent with the courtroom testimony of the two witnesses.

15. Criminal Law § 116— instructions on failure of defendant to testify

The trial court's instructions on the failure of defendant to testify complied with the requirements of G.S. 8-54 and exceeded the minimal requirements approved in prior decisions.

16. Criminal Law § 46— search for defendant — defendant's actions when located — evidence of flight

In a prosecution for first degree murder, testimony by an SBI agent relating to his unsuccessful search for defendant which continued for three days after the commission of the crime and his description of defendant's furtive acts when he was finally located were properly admitted into evidence.

17. Criminal Law § 87— manner of examination of witness — no abuse of discretion by court

No abuse of the court's discretion was shown in the manner in which the district attorney was permitted to examine an SBI agent.

18. Criminal Law § 33— observation of defendant in certain car before crime — relevancy

In a prosecution for murder committed in the perpetration of a robbery wherein an automobile observed at the crime scene and in which defendants fled was identified as a blue and white Plymouth Duster, a witness's testimony that he saw two of the defendants a short time before the crime in a blue and white Plymouth Duster which belonged to one defendant's sister was relevant to show that one defendant had access to a blue and white Plymouth Duster and

to strengthen eyewitness testimony that such defendant was the man who remained with the automobile and furnished the "get away" car.

19. Criminal Law § 87— ownership of vehicle — foundation for testimony

Testimony that the witness lived in the small town of Laurinburg and had known defendant for twenty years gave a reasonable foundation for and credence to the witness's testimony that a car in which he saw the defendant riding was owned by defendant's sister.

20. Criminal Law § 113— failure to define "corroboration"

The trial court did not err in failing to define "corroboration" and "corroborative evidence" absent a request for such an instruction.

21. Criminal Law § 89— noncorroborative evidence — error cured by instruction

In a prosecution for murder committed in the perpetration of a robbery, error in the admission for corroborative purposes of an officer's testimony that a witness told him that a person standing at the raised hood of a car at the crime scene "looked real funny at him when he drove up" when the witness did not so testify was cured by the trial court's instruction that the jury should not consider that portion of the officer's testimony.

22. Criminal Law § 96— withdrawal of evidence

Ordinarily, when incompetent evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in admission of the evidence is cured.

23. Criminal Law § 89— noncorroborative evidence — error cured when objection sustained

Any error in the admission of an officer's testimony that a witness told him a car at the crime scene was a Plymouth or Dodge with a N. C. license plate and that the witness saw four subjects leave the scene, when the witness testified only that the car was blue and white and did not testify as to the number of persons he saw leave the scene, was cured when the trial court sustained defendant's objections to the noncorroborative testimony.

24. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

The admission of incompetent testimony is cured when substantially the same evidence is theretofore or thereafter admitted without objection.

25. Homicide § 21— robbery-murder — aider and abettor — sufficiency of evidence

In a prosecution for murder committed in the perpetration of an armed robbery, the State's evidence was sufficient for the jury to find that defendant acted as lookout and driver of the "get away" car, and that he was thus guilty of first degree murder as an aider and abettor, where it tended to show: defendant was seen driving his sister's blue and white Plymouth Duster automobile with a codefendant as a passenger shortly before the crime was committed; a blue

and white Plymouth Duster was parked in front of the store where the crime occurred during the time of the crime and defendant was standing beside the car; the hood of the car was up and defendant stuck his head under the hood when the store owner appeared; a codefendant was seen entering the Duster and none of the defendants were observed at the crime scene after the Duster departed; the store owner fired toward and struck the Duster at least one time; witnesses observed a blue and white Duster traveling toward Laurinburg shortly after the crime; the car was occupied by three or four colored people and one occupant had a bloody rag beside his head; a blue and white Duster with blood on the front passenger headrest and with the right front window broken out was found parked one-quarter mile from defendant's home; defendant's fingerprints were on the hood of the car; and all defendants had lived in Laurinburg for at least fifteen years.

26. Homicide § 2— conspiracy to rob — murder during robbery — responsibility of conspirator

Where an accused entered into a conspiracy to commit an armed robbery, he is criminally responsible for a murder committed by another conspirator during the robbery even though he did not actually participate in that attempt.

27. Criminal Law § 87; Indictment and Warrant § 13— motion for bill of particulars — testimony of proposed witnesses

The trial court did not err in the denial of the portion of defendant's motion for a bill of particulars seeking a detailed statement of the testimony of each witness to be offered by the State, the court having ordered the State to furnish defendant a list of the proposed witnesses for the State and a copy of all statements made by defendant and his codefendants to police officers concerning the alleged crime.

28. Criminal Law § 92— consolidation of charges against four defendants

The trial court properly consolidated for trial charges against four defendants for murder committed in the perpetration of an armed robbery. Former G.S. 15-152.

29. Jury § 2— motion for special venire

The trial court in a murder case did not err in the denial of defendant's motion for a special venire on the ground that deceased was well known and highly regarded in his township.

30. Constitutional Law § 31; Criminal Law § 97— reading of witness's testimony to jury by court reporter

The trial court did not err in allowing the court reporter, at the request of the jury, to read back the testimony of two witnesses.

31. Criminal Law § 117— instructions on corroborative evidence

Trial court's instructions on corroborative evidence were in accord with prior Supreme Court decisions.

32. Criminal Law §§ 9, 113— instructions on aiding and abetting — criminal purpose

In a prosecution for murder committed in the perpetration of armed robbery, the trial court's instructions made it clear that in order to con-

vict defendant as an aider and abettor, the State had to prove beyond a reasonable doubt that he shared with his codefendants the criminal purpose to commit the crime of armed robbery.

33. Homicide § 30— felony-murder — failure to submit lesser offenses

The trial court in a first degree murder case was not required to submit lesser included offenses to the jury where all of the evidence tended to show that the murder was perpetrated during the course of an armed robbery.

34. Criminal Law § 114— instructions on taking of verdicts — no expression of opinion

The trial judge did not express an opinion as to defendant's guilt when he instructed in the presence of the jury that the clerk would first take the verdict as to a codefendant and "following that and any motions his attorney might like to make" the clerk would take the verdict as to defendant, although the better practice is for the court to instruct the clerk in the absence of the jury as to the procedure for taking the verdict.

35. Constitutional Law § 36; Criminal Law § 135; Homicide § 31— death sentences unconstitutional — imposition of sentences of life imprisonment

Since the U. S. Supreme Court has invalidated the death penalty provisions of G.S. 14-17 (Cum. Sup. 1975), the statute under which each defendant was indicted, convicted and sentenced to death for first degree murder, the sentences of death are vacated and sentences of life imprisonment are substituted therefor by authority of the provisions of 1973 Sess. Laws, c. 1201, § 7 (1974 Session).

36. Constitutional Law § 29; Jury § 7— exclusion of jurors because of capital punishment views — death sentences vacated

Defendants' constitutional rights were not violated by the exclusion of jurors because of their views concerning capital punishment in a trial of defendants for first degree murder where sentences of death imposed on defendants have been invalidated and sentences of life imprisonment have been substituted therefor, since the decision of *Witherspoon v. Illinois*, 391 U.S. 510, invalidated only the sentence of death and not the conviction of a defendant.

APPEAL by defendants from *Smith, J.*, at 5 May 1975 Criminal Session, ROBESON Superior Court. Each defendant gave notice of appeal but the appeals were not perfected because the State failed to serve its countercases. We allowed petitions for writs of certiorari as to each defendant on 8 January 1976 to the end that their respective appeals might be perfected.

Defendants were charged in separate bills of indictment with murder in the first degree. The cases were consolidated for trial over the objection of each defendant.

The State offered evidence which tended to show that on the morning of 13 December 1974 Coreene Jacobs was in the store operated by Mrs. Jacobs and her husband, Wade Jacobs. During the morning, Eula Hunt arrived to clean the store and the Jacobs' dwelling which adjoined and was to the rear of the store. At about 11:30 a.m., Mrs. Jacobs, Eula Hunt and Joseph Maxwell Cook were sitting in the store talking. At that time three black men came into the store. One of the men, later identified as Leroy Richardson, asked for a package of Winston cigarettes and Mrs. Jacobs started behind the counter to obtain the cigarettes. Just as she reached the counter, Richardson grabbed her and said, "I want all of your money and your life." One of the men, later identified as James McEachin, pointed a knife toward Eula Hunt. He tied her up and made her lie on the floor. The third man, later identified as Coleman Covington, pointed a sawed-off shotgun in Mr. Cook's face. Richardson forced Mrs. Jacobs to open the cash register, threw her to the floor and stood upon her body while he removed the money from the cash register. After finding some money concealed beneath a round of cheese, he took a butcher knife used to cut cheese and stabbed Mrs. Jacobs in the neck. Mr. Cook said, "Please don't kill her. She's give you all of her money." Then Richardson, still armed with the butcher knife and with the aid of Covington dragged Mr. Cook from the chair in which he was sitting. When Mrs. Jacobs begged them not to kill Mr. Cook, Richardson replied, "The white sonofabitch ought to have been dead." Covington and Richardson then stood Mr. Cook up and Richardson stabbed him in the back with the butcher knife. Mr. Cook fell and Covington hit him on the head with an unidentified object. He then hit Mrs. Jacobs on the head causing her to lose consciousness.

Wade Jacobs returned to the store with a load of sand at about 11:20 a.m. and at that time observed a man, later identified as David Wayne Nicholson, standing by a blue and white automobile. The hood of the car was up and Nicholson stuck his head under the hood when Mr. Jacobs stopped. Mr. Jacobs entered the store when he saw a hand motion from inside the building. When he entered the store, he was struck from behind and upon turning, he saw Richardson run toward him with the butcher knife in his hand. Mr. Jacobs met Richardson and caught his arm. Covington joined the affray, using the sawed-off shotgun as a club. McEachin cut Mr. Jacobs several times with a pocketknife. The men forced Mr. Jacobs across

the body of his wife into the living quarters where he tripped over a chair. As he fell, he kicked Covington down and also delivered a blow to Richardson. Then "someone hollered run." The three black men ran out through the store and Mr. Jacobs obtained his shotgun and then ran to the front of the store where he saw Richardson enter the blue and white car on the passenger side. He fired three shots toward the car and saw glass fall from the car. The blue and white automobile knocked down the mailbox and then proceeded down Highway 501 toward Laurinburg. Hubert Faircloth observed the blue and white automobile while it was parked in front of the store and identified it as a "Duster." On the same day, a blue and white "Duster" automobile was found in Laurinburg. It was established that this automobile belonged to defendant Nicholson's sister. The window on the right side was shattered and there was blood on the headrest on the passenger side. Fingerprints lifted from the hood of this automobile were positively identified as being fingerprints of defendant David Wayne Nicholson. Mr. Cook's wallet, Mrs. Jacobs' wallet, a sawed-off shotgun and a knife were subsequently found along Highway 501 between Jacobs' store and Laurinburg.

Dr. Bob Andrews, a pathologist who performed an autopsy on the body of Joseph Maxwell Cook, testified:

> My initial investigation of the body revealed a wound in the back of the right side of about an inch and a half long; it was located an inch and a half to the right of the midline, about twelve inches below the shoulder line on the right back. I probed that wound, and it went through the chest wall in the back just below the twelfth rib, through the lower lobe of the right lung, cut a portion of the diaphram (sic) on the right; went through the sac that covers the heart, and nicked the lower edge of the heart. . . .

He testified that, in his opinion, Mr. Cook died as a result of hemorrhage caused by this wound.

Officers who saw Covington upon his arrest on 15 December 1974, testified that he had scars on the right side of his face and head. He gave one of the officers a pellet which he said he had picked out of his leg.

Defendants offered no evidence and the jury returned verdicts of guilty as charged. Each defendant gave notice of appeal from judgment imposing the death penalty.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr. and Associate Attorney Elizabeth R. Cochrane, for the State.

Carl A. Barrington, Jr., attorney for appellant Covington.

H. E. Stacy, Jr., attorney for appellant McEachin.

Joseph C. Ward, Jr. and Arthur L. Lane, attorneys for appellant Nicholson.

John C. B. Regan, III, attorney for appellant Richardson.

BRANCH, Justice.

APPEAL OF DEFENDANT COVINGTON

Defendant Covington assigns as error the failure of the trial judge to find facts when he denied defendant's motion to suppress the in-court identification testimony of the State's witnesses, Coreene Jacobs, Wade Jacobs and Eula Hunt.

When defendants moved to suppress the in-court identification testimony of Coreene Jacobs, Wade Jacobs and Eula Hunt, the trial judge correctly conducted a *voir dire* hearing in the absence of the jury to determine its admissibility.

On *voir dire,* Mrs. Jacobs identified defendants McEachin, Covington and Richardson as the men who entered the Jacobs' store on 13 December 1974 and there killed Joseph Maxwell Cook. She testified that she was in the presence of these men for a period of fifteen to twenty minutes. Mrs. Jacobs admitted that she subsequently saw defendants at a pretrial hearing. Defense counsel inquired if she could better describe Richardson from her observations in court or from the twenty minutes that she saw him in the store on 13 December 1974. She replied, "I'd know him anywhere." Mrs. Jacobs stated that she saw defendant Covington when he walked in the door and for a period of about two minutes when she was lying on the floor. She saw McEachin for only a brief moment when he came in the door. On cross-examination, Mrs. Jacobs was unable to describe the clothes or the particular features of the defendants as they appeared on 13 December 1974.

Eula Hunt testified that she saw the three defendants enter the Jacobs' store on 13 December 1974. She identified McEachin as the one who tied her up, Richardson as the one who grabbed

and stabbed Mrs. Jacobs, and Covington as the man she saw hold a gun on Mr. Cook. She described several articles of clothing worn by Covington, McEachin and Richardson respectively.

Mr. Jacobs identified all four defendants as the men he observed at his store on 13 December 1974 and he stated that his identification was based on his observations of these men on that day. He admitted having seen all of them in a courtroom subsequent to 13 December 1974. The State also offered the testimony of Hubert Faircloth who identified the defendants Richardson and McEachin as two men he saw at the Jacobs' store on 13 December 1974.

Each of the State's witnesses examined on *voir dire* testified that he or she had not been shown any pictures for identification purposes and that he or she had not observed any of the defendants in a "lineup."

Defendants offered no evidence on *voir dire*. At the conclusion of the *voir dire* hearing Judge Smith, without making any findings of fact or entering any conclusions of law, ruled "that identification as to each of the defendants is admissible."

In support of their position as to this assignment of error, defendants rely on the rules stated in *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884. There we stated:

> When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878 (1970); *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); *State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971).

See *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967.

In *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561, the prosecution, on *voir dire*, offered evidence tending to show that a con-

fession was voluntarily made. Defendant offered no evidence in contradiction. The trial judge, without finding any facts, admitted the challenged confession into evidence. Holding the admission of the confession to be without prejudicial error, Justice Sharp, now Chief Justice, speaking for the Court, stated:

> . . . If, on *voir dire,* there is conflicting testimony bearing on the admissibility of a confession, it is error for the judge to admit it upon a mere statement of his conclusion that the confessison was freely and voluntarily made. In such a situation the judge must make specific findings so that the appellate court can determine whether the facts found will support his conclusions. *State v. Moore,* 274 N.C. 141, 166 S.E. 2d 53; *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. When, as in this case, no conflicting testimony is offered on *voir dire,* it is not error for the judge to admit the confession without making specific findings. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841. Clearly, however, it is always the better practice for the court to find the facts upon which it concludes any confession is admissible.

Accord: *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841. Defendant challenged the in-court identification testimony on the grounds that it was tainted by an unfairly conducted lineup in *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. We rejected his contention that this was prejudicial error and Justice Lake, speaking for the Court, stated:

> If there were any conflicts in the evidence or any suggestion whatever in the entire record that the lineup was unfairly conducted or that the defendant did not waive his right to counsel thereat, as the State's evidence clearly shows he did, we would reverse the conviction and grant a new trial because of the failure of the trial judge to find the crucial facts. Where, however, as here, there is no conflict in the evidence, it is abundantly clear that the defendant did waive his right to counsel at the lineup, it is equally clear that the lineup was conducted fairly and without prejudice to him, and perfectly obvious that the in-court identification was not fruit of the lineup but had its in-

dependent origin in the witness' observation of the crime itself, this failure of the trial court to insert such findings into the record must be deemed harmless error. . . .

State v. Stepney, 280 N.C. 306, 185 S.E. 2d 844, is a case in which identification testimony was challenged on the ground that the in-court identification was tainted by an out-of-court pretrial identification. The court, without conducting a *voir dire,* admitted the identification testimony into evidence. Finding no prejudicial error in the admission of this testimony, we stated:

> It is apparent from the foregoing decisions that the better procedure dictates that the trial judge, even upon a general objection only, should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony. *State v. Blackwell, supra* (276 N.C. 714, 174 S.E. 2d 534). Failure to conduct the voir dire, however, does not necessarily render such evidence incompetent. Where, as here, the pretrial viewing of photographs was free of impermissible suggestiveness, and the evidence is clear and convincing that defendant's in-court identification originated with observation of defendant at the time of the robbery and not with the photographs, the failure of the trial court to conduct a voir dire and make findings of fact, as he should have done, must be deemed harmless error. *State v. Williams, supra* (274 N.C. 328, 163 S.E. 2d 353). A different result could not reasonably be expected upon a retrial if all evidence of pretrial photographic identification were excluded.

In instant case, there was no evidence of a pretrial lineup or a pretrial identification by use of photographs. Defendants did, however, elicit by cross-examination the fact that the State's witnesses observed the defendant in courtroom proceedings on one or more occasions subsequent to 13 December 1974.

[1] We have held that the viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so "unnecessarily suggestive and conducive to irreparable mistaken identification" as would deprive defendant of his due process rights. See *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610.

[2] This record discloses that there was no conflicting evidence on the *voir dire* hearing. There was nothing in the record to show any improper pretrial confrontation. The record does disclose clear and convincing evidence that the identification testimony by the State's witnesses was of independent origin based on the witness's observation of defendants on 13 December 1974. Under these circumstances, the trial judge's failure to find and insert factual findings into the record does not constitute prejudicial error. However, we again note that when there is objection to or a motion to suppress testimony of identification, the better practice is for the trial judge to find and insert facts into the record to support his ruling.

[3] Defendant, without citation of authority, next contends that the trial judge erred in failing to suppress Mrs. Jacobs' testimony that the deceased, Joseph Maxwell Cook, stated, "Please don't kill her. She's give you all of her money." This statement was made by Mr. Cook at the time or just before Richardson stuck a knife in Mrs. Jacobs' throat and immediately before he fatally wounded Mr. Cook.

This exclamation by Mr. Cook was a spontaneous utterance made without time for fabrication or reflection. The rule governing the admission of such statements is concisely stated in 1 Stanbury's N. C. Evidence § 164, at 554 (Brandis Rev. 1973):

> "When a startling or unusual incident occurs, the exclamations of a participant or a bystander concerning the incident, made spontaneously, and without time for reflection or fabrication are admissible into evidence."

Clearly Mr. Cook's utterance was correctly admitted as part of the *res gestae*. *State v. Burleson*, 280 N.C. 112, 184 S.E. 2d 869; *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469.

The next assignment of error challenges the ruling of the trial judge which admitted, over objection, a statement made by defendant Richardson. Just before he stabbed Mr. Cook, defendant Richardson said: "The white sonofabitch ought to have been dead." In the alternative defendant Covington argues that if the statement was admissible, the trial judge should have instructed the jury that the statement should not bear on his innocence or guilt.

[4, 5] When the State shows a *prima facie* conspiracy, the declarations of the coconspirators in furtherance of the common

plan are competent against each of them. *State v. Crump,* 280 N.C. 491, 186 S.E. 2d 369; *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633. This is so even where the defendants are not formally charged with a criminal conspiracy. *State v. Absher,* 230 N.C. 598, 54 S.E. 2d 922. A criminal conspiracy is the unlawful conference of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act in an unlawful way. *State v. Guthrie,* 265 N.C. 659, 144 S.E. 2d 891; *State v. Parker,* 234 N.C. 236, 66 S.E. 2d 907. The State's evidence showed that these defendants were carrying out a plan or an agreement to commit an armed robbery when Mr. Cook was killed. This evidence established a *prima facie* conspiracy, and, therefore, Richardson's statement was admissible. Further, this statement which was made just before defendant Richardson inflicted the fatal blow to Mr. Cook was also admissible as a part of the *res gestae. State v. Burleson, supra; State v. Goines, supra; State v. Feaganes,* 272 N.C. 246, 158 S.E. 2d 89.

Defendant's assignment of error number 26 is deemed abandoned since he brings forward no argument or citation of authority. Rule 28, Rules of Practice in the Supreme Court.

[6] Defendant Covington contends that the trial judge erred in his instructions to the jury on the felony-murder doctrine. He argues that the trial judge should have instructed the jury that "the death of Mr. Cook must be found . . . to have arisen so as to be a direct or proximate cause of the felony allegedly perpetrated." Failure to give such an instruction, defendant contends, allowed the jury to return a verdict of guilty of murder in the first degree even though he may have withdrawn from the commission of the felony, or the felony may have occurred prior to the homicide.

We disagree. G.S. 14-17 provides in part:

> A murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed murder in the first degree and shall be punished with death. . . .

In *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666, Chief Justice Bobbitt, writing for the Court, elaborated upon the requirements of the felony-murder doctrine codified as G.S. 14-17. He stated: "A killing is committed . . . within the purview of a felony-murder statute 'when there is no break in the chain of

events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents forming one continuous transaction.' " We find no intimation in any case that the robbery must be the *proximate* cause of the victim's death. In the present case, the trial judge instructed that the State must prove beyond a reasonable doubt "that the defendant Leroy Richardson stabbed Joseph Maxwell Cook *while* committing the crime of robbery with a dangerous weapon of Coreene Jacobs or Joseph Maxwell Cook or common law robbery of Coreene Jacobs . . . that the stabbing of Joseph Maxwell Cook proximately caused his death." This instruction sufficiently defined the required relationship between the homicide and the felony. The trial judge further instructed that the jury must find beyond a reasonable doubt that the other defendants were acting in concert with Richardson at the time of the homicide. Under the facts of this case, we find no error in the challenged instructions.

Defendant assigns as error the refusal of the trial judge to grant his motions for judgment as of nonsuit.

Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. When there is sufficient evidence, direct or circumstantial, from which the jury could find that the charged offense has been committed and that defendant was the person who committed it, the motion should be denied. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842; *State v. Goines, supra.*

[7] In the case before us, the State offered substantial evidence through several eyewitnesses that Joseph Maxwell Cook was killed while defendants were engaged in the perpetration of an armed robbery and that defendant Covington not only was taking part in the armed robbery but that he also physically participated in the killing of the victim. Thus, the trial judge correctly overruled defendant Covington's motion for judgment as of nonsuit.

Defendant Covington contends that the argument of the district attorney resulted in prejudicial error.

[8-10] We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable infer-

ences to be drawn therefrom together with the relevant law so as to present his side of the case. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. *State v. Wortham,* 287 N.C. 541, 215 S.E. 2d 131; *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *vacated and remanded as to death penalty only,* 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761; *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence; *State v. Noell, supra;* and *State v. Monk, supra.* It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu. State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283.

[11, 12] Here, the district attorney's argument that deceased had been "a living, breathing human being, just like you and me, and he is gone forever now" was within the bounds of the record evidence. Neither do we find gross impropriety in the district attorney's statement that "everybody is concerned about the rights of the defendants . . . When in God's name are we going to start getting concerned about the rights of the victims?" At this point in the trial, it must have been evident to the jury that defendants' counsel had exercised every precaution to protect each defendant's rights and the district attorney had likewise represented the State. The utterance here complained of seems to be only a stirring plea that the defendants and the State be given equal consideration by the jury. However, a more serious question is raised by portions of the district attorney's argument in which he stated that defense counsel, in their arguments, would tell the jury that they (defense counsel) are "just as concerned that Joseph Maxwell Cook is dead as the solicitor sitting over there. They will make vigorous arguments to you. That is what they are supposed to do. That is their duty. *They are supposed to do everything they can to sway your mind from justice in this case and get their clients off if they can . . . .* " This argument by the district attorney was not supported by

the evidence or the law relevant to this case or any other case. It is true that counsel should represent their clients with all of their skill, ability and resourcefulness, but it is not their duty to sway the jury from justice. We do not approve this language. However, this unfortunate statement tended to reflect upon defense counsel and our judicial system to a greater degree than it prejudiced defendant Covington. The trial judge's prompt aciton in instructing the jury to disregard this argument removed any possibility of reversible error. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897; *State v. Ray*, 212 N.C. 725, 194 S.E. 482. This assignment of error is overruled.

[13] Finally, defendant Covington contends that the trial judge erred in failing to suppress the testimony of decedent's wife. Counsel argues that her testimony was irrelevant and served no purpose except to "buy jury sympathy and bias."

The trial judge conducted a *voir dire* hearing and determined that Mrs. Cook's testimony was admissible. She thereupon testified before the jury:

> I am Linnie Cook, and was married to Joseph Maxwell Cook. On that date I last saw him in my back yard at about eleven o'clock a.m. He left driving his pickup truck. At that time he was sixty-three years old and in good health. I did not see him again until approximately three days later when he was dead and I saw his body in the funeral home. When he left our home on the morning of the 13th of December he had no scratches, wounds, or contusions on his forehead and no wound anywhere else on his body as far as I know.

In support of this assignment of error, defendant quotes from Annot., 67 A.L.R. 2d 731, *Admissibility and propriety, in homicide prosecution of evidence as to deceased's spouse and children.* We note that the scope of the annotation is expressly limited to cases "where the evidence is not relevant to any issue in the case other than the question whether the deceased was survived by a widow or children." Most of the cases in the annotation which hold such evidence to be inadmissible are cases bottomed on the fact that the evidence clearly had no relevance to any issue at trial. However, one case cited by defendant Covington warrants our consideration. In *Hathaway v. State*, 100 So. 2d 662, the Florida Court of Appeals granted a new trial on two grounds: (1) the prosecuting attorney was permitted to ask

the accused whether he had testified at the preliminary hearing, and (2) the deceased's wife identified decedent's body *even though defendant admitted the identity of the body* and another witness could have been called to establish the identity of the victim. The Florida court concluded that, under these circumstances, the wife was an incompetent witness to establish the identity of the body. The case, *sub judice*, differs from *Hathaway* in that the testimony of Mrs. Cook was pertinent to establish an element of the crime. Defendant had not stipulated or admitted the cause of Mr. Cook's death and the burden remained on the State to establish all elements of the crime charged, including the proximate cause of decedent's death. Mrs. Cook's marital status was relevant since her relationship with Mr. Cook placed her in a position to testify authoritatively as to her husband's physical condition. Her testimony that Mr. Cook was in good health before he left home on 13 December supported the State's contention that Mr. Cook died from wounds he received on the day of the robbery.

The general rule in this jurisdiction is that, "Every circumstance that is calculated to throw any light upon the supposed crime is admissible" in a criminal case. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, *cert. denied* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936. Although testimony introduced solely for the purpose of improperly exciting prejudice against a defendant should not be admitted, *State v. Page,* 215 N.C. 333, 1 S.E. 2d 887, evidence which is otherwise competent and material should not be excluded merely because it may have a tendency to prejudice a defendant. *State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27; *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24; *State v. Green,* 251 N.C. 40, 110 S.E. 2d 609; *State v. Wall,* 243 N.C. 238, 90 S.E. 2d 383; *State v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730.

Medical testimony subsequently offered by the State did not render Mrs. Cook's testimony incompetent. The State had the burden of proving every element of the crime charged so long as defendant stood upon his plea of not guilty. The State had the right to select its method of proof subject to the enforcement of the rules of evidence and fundamental fair play by the trial judge. Assuming, *arguendo,* that the evidence was erroneously admitted, we do not think that a different verdict would have been returned had the evidence been suppressed.

APPEAL OF DEFENDANT RICHARDSON

[14] Defendant Richardson contends that the trial judge, in his charge, expressed an opinion as to his guilt in violation of the provisions of G.S. 1-180.

It is well settled that the trial judge shall not express or intimate his opinions as to the innocence or guilt of an accused at any stage of the trial, it being the intent of the law to insure every litigant a fair and impartial trial. G.S. 1-180; *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481; *State v. Simpson*, 233 N.C. 438, 64 S.E. 2d 568.

Defendant first challenges that portion of the charge in which the trial judge, in recounting his recollection of the evidence, stated:

> As I remember, there was also some evidence received which tended to show that at an earlier time certain witnesses, as I remember, Wade Jacobs and Eula Hunt—again, *take your recollection*—made certain statements to Deputy Sheriff Hubert Stone; that those statements were consistent with the testimony which Wade Jacobs and Eula Hunt gave here in the Courtroom. (Emphasis ours.)

Defendant specifically takes exception to the court's statement that "those statements *were* consistent with the testimony which Wade Jacobs and Eula Hunt gave here in the courtroom." However, the very next instruction by the trial judge was as follows:

> Now, ladies and gentlemen, you must not consider those earlier statements as evidence of the truth of what was said at the earlier time, because they were not made under oath here in the courtroom, *but if you believe that those earlier statements were made and you find that they were consistent with the testimony* that those two witnesses gave here in the courtroom, then you might consider that together with all other facts and circumstances bearing upon this witness' truthfulness *in deciding whether you will believe or disbelieve* what they said here in the courtroom under oath. (Emphasis ours.)

When considered contextually, as we must do according to our often repeated rule, we conclude that the trial judge's instructions made it clear that it was for the jury, and for the jury alone, to find whether Sheriff Stone's testimony was con-

sistent with the courtroom testimony of Wade Jacobs and Eula Hunt. Our conclusion is strengthened by the fact that before Deputy Sheriff Stone testified as to the statements made by Wade Jacobs, the court instructed the jury "anything that this witness should testify that Mr. Jacobs told him on the 13th day of December, 1974, is offered for one purpose only and that is to corroborate the testimony of Mr. Jacobs, *if in fact you find that it does so corroborate his testimony.*" (Emphasis ours.) A like instruction was given before the witness testified concerning the statements of Eula Hunt.

[15] We conclude that this challenged instruction did not deprive defendant Richardson of a fair and impartial trial. Neither do we find prejudicial error in Judge Smith's instructions concerning defendant's right not to testify. In this connection, he charged:

> Now, the defendants and each one of them in this case have not testified or offered evidence. The law of the State of North Carolina and of the United States gives them that right and privilege. This same law also assures each of them that their decision not to offer evidence or not to testify will create no presumption of any kind against them or any of them. Therefore, ladies and gentlemen, you must be very careful in your deliberations not to let the decision of the defendants or any of them to not to offer evidence or to testify influence your decision in any way.

G.S. 8-54, in pertinent part, provides:

> 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.

We have held that it is the better practice not to instruct on the defendant's failure to testify. *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115. In *Barbour,* defendant did not request the instruction and the trial judge, in effect, instructed that defendant's failure to testify was not to be considered against him. We noted that the instruction was meager but nevertheless held it met minimum requirements.

In *State v. Bryant,* 283 N.C. 227, 195 S.E. 2d 509, we held the following instruction to be adequate:

> " . . . [N]o person is required to testify against himself in a criminal case, and the only way that this right can be fully protected is that when a person accused of a crime does not testify, that the jury must not consider his failure to testify one way or the other in reaching a decision in the case; so don't consider in your deliberations the fact that the defendant did not testify in this case."

See also *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733. Here the trial judge's instructions comply with the requirements of G.S. 8-54 and exceed the minimal requirements approved by our Court in *Bryant, Barbour* and *McNeill.*

[16] Defendant Richardson next contends that the trial judge erred by overruling his objection to testimony of SBI Agent Wade Anders concerning a search for and apprehension of Richardson.

In *State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697, we stated:

> The rule in North Carolina is that flight of an accused may be admitted as some evidence of guilt. However, such evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt. Proof of flight, standing alone, is not sufficient to amount to an admission of guilt. An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93; *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347 . . . .
>
> * * *
>
> . . . Moreover, most jurisdictions recognize that testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime is competent. See cases collected in Annot., 25 A.L.R. 886; Wharton's Criminal Evidence § 214 (1972). See also *State v. Wallace,* 162 N.C. 622, 78 S.E. 1; *State v. Jones,* 93 N.C. 611.

Defendant's contention that the evidence was inadmissible because the alleged flight was not in close proximity to the crime is answered in *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93. There we stated:

> In the present case, evidence that defendant left his home 16 days after the alleged offenses were committed is competent to be considered by the jury in connection with other circumstances in passing upon the question of guilt. *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938), and cases therein cited.

In instant case, the witness Anders stated that he began a search for Richardson on 13 December 1974. He searched the Stewartsville area, and all of the predominantly black housing projects in Scotland County without success. Although not specifically stated, we think it implicit in Agent Anders' testimony that Richardson's home was visited in the course of the search. On 15 December 1974 the witness, in company with other police officers, went to a house in the rural area of Scotland County where a lady admitted him into the house. He searched the front room, the dining room, the bathroom, and two bedrooms without finding Richardson. However, when he entered the kitchen, a voice said, "Here I am" and Agent Anders then found defendant Richardson crouched between an upright freezer and an upright refrigerator.

We hold that the testimony of SBI Agent Anders relating to his unsuccessful search for defendant which continued for three days after the commission of the crime and his description of defendant Richardson's furtive acts when he was finally located were properly admitted into evidence.

[17] We find no merit in defendant's argument that the district attorney questioned SBI Agent Anders in an unreasonable manner.

The examinations of witnesses is largely in the control of the trial judge and he may take appropriate measures to control the conduct of counsel, witnesses and spectators. 1 Stansbury's North Carolina Evidence § 25 (Brandis Rev. 1973).

Objections to the questions addressed to Agent Anders were apparently addressed to the *admissibility* of the evidence. The record does not reveal that the trial judge was made aware that defendant Richardson objected to the *manner* in which the

district attorney examined the witness. We will not interfere with the exercise of the trial judge's duty to control the conduct and course of a trial absent a showing of manifest abuse. No such abuse has been shown.

APPEAL OF DEFENDANT NICHOLSON

[18] Defendant argues that Judge Smith erred in failing to allow his motion to strike the testimony of James Thomas because the evidence was too remote to be relevant.

Thomas testified that he had known all four of the defendants for some period of time and specifically that he had known Nicholson who lived near him in Laurinburg, North Carolina, for about twenty years. On the 13th day of December 1974, between 10:30 and 11:30 a.m., he saw David Nicholson and Leroy Richardson riding in a blue and white Plymouth Duster. Nicholson was driving and Richardson was sitting in the right front seat. He saw Nicholson stop the car at a point about seven miles from the Robeson County line, look under the seat and then drive off. The automobile belonged to Nicholson's sister. It was later established that the crime was committed about 11:30 a.m. on 13 December 1974.

In a criminal case, every circumstance that is calculated to throw any light upon the alleged crime is admissible. *State v. Sneeden, supra; State v. Hamilton, supra.*

1 Stansbury's North Carolina Evidence § 78, at 237 (Brandis Rev. 1973), contains the following statement concerning tests of relevancy and materiality of evidence:

> The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable,* or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it, at the same time pointing out that the inference to be drawn need not be a *necessary* one. . . .

The automobile observed at the scene of the crime and in which defendants allegedly fled was identified as a blue and white Plymouth Duster. Thomas' testimony that he saw Nichol-

son and Richardson a short time before the crime in a blue and white Plymouth Duster which belonged to Nicholson's sister bore a reasonable connection to the facts to be proved by the State in order to carry its burden of proof. The evidence tended to show that Nicholson had access to a blue and white Plymouth Duster and to strengthen the eyewitness testimony that Nicholson was the man who remained with the automobile and furnished the "get away" car.

[19] Defendant further argues, without citation of authority, that no foundation was established for the testimony concerning the ownership of the Plymouth automobile. Defendant's objection and motion to strike was lodged after the witness had testified concerning several different matters. It is, therefore, impossible for us to know to what matter it was directed. In this posture of the record, the ruling on the motion to strike was a matter within the trial judge's discretion. See *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353. No abuse of discretion is shown. Defendant did not timely object, exercise his right of cross-examination or request that he be allowed to qualify the witness. Finally, we observe that the testimony of this witness to the effect that he lived in the small town of Laurinburg and that he had known Nicholson for twenty years gives a reasonable foundation for and credence to the challenged testimony. We find no error in the admission of this evidence.

[20] *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295, squarely rejects defendant Nicholson's contention that the trial judge erred in not explaining the meaning of the words corroboration and corroborative evidence. In *Lee,* this Court stated:

> . . . The court did not, in its charge, explain the difference between substantive evidence and corroborative evidence. Defendant made no request for such an instruction. The failure to make reference in the charge to the difference between substantive evidence and corroborative evidence and to define each of these terms is not ground for exception. Rule 21, 221 N.C. 558; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278.

Here defendant Nicholson's counsel made no request for such an instruction and upon authority of *State v. Lee, supra,* we overrule this assignment of error.

The State offered the testimony of Hubert Stone for the limited purpose of corroborating two State's witnesses. Defendant Nicholson argues that the trial judge erred in overruling his objections, denying his motions to strike and in not giving adequate limiting instructions.

The admissibility of prior consistent statements to corroborate a witness whose veracity has been impugned in any way is well recognized in North Carolina. 1 Stansbury's North Carolina Evidence § 51 at 147, 148 (Brandis Rev. 1973); *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671, *vacated as to death penalty only* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875; *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. Brabham,* 108 N.C. 793, 13 S.E. 217. Trial judges are granted broad discretion in admitting evidence which goes to the credibility of witnesses. *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196. Of course, the prior statements are admissible only when they are, in fact, consistent with the testimony of the witness. *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83; *State v. Walker,* 269 N.C. 135, 152 S.E. 2d 133. Nevertheless, slight variances in the corroborative testimony do not render it inadmissible. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745, *cert. denied* 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432 *and* 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429, *cert. denied* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717. Such evidence is admitted, not as substantive evidence of the facts stated, but solely for the purpose of corroborating the witness. *State v. Rose,* 270 N.C. 406, 154 S.E. 2d 492.

Here, when it became apparent to the trial judge that the testimony of the witness Stone was offered for the purpose of corroboration, he instructed the jury: "Anything that this witness should testify that Mr. Jacobs told him on the 13th day of December, 1974 was offered for one purpose only and that is to corroborate the testimony of Mr. Jacobs if, in fact, you find that it does so corroborate his testimony."

[21] Defendant Nicholson first points to the testimony of the witness which related that Wade Jacobs told him that "he saw the car sitting beside the station with the hood raised and said that one subject was at the car at the hood and he said *he looked at him real funny when he drove up. . . .* " Mr. Jacobs did not testify that Nicholson looked at him "real funny when he drove

up"; however, an objection was made and sustained as soon as the language objected to was spoken. The trial judge further instructed the jury that they should not consider this portion of Stone's testimony. Judge Smith then asked counsel if the instruction was sufficient. No response was made to his inquiry. Defendant contends that this language was so prejudicial that the trial judge's instruction could not cure the error.

[22] Ordinarily when incompetent evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in admission of the evidence is cured. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297; *State v. Green,* 251 N.C. 40, 110 S.E. 2d 609; *State v. Campo,* 233 N.C. 79, 62 S.E. 2d 500. This rule of law is based upon the assumption that jurors have sufficient intelligence and character to comply with the cautionary instructions of the trial judge. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.

Defendant relies on *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620, to support his argument that the prejudice from the admission of the evidence could not be cured by a cautionary instruction. *Bruton,* however, is clearly distinguishable since in *Bruton,* the error complained of grew out of a joint trial in which the defendant objected to the admission of a non-testifying codefendant's extrajudicial confession which implicated the defendant. This violation of the defendant's constitutional right of confrontation and cross-examination is a far cry from the admission of the evidence here complained of. We note that in *Bruton* Justice Brennan recognized the fact that a trial judge's instruction may effectively limit the prejudicial effect of inadmissible evidence in many cases. He there stated: "It is not unreasonable to conclude that in many cases the jury can and will follow the trial judge's instruction to disregard such information." The evidence in the present case was of little or no prejudicial effect. We, therefore, hold that the trial judge's prompt action effectively cured any possible prejudice growing out of the admission of this evidence.

[23] The witness Stone also testified that Jacobs told him that the car at the scene was a Plymouth or Dodge with a North Carolina license plate. Actually the only description of the automobile given by the witness Jacobs was that it was a blue and white car. Again, upon counsel's objection, the trial

judge promptly sustained his objection and allowed his motion to strike. Defendant failed to request further instructions. We find no prejudicial error in this minor variation in the witness's testimony. See *State v. Gooding,* 196 N.C. 710, 146 S.E. 806. Officer Stone further testified that Jacobs told him that he saw subjects leaving the scene and that there were four of them. The record shows that Mr. Jacobs testified that he saw the automobile leave the scene but he did not testify as to how many persons were in the automobile. Defendant's objection was promptly sustained and there was no motion to strike. The judge's prompt action removed any prejudice growing out of this slight variance.

When the State offered testimony of witness Stone to corroborate the witness Eula Hunt, the trial judge again instructed the jury that:

> . . . [A]nything that this witness should testify that he might have been told by Eula Hunt is, again, offered for one purpose only and that purpose is to corroborate the testimony of Eula Hunt if you find that it does in fact corroborate the testimony that she gave here in the courtroom.

We find no error in the officer's testimony that Eula Hunt told him that she was inside the station "when three colored males came in the station; one of them had a pocket knife." The record discloses that Eula Hunt testified on direct examination that defendant Richardson had a knife. Thus, Stone's testimony fully corroborated the testimony of the witness Hunt.

[24] Defendant Nicholson argues that he was prejudiced because Officer Stone testified that Eula Hunt said that the car used by defendants was a blue car with a white streak down the side of it and that the car left going toward Laurinburg. Eula Hunt did not testify as to the color of the automobile or the direction in which it traveled as it left the scene. However, there was plenary evidence admitted without objection as to the color of the automobile and the direction it traveled as it left the scene. It is well recognized in this jurisdiction that the admissison of incompetent testimony is cured when substantially the same evidence is theretofore or thereafter admitted without objection. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17; *State v. Owens,* 277 N.C. 697, 178 S.E. 2d 442; *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915.

The testimony of Officer Stone corroborated the testimony of the witnesses Hunt and Jacobs in all respects except as to the minor variations hereinabove discussed.

For the reasons stated, this assignment of error is overruled.

[25] Defendant Nicholson next assigns as error the trial judge's denial of his motions for judgment as of nonsuit. He relies upon the unquestioned rule that evidence which merely suggests the possibility of guilt or which raises only a conjecture as to a defendant's guilt is insufficient to require submission of the case to the jury. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734. However, it is equally well recognized in this jurisdiction that upon motion for nonsuit, the question for the court is whether, upon consideration of the evidence in the light most favorable to the State, there is reasonable basis upon which the jury might find that the offense charged in the indictment has been committed and the defendant was the perpetrator or one of the perpetrators of the crime. *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222; *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679.

This Court considered the conviction of a defendant upon the theory that he was a principal in the second degree in *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5, and there Justice Ervin, speaking for the Court, stated:

> The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation. *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Hildreth,* 31 N.C. 440, 51 Am. D. 369.
>
> To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. [Citations omitted.] A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent

> of the actual perpetrator (*S. v. Oxendine,* 187 N.C. 658, 122 S.E. 568), and renders assistance or encouragement to him in the perpetration of the crime. *S. v. Hoffman,* 199 N.C. 328, 154 S.E. 314; *S. v. Baldwin,* 193 N.C. 566, 137 S.E. 590. While mere presence cannot be constituted aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. [Citations omitted.]

The statement of law in *Birchfield* has been quoted with approval in the recent cases of *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17, and *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655.

The evidence against defendant Nicholson tended to show that he was seen driving his sister's blue and white Plymouth Duster automobile with defendant Richardson as a passenger within an hour of the time the crime was committed. A blue and white Plymouth Duster automobile was parked in front of Jacobs' store during the time the crime was being committed and during that time, Nicholson was standing by the car "looking across the field." The hood of the automobile was up and when Mr. Jacobs appeared Nicholson stuck his head under the hood. Richardson was seen entering the Duster automobile and none of the defendants were observed at the scene of the crime after the Plymouth Duster departed. Just before the automobile hurriedly departed, Mr. Jacobs fired toward and struck it at least one time. Witnesses observed a blue and white Duster automobile at about 11:30 a.m. traveling north on Highway 501 toward Laurinburg, North Carolina. The car was occupied by "three or four colored people." One of the occupants had a bloody rag beside his head. On the same day, a blue and white Plymouth Duster automobile was found parked on Stewartsville Road in Laurinburg, North Carolina, about one-quarter of a mile from where Nicholson lived. Blood was found on the headrest on the passenger side of the front seat and the right front window was broken out. Nicholson's fingerprints were found on the hood of the automobile. All defendants had lived in the Town of Laurinburg for at least fifteen years.

In our opinion, this evidence was sufficient to reasonably support findings by the jury that defendant Nicholson arrived

at the scene of the crime in the Plymouth Duster automobile with the other defendants; that defendants Covington, Richardson and McEachin entered the Jacobs' store with the intent to there commit an armed robbery; that Covington was armed with a shotgun as he entered the store; and that Nicholson remained with the automobile as a lookout and for the purpose of furnishing the " get away" car in which defendants later fled the scene of the crime. Thus, the evidence would permit, but not require, the jury to find that defendant Nicholson was present at the scene of the crime, that he shared in the criminal intent to commit the crime of armed robbery with the other defendants who committed the crime and that he actually rendered assistance to them in the perpetration of the crime.

[26] When an accused enters into a conspiracy to commit an armed robbery, he is criminally responsible for a murder committed by another conspirator during the robbery even though he did not actually participate in that attempt. *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213; *State v. Fox, supra.* Those who aid, abet, counsel or encourage, as well as those who execute their designs are conspirators. *State v. Carey, supra; State v. Turner,* 119 N.C. 841, 25 S.E. 810.

The trial judge correctly overruled the defendant Nicholson's motion for judgment as of nonsuit.

Defendant Nicholson also assigns as error the argument of the district attorney. We have previously considered and rejected the major contentions brought forward in this assignment of error. Counsel for defendant Nicholson has diligently brought forward and attacked nearly the entire argument of the district attorney. We deem it sufficient to say that we have carefully reviewed the entire argument of the district attorney and we find no departure from the facts of the case or the relevant law in the district attorney's argument as would result in error warranting a new trial.

[27] Defendant avers that Judge Godwin erred when he refused to grant all the items requested in his motion for a bill of particulars.

Prior to trial, defendant moved for a bill of particulars in which he sought: (1) the names and addresses of all witnesses proposed to be used by the State, (2) all statements made by any of defendants to any proposed witnesses and (3) a detailed

statement of the testimony of each witness to be offered by the State. Judge Godwin entered an order granting the relief requested in prayers (1) and (2). Further, he specifically ordered that defense counsel be permitted to confer with proposed witnesses Stone and Johnson and that he be furnished a copy of the autopsy report.

The function of a bill of particulars is to inform an accused of the nature of the evidence the State proposes to offer and the granting of a bill of particulars lies largely within the trial judge's discretion. *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481.

Here defendant was furnishesd a list of all the State's witnesses who probably would be offered at trial and a copy of all statements made by defendant and his codefendants to police officers concerning the alleged crime. Defendant had the right to examine proposed State's witnesses in order to amplify the clearly stated charge contained in the bill of indictment. We find nothing in the statutes or our case law which requires the State to furnish to the accused a recital of the entire testimony of each proposed witness. We, therefore, find no error in Judge Godwin's order granting defendant's motion for a bill of particulars.

[28] We find no merit in defendant's contention that the trial judge erred in consolidating the cases for trial and in denying his motion for severance. Each defendant was charged in a separate bill of indictment with the crime of first-degree murder. The charges relate to the same crime which grew out of the same acts. Most of the evidence which was competent as to one defendant was admissible as to the other defendants. Thus, the trial judge, acting within his discretion, properly ordered the cases consolidated for trial. G.S. 15-152 (replaced effective 1 September 1975 by G.S. 15A-926) ; *State v. King,* 287 N.C. 645, 215 S.E. 2d 540; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386. There is no basis for defendant's motion for severance of offenses since the indictment charged only one crime.

[29] The action of the trial judge in denying defendant's motion for a special venire was also a matter within his sound discretion. *State v. Yoes, supra.* The record shows an order entered by Jugde Godwin denying the motion "after hearing arguments of counsel for defendant David Wayne Nicholson and the dis-

trict attorney . . . . " The only argument concerning this matter which defendant presents in his brief is that the deceased was well known and highly regarded in his township. The trial judge had the advantage of affidavits and argument of counsel neither of which is before us. Under these circumstances, we find no cause to disturb Judge Godwin's discretionary ruling.

[30] Defendant further contends that the trial judge erred by allowing the court reporter, at the request of the jury, to read back the testimony of witnesses Wade Jacobs and Hubert Faircloth. Defendant Nicholson argues that he was prejudiced by this procedure because the jury could not, at that point, observe the demeanor of the witnesses. The trial judge may, in his discretion, allow or refuse a jury request for restatement of the evidence. 23-A C.J.S. Criminal Law § 1377. Even if this had not been a matter within the trial judge's discretion, any prejudice to defendant was cured by the fact that the jury had observed both Wade Jacobs and Hubert Faircloth upon the witness stand during lengthy direct examinations and cross-examinations.

[31] We next consider defendant's assignment of error regarding the trial judge's instructions. Nicholson contends that there was error in the instructions concerning the corroborative testimony of the witness Hubert Stone. The trial judge instructed:

> Now, ladies and gentlemen, you must not consider those earlier statements as evidence of the truth of what was said at the earlier time, because they were not made under oath here in the courtroom, but if you believe that those earlier statements were made and you find that they were consistent with the testimony that those two witnesses gave here in the courtroom, then you might consider that together with all other facts and circumstances bearing upon this witness' truthfulness in deciding whether you will believe or disbelieve what they said here in the courtroom under oath.

We have previously noted that adequate cautionary instructions were given prior to the admission of this witness' testimony. The above-quoted instructions are in accord with our decisions. *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429, *cert. denied* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717; 3 North Carolina Index 2d, Criminal Law § 117.

[32] Defendant Nicholson contends that the trial judge failed to apply the law of aiding and abetting to the facts. He argues that the charge did not adequately require the jury to find that he shared in the criminal purpose to commit the crime. Judge Smith, *inter alia*, charged:

> . . . [I]t is not necessary for a person to be guilty of a crime that he do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is held responsible for the acts of the other, done in the commission of that crime. . . .
>
> * * *
>
> Now, a person may also be guilty of murder in the first degree although he does not do any of the acts necessary to constitute murder in the first degree. A person who aids and abets another to commit murder in the first degree is also guilty of that crime, just as if he had personally done all the acts necessary to constitute the crime. Now, I charge, ladies and gentlemen, that for you to find the defendant, David Wayne Nicholson, guilty of murder in the first degree because of aiding and betting, the State must prove from the evidence and beyond a reasonable doubt: First, that the crime of murder in the first degree—as that was previously explained to you under the "murder-felony rule" —was committed by Leroy Richardson, Coleman Covington and James McEachin, or any one of them; second, that the defendant David Wayne Nicholson, though not physically present in the store at the time the alleged crime was committed shared the criminal purpose of either Leroy Richardson, Coleman Covington or James McEachin or any one of them and that to the knowledge of Leroy Richardson, Coleman Covington or James McEachin, or either of them, was aiding and was in a position to aid all or any one of them at the time the alleged crime was committed. However, ladies and gentlemen, 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 intends to assist with the commission. To be guilty he must actively aid the person or persons committing the crime or in some way communicate to the person or persons his intention to so assist in the commission. So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about

> the 13th of December, 1974, Leroy Richardson, Coleman Covington, James A. McEachin or any one of them committed the crime of murder in the first degree, as that was earlier explained to you under the "murder-felony rule," and that the defendant David Wayne Nicholson was outside and not physically present, and that the criminal purpose of Leroy Richardson, Coleman Covington or James McEachin, or any one of them which you find might be guilty of murder in the first degree had knowledge that the defendant David Wayne Nicholson was outside and was aiding them or in a position to then aid—to then at the time aid in the alleged crime of first degree murder, and that the first degree murder was committed by the person whom he was in a position to aid and abet, as I have heretofore explained, you would then return a verdict of guilty of murder in the first degree as to David Wayne Nicholson.

This and other portions of the charge make it eminently clear that in order to convict defendant Nicholson, it must be proven beyond a reasonable doubt that he shared with his co-defendants the criminal purpose to commit the crime of armed robbery.

[33] Defendant's argument that the trial judge erred in his instructions as to possible verdicts is feckless. Judge Smith submitted the possible verdicts of murder in the first degree and not guilty. All of the evidence tended to show that the murder of Mr. Cook was perpetrated during the course of an armed robbery. Such a killing is murder in the first degree and the trial judge was therefore not required to submit lesser included offenses to the jury for its consideration. *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111, *cert. denied* 409 U.S. 995, 34 L.Ed. 2d 259, 93 S.Ct. 328; *State v. Donnell,* 202 N.C. 782, 164 S.E. 352. Neither was the trial judge required to instruct on circumstantial evidence absent a request for such instruction, the court having correctly instructed on the burden and quantum of proof. *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207. This is particularly true when, as here, the State relied mainly on direct evidence to prove its case. *State v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639. No request for such instruction appears in this record.

[34] This defendant contends that the trial judge expressed an opinion as to defendant's guilt when he gave instructions as to the taking of verdicts.

When Judge Smith completed his charge, he stated:

> If and when you agree upon your verdict or verdicts, they will be taken in this manner: The Clerk will first take the verdict of the defendant—with reference to Leroy Richardson; following the completion of that and any motions that his attorney might like to make, the Clerk will take the verdict with reference to the defendant Coleman Covington and following the completion of that and any motions his attorney might wish to make, the Clerk will then take the verdict with reference to the defendant James McEachin; following that and following any motions his attorney might like to make, the Clerk will take the verdict concerning the defendant David Wayne Nicholson.

It is the better practice to instruct the clerk, in the absence of the jury, as to the procedure to be followed in taking verdicts. However, we do not believe that a juror, uninstructed in the course and procedure of a criminal trial, would be aware of the usual motions made upon the return of a verdict so that he would interpret this instruction to be an expression of opinion as to defendant's guilt by the trial judge. We note that the trial judge did not mention that Nicholson's counsel should make any motions. This assignment of error is overruled.

Defendant Nicholson's other assignments of error are formal and do not require further discussion.

APPEAL OF DEFENDANT McEACHIN

Defendant McEachin assigns as errors the exclusion of certain prospective jurors for cause because of their answers to questions concerning capital punishment, the denial of his motion for a new trial and the denial of his motion to set aside the verdict for errors of law assigned and to be assigned. The questions presented by these assignments of error are fully considered and rejected in other portions of this opinion. We, therefore, overrule these assignments of error.

[35] We have carefully considered every assignment of error brought forward by defendants and find no error which would justify disturbing the verdicts. Accordingly, we find no error in the trial which affects the verdicts returned by the jury. However, on 2 July 1976, the Supreme Court of the United States, in *Woodson v. North Carolina,* ..... U.S. ....., 44 U.S.L.W. 5267, invalidated the death penalty provisions of G.S. 14-17

(Cum. Sup. 1975), the statute under which each defendant was indicted, convicted and sentenced to death. In compliance with that decision, the judgment in Case No. 74CR18379 imposing a sentence of death upon Coleman Covington, the judgment in Case No. 74CR18381 imposing a sentence of death upon James McEachin, the judgment in Case No. 74CR18378 imposing a sentence of death upon Leroy Richardson and the judgment in Case No. 74CR18382 imposing a sentence of death upon David Wayne Nicholson are vacated and by authority of the provisions of 1973 Sess. Laws c. 1201, § 7 (1974 Session), sentences of life imprisonment are substituted in each case.

[36] All defendants, relying upon *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, contend that their constitutional rights were violated by the exclusion of jurors because of their views concerning capital punishment. Their contention requires little discussion in light of the holding in *Woodson v. United States, supra.* In *Witherspoon,* the Supreme Court made it clear that the decision did not invalidate the conviction of a defendant as opposed to a sentence of death. We quote a portion of Footnote 21 from *Witherspoon:*

> . . . Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case.

We hold that defendants' constitutional rights were not violated by the exclusion of jurors because of their views concerning capital punishment.

These cases are remanded to the Superior Court of Robeson County with directions (1) that the presiding judge, without requiring the presence of defendants, enter as to each defendant a judgment imposing life imprisonment for the first-degree murder of which he has been convicted; and (2) that in accordance with these judgments the clerk of superior court issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish to each defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the verdicts.

In No. 74CR18379 (Coleman Covington)—Death sentence vacated.

In No. 74CR18381 (James McEachin)—Death sentence vacated.

In No. 74CR18378 (Leroy Richardson)—Death sentence vacated.

In No. 74CR18382 (David Wayne Nicholson)—Death sentence vacated.

STATE OF NORTH CAROLINA v. PERRY LEE TOLLEY

No. 97

(Filed 14 July 1976)

1. **Criminal Law § 158— motion to amplify record on appeal — denial proper**

Motion of defendant's appellate counsel to amplify the record on appeal which was made one day before oral arguments were heard in the case is disallowed since (1) that portion of defendant's motion containing a recitation of fact is outside the scope of Rule 9(b)(3) of the Rules of Appellate Procedure, which enumerates what the record on appeal in criminal cases shall contain; (2) that portion seeking to bring forward the pretrial orders of confinement and the post-trial order for payment of legal fees is irrelevant to the question whether defendant's motion for a continuance was properly denied; and (3) that portion of the motion referring to a statement by the jury foreman to the trial judge after the jury had been discharged, and the court reporter's affidavit in support thereof, are improper as an attempt to impeach the verdict with hearsay evidence based upon statements by the jurors themselves.

2. **Criminal Law § 91— motion for continuance denied — question of law raised — review on appeal**

Where defendant contended that the trial court's ruling denying his motion for a continuance effectively denied him the right to offer testimony and the right to compel the attendance of out-of-state witnesses, thereby denying him a "fundamental element of due process of law" under both federal and state constitutions, the question presented was one of law rather than discretion, and the ruling of the trial court was reviewable on appeal.

3. **Criminal Law § 91— motion to continue — no misapprehension of law in denial**

The record in this rape prosecution discloses that the trial court did not deny defendant's motion for continuance under a misapprehension of the law in that the court was unaware of the provisions of G.S. 15A-811 et seq., the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, where the

record reflects that the court issued certificates pursuant to the provisions of the Act to procure the attendance at trial of three prosecution witnesses who resided in Virginia, but defendant did not seek the court's assistance in summoning witnesses pursuant to the Act.

4. **Constitutional Law § 31; Criminal Law § 91— motion to continue — presence of family members sought — denial of motion — no denial of due process**

The trial court in this rape prosecution did not commit prejudicial error amounting to a denial of due process in failing to continue the case so that additional members of defendant's family might be subpoenaed as witnesses for him, where the record does not show that names and addresses were furnished the court, and no affidavit or other proof was offered in support of the motion for a continuance; moreover, it may be assumed that absent brothers and sisters, even if present, would not have added significantly to the testimony of defendant's mother and sister who testified in his behalf.

5. **Criminal Law §§ 73, 80— doctor's report excluded as hearsay — reference to report not prejudicial**

Defendant was not prejudiced where a rape victim testified that she and another rape victim had been examined by a doctor, the doctor was on vacation but she had the doctor's report, defendant's objection was sustained, and the district attorney stated that he did not want to introduce the doctor's report but just wanted to show that the witness went to a doctor.

6. **Criminal Law §§ 89, 113— prior inconsistent statement — jury instruction proper**

The trial court's instruction with respect to a prior inconsistent statement allegedly made by the prosecutrix that "What she said at the earlier time is not evidence," though technically erroneous, was not prejudicial to defendant, since the portion of the charge immediately preceding and immediately following the challenged sentence correctly informed the jury that the prior inconsistent statement of the prosecutrix, if made, could be considered for the purpose of impeaching her testimony at trial.

7. **Criminal Law §§ 89, 114— instruction on corroborative testimony — no expression of opinion**

The trial court's instruction concerning corroboration of the prosecutrixes' testimony did not amount to an expression of opinion, since the instruction, though slightly garbled, was quickly corrected by the trial court, and the instruction, as it appeared in the record, was improperly punctuated by the court reporter thus producing an inaccurate recital of what the court actually said.

8. **Criminal Law § 140; Rape § 7— two offenses of rape — consecutive life sentences imposed — no error**

Where defendant was convicted of two offenses of second degree rape involving two separate victims, the trial court's imposition of a life sentence in each case, the sentences to run consecutively, was not unlawful, since the maximum statutory punishment for second degree

rape is life imprisonment, and whether sentences for separate offenses are to run concurrently or consecutively is within the sound discretion of the trial judge.

9. Criminal Law § 103— regulating conduct and course of trial — duty of trial judge

It is the duty of the trial judge, in the exercise of his discretion, to regulate the conduct and the course of business during trial, and the judge has the inherent power to take whatever legitimate steps are necessary to deal with an unruly, disruptive or contemptuous defendant.

10. Constitutional Law § 30; Criminal Law § 98— shackling defendant during trial — use in extraordinary circumstances only

The general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. Shackling of defendant should be avoided because (1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion.

11. Constitutional Law § 30; Criminal Law § 98— need for shackling defendant during trial — burden of proof

The burden of showing the necessity for using shackles on defendant during trial rests upon the State.

12. Constitutional Law § 30; Criminal Law §§ 98, 103— rule against shackling defendant — exceptions

The rule against shackling is subject to the exception that the trial judge, in the exercise of sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial.

13. Constitutional Law § 30; Criminal Law §§ 98, 103— shackling defendant — circumstances considered by court

"Material circumstances" which the trial judge may consider in exercising his sound discretion to use shackles on defendant include, inter alia, the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternate remedies.

14. Constitutional Law § 30; Criminal Law §§ 98, 103— use of shackles — duty of court to state reasons, offer opportunity for objection

When the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he

should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the court that such measures are unnecessary.

15. Constitutional Law § 30; Criminal Law §§ 98, 112— shackling defendant — jury instruction upon request

Where the trial judge, in the exercise of sound discretion, determines that the defendant must be handcuffed or shackled, he should, upon request, instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt.

16. Constitutional Law § 30; Criminal Law § 98— defendant tried in shackles — failure to object — no request for instruction — no denial of due process

In a prosecution of defendant for two offenses of second degree rape upon two different individuals, the trial court did not err in allowing defendant to be tried in shackles where the court, shortly before the conclusion of the State's case and out of the jury's presence, noted for the record that he had allowed defendant to be tried in shackles because defendant apparently had attemped to escape during the preliminary hearing one month before the trial and because the sheriff recommended such restraints as a security measure; moreover, defense counsel made no objection when given an opportunity to do so by the court and made no request for an instruction to the jury to disregard the fact that defendant had been restrained with shackles throughout his trial.

DEFENDANT appeals from judgments of *Wood, J.*, 20 October 1975 Criminal Session, CASWELL Superior Court.

Defendant is charged in separate bills of indictment with (1) rape of Tracy Lee Allen and (2) rape of Karen Davis, both offenses allegedly occurring in Caswell County on 20 August 1975. Upon arraignment, the State announced that it would seek convictions only for second degree rape.

The State's evidence tends to show that Tracy Lee Allen and Karen Davis, both nineteen, were residents of Danville, Virginia. On 20 August 1975 they drove to the Lantern Restaurant on Highway 68 in Caswell County, North Carolina, one or two miles from the city limits of Danville, Virginia, arriving about 9 p.m. Defendant was there when they arrived. Both girls knew defendant on sight, having seen him at the Lantern Restaurant on several previous occasions. When they drove into the parking lot, defendant ran to their car, said a friend had driven off with his car, and asked them to take him to get it. The girls refused, saying they were going somewhere else. Defendant thereupon opened the door, said "slide over baby," and got in.

He told them he had a gun "and asked us if that made any difference." They had seen defendant with a pistol on other occasions at the Lantern Restaurant and believed he had a pistol. So, with defendant giving directions, Tracy Lee Allen drove through Danville and south on U. S. 29 and Old 29, finally leaving the paved roads and driving down a dirt road which ended at an old house. There defendant took the car keys and forced the girls to get out. He took them down a path to a clearing in the woods where he tied Karen's hands behind her back, forced Tracy Lee to undress and raped her. He told her to pray because he intended to kill the one he didn't like. Defendant then tied Tracy Lee's hands with the same two belts he had used to bind Karen and proceeded to rape Karen.

Defendant kept the girls subjugated for more than one and one-half hours, raping each of them more than once. He showed them scars he had received in prison fights, told them how rough life had treated him both inside and outside of jail, and said "he was taking it out on us." Finally, defendant produced a pack of razor blades, said he felt guilty about what he had done, intentionally cut his own arm, and told the girls to sit and watch him die. Eventually he permitted them to get dressed and all three of them returned to the car. He allowed Tracy Lee Allen to drive. Defendant was bleeding all over the car but refused to be taken to the hospital. He wanted to be taken back to the Lantern Restaurant and said he would "make up a story" that he had a knife fight with some people behind The Drifter, and he requested the girls to corroborate him. He said he would kill them if they told anyone what had happened.

They arrived at the Lantern after 11 p.m. and the girls got home after midnight. No mention was made of the incident to anyone until the following day. They discussed the matter with their boyfriends and then talked to Sheriff Poteat of Caswell County and obtained warrants charging defendant with rape.

The sheriff and SBI Agent Dorsett went to the crime scene on Friday afternoon, 22 August 1975, where they found, among other things, a belt identified as belonging to defendant (S-4), an empty Gillette stainless steel razor blade package (S-6), two paper match folders (S-7), a belt buckle (S-8), a belt loop (S-9), and an earring identified by Tracy Lee Allen as belonging to her (S-10).

Defendant did not testify as a witness in his own behalf but offered evidence through other witnesses. His mother and sisters testified that defendant never wore a belt, did not own one, and that the belt identified as State's Exhibit 4 did not belong to him.

Billy Cox testified that in a conversation with Tracy Lee Allen six days after the alleged rape, he asked her "was it true about Perry Lee Tolley raping her, and she said, No, and if I heard anybody else talking about it to tell them that it wasn't true." On rebuttal, the prosecutrix Tracy Lee Allen admitted that she made the statement because she didn't want anybody to know about it.

The jury convicted defendant of second degree rape in both cases and the court imposed a life sentence in each case, to run consecutively. Defendant appealed to the Supreme Court assigning errors discussed in the opinion.

Clarence L. Pemberton and Melzer A. Morgan, Jr., attorneys for defendant appellant.

Rufus L. Edmisten, Attorney General, and Richard L. Griffin, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] On the day before oral arguments were heard in this case, defendant's appellate counsel filed in the Office of the Clerk of the Supreme Court a written motion to amplify the record on appeal, pursuant to Rules 9(b)(6) and 37(a) of the Rules of Appellate Procedure, to include four documents, marked Exhibits A, B, C, and D, which were attached to said motion. For the reasons which follow, this motion must be disallowed.

We note initially that the portion of defendant's motion containing a recitation of fact is outside the scope of Rule 9(b)(3), which enumerates what the record on appeal in criminal cases shall contain. Moreover, that portion of the motion seeking to bring forward the pretrial orders of confinement and the post-trial order for payment of legal fees (Exhibits A, C and D) is irrelevant to the question whether defendant's motion for a continuance was properly denied. Finally, that portion of the motion referring to a statement by the jury foreman to the trial judge after the jury had been discharged, and the court reporter's affidavit in support thereof (Exhibit B), are im-

proper as an attempt to impeach the verdict with hearsay evidence based upon statements by the jurors themselves. This the law does not permit. *See State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235 (1964). Defendant's motion to amplify the record on appeal is therefore denied.

The crimes in question were committed on 20 August 1975. Defendant was arrested on 22 August 1975 and a preliminary hearing was held on 19 September 1975. The Grand Jury of Caswell County returned true bills of indictment on 20 and 21 October 1975 charging defendant with rape of Tracy Allen and Karen Davis. Upon arraignment, the State announced that it would seek convictions only for second degree rape.

Prior to arraignment on 21 October 1975, defendant moved for a continuance for that both bills of indictment had been returned within one day of trial. When the motion was denied defendant's counsel stated: "Your Honor, some of the witnesses for the defendant are across the [State] line and I did not learn that they were not going to be here until this morning. Some of the brothers and sisters of the defendant, they were to be here but they are not here." The court replied, "Well, you are going to have to get them here, you have the same bridge to cross later on."

Following arraignment the cases were consolidated for trial without objection, but defendant renewed his motion for continuance until the December Term and restated the basis for it as follows: "I have been unable since the witnesses came from Virginia and since the Grand Jury brought in the second charge, I have not had time to see the witnesses. . . . " Defendant's motion was again denied with the following exchange:

> "COURT: Of course the Grand Jury brought in one bill yesterday and I don't believe that you will be in any better shape in the December Term than you are now about bringing the witnesses from Virginia.
>
> DEFENSE COUNSEL: I don't know and can't say. We can't subpoena witnesses from Virginia.
>
> COURT: No, sir, that is correct.
>
> DEFENSE COUNSEL: That is the situation that we are in. (Note by appellate counsel—defendant claimed to have two witnesses [women] who were out with him that night.)"

Denial of his motion for a continuance constitutes defendant's first and second assignments of error.

[2] It is settled law that a motion for continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon will not be reviewed absent abuse of discretion. It is equally well settled that if the motion is based on a right guaranteed by the federal or state constitutions, the question presented is one of law, not discretion, and the ruling of the trial court is reviewable on appeal. *State v. Brower,* 289 N.C. 644, 224 S.E. 2d 551 (1976), and cases therein cited; *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975). Here, defendant contends the trial court's ruling effectively denied him the right to offer testimony and the right to compel the attendance of out-of-state witnesses, thereby denying him "a fundamental element of due process of law" under both federal and state constitutions. *Washington v. Texas,* 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296, *cert. denied* 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972). The question presented is therefore one of law rather than discretion. *State v. Brower, supra; 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).

[3] Defendant's primary contention appears to be that his motion for continuance was denied under a misapprehension of the law in that the court was unaware of the provisions of G.S. 15A-811 *et seq.* (formerly G.S. 8-65), the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, whereby witnesses residing in other states which have adopted the Act may be summoned to appear in criminal trials in North Carolina. An examination of the record demonstrates the unsoundness of this contention.

[4] The record clearly reflects that the trial judge was not inadvertent to the provisions of G.S. 15A-811 *et seq.* On 13 October 1975 he issued certificates pursuant to the provisions of that Act to procure the attendance at trial of three prosecution witnesses who resided in Virginia. Moreover, nothing in the record suggests that defense counsel, before moving for a continuance, had sought the court's assistance in summoning witnesses pursuant to the Act. In fact, it is not clear from counsel's remarks that he desired the court's help in that respect at the time his motion was lodged. In any event, counsel's statement in support

of his motion contain no intimation or suggestion that he could not have investigated the case, spoken to defense witnesses, arranged for their appearance in court, and generally prepared the defense during the month between the preliminary hearing and the day of the trial. *See State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948); *compare State v. Whisnant,* 271 N.C. 736, 157 S.E. 2d 545 (1967); *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962); *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949), *cert. denied* 340 U.S. 835, 95 L.Ed. 613, 71 S.Ct. 18 (1950); *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322 (1943). Furthermore, the only absent witnesses mentioned were "some of the brothers and sisters of the defendant." No names and addresses were furnished the court; no affidavit or other proof was offered in support of the motion for a continuance, *see State v. Miller, supra; State v. Flowers,* 244 N.C. 77, 92 S.E. 2d 447 (1956); *State v. Gibson, supra;* and, under the circumstances, it may be assumed that absent brothers and sisters, even if present, would not have added significantly to the testimony of defendant's mother and sister who testified in his behalf. G.S. 15A-812 and 813 require a finding that the witnesses sought to be summoned are "material and necessary." All things considered, it can hardly be said *on this record* that the trial court committed prejudicial error amounting to a denial of due process in failing to continue the case so that additional members of defendant's family might be subpoenaed at witnesses for him.

The record is silent as to whether the trial judge was informed when the motion for continuance was made that "defendant claimed to have two witnesses (women) who were out with him that night." Defense counsel made no statement that he was attempting to locate the two female witnesses. If such witnesses existed, it would seem that during the month preceding the trial counsel could have procured sufficient information about them to enable him to provide the trial judge, at the time of his motion, with their names and addresses, and inform him of the nature of their testimony. "A continuance ought to be granted if there is an apparent probability that it will further the ends of justice. Consequently, a postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term. [Citation omitted.]" (Emphasis added.) *State v.*

Gibson, supra; accord, State v. Phillip, supra. Considered in totality, the record before us does not suggest that defendant reasonably believed that *material* evidence would be brought to light by a continuance. Rather, the record suggests a natural reluctance to proceed to trial, engendered by the seriousness of the charge and lack of a substantial defense, rather than scarcity of time or absence of bona fide witnesses. *See State v. Gibson, supra.* In our view, a continuance would not have enabled defendant and his counsel to obtain additional witnesses whose testimony would have provided a stronger defense. Assignments one and two are therefore overruled.

[5] Tracy Lee Allen testified that she and Karen Davis were examined by a doctor on Friday after they were raped on Wednesday; that the doctor was now on vacation but she had the doctor's report. Defendant's objection was sustained, whereupon the district attorney said: "I am not going to introduce it. I just wanted to show that she went to a doctor." Defense counsel replied: "I don't know if it does or not, it is two days late." By his third assignment of error defendant contends he was prejudiced by the district attorney's reference to the medical report which he knew was inadmissible. Defendant argues that the episode "communicated to the jury material [inappropriate] for jury view" and thereby excited the jurors' curiosity as to "why the doctor's report was kept from them." We find no merit in this assignment.

Defendant cites no authority for his conclusory assertion of prejudice due to juror curiosity about the contents of the medical report. While it is true that the report, assuming its contents were relevant, was apparently incompetent as hearsay, *see* G.S. 8-44.1; 1 Stansbury's North Carolina Evidence § 138 (Brandis rev. 1973) and cases cited; 3 Strong's North Carolina Index 2d, Evidence, § 29 (1967), and cases cited, defendant's objection to the challenged reference by the prosecutor was *sustained.* The district attorney himself then stated that he did not intend to introduce the report and merely wished to show that the prosecutrix had been examined by a physician—a fact to which the witness had already testified without objection. On this record defendant's contention is no more than an unsubstantiated claim of possible prejudice. This is legally insufficient to support the assignment of error. Defendant's third assignment is overruled.

[6] Billy Cox, a witness for defendant, testified that Tracy Lee Allen stated to him, following the alleged rape, that defendant had not raped her. As Cox began to testify regarding his conversation with Miss Allen, the trial judge on his own motion instructed the jury as follows:

> "Ladies and gentlemen, this conversation that this witness is about to testify to, the court instructs you, you consider only for the purpose of showing that at sometime prior to the trial that this witness, Tracey Allen, made some inconsistent statement about what happened here, if you find that she did make an inconsistent statement and you will consider it for that purpose only. *What she said at the earlier time is not evidence,* it is not, well you may consider it only for the purpose of showing that it either corroborates her testimony at this trial or that she made an inconsistent statement at the earlier date and it is not substantive evidence in this trial." (Emphasis added.) EXCEPTION No. 4

Defendant assigns as error the italicized portion of the quoted instruction, contending that the witness's prior inconsistent statement was in fact competent evidence for the purpose of impeachment and that the challenged instruction was prejudicial requiring a new trial. This constitutes defendant's fifth assignment of error.

The quoted instruction is somewhat garbled and not a model for clarity. The challenged portion in italics, standing alone, is technically erroneous, but the charge as a whole is correct. "We have said many times that a charge must be construed contextually, 'and isolated portions of it will not be held prejudicial when the charge as a whole is correct.' *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971)." *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972); *accord, State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970). A disconnected portion of the charge may not be taken out of context and critically examined for an interpretation from which erroneous expressions may be inferred. *State v. McWilliams, supra; State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969). The charge of the court must be read as a whole and construed contextually, *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918), and if it presents the law fairly and clearly to the jury, the fact that some expressions, standing

alone, might be considered erroneous will afford no ground for reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966).

When the foregoing principles are applied to the challenged instruction, it is obvious that defendant was not prejudiced. The portions of the charge immediately preceding and immediately following the challenged italicized phrase correctly inform the jury that the prior inconsistent statement of the prosecutrix, if made, could be considered for the purpose of impeaching her testimony at trial. Moreover, the trial judge in his final charge to the jury, after speaking of the impeaching aspects of the testimony of the witness Cox, concluded: "If you believe that such earlier statement was made, that it does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing on the witness' truthfulness in deciding whether you believe or disbelieve her testimony at this trial." We hold that defendant was not prejudiced by the isolated portion of the charge to which he objects. It had no prejudicial effect on the result of the trial and was therefore harmless. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950). This assignment is overruled.

In his brief, defendant expressly abandons his sixth and eighth assignments of error relating to the sufficiency of the evidence and to the trial court's definition of rape in his instruction to the jury. We therefore turn to the seventh assignment.

[7] The instruction to which defendant's seventh assignment of error is addressed appears in the record in the following form:

> "Now ladies and gentlemen, again I instruct you that what these two State's witnesses, Karen Davis and Tracey Lee Allen, told Detective Moss you will consider only for the purpose of corroborating their testimony here at this trial, if in fact you find their statement did. (What they told him on that occasion does corroborate their testimony here at this trial.)"

EXCEPTION NO. 7

Defendant contends that the final sentence in parentheses constitutes an expression of opinion in violation of G.S. 1-180, was highly prejudicial, and requires a new trial. The State contends the court reporter improperly punctuated the words used by the judge and thus produced the bizarre and inaccurate result complained of. The State says and contends that the in-

struction as given should be written as follows: " . . . again I instruct you that what these two State's witnesses . . . told Detective Moss you will consider only for the purpose of corroborating their testimony here at this trial, if in fact you find their statement did—what they told him on that occasion does —corroborate their testimony here at this trial." We now consider these opposing contentions.

A careful review of the entire charge lends credence to the State's position. Immediately before the sentence in parentheses which is the subject of Exception No. 7, the trial judge gave a proper and grammatically correct instruction concerning similar corroborative testimony of Sheriff Poteat to whom the girls had talked. With reference to Sheriff Poteat's testimony, the court said: "Again I instruct you that this statement is to be considered by you only for the purpose of corroborating the testimony of Tracey Allen and Karen Davis here at this trial, if in fact you find that what these two young ladies told the sheriff on the 21st day of August 1975 does corroborate their testimony here at this trial and for that purpose only." When the unchallenged instruction with respect to Sheriff Poteat's testimony is compared to the challenged instruction to which Exception No. 7 refers, it is apparent that when the judge strayed from his usual phraseology he corrected it by substituting for the words "their statement did" the words "what they told him on that occasion does corroborate their testimony here at this trial." When the charge is read aright so as to reflect the true meaning of what the judge actually said, it is quite apparent that the jury was told that what Karen Davis and Tracy Lee Allen told Detective Moss would be considered "only for the purpose of corroborating their testimony here at this trial, if in fact you find . . . what they told him on that occasion does corroborate their testimony here at this trial." *Cf. State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). The jury was not misled by the slightly garbled but quickly corrected language of the trial judge and defendant suffered no prejudice. "[N]ot every . . . poorly expressed instruction by the trial judge is of such harmful effect as to constitute reversible error." *State v. Bailey, supra.* Viewed in light of all the facts and circumstances, and considering the charge as a whole, we hold that the instruction to which this assignment is addressed was not a prejudicial expression of opinion by the trial judge. Defendant's seventh assignment is overruled.

[8] Defendant was convicted of two offenses of second degree rape involving two separate victims. The trial judge imposed a life sentence in each case, the sentences to run consecutively. Defendant contends the imposition of consecutive sentences is harsh and unlawful. The action of the court in imposing them constitutes his ninth assignment of error.

G.S. 14-21(b) provides that the maximum punishment for second degree rape shall be imprisonment in the State's prison for life. Thus the imprisonment imposed in each case does not exceed the punishment authorized by law. Whether sentences for separate offenses are to run concurrently or consecutively is within the sound discretion of the trial judge. The fact that the sentences are imposed to run consecutively is not error.

We have consistently held that a sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual punishment unless the punishment provisions of the statute itself are unconstitutional. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Cradle, supra,* and cases cited therein. The federal rule coincides with ours. *See Gore v. United States,* 357 U.S. 386, 2 L.Ed. 2d 1405, 78 S.Ct. 1280 (1958); *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180; *United States v. Pruitt,* 341 F. 2d 709 (4th Cir. 1965); *United States v. Martell,* 335 F. 2d 764 (4th Cir. 1964); *Martin v. United States,* 317 F. 2d 753 (9th Cir. 1963). And consecutive life sentences have been specifically upheld by this Court in many cases, including *State v. Mitchell, supra,* and *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966). Defendant's ninth assignment of error is therefore overruled.

This brings us to the question whether the trial judge committed prejudicial error by permitting defendant to be tried in shackles.

Shortly before the State rested its case, the jury was excused and the following exchange occurred between the trial judge and defense counsel regarding the fact that defendant was being tried in shackles:

> "COURT: Now let the record show that the Court is aware that the defendant is wearing shackles on his feet and there is no objection to that but let the record show that the Sheriff of the County asked that he be allowed to wear these things because the defendant in the preliminary

hearing, the defendant ran and that is the reason that the Court has allowed the defendant to wear shackles on his legs. Mr. Pemberton, you are not objecting to that now are you?

ATTORNEY PEMBERTON: No, sir.

EXCEPTION NO. 3"

Although it is not completely clear from the record, a fair reading of the quoted passage indicates, as defendant asserts in his brief, that by order of the court defendant was restrained with leg irons for the duration of his trial. Defendant contends that this action by the trial judge rendered his trial fundamentally unfair, in that his appearance before the jury while shackled with leg irons during the entire course of his three-day trial destroyed the presumption of innocence to which he was entitled until proven guilty beyond a reasonable doubt. Thus, argues defendant, he was denied due process under the Fourteenth Amendment to the Federal Constitution and Article I, Section 19 of the State Constitution.

[9] It is the duty of the trial judge, in the exercise of his discretion, to regulate the conduct and the course of business during trial. *State v. Spaulding,* 288 N.C. 397, 219 S.E. 2d 178 (1975). Thus it is within the judge's discretion, when necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial. *See State v. Spaulding, supra; State v. Mansell,* 192 N.C. 20, 133 S.E. 190 (1926). Similarly, the trial judge, having the responsibility of preserving proper decorum and appropriate atmosphere in the courtroom during a trial, has the *inherent power* to take whatever legitimate steps are necessary to deal with an unruly, disruptive or contemptuous defendant. *Illinois v. Allen,* 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 (1970); *accord, State v. Brown,* 19 N.C. App. 480, 199 S.E. 2d 134, *appeal dismissed* 284 N.C. 255, 200 S.E. 2d 659 (1973); *State v. Dickerson,* 9 N.C. App. 387, 176 S.E. 2d 376 (1970). However, neither our research nor that of the parties has revealed an instance in which this Court has dealt with the matter of the shackled defendant. It is this question to which we now turn.

We begin with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution and the Law of the Land Clause of Article I, Section 19 of the State Constitution.

"Due process of law guarantees respect for those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934), or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)." *Commonwealth v. Mayhugh,* 233 Pa. Super. 24, 336 A. 2d 379 (1975). Otherwise stated, "due process of law" formulates a flexible concept, the purpose of which is "to insure fundamental fairness." *See Betts v. Brady,* 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252 (1942); *accord, State v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563 (1947), *cert. granted* 333 U.S. 854, 92 L.Ed. 1134, 68 S.Ct. 727, *petition dismissed* 334 U.S. 806, 92 L.Ed. 1739, 68 S.Ct. 1185 (1948). Similarly, the "law of the land" requires that the administration of justice "be consistent with the fundamental principles of liberty and justice." *State v. Hedgebeth, supra.* Thus it has long been settled that "law of the land" is equivalent to "due process of law." *Smith v. Keator,* 285 N.C. 530, 206 S.E. 2d 203 (1974); *Watch Co. v. Brand Distributors,* 285 N.C. 467, 206 S.E. 2d 141 (1974); *State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786 (1961); *State v. Perry,* 248 N.C. 334, 103 S.E. 2d 404 (1958), *cert. denied* 361 U.S. 833, 4 L.Ed. 2d 74, 80 S.Ct. 83 (1959); *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717 (1950); *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949); *State v. Hedgebeth, supra.*

Essential to the concept of due process is the principle that every person who stands accused of a crime is entitled to the "fundamental liberty" of a fair and impartial trial. *Estelle v. Williams,* ____ U.S. ____, ____ L.Ed. 2d ____, ____ S.Ct. ____ (1976); *Drope v. Missouri,* 420 U.S. 162, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975); *Massey v. Moore,* 348 U.S. 105, 99 L.Ed. 135, 75 S.Ct. 145 (1954); *Betts v. Brady, supra.* Likewise, it has long been recognized that "the presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams, supra. See Coffin v. United States,* 156 U.S. 432, 39 L.Ed. 481, 15 S.Ct. 394 (1895); *Kennedy v. Cardwell,* 487 F. 2d 101 (6th Cir. 1973), *cert. denied* 416 U.S. 959, 40 L.Ed. 2d 310, 94 S.Ct. 1976 (1974); *United States v. Samuel,* 431 F. 2d 610 (4th Cir. 1970), *cert. denied sub. nom. Samuel v. United States,* 401 U.S. 946, 28 L.Ed. 2d 229, 91 S.Ct. 964 (1971). To implement the presumption of innocence, the enforcement of which "lies at the foundation of the administration

of our criminal law," *Coffin v. United States, supra,* courts must guard against factors which may "undermine the fairness of the fact-finding process" and thereby dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970)." *Estelle v. Williams, supra.* It follows, therefore, that the presumption of innocence requires the indicia of innocence, for "regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *Eaddy v. People,* 115 Colo. 488, 174 P. 2d 717 (1946); *accord, Anthony v. State,* 521 P. 2d 486 (Alaska 1974).

[10] Accordingly, there has evolved the general rule that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. *See Snow v. Oklahoma,* 489 F. 2d 278 (10th Cir. 1973); *Kennedy v. Cardwell, supra; United States v. Henderson,* 472 F. 2d 556 (5th Cir.), *cert. denied* 411 U.S. 971, 36 L.Ed. 2d 694, 93 S.Ct. 2166 (1973); *United States v. Roustio,* 455 F. 2d 366 (7th Cir. 1972); *Dorman v. United States,* 435 F. 2d 385 (D.C. Cir. 1970); *United States v. Thompson,* 432 F. 2d 997 (4th Cir. 1970), *cert. denied* 401 U.S. 944, 28 L.Ed. 2d 226, 91 S.Ct. 955 (1971); *United States v. Samuel, supra; Woodards v. Cardwell,* 430 F. 2d 978 (6th Cir. 1970), *cert. denied* 401 U.S. 911, 27 L.Ed. 2d 809, 91 S.Ct. 874 (1971); *Loux v. United States,* 389 F. 2d 911 (9th Cir.), *cert. denied* 393 U.S. 867, 21 L.Ed. 2d 135, 89 S.Ct. 151 (1968); *Way v. United States,* 285 F. 2d 253 (10th Cir. 1960); *Odell v. Hudspeth,* 189 F. 2d 300 (10th Cir.), *cert. denied* 342 U.S. 873, 96 L.Ed. 656, 72 S.Ct. 116 (1951); *Blaine v. United States,* 136 F. 2d 284 (D.C. Cir. 1943); *Anthony v. State, supra; People v. Harrington,* 42 Cal. 165, 10 Am. Rep. 296 (1871); *Eaddy v. People, supra; Shultz v. State,* 131 Fla. 757, 179 So. 764 (1938); *People v. Boose,* 33 Ill. App. 3d 250, 337 N.E. 2d 338 (1975); *Blair v. Commonwealth,* 171 Ky. 319, 188 S.W. 390 (1916); *People v. Thomas,* 1 Mich. App. 118, 134 N.W. 2d 352 (1965); *Commonwealth v. Brown,* ____ Mass. ___, 305 N.E. 2d 830 (1973); *State v. Kring,* 64 Mo. 591 (1877); *State v. Borman,* 529 S.W. 2d 192 (Mo. App. 1975); *State v. Robinson,* 507 S.W. 2d 61 (Mo. App. 1974); *State v. Jones,* 130 N.J. Super., 596, 328 A. 2d 41 (1974); *State v. Roberts,* 86 N.J. Super. 159, 206 A. 2d 200 (1965); *People*

v. Mendola, 2 N.Y. 2d 270, 140 N.E. 2d 353, 159 N.Y.S. 2d 473 (1957); *French v. State,* 377 P. 2d 501 (Okl. Cr. 1963); *Commonwealth v. Mayhugh, supra: Commonwealth v. Cruz,* 226 Pa. Super. 241, 311 A. 2d 691 (1973); *Thompson v. State,* 514 S.W. 2d 275 (Tex. Cr. App. 1974); *Sparkman v. State,* 27 Wis. 2d 92, 133 N.W. 2d 776 (1965); Krauskopf, "Physical Restraint of the Defendant in the Courtroom," 15 St. Louis U.L.J. 351 (1971); Comment, "Dealing with Unruly Persons in the Courtroom," 48 N.C.L. Rev. 878 (1970); Note, 56 Minn. L. Rev. 699 (1972); Note, 8 St. Louis U.L.J. 401 (1964); 21 Am. Jur. 2d, Criminal Law § 240 (1965), and cases cited therein; 23 C.J.S., Criminal Law § 977 (1961), and cases cited therein; American Bar Association Project on Standards for Criminal Justice, Standards Relating to Trial by Jury § 4.1(c) (Approved Draft 1968), and comments thereto; *cf. Illinois v. Allen,* 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 (1970). "The historical development of the rule that a defendant should be unfettered while standing trial, except in extraordinary instances, has been traced from Virgil and the Bible through Magna Carta and the great English legal scholars—Bracton, Coke and Blackstone—into our own jurisprudence. *See* Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis U.L.J. 351 (1971)." *Kennedy v. Cardwell, supra.* Although the original reasons underlying the common law rule are not entirely clear, the American cases on the subject indicate that shackling of the defendant should be avoided because (1) it may interfere with the defendant's thought processes and ease of communication with counsel, (2) it intrinsically gives affront to the dignity of the trial process, and most importantly, (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion. *Kennedy v. Cardwell, supra; United States v. Samuel, supra; Commonwealth v. Brown, supra; State v. Roberts, supra.*

[11] Hence, a majority of American courts agree that, in the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it "interfere[s] with a fair and just decision of the question of . . . guilt or innocence." *Blair v. Commonwealth, supra; accord. Kennedy v. Cardwell, supra; United States v. Samuel, supra.* And because of the inherent prejudice engendered by the use of

shackles, the rule since the earliest cases has been that the burden of showing necessity for such measures rests upon the State. *See People v. Harrington, supra; Blair v. Commonwealth, supra.*

To say, as a general rule, that trial in shackles is inherently prejudicial is not to conclude, however, that *every* such trial is fundamentally unfair. In certain instances, shackling the defendant may be justified, not because no prejudice is engendered thereby, but because it is shown by the State to be necessary notwithstanding any such prejudice. "[T]he right to the indicia of innocence is a relative one. . . . [I]n appropriate circumstances, [it] must bow to the competing rights of participants in the courtroom and society at large." *United States v. Samuel, supra.*

[12] Thus, the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial. *Kennedy v. Cardwell, supra; United States v. Samuel, supra; Commonwealth v. Brown, supra; State v. Roberts, supra.* The cases traditionally hold that accommodation between the conflicting interests of the defendant and the State with regard to the use of shackles and other physical restraints lies within the discretion of the trial judge because "[i]t is he who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes." *United States v. Samuel, supra.*

This broad discretion which is vested in the trial court is not unlimited. "The power to order a defendant to stand trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion." *State v. Roberts, supra.* And sound judicial discretion means "a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. *Langnes v. Green,* 282 U.S. 531, 534, 51 S.Ct. 243, 75 L.Ed. 520 (1931). . . . [T]his requires a knowledge and understanding of the material circumstances surrounding the matter calling for the exercise of sound discretion." *Woodards v. Cardwell, supra; accord, Kennedy v. Cardwell, supra; United States v. Samuel, supra; Commonwealth*

v. Brown, supra; State v. Roberts, supra; ABA Project on Standards for Criminal Justice, *supra.*

[13] The "material circumstances" which the trial judge may consider in exercising his sound discretion include, *inter alia,* the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies. *See Kennedy v. Cardwell, supra; Commonwealth v. Brown, supra; State v. Borman, supra;* ABA Project on Standards for Criminal Justice, *supra.* "The information upon which the judge acts need not necessarily come from evidence formally offered and admitted at the trial. His knowledge may stem from official records or what law enforcement officers have told him. . . . It has even been said that the trial court may take judicial notice of facts generally within the limits of his jurisdiction." *State v. Roberts, supra; accord, Comonwealth v. Brown, supra.* However, the ultimate decision must remain with the trial judge, who may not resign his exercise of discretion to that of his advisors. *See State v. Roberts, supra; People v. Mendola, supra; Sparkman v. State, supra.*

[14] Whatever the basis for his decision, however, the unquestioned rule is that when the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the court that such measures are unnecessary. While the cases have established no definitive rule as to the exact form of evidentiary hearing to determine whether shackling of the defendant is necessary, the most prevalent conclusion is that the hearing may be informal and that the ordinary rules of evidence need not be observed, although the trial judge may decide, particularly where the need for physical restraint is controverted, to conduct a full evidentiary hearing with sworn testimony and formal findings of fact. In any event, a record must be made which reflects the reasons for the action taken by the court and

which indicates that counsel have been afforded an opportunity to controvert these reasons and thrash out any resulting factual questions. Only in this manner can there be preserved a meaningful record from which a reviewing court may determine whether the trial court abused its discretion. *See United States v. Samuel, supra; Commonwealth v. Brown, supra; State v. Roberts, supra; Thompson v. State, supra;* ABA Project on Standards for Criminal Justice, *supra.*

[15] Once the decision to shackle the defendant during trial has been made by the trial court in this fashion, the cases make it clear that the judge should take all reasonable precautions to insure that the jury's deliberations and verdict remain untainted by their observations of defendant while he is so restrained. The better reasoned cases hold that "in any case where the trial judge, in the exercise of sound discretion, determines that the defendant must be handcuffed or shackled, it is of the essence that he instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt. This is the least that can be done toward insuring a fair trial." *State v. Roberts, supra; accord, Commonwealth v. Brown, supra; Commonwealth v. Cruz, supra; Thompson v. State, supra; State v. Cassel,* 48 Wis. 2d 619, 180 N.W. 2d 607 (1970). *See* ABA Project on Standards for Criminal Justice, *supra.* At the very least, it would seem that such an instruction should be given when requested. *See State v. Washington,* ___ La. ___, 322 So. 2d 185 (1975); *Commonwealth v. Marvrellis,* ___ Mass. App. ___, 325 N.E. 2d 295 (1975); *Commonwealth v. McGonigle,* 228 Pa. Super. 345, 323 A. 2d 733 (1974); *Commonwealth v. DeMarco,* 225 Pa. Super. 130, 310 A. 2d 341 (1973).

The propriety of physical restraints depends upon the particular facts of each case, and the test on appeal is whether, under all of the circumstances, the trial court abused its discretion. *See Kennedy v. Cardwell, supra; United States v. Henderson, supra; United States v. Samuel, supra; Allen v. State,* 235 Ga. 709, 221 S.E. 2d 405 (1975); *Commonwealth v. Brown, supra; State v. Borman, supra; State v. Roberts, supra; Flowers v. State, supra.*

Applying the stated principles to the case at bar, the question for decision boils down to this: On the basis of the record before us, can we say, as a matter of law and with "definite

and firm conviction," that "the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors"? *In re Josephson,* 218 F. 2d 174 (1st Cir. 1954); *accord, Kennedy v. Cardwell, supra.* For the reasons which follow, the answer is no.

[16] The record in the instant case reveals no mention of defendant's shackled condition until shortly before the conclusion of the State's case. At that time the trial judge, out of the presence of the jury, noted for the record that he had allowed defendant to be tried in shackles because defendant apparently had attempted to escape during the preliminary hearing one month before the trial and because the sheriff recommended such restraints as a security measure. Defense counsel, when asked by the court if he had any objection, replied, "No, sir."

This exchange, brief though it is, indicates that the trial judge in this instance did in fact exercise his discretion in ordering defendant to be shackled to prevent the possibility of another attempted escape. While we think the better practice would have been to resolve the matter of shackles before the trial began, there is nothing in the record to indicate that defense counsel was not afforded an opportunity before trial to controvert the fact of defendant's previous attempt to escape and to persuade the court that shackles were unnecessary. In fact, the record shows that counsel declined the judge's express invitation to do so when the matter first arose after trial had begun. Moreover, in addition to the uncontroverted fact of defendant's prior escape attempt, the court, in making its decision, also had before it the facts that defendant was a twenty-five-year-old male, in apparent good health and physical condition, who was charged with two rapes, and that the sheriff, charged with the custody of defendant during the trial, was of the opinion that shackles were necessary. Furthermore, although it is possible, as defendant suggests, that any necessary security precautions might have been accomplished by the use of armed guards rather than shackles, the record reflects that defense counsel at no time suggested any such alternative measures. In fact, the need for shackles as opposed to some less restrictive means of security was not controverted. And since defendant stated that he had no objection and did not seek to challenge the court's action or the reasons for it, we cannot say that the court abused its discretion in failing to conduct a hearing *ex mero motu.* The record reveals *some reasonable basis* upon which the judge concluded,

in the exercise of his sound discretion, that it was necessary to leave defendant shackled during his trial. *See Commonwealth v. Chase,* 350 Mass. 738, 217 N.E. 2d 195, *cert. denied* 385 U.S. 906, 17 L.Ed. 2d 137, 87 S.Ct. 222 (1966); *People v. Mendola, supra.* Accordingly, we cannot say, as a matter of law, that the trial judge abused his discretion in this instance.

Likewise, defendant's contention that the trial judge erred in failing to instruct the jury to disregard the fact that defendant had been restrained with shackles throughout his trial cannot be sustained. While such an instruction would have been advisable, *see Commonwealth v. Brown, supra; State v. Roberts, supra; Thompson v. State, supra;* ABA Project on Standards for Criminal Justice, *supra,* we decline to hold that the trial judge committed prejudicial error in failing to give such an instruction on his own motion when none was requested by defendant. Defendant's failure to request appropriate cautionary instructions at trial had the effect, under the circumstances shown, of waiving as a basis for appeal the oversight of the trial judge now complained of. *See State v. Washington, supra; Commonwealth v. Marvrellis, supra; Commonwealth v. McGonigle, supra; Commonwealth v. DeMarco, supra.*

Finally, we are of the opinion that defense counsel's failure to object to the shackling, even when explicitly asked about it by the trial judge, waived any error which may have been committed. The general rule in non-capital cases is that "an objection not made in apt time is waived." *State v. Davis* and *State v. Fish,* 284 N.C. 701, 202 S.E. 2d 770, *cert. denied* 419 U.S. 857, 42 L.Ed. 2d 91, 95 S.Ct. 104 (1974); *accord, State v. Strickland,* 290 N.C. 169, 225 S.E. 2d 531 (1976). *See also* Rule 10, North Carolina Rules of Appellate Procedure, 287 N.C. 671 (Appendix 1975). And this is true even though the error alleged on appeal but not objected to below involves a constitutional right. *United States v. Indiviglio,* 352 F. 2d 276 (2d Cir. 1965), *cert. denied* 383 U.S. 907, 15 L.Ed. 2d 663, 86 S.Ct. 887 (1966); *accord, Estelle v. Williams, supra.* If defendant has an objection, he has an obligation to call the matter to the court's attention so that the trial judge may, if necessary, remedy the situation. "Any other approach would rewrite the duties of trial judges and counsel in our legal system." *Estelle v. Williams, supra. See State v. Strickland, supra.* Considering the instant case in light of these principles, we believe the better-reasoned rule is that defendant, while ordinarily con-

stitutionally entitled to appear at his own trial free of shackles, must, when shackling is suggested, object to the proposed restraint and, absent reasonable excuse therefor, failure to do so will ordinarily preclude the shackling as an issue on appeal. *See Flowers v. State, supra.*

Estelle v. Williams, supra, decided 3 May 1976, involved the analogous issue of trial in prison garb. The United States Supreme Court held in that case that, although a criminal defendant cannot be constitutionally compelled to stand trial while dressed in identifiable prison clothes, "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." To like effect is *Hernandez v. Beto,* 443 F. 2d 634 (5th Cir.), *cert. denied* 404 U.S. 897, 30 L.Ed. 2d 174, 92 S.Ct. 201 (1971), in which the 5th Circuit, in denying appellee's petition for rehearing, stated: "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." Thus, the right not be tried in any court while dressed in prison garb may be waived by failure to object at trial.

So it is here. We can only speculate whether defendant's failure to object to the shackles when afforded an opportunity to do so was a defense tactic or mere indifference. In either event, his silence negates any suggestion of compulsion and suggests that counsel either shared the view that the shackles were necessary or, as a tactical matter, felt that the sight of defendant in shackles would engender among the jurors more sympathy for defendant than prejudice against him. *Cf. Estelle v. Williams, supra.*

In summary, we hold that (1) abuse of discretion has not been shown and (2) by failing to object, defendant waived any error with respect to his shackling. Even so, security measures which are inherently prejudicial, such as shackling, should ordinarily be avoided. When necesssity dictates the use of such restraints, the trial judge should, preferably before the trial begins, place in the record in the presence of defendant and his counsel the reasons for shackling and give them an opportunity to make their objections known. A formal hearing is not required, but when the stated reasons for shackling are controverted by defendant, it would be the better practice to hold a formal voir dire and make specific findings of fact as a basis for the court's

discretionary ruling. If the court concludes in the exercise of its sound discretion that shackling is required, the trial judge should, and upon request shall, instruct the jury against bias and specifically charge that defendant's guilt should not be inferred from the fact that, as a security measure, he has been shackled during the trial. In our considered judgment these safeguards comport with due process of law which requires all courts to insure that elementary fairness toward one charged with an offense is not infringed.

Even so, "there remain competing interests and balancing forces in the administration of criminal justice. There is a line which, through a continuing process of application, marks the interests reasonably necessary to the administration of justice; and beyond which even the most unassailable individual constitutional rights cannot venture." *Commonwealth v. Mayhugh*, 233 Pa. Super. 24, 336 A. 2d 379 (1975). In our judgment the facts of this case fall behind that line. Defendant's assignment of error with respect to shackling is therefore overruled.

Every person charged with crime is "entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953). After careful examination of the entire record we conclude that defendant has been afforded a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

No error.

ANGELUS CHAMBERS RICKENBAKER v. THOMAS C. RICKENBAKER

No. 95

(Filed 14 July 1976)

Evidence § 27— tapped telephone line — conversations inadmissible in alimony and child support action

In an action for child support, alimony *pendente lite* and permanent alimony, the Court of Appeals correctly decided that the trial judge's finding that defendant did not use an extension phone in his office in the ordinary course of business was supported by ample evidence, where such evidence tended to show that defendant had the phone, which was an extension of the phone located in the parties' home, placed in a locked closet in his office without the knowledge or consent of plaintiff; a sound-activated recorder was installed by

defendant and not by the communications common carrier in the ordinary course of its business; and neither defendant nor his employees placed calls or directly received incoming calls on the telephone. Moreover, the Court of Appeals correctly affirmed that portion of the trial court's order which suppressed all evidence resulting from the interception of the plaintiff's telephone communications. 18 U.S.C. § 2515.

APPEAL by defendant from decision of the Court of Appeals pursuant to G.S. 7A-30(2), 28 N.C. App. 644, 222 S.E. 2d 463, (opinion by *Judge Arnold; Judge Parker* concurring, and *Chief Judge Brock* dissenting), affirming in part and vacating in part an order of the MECKLENBURG District Court filed June 10, 1975.

On 15 June 1973, Angelus C. Rickenbaker instituted this action against her husband, Thomas C. Rickenbaker, seeking child support for two minor children of the marriage, alimony *pendente lite* and permanent alimony. Defendant answered denying the material facts which plaintiff alleged in support of her claim for alimony and alleged, in bar of plaintiff's claim, adultery on the part of plaintiff.

The case was tried before District Judge William G. Robinson and judgment was entered awarding plaintiff use of the family home for herself and children as well as $2,200 per month for child support and alimony. On appeal, the Court of Appeals held that plaintiff had not proven the facts entitling her to relief. The judgment was vacated and the cause remanded for further proceedings.

Thereafter, on 17 June 1974, defendant filed a supplemental answer pleading several acts of adultery in bar of plaintiff's claim for alimony. Before the cause came to trial a second time, plaintiff filed a motion to suppress "any and all evidence on the trial of this cause resulting from the interception of wire or oral communications of the plaintiff by defendant and his agents and also any evidence derived from such interception of wire or oral communications . . . . " At the hearing on this motion, defendant produced evidence tending to show that plaintiff and defendant were married and living together as man and wife until the month of January 1973 when they separated and began to live separate and apart. Prior to the separation of plaintiff and defendant, Southern Bell Telephone and Telegraph Company installed a telephone (#375-8565) in the residence on Twiford Place. This telephone was listed in defendant's name

and he paid the telephone bills incurred from the use of the telephone throughout the time in controversy.

On 27 September 1973, upon instructions from defendant, the telephone company installed an extension telephone (#375-8565) in a supply closet in defendant's office in the Johnston Building in Charlotte. Without plaintiff's knowledge or consent, defendant then installed a sound-activated tape recorder to the equipment installed in a closet. The recording device and telephone extension line were used to record numerous conversations between plaintiff and other persons. The extension line was used solely in conjunction with the tape recorder to record telephone conversation messages and neither defendant nor his employees placed or directly received telephone calls on the extension telephone. Defendant listened to these recordings and as a result of these conversations, made reports to various investigators employed by the Wackenhut Corporation concerning the adulterous conduct alleged in defendant's supplemental answer.

Defendant testified that he had the extension telephone and recorder installed to determine if plaintiff was referring his business calls to his office.

By order dated 10 June 1975, Judge Robinson, after finding facts substantially in accord with the evidence presented at the hearing, concluded as a matter of law that defendant unlawfully intercepted plaintiff's telephone calls in violation of the provisions of 18 U.S.C. 2510, *et seq.* He thereupon ordered that the allegations of adulterous conduct contained in paragraph 8 of defendant's supplemental answer be stricken and that any evidence pertaining to the allegations of paragraph 8 should not be used by the defendant in the course of the trial of this case.

Holding that defendant's interception of the telephone calls violated the provisions of 18 U.S.C. 2510, *et seq.*, the Court of Appeals affirmed the order so far as it excluded all evidence resulting from the interception of plaintiff's telephone communications and vacated that portion of the order excluding any evidence pertaining to the *allegations* of paragraph 8 of the supplemental answer.

Warren C. Stack and Richard D. Stephens for defendant appellant.

DeLaney, Millette, DeArmon & McKnight, P.A., by Ernest S. DeLaney, Jr., and Ernest S. DeLaney, III, for plaintiff.

BRANCH, Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in affirming that portion of the trial court's order which suppressed all evidence resulting from the interception of the plaintiff's telephone communications.

18 U.S.C. § 2511, in part, provides:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communications; or . . . .
>
> * * *
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

In order to intelligently follow the provisions of the pertinent statutes, we turn to 18 U.S.C. § 2510 for relevant definitions:

> As used in this chapter—
>
> (1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operat-

ing such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than——

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

The focal statute for our consideration is 18 U.S.C. § 2515 which provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Defendant, relying on the language in 18 U.S.C. § 2510(5)(a), contends that Title III does not apply to the facts of this case because the communications were intercepted by the use of an extension telephone furnished by a communica-

tions common carrier which was being used in the ordinary course of his business. In support of this argument, he relies upon the case of *United States v. Christman*, 375 F. Supp. 1354. In *Christman*, the Regional Chief of Security for a department store chain was charged with unlawful interception of telephone conversations. He had received reports concerning certain improprieties in the shoe department of a particular store. This store operated a private telephone system to be used for calls within the store or to other stores in the same chain. Defendant arranged for an extension to be installed to the shoe department extension and thereby intercepted and recorded certain conversations. The United States District Court granted the defendant's motion for acquittal and noted that Congress intended to apply criminal sanctions to limited types of interceptions and communications and that a privately operated intercommunication system not using the facilities of a common carrier is not within the scope of the statute. 18 U.S.C. § 2510(2). Further, the court held that § 2511(2)(a)(i) allowed the interception of "communications in the normal course of employment 'while engaged in any activity which is a necessary incident of the rendition of the service or to the protection of the rights or property of the carrier of such communication . . . .' " The court reasoned that employees misusing a private telephone system are not entitled to any reasonable expectation that the conversations were not subject to interception. 18 U.S.C. § 2510(2). Obviously instant case is distinguishable from *Christman* since we are not here concerned with the interception of communications by a common carrier engaged in an activity which was necessary or incidental to the rendition of the services by the common carrier or for the protection of its rights.

The 10th Circuit Court of Appeals has flatly held as a matter of law that a telephone extension use without authorization or consent to surreptitiously record a private telephone conversation is not being used in the ordinary course of business. *United States v. Harpel*, 493 F. 2d 346; *accord: Gerrard v. Blackman*, 401 F. Supp. 1189.

In the case before us, defendant testified that he used the telephone to obtain information as to possible business calls. However, the circumstances surrounding the facts of this case rebut this testimony. The telephone was placed in a locked closet in defendant's office without the knowledge or consent of plaintiff. A sound-activated recorder was installed by defendant and

not by the communications common carrier in the ordinary course of its business. Neither defendant nor his employees placed calls or directly received incoming calls on the telephone. Under these circumstances, we hold that the Court of Appeals correctly decided that the trial judge's finding that defendant was not using the extension telephone in the ordinary course of business was supported by ample evidence.

Defendant, relying upon the case of *Simpson v. Simpson*, 490 F. 2d 803, strongly argues that 18 U.S.C. § 2511, *et seq.*, does not prohibit a spouse from intercepting telephone communication from the other spouse. In *Simpson*, the husband and wife were residing in the marital home and the husband, who had misgivings as to his wife's fidelity, attached a device for tapping and recording conversations to the phone lines within the home. He thereby intercepted conversations between his wife and another man. The tapes were played to several persons including a lawyer on whose advice the wife agreed to an uncontested divorce. Thereafter the wife instituted action in the United States District Court for civil damages against her former husband pursuant to 18 U.S.C. § 2520. The District Court held that the interception of messages in the home by the husband through the use of electronic equipment of conversations between his wife and other persons did not come within the statutory proscription of Title III of the Omnibus Crime Control and Safe Street Act of 1968. In affirming the decision of the District Court, the 5th Circuit Court of Appeals, after initially stating that the question before it was one of statutory construction, proceeded to review the legislative history of the act in an attempt to find the legislative intent in enacting the statutes. The court initially conceded that the naked language of Title III, because of its inclusiveness, reached the case. In the next sentence, however, the court stated that in its opinion Congress did not intend such far-reaching results because the statute, the committee reports and the legislative hearings did not reveal a positive intent to reach so far. Further, after observing that Title III is a part of a crime control act which sought to bolster the effectiveness of law enforcement officers, the court stated:

> Be this as it may, Title III also was intended to protect individuals against invasions of their privacy by sophisticated surveillance devices. *Senate Report*, p. 2153. Thus,

the Senate report introduces its section on the "Problem" with the following paragraph:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at U.S. Code Cong. & Admin. News 1968, p. 2154. The report further states that, "To assure the privacy of oral and wire communications, title III prohibits *all wiretapping* and electronic surveillance by persons *other than duly authorized law enforcement officers* . . . . " *Id.* at U. S. Code Cong. & Admin. News 1968, p. 2153. The nature and breadth of Congress's response to private surveillance is fairly indicated by the Senate report's section entitled "Prohibition," quoted in full in the margin. [Emphasis ours.]

The quoted prohibition is as follows:

"Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture, and advertising of intercepting devices. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions.

> Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation."

After noting that the act should be strictly construed because it imposed criminal sanctions, the court concluded its opinion with this language:

> As should be obvious from the foregoing, we are not without doubts about our decision. However, we have concluded that the statute is not sufficiently definite and specific to create a federal cause of action for the redress of appellant's grievances against her former husband. Our decision is, of course, limited to the specific facts of this case. No public official is involved, nor is any private person other than appellee, and the *locus in quo* does not extend beyond the marital home of the parties.

Simpson is distinguishable from instant case in that in *Simpson,* the husband and wife were living together in the marital home as man and wife. Here, the parties were living in a state of separation so that the marriage veil which separates the marriage relation from public concern and scrutiny had been torn asunder. Thus the statutory regulation did not invade the realm of personal acts within a marital home. The cases are further distinguishable in that *Simpson* involved a suit seeking recovery of civil damages. In the case *sub judice* we consider only an evidentiary matter. We think that these distinctions are highlighted because in *Simpson,* the court very carefully restricted its decision to the specific facts of that case.

We do not agree with the 5th Circuit's patently doubtful conclusion that the legislative history of the statutes under consideration shows no direct indication that the statute was intended to reach domestic conflicts. The history of the act indicates a legislative intent that individuals be protected from invasions of their privacy by sophisticated surveillance devices. Further, we think that the language of the statute compels us to reach a result consistent with the decision of the Court of Appeals. The statute clearly states that:

> . . . Any person who willfully intercepts . . . any wire or oral communication; . . . willfully uses any . . . mechanical

> or other device to intercept any oral communication when such device is affixed to, or otherwise transmits a signal through, a wire, cable or other like connection used in wire communications . . . shall be fined not more than $10,000.

18 U.S.C. § 2511. Title III further provides that:

> . . . No part of the contents of such communication and *no evidence derived therefrom may be received in evidence in any trial,* hearing, or other proceeding in or before any court . . . or other authority of the United States, a State, or a political subdivision thereof if disclosure of that infortion would be in violation of this chapter. [Emphasis ours.]

18 U.S.C. § 2515. None of the exceptions to the proscription contained in this chapter are applicable to instant case.

Where the statutory language is clear, there is no need to refer to legislative history. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling,* 324 U.S. 244, 89 L.Ed. 921, 65 S.Ct. 605; *United States v. Public Utilities Commission,* 345 U.S. 295, 97 L.Ed. 1020, 73 S.Ct. 706; *Ex Parte Collett,* 337 U.S. 55, 93 L.Ed. 1207, 69 S.Ct. 944; *Packard Motor Car Co. v. N.L.R.B.,* 330 U.S. 485, 91 L.Ed. 1040, 67 S.Ct. 789. Even so, we note that several courts have elected to interpret the statutes before us and have reached the conclusion that the plain legislative intent in enacting Title III was that no part of the contents or wire or oral communications may be received in evidence in any trial if the message was intercepted in violation of that chapter. *Gelbard v. United States,* 408 U.S. 41, 33 L.Ed. 2d 179, 92 S.Ct. 2357; *United States v. Eastman,* 465 F. 2d 1057; *State v. Ford,* 108 Ariz. 404, 499 P. 2d 699, *cert. denied,* 409 U.S. 1128, 35 L.Ed. 2d 261, 93 S.Ct. 950.

At this time, the question of whether the challenged evidence would be available for the purpose of impeachment under given conditions is not before us and is not decided. We expressly limit our decision to the facts of this case and, as so limited and modified, the opinion of the Court of Appeals is affirmed.

Modified and affirmed.

State v. Swift

STATE OF NORTH CAROLINA v. TAMARCUS SWIFT, ALIAS POISON IVY

No. 24

(Filed 14 July 1976)

1. Indictment and Warrant § 10— use of alias in indictment

Defendant was not prejudiced by the court's denial of his motion to quash the indictments on the ground that his name was set out therein as "Tamarcus Swift, Alias Poison Ivy," especially since two witnesses who knew defendant well used the alias when testifying, the court sustained objections to use of the alias by the district attorney, and the court instructed the jury that the alias was not to be considered to defendant's detriment.

2. Constitutional Law § 30— references to defendant by nicknames — fair trial

Defendant was not denied a fair trial because State's witnesses were permitted to refer to defendant by his nicknames of "Poison Ivy" and "Poison," especially where defendant offered testimony in which the nickname "Poison Ivy" was used.

3. Homicide § 12— murder indictment under G.S. 115-144 — proof of felony-murder

A felony-murder may be proven by the State although the indictment charges murder in the statutory language of G.S. 15-144.

4. Homicide § 12; Indictment and Warrant § 13— bill of particulars — election by State — felony-murder or premeditated murder

The trial court did not err in the denial of defendant's motion for a bill of particulars stating whether the State would proceed under the felony-murder rule or on the basis of premeditation and deliberation since the district attorney advised that the State would proceed under both theories, and since the State was not required to elect upon which theory it would proceed prior to the introduction of evidence.

5. Constitutional Law § 29; Jury § 7— capital punishment beliefs — excusal for cause — effect of invalidation of death penalty

Defendant was not prejudiced by the excusal for cause of prospective jurors because of their capital punishment beliefs since the death penalty provisions of the statute under which defendant was convicted and sentenced to death, G.S. 14-17 (Cum. Supp. 1975), was invalidated by the U. S. Supreme Court in *Woodson v. North Carolina*, ... U.S. ..... (1976).

6. Criminal Law § 87— leading questions

The trial court did not abuse its discretion in permitting the district attorney to ask leading questions during the direct examination of State's witnesses.

7. **Criminal Law § 73— declarations to defendant — competency to show knowledge, state of mind**

In a homicide prosecution, testimony by State's witnesses that defendant's aunt told him that she had been beaten up by the victim's husband, that defendant's aunt told defendant where to find the residence of the person who had beaten her, and that an unidentified person told defendant that the victim's husband was coming out of a house was competent to show defendant's knowledge of the asserted facts and to indicate his intentions and state of mind toward the victim's husband.

8. **Criminal Law § 65— evidence to show state of mind and intentions**

In a homicide prosecution, testimony that after the shooting defendant's aunt "seemed to be upset because of what happened" and defendant "got her to go in the house and go to bed" was competent to show defendant's state of mind, his intentions and mood at the time.

9. **Criminal Law § 57— testimony as to how rifle functioned**

A police officer's testimony as to how a certain rifle functioned was competent to show that the rifle could not have discharged accidentally in the manner contended by defendant.

10. **Criminal Law § 43— proper use of photographs**

Photographs were not used as substantive evidence but were properly used for illustrative purposes when a witness placed an "X" on a photograph to locate defendant's position, when a witness testified as to the amount of blood shown in a photograph, and when a witness identified blood on the walls and holes in the walls as shown on the photographs.

11. **Homicide § 20— teeth found at murder scene — competency**

Testimony as to the location of several teeth found at the scene of the homicide was competent to corroborate a physician's testimony that deceased was killed with a gunshot wound in the face and to show the direction from which the shot was fired and the range of the shot.

12. **Criminal Law § 128— arrest of person with weapon in courtroom — knowledge of juror — motion for mistrial**

The trial court did not err in the denial of defendant's motion for a mistrial when a juror notified the court that her supervisor had told her that some man, unrelated to this case, was arrested in the courtroom during the trial for carrying a loaded weapon where the court interrogated the jurors and determined that each of them could return a fair and impartial verdict uninfluenced by the incident.

13. **Criminal Law § 101— sequestration of jury**

The sequestration of the jury rests in the discretion of the trial court. G.S. 9-17.

14. **Constitutional Law § 30; Criminal Law § 102— possibility of indictment of defense witnesses — procedure out of jury's presence — fair trial**

Defense witnesses were not threatened by the district attorney and defendant was not denied a fair trial when the court, upon learn-

ing that two potential defense witnesses might be charged as accessories after the fact to murder, advised the potential witnesses of their rights out of the jury's presence, and the district attorney stated that he had no intention of indicting one of the witnesses and thus intimated that the other witness might be indicted; furthermore, defendant was not prejudiced by such procedure since both witnesses testified favorably for defendant.

15. Criminal Law § 76—waiver of right to remain silent — sufficiency of evidence

Although the court found that defendant gave no specific answer when asked whether he desired to answer a certain question, the court's determination that defendant waived his right to remain silent was supported by the evidence and findings when the fact that defendant had affirmatively waived his right to counsel and had affirmatively acknowledged understanding his Miranda rights is considered with the other responses and statements made by defendant.

16. Criminal Law § 112— instructions on reasonable doubt — doubt from evidence or lack of evidence

The trial court did not err in instructing that a reasonable doubt is an honest, substantial misgiving generated "by the insufficiency of proof" without instructing further that such misgiving could arise "out of the evidence" since it is clear from the charge as a whole, including the court's instruction that a reasonable doubt "is a sane, rational doubt arising out of the evidence or lack of evidence," that the court used the words "insufficiency of proof" to refer to an insufficiency arising out of the evidence or out of the lack of evidence.

17. Assault and Battery § 15— discharging firearm into occupied dwelling — instructions — intentional use of firearm

The trial court did not err in the use of the words "intentionally used a firearm" when instructing on the offense of discharging a firearm into an occupied dwelling where it is clear that the court used the words as synonymous with "intentionally fired or discharged a firearm."

18. Homicide § 28— instructions — accident or misadventure — "actual" firing of weapon

The trial court in a homicide prosecution did not err in charging the jury that defendant contended he did not "actually" fire the rifle into the victim's dwelling rather than stating that defendant contended he did not "intentionally" fire the rifle into the dwelling; furthermore, the court in substance gave defendant's requested instruction that he would not be guilty if he "unintentionally" proximately caused the victim's death by use of a rifle.

19. Criminal Law § 126— instructions on unanimity of verdict

The court's instruction, "Any verdict you arrive at must be unanimous; in other words, there must be a meeting of the minds," could not have caused the jurors to believe that there had to be a meeting of the minds and thus did not coerce a verdict.

20. Homicide §§ 4, 14; Constitutional Law § 30— felony-murder rule — constitutionality

The felony-murder rule set forth in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of the due process requirement that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged, since under the statute premeditation and deliberation are not elements of the crime of felony-murder and the statute involves no presumption at all.

21. Homicide §§ 14, 30— felony-murder — proof of premeditation and deliberation — submission of lesser offenses

When the law and evidence justify use of the felony-murder rule, the State is not required to prove premeditation and deliberation, and the court is not required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.

22. Homicide § 4— felony-murder — discharging firearm into occupied dwelling

The offense of discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1 is an unspecified felony within the purview of G.S. 14-17 and can result in a conviction for first-degree murder under the felony-murder rule.

23. Constitutional Law § 36; Criminal Law § 135; Homicide § 31— unconstitutionality of death penalty — imposition of life imprisonment

Since the U. S. Supreme Court in *Woodson v. North Carolina*, ... U.S. , invalidated the death penalty provisions of G.S. 14-17, the statute under which defendant was convicted and sentenced to death for first degree murder, the sentence of death is vacated and a sentence of life imprisonment substituted therefor by authority of 1973 Sess. Laws, c. 1201, § 7 (1974 Session).

DEFENDANT appeals from judgment of *Peel, J.*, 11 August 1975, Criminal Session, WAYNE Superior Court.

On indictment, proper in form, defendant was charged with the murder of Thelma Jean Jones on 3 June 1975. The jury returned a verdict of guilty of murder in the first-degree, and the death sentence was imposed.

The evidence for the State tended to show the following:

Linda Faye Carroll, defendant's aunt, had been going with a married man named Zeno Jones for a few weeks. Zeno Jones' wife, Thelma Jean Jones, was the victim.

On 3 June 1975 Linda Faye Carroll and Zeno Jones had been riding around together drinking vodka. While they were riding, they had an argument because Jones said he was breaking up with her. During the argument Linda Faye Carroll was

hit in the face, whereupon she jumped out of the car some distance from Mina Weil Park in Goldsboro, North Carolina, and then walked to the park where she saw her nephew, the defendant, who was with Gwendolyn Sherrod, Annie Davis and others.

Defendant then drove Gwendolyn Sherrod's car away from Mina Weil Park. In this vehicle were Linda Faye Carroll, Gwendolyn Sherrod, Annie Davis, and George Faison. Another car followed. Defendant went to a house on Slocumb Street and obtained a rifle from Alton Artis. Linda Faye Carroll had a conversation with Annie Davis in front of defendant concerning how Zeno Jones had beaten her up.

Defendant then drove the car to a low rent housing project in Goldsboro, North Carolina, where Zeno Jones and his wife lived with their family. Defendant with the rifle in his hand got out of the car accompanied by Linda Faye Carroll. They walked towards 110 Dupont Circle, which was the home of Zeno Jones and his wife. It was about 11:00 p.m.

Linda Faye Carroll knocked on the door at 110 Dupont Circle. A witness in the car testified that she saw defendant with the rifle in his hand. He moved the lever, pointed the gun, and after some seconds a shot was fired. Very soon after this, Linda Faye Carroll and defendant came back to the car. Another witness had observed that defendant had a gun in the front of the Jones' apartment after the shot was fired.

Zeno Jones testified that after he had been home for a while on this night he heard a knock on the door. He, his wife and two children were in the apartment. His wife went to the door and came back and told Zeno Jones that somebody was there to see him. She went back to the door. At this time defendant and Linda Faye Carroll were outside the door. Zeno Jones testified that defendant shot his wife. A rifle (State's Exhibit 1) was found behind the dwelling where defendant was arrested.

Dr. Warren E. Parmalee was an expert medical witness. He went to the Zeno Jones home, arriving about 11:45 p.m. He found Thelma Jean Jones lying on the inside of the door in the entry hallway with much blood around her. There was an entry wound in the front of her face and an exit wound in the back of her neck. It was his opinion that the probable cause of death was a gunshot wound to her head.

Defendant's evidence tended to show the following:

Defendant was in the Army stationed at Fort Bragg, North Carolina, and was at home for the weekend. He had been drinking at the Park. After his aunt, Linda Faye Carroll, told him about Zeno Jones beating her up, he advised her to take out a warrant against him. Defendant obtained the rifle from Artis for Linda Faye Carroll's protection. He went to the Jones' residence to talk to him. Defendant told Linda Faye Carroll there would be no shooting. He testified that he took the rifle out of the car and propped it against the side of the house. Linda Faye Carroll made the first move for the rifle, and then they became engaged in a struggle for the rifle. The rifle fired while they were struggling, but his finger was not on the trigger. Also, Linda Faye Carroll had her hands on the rifle when it discharged.

Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Charles M. Hensey and Associate Attorney Henry H. Burgwyn for the State.

W. Dortch Langston, Jr. and Phillip A. Baddour, Jr. for defendant appellant.

COPELAND, Justice.

Counsel for defendant makes a total of 63 assignments of error, based on 333 exceptions. 12 assignments have been abandoned.

[1] (1) Assignment of Error No. 1 contends it was error to deny defendant's motion to quash the bills of indictment because defendant's name is set out in both bills as "Tamarcus Swift (Alias Poison Ivy)."

The word "alias" is defined in Webster's Third New International Dictionary 52, 53 (1971) as "used esp. in legal proceedings to connect the different names of anyone who has gone by or been known by two or more names." The record in this case indicates that defendant was known to his friends and acquaintances as "Poison Ivy."

Quashal of indictments is not favored where they do not affect the merits of the case. *State v. Beach,* 283 N.C. 261, 196

S.E. 2d 214 (1973); 4 Strong, N. C. Index 2d, Indictments and Warrants § 7 and cases theren cited; G.S. 15-153. Here defendant contends that he was denied a fair trial because the use of the alias might create in the minds of the jury an implication that he was a criminal. To support this position, defendant cites two federal cases in which there was no reversible error found on account of the use of the aliases involved. Language in these cases stands for the proposition that loading indictments with unnecessary aliases is or may be inherently prejudicial. *United States v. Monroe,* 164 F. 2d 471 (1947); *D'Allessandro v. United States,* 90 F. 2d 640 (1937). There was no such loading of the indictments in our case. The indictments included only one alias or nickname. Apparently this was defendant's only alias. At least two witnesses who knew defendant well used this alias when testifying.

Also, we note that the trial court sustained objections as to the use of the alias by the District Attorney. Additionally, in the final instruction to the jury they were told:

> "Now, members of the jury, the fact that he stands indicted . . . is no evidence of his guilt and you will not consider it against him. Likewise the fact, ladies and gentlemen, the fact that the bills of indictment—they were read to you—were read to you in the form—in the name of the defendant as Tamarcus Swift, alias Poison Ivy, are not to be considered by you to his detriment in any respect."

This instruction substantially conforms to the instruction approved in *United States v. Monroe, supra.*

Defendant has failed to show any prejudicial error. There is no merit to this assignment, and it is overruled.

[2] (2) In Assignment of Error No. 12, defendant in a related manner maintains the court erred in overruling defendant's objections and motions to strike relative to his name being referred to by witnesses for the State as "Poison Ivy" and "Poison" for that it prejudiced the jury against him. He contends that referring to him by his nickname prevented him from getting a fair trial.

The record indicates that the District Attorney used the nickname twice when examining witnesses. The court sustained objection each time. It is noted from the record that defendant offered testimony in which the nickname "Poison Ivy" was

used and there was no objection or motion to strike. Thus, there was no prejudicial error from the admission of similar testimony by the State. *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971); 1 Stansbury's N. C. Evidence, § 30 (Brandis Rev. 1973). Frankly, we do not believe it would have been error to refer to defendant by the name by which he was generally known. The fact that his nickname may have been demeaning does not create error per se. Defendant had an opportunity to explain his nickname. In fact, he testified that he got the nickname "Ivy" from his grandmother when he was 4 or 5 years old.

The assignment of error is without merit and overruled.

[3] (3) Assignments 3 and 62 argue that the language of the bill of indictment did not identify the crime charged and was ambiguous and confusing.

The bill of indictment reads as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Tamarcus Swift (Alias Poison Ivy) late of the County of Wayne on the 3rd day of June, 1975, with force and arms, at and in said County, feloniously, wilfully, and of his malice aforethought, did kill and murder Thelma Jean Jones, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant says this bill of indictment does not give him notice that the State intends to rely on the felony-murder rule as it is spelled out in General Statutes 14-17.

Defendant concedes that our Court has held for many years that a felony-murder may be proven by the State as alleged here under the statutory language of General Statutes 15-144. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955); *State v. Mays* 225 N.C. 486, 35 S.E. 2d 494 (1945); *State v. Smith,* 223 N.C. 457, 27 S.E. 2d 114 (1943); *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536 (1933).

In addition to the murder indictment, defendant was also charged in another bill of indictment with the willful discharge

of a firearm into occupied property in violation of General Statutes 14-34.1. Both bills refer to the deceased, Thelma Jean Jones. Defendant was certainly made aware of the fact that he would be called upon to answer for the murder of Thelma Jean Jones and also for shooting into an occupied dwelling where she was. These two indictments, when read together, informed defendant of the crimes with which he was charged. Our law is clear on the subject, and we adhere to our previous decisions. The assignment of error is without merit and overruled.

[4] (4) Defendant's Assignment of Error No. 4 maintains the court erred in denying his motion for a bill of particulars, which requested the State to determine whether it was going to proceed on felony-murder or murder based on premeditation and deliberation.

The record discloses that this question was considered by the trial court and the District Attorney advised defendant that he would proceed in the case upon the theory of felony-murder and also premeditation and deliberation. A subsequent renewed motion of defendant requesting the State to elect under which theory it would proceed was overruled.

General Statutes 15-143, providing for a bill of particulars, was repealed 1 July 1975, and the present law on the subject is now included in General Statutes 15A-925. Justice Moore, speaking for our Court on this subject in terms still relevant under G.S. 15A-925, said:

> "The function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry. [Citations omitted.]
>
> "The granting or denial of motions for a bill of particulars is within the discretion of the court and is not subject to review except for palpable and gross abuse thereof." [Citations omitted.] *State v. McLaughlin,* 286 N.C. 597, 603, 213 S.E. 2d 238, 242 (1975).

Defendant was obviously aware that the trial was going to proceed on both theories, and there does not appear to be any evidence introduced which was beyond the knowledge of defendant and necessary to enable defendant adequately to prepare or conduct his defense. Certainly, the court did not abuse its discre-

tion in denying the motion for a bill of particulars. *State v. McLaughlin, supra;* G.S. 15A-925.

We have held that the State is not required to elect prior to the introduction of evidence as to whether it will proceed under the felony-murder rule or on the basis of premeditation and deliberation. *State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975).

We adhere to our previous decisions, and the assignment of error is overruled.

[5] (5) Did the court commit error in excusing certain jurors for cause, as contended in assignments of error 6, 7, and 9?

These assignments of error generally relate to questions dealing with capital punishment that were asked jurors during the jury selection process. On 2 July 1976 the Supreme Court of the United States in *Woodson v. North Carolina,* ____ U.S. ____ in a five-to-four decision invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendant was convicted and sentenced to death. For this reason, these assignments of error become academic and there can be no prejudicial error. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976), decided this same day. The assignments are overruled.

[6] (6) By Assignment of Error No. 13, defendant argues the court erred in overruling defendant's objections to 58 leading questions asked by the State to its witnesses on direct examination.

It is generally held that leading questions may not be asked on direct examination but the rulings of the trial judge are discretionary. *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); 1 Stansbury's N. C. Evidence, *supra* § 31.

Justice Branch speaking for our court in *State v. Greene, supra* at 492, 493, 206 S.E. 2d at 236 said:

> "The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of

delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth. [Citations omitted.]"

Upon examination of the record it appears that the questions are generally within the guidelines above set forth. The rulings of the court were discretionary, and there does not appear to be any abuse of such discretion. *State v. Brunson, supra; State v. Greene, supra.* The assignment is overruled.

[7] (7) Under assignments of error 16, 30 and 44, defendant contends the court erred in allowing into evidence over objection the testimony of witnesses Annie Davis, Gwendolyn Sherrod and John Faison.

Generally, the testimony of Annie Davis and John Faison was to the effect that Linda Faye Carroll told defendant that Zeno Jones had beaten her up. It is obvious the testimony was not offered by the State to prove the truth of the matter asserted, but rather to show that these statements were actually made to defendant. No limiting instruction was requested.

The law permits declarations of one person to be admitted into evidence for the purpose of showing that another person has knowledge or notice of the declared facts and to demonstrate his particular state of mind. Such declarations are also admissible as circumstantial evidence of the existence of a particular emotion which would naturally result from hearing the words or otherwise help to explain subsequent conduct. 1 Stansbury's N. C. Evidence, *supra* § 141.

Certainly, these statements were relevant to show defendant's knowledge or notice of the asserted facts as well as to indicate his intentions and state of mind relative to Zeno Jones. For the same reason, the testimony of Gwendolyn Sherrod that Linda Faye Carroll told defendant where to find the residence of Zeno Jones is proper. The further testimony of Annie Davis that someone in the car told defendant they saw Zeno Jones run-

ning out of the house and the testimony of Gwendolyn Sherrod that an unidentified person running toward defendant told him that Zeno Jones was coming out of the house were competent for the reasons above stated.

Even if the testimony is considered inadmissible under the hearsay rule and not within any of the exceptions thereto, these statements were not prejudicial to defendant for the reason that he took the witness stand and admitted virtually every one of the so-called hearsay statements. *State v. Greene, supra; State v. Van Landingham, supra; State v. Stepney, supra.* The assignments of error are overruled.

(8) Defendant maintains the trial court erred in admitting the testimony of Annie Davis and R. A. Stocks under assignments of error 17, 20, and 29, for that it was not relevant.

" . . . [E]vidence is relevant if it has any logical tendency . . . to prove a fact in issue." 1 Stansbury's N. C. Evidence, *supra* § 77, at 234. It is difficult to formulate an exact rule to determine relevancy and materiality because of the variety of possible fact situations. 1 Stansbury's N. C. Evidence, *supra* § 78. We have held that in criminal cases every circumstance that is calculated to throw any light upon the alleged crime is admissible. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965).

[8] In particular, defendant objects to the testimony of the State's witness Annie Davis that Linda Carroll "seemed to be upset because of what happened" and that "he [the defendant] got her to go in the house and go to bed." Under the guidelines of *Stansbury* this testimony seems relevant and material and tends to show defendant's state of mind, his intentions and mood at the time. The assignment of error is overruled.

[9] Under this same general category, defendant objects to testimony of Detective Stocks of the Goldsboro Police Department, who had been so employed for eleven and one-half years. The weapon involved was identified as a Winchester 30.30 rifle. Detective Stocks, who was familiar with the operation of this type of rifle, testified over objection as to how it functioned. It must be remembered that defendant argues that the rifle discharged as a result of a struggle over control of the weapon and that the shooting was an accident. Certainly, the

testimony as to how this type of weapon functioned would be relevant. It tended to show that the rifle could not have been discharged accidentally in the manner contended by defendant. The assignment of error is without merit and overruled.

[10] (9) Next defendant assigns errors 19, 22, 23 and 36 for the reason that photographs were received into evidence that did not illustrate prior testimony of witnesses. Defendant argues that the photographs were used as substantive evidence. Specific objection is made to one of the witnesses placing an "X" on a photograph to locate the position of the defendant. Also, defendant objects to the testimony of State's witness Stocks relative to the amount of blood shown in the photograph. Defendant asserts that the testimony of Dr. Parmelee is substantive in nature when he identified blood on the walls and holes in the walls as shown on the photographs.

Defendant's contention that photographs are admissible only to illustrate *prior* testimony is without merit. Where a proper foundation has been laid, photographs may be used contemporaneously with the witness's testimony in order to illustrate his testimony and facilitate his explanation. Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything that is competent for him to describe in words. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969).

An examination of the record reveals that a proper foundation was laid and the photographs were in fact used to explain and illustrate the witnesses' testimony. Additionally, although no instruction was mandated since defendant failed to request one, the trial judge properly instructed the jury that the photographs "are not to be considered by you as substantive evidence" and that they are "admissible solely for the purpose of illustrating the testimony of the witnesses if they tend to do so and admissible for no other purpose." *State v. Cox,* 289 N.C. 414, 222 S.E. 2d 246 (1976); *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied,* 423 U.S. 1091 (1976); *State v. McKissick,* 271 N.C. 500, 157 S.E. 2d 112 (1967).

Defendant has failed to show any error, and these assignments of error are without any merit and overruled.

[11] (10) Assignment of Error No. 21 is based on 55 exceptions. Defendant complains about testimony relative to teeth

found. The evidence disclosed that the deceased was shot in the face and several teeth were found at the scene. Defendant contends this testimony was offered to arouse sympathy for the State's case and prejudice defendant.

"Relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the party who offers it." 1 Stansbury's N. C. Evidence, *supra* § 80, at 242. Of course, if the only effect of the evidence is to excite prejudicial sympathy, then it may be grounds for a new trial. 1 Stansbury's N. C. Evidence, *supra* § 80.

Three witnesses testified about the teeth and where they were located. Certainly, this constituted circumstantial evidence that tended to show the direction from which the shot was fired, the range of the shot, and the fact that deceased died from a gunshot wound. This testimony corroborated Dr. Parmelee who testified that the deceased was killed with a gunshot wound in the face. It was relevant and thus admissible. This assignment is without merit and overruled.

[12] (11) Assignment of Error 27 maintains the court should have declared a mistrial because of an incident in the courtroom.

It appears a man was arrested in the courtroom during the course of the trial for carrying a loaded weapon. One of the jurors notified the trial judge that her supervisor had mentioned it to her. As a result, the trial judge interrogated each of the jurors as to their recollection about the incident and its effect upon them. Judge Peel made findings of fact, concluded there had been no prejudice, and denied the motion for a mistrial in his discretion. Certainly there is no showing of any prejudice to defendant by the arrest of some man, unrelated to this case, carrying a loaded weapon in the courtroom. Each juror told the trial judge that he or she could return a fair and impartial verdict uninfluenced by the incident. The court further instructed the jurors that they were not to consider the incident in their deliberations and were not to discuss it further.

A motion for a new trial for an incident such as this is addressed to the sound discretion of the trial court and in the absence of abuse of discretion there is no error. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975) ; 7 Strong, N. C. Index 2d, Trial, §§ 5 and 9 (1968). This assignment is without any merit and overruled.

[13] (12) As a result of the previous incident, defendant assigns Error No. 28 for the refusal of the court to sequester the jury. The sequestration of the jury along with the course and conduct of the trial rests in the discretion of the trial court. G.S. 9-17. *See also State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); 2 Strong, N. C. Index 2d, Criminal Law § 98, at 633 (1967) and cases therein cited (sequestration of witnesses is discretionary). The assignment is without merit and is overruled.

[14] (13) Under Assignment of Error No. 33, defendant contends it was error to permit the District Attorney to threaten potential defendant's witnesses Faison and Vick and thus not accord defendant a fair trial.

It came to the attention of the court that Faison and Vick would possibly be called as witnesses for defendant and that the District Attorney might charge them with being accessories after the fact to murder. The trial judge wisely decided that he should advise those potential witnesses and possible defendants of their rights out of the presence of the jury. In the course of it, the District Attorney stated that Vick stayed in the car and he had no intention of indicting him for anything. The intimation was that possibly Faison might be indicted. It was then that Judge Peel fully advised Faison of his right to have a lawyer. Faison indicated that he did not wish one and was asked to sign a document to that effect.

The judge did exactly what he should have done under the circumstances. This took place out of the presence of the jury. The witnesses were not threatened, and defendant was not prejudiced. As a matter of fact both witnesses testified advantageously for defendant. This assignment of error is without any merit and overruled.

(14) In assignments 42 and 43, defendant contends the court erred in its findings of fact and conclusions of law as to defendant's waiver of his constitutional rights as outlined by the Miranda decision. He contends that on account of this error the court erred in allowing State's witnesses to testify before the jury to statements made by defendant.

Defendant specifically argues that the trial court's finding of fact number 11 that he "understood what his rights were and

that he stated to the officers that he did so understand" was not supported by the facts. This contention is without merit. Officers Sharpe and Griffin both testified that defendant was read his rights and that he acknowledged understanding them.

[15] Defendant next argues that defendant never intelligently and voluntarily waived his right to remain silent. He argues that this conclusion is required both by the evidence and finding of fact number 14, which states:

> "14. That in response to the specific question, 'Did he desire to answer the question?' the defendant did not make a specific answer to that question but he continued to state that he did not know anything about the charge against him."

However, in order to determine whether defendant waived his right to remain silent, it is also necessary to look at the other circumstances. At the time this question was asked, defendant had affirmatively waived his right to counsel and affirmatively asknowledged understanding his Miranda rights. Considering these circumstances and the other responses and statements of defendant, including the fact that defendant's only incriminating statements were of an alibi nature as well as denying knowing Zeno Jones or the victim or having been with Linda Faye Carroll, we conclude the evidence supports the substance of finding of fact number 15, which reads:

> "15. That in the context in which such response [referring to the response in finding of fact number 14] was made, together with the other circumstances then and there existing, this represented a specific indication that he was willing to answer the questions of the officers and be interrogated; that he did nothing to indicate that he did not want to talk to them; that he was very cooperative and never made any request to the officers to stop asking him any questions."

It therefore follows that the court's conclusions of law are supported by the findings of fact and the evidence. *State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975). *See also Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The assignments of error are overruled.

[16] (15) Under assignment 47, defendant maintains the court erred in its instruction to the jury explaining reasonable

doubt. He contends that the judge should have charged as follows in the latter portion of the instruction, "A reasonable doubt . . . is an honest, substantial misgiving generated *out of the evidence* or by the insufficiency of the proof. . . . " He argues that he was prejudiced by the omission of the phrase "out of the evidence." He relies on the converse of the holding in *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954), which held that it was error for the judge to define reasonable doubt as one "growing out of the testimony in the case" unless the judge added the words "or from the lack or insufficiency of the evidence" or similar words.

It is a well established rule that a charge must be construed in its entirety. *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1971), *cert. denied,* 409 U.S. 948, 93 S.Ct. 293, 34 L.Ed. 2d 218 (1972); *State v. Leach,* 272 N.C. 733, 158 S.E. 2d 782 (1968); *State v. Blue,* 270 N.C. 283, 154 S.E. 2d 99 (1967). When the portion of the instruction to which defendant excepts is considered with the rest of the instruction, it is evident that the charge carries the very meaning that defendant feels was omitted. The judge charged that a reasonable doubt "is a sane, rational doubt arising out of the evidence or lack of evidence or from its deficiency." He emphasized the importance of the jury's "considering, comparing and weighing all the evidence." Obviously, when the judge used the language "insufficiency of proof," he still referred to an insufficiency arising out of the evidence or out of the insufficiency of the evidence. The charge given substantially conforms with language approved by our Court in previous decisions. *State v. Shaw,* 284 N.C. 366, 200 S.E. 2d 585 (1973); *State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519 (1967); *State v. Hammonds, supra.* The assignment is without merit and overruled.

(16) Under assignment 48, defendant argues that the court erred in its jury instructions explaining the elements of the crime of discharging a firearm into an occupied dwelling, particularly as that crime relates to the bill of indictment charging first-degree murder.

The court charged the jury as follows:

> "Now, I charge members of the jury that for you to find the defendant guilty of this offense the State must prove beyond a reasonable doubt, first: that the defendant

shot Thelma Jones while committing the crime of discharging a firearm into occupied property, and I instruct you members of the jury that in order for the defendant to be guilty of discharging a firearm into occupied property the State must prove each of the following things from the evidence and beyond a reasonable doubt:

"1. That the defendant *intentionally used a firearm* and I instruct you that a 30.30 rifle is a firearm and that, 2. That he did it without legal excuse or justification, and 3. *That he discharged the firearm* into a dwelling which was at the time occupied, and 4. He did so at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons; and 5. That the discharge of the firearm by the defendant proximately caused Thelma Jones' death.

"A proximate cause is a real cause, a cause without which Thelma Jones' death would not have occurred.

"Now, members of the jury, the defendant contends that he did not actually fire the rifle into the dwelling. He further contends that he was trying to prevent Linda Carroll from using the rifle on that occasion and that whatever occurred did so as a result of an accident while he and Linda Faye Carroll were struggling for the rifle. If Thelma Jones died by accident or misadventure, that is *if* the rifle discharged at a time when the defendant and Linda Faye Carroll were struggling for the rifle and *the defendant did not intentionally fire the rifle into the dwelling, the defendant would not be guilty of first degree murder.*" (Emphasis added.)

* * *

"And so members of the jury, *if* the State has satisfied you beyond a reasonable doubt that on or about June the 3, 1975 Tamarcus Swift shot Thelma Jones, and that *he did so while committing the crime of discharging a firearm into occupied property, that is that he intentionally used a firearm and that he did so without legal justification or excuse,* and that he discharged the firearm into the dwelling of Zeno Jones which was at the time occupied and that he did so at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons, and that such dis-

charge of the firearm by the defendant proximately caused Thelma Jones' death, it would be your duty to return a verdict of guilty of murder in the first degree; however, if you do not find or have a reasonable doubt as to any one or more of these things you would not find the defendant guilty of this charge, and you would then consider whether or not the defendant is guilty of involuntary manslaughter." (Emphasis added.)

* * *

"[F]or you to find the defendant guilty of discharging a firearm into occupied property the State must prove each of the following things beyond a reasonable doubt:

"1. That the defendant *intentionally used a firearm,* and I instruct you that a 30.30 rifle is a firearm; and 2. That he did so without legal justification or excuse, and, 3. That he *discharged the firearm* into a dwelling which was at the time occupied and 4. That he did so at that, at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons.

"Now, the defendant members of the jury again contends as he did in relation to the charge of first degree murder. *You will consider my instructions as to* that as referring to *his contentions* on this charge; *that he didn't intentionally fire the rifle into the dwelling;* that he did not fire the rifle; that he was trying to prevent Linda Faye Carroll from using the rifle, and whatever did occur did so as a result of an accident while he and Linda Carroll were struggling for the rifle.

"Likewise by his plea he denies each essential element of the crime with which he is charged, and as to that charge members of the jury if the State has satisfied you beyond a reasonable doubt that on or about June the 3, 1975, the defendant, Tamarcus Swift *intentionally used a firearm,* and that he did so without legal justification or excuse, and *that he discharged the firearm* into the dwelling of Zeno Jones which was at the time occupied and that he did so at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons, it would be your duty to return as your verdict a verdict of guilty as charged as to this charge." (Emphasis added.)

* * *

"And so members of the jury, first as to the bill of indictment with which the defendant is charged with first degree murder, and so as to that charge, members of the jury, if the State has satisfied you beyond a reasonable doubt that on or about June the 3, 1975 Tamarcus Swift shot Thelma Jones, and *that he did so while committing the crime of discharging a firearm into occupied property, that is that he intentionally used a firearm and that he did so without legal justification or excuse and that he discharged the firearm* into the dwelling of Zeno Jones which was at the time occupied and that he did so at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons, and further that such discharging of the firearm by the defendant proximately caused Thelma Jones' death, it would be your duty to return a verdict of guilty of murder in the first degree. However, if you do not so find or have a reasonable doubt as to any one or more of these things, you would not find the defendant guilty of this charge and you would then consider whether or not the defendant is guilty of involuntary manslaughter." (Emphasis added.)

* * *

"Now, members of the jury, as to the other charge, that is the charge of discharging a firearm into occupied property, as to that charge members of the jury I charge you that if the State has satisfied you beyond a reasonable doubt that on or about June the 3, 1975 that the defendant *intentionally used a firearm* and that he did so without legal justification or excuse and *that he discharged the firearm* into the dwelling of Zeno Jones which was at the time occupied and that he did so at a time when he knew or had reasonable grounds to believe that the dwelling might be occupied by one or more persons, it would be your duty to return a verdict of guilty of discharging a firearm into occupied property or guilty as charged. By that I mean if the State has satisfied you beyond a reasonable doubt as to each and every one of those elements which I have outlined and heretofore explained to you it is your duty to return a verdict of guilty as charged on this charge." (Emphasis added.)

General Statutes 14-34.1 provides:

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

[17] Defendant contends that *State v. Williams,* 284 N.C. 67, 199 S.E. 2d 409 (1973), as interpreted by *State v. Williams,* 21 N.C. App. 525, 204 S.E. 2d 864 (1974) (a different *Williams)* establishes that the instruction should be that the defendant intentionally, without legal justificaton or excuse, discharged the firearm into an occupied dwelling. Defendant submits that the utilization of the term "intentionally used a firearm" is incorrect and prejudicial.

In *State v. Williams,* 21 N.C. App. 525, *supra,* error was found because of the following instructions: " . . . and fourth, and last, that the defendant acted willfully or wantonly which means that he must have known that one or more persons were in the dwelling or apartment." The Court of Appeals held that the instruction did not comply with the language in *State v. Williams,* 284 N.C. 67, *supra* at 73, 199 S.E. 2d at 412, which provided that a person is guilty of the felony created by G.S. 14-34.1 "if he intentionally, without legal justification or excuse discharges a firearm into an *occupied building* with knowledge that the building is then occupied by one or more persons or when he had reasonable grounds to believe that the building might be occupied by one or more persons." In *State v. Williams,* 21 N.C. App. 525, *supra* at 527, 204 S.E. 2d at 865, the language which the court objected to was equating "willful and wanton conduct" with "knowledge of occupancy." There was nothing in either of the *Williams* cases banning the terminology "used a firearm."

Although a preferable charge would have used the language "intentionally discharged a firearm," we see no prejudicial error in this case by the use of the language "intentionally used a firearm."

Before the final mandate on murder, when charging the jury as to accident and misadventure, the court instructed the jury that if "the defendant did not intentionally fire the rifle into the dwelling, the defendant would not be guilty of first

degree murder." When the charge is read contextually, it becomes clear that the words "intentionally used a firearm," as used by the trial judge, were synonymous with the words "intentionally fired or discharged a firearm." There was no reason for the jury to misunderstand the instruction. No prejudicial error is shown, and this assignment is overruled.

[18] (17) Under assignment 49, defendant asserts that the court erred in its instruction on accident or misadventure.

The court declined to give the following requested instruction by defendant:

> "If Tamarcus Swift unintentionally proximately caused Thelma Jean Jones' death by use of a rifle, in a manner which was not reckless or wanton with no wrongful purpose, and while engaged in a lawful pursuit homicide would be excused on the ground of accident or misadventure."

In lieu thereof, the court charged as follows:

> "Now, members of the jury, the defendant contends that he did not *actually* fire the rifle into the dwelling. He further contends that he was trying to prevent Linda Carroll from using the rifle on that occasion and that whatever occurred did so as a result of an accident while he and Linda Faye Carroll were struggling for the rifle. If Thelma Jones died by accident or misadventure, that is if the rifle discharged at a time when the defendant and Linda Faye Carroll were struggling for the rifle and the defendant did not intentionally fire the rifle into the dwelling, the defendant would not be guilty of first degree murder." (Emphasis added.)

Defendant particularly complains because the trial judge used the word *actually* rather than the word *intentionally.*

It must be remembered that the trial judge was stating the contentions of defendant when he used the word "actually." When defendant testified, he said, "I did not have my hand on the trigger. Linda's hands were on the gun." He later testified on cross-examination as follows: "I didn't ever touch any part of the rifle down there on the trigger mechanism. . . . I didn't fire it. I didn't have my hands around the trigger." Certainly, the contention stated conforms with defendant's testimony.

Later in the instruction, the judge charged on involuntary manslaughter as follows:

> "Now, members of the jury, involuntary manslaughter is the unintentional killing of a human being by an act done in a criminally negligent way. Now, I charge that for you to find the defendant guilty of involuntary manslaughter the State must prove two things beyond a reasonable doubt: First, that the defendant acted in a criminally negligent way. Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent if it was done with such recklessness or carelessness as showed a thoughtless disregard of consequences or a heedless indifference for the safety and rights of others. . . . "

Under this later instruction, in order for the State to secure a conviction, the jury had to believe that defendant unintentionally killed a human being in a criminally negligent manner.

The instructions given substantially comported with defendant's requested instruction, and the assignment of error is overruled.

(18) Under assignment 53, defendant contends that the court erred in its instruction to the jury on possible verdicts for discharging a firearm into occupied property.

The record discloses that after the judge had completed his instruction on involuntary manslaughter, he proceeded to the other charge in the following language:

> "Members of the jury, in the other bill of indictment, members of the jury the defendant is charged with discharging a firearm into occupied property. As to that charge members of the jury, on that charge there are three possible verdicts: one is guilty of first degree murder, guilty of involuntary manslaughter and not guilty."

In the next paragraph, the court proceeds to give the proper mandate as to the charge of discharging a firearm into an occupied dwelling. Later in the recapitulation, the court properly separated the two cases and told the jury the possible verdicts in each one.

The original *lapsus linguae* resulted in no prejudice to defendant. The assignment of error is overruled.

[19] (19) Under assignment of error 55, defendant complains about the following language in the judge's instruction: "*Any verdict you arrive at* must be unanimous; in other words it, there must be a meeting of the minds." (Emphasis added.)

Defendant contends this instruction could have caused the jurors to believe that there *must* be a meeting of the minds and as a result the jury voted for a verdict of guilty.

The language immediately preceding this instruction was as follows, "[W]hen you go to your room your duty is to arrive at a just verdict in this case and in doing that you are to try to arrive at the truth of the matter."

A charge must be considered contextually, and when this is done, it is clear that no force was applied by the judge. *State v. Branch, supra; State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied,* 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976). Judge Peel was just telling the jury *any verdict reached* must be unanimous. He did not say a verdict had to be reached.

The assignment is without any merit and overruled.

[20] (20) Under assignments 56, 57 and 58, defendant contends that the felony-murder rule as set forth in General Statutes 14-17 is an unconstitutional denial of due process and equal protection of the law; that the court erred by omitting from its instruction that in order to find defendant guilty of first-degree murder the jury must find defendant killed Thelma Jones with malice, premeditation and deliberation; and that the court erred in failing to instruct the jury that they could return verdicts of second-degree murder and voluntary manslaughter.

General Statutes 14-17 provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."

A violation of this section is an unspecified felony within the purview of General Statutes 14-17 and therefore can result

in conviction for first degree murder under the felony-murder rule. *State v. Williams,* 284 N.C. 67, 199 S.E. 2d 409 (1973).

Defendant contends that General Statutes 14-17 establishes a presumption of premeditation and deliberation and thus violates the requirement of the due process clause of the Fourteenth Amendment that the prosecution prove beyond a reasonab'e doubt every fact necessary to constitute the crime charged. *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975).

We do not believe that *Mullaney* applies to this situation because G.S. 14-17 is a rule of law and not a presumption. If G.S. 14-17 is compared with murder in the first degree based on premeditation and deliberation, it might be said that the practical effect of G.S. 14-17 is that premeditation and deliberation are presumed when a murder is committed in the perpetration of a felony described under G.S. 14-17. *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). However, G.S. 14-17 actually involves no presumption at all. Under G.S. 14-17 premeditation and deliberation are not elements of the crime of felony-murder. Thus, the contention of defendant that the act of firing a firearm into an occupied dwelling has no rational connection with premeditation and deliberation is without merit. The only requirement for purposes of G.S. 14-17 is that the felony involved be one of the specified felonies or an unspecified felony within the purview of G.S. 14-17. We have held in *State v. Williams, supra,* that G.S. 14-34.1 is such a felony because of the reasonable correlation between committing a crime under G.S. 14-34.1 and the possibility of death occurring.

[21] It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it. *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). Justice Parker (later Chief Justice), speaking for our Court, said in *State v. Maynard,* 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958):

> "Where a murder is committed in the perpetration or an attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective

of premeditation or deliberation or malice aforethought. [Citations omitted.]"

[22] Again our Court held, speaking through Justice Ervin in *State v. Streeton,* 231 N.C. 301, 305, 56 S.E. 2d 649, 652 (1949):

> "It is evident that under this statute a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not."

Certainly, shooting into an occupied dwelling meets these standards.

Our Court held in *State v. Thompson,* 280 N.C. 202, 211, 185 S.E. 2d 666, 672 (1972), speaking through Chief Justice Bobbitt:

> "We have held that a felony which is inherently dangerous to life is within the purview of G.S. 14-17 although not specified therein. [Cases cited.] However, as indicated in *State v. Doss, supra* at 427, 183 S.E. 2d 679, no decision of this Court purports to hold that the only unspecified felonies within the purview of G.S. 14-17 are felonies which are inherently dangerous to life. In our view, and we so hold, any unspecified felony is within the purview of G.S. 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. 14-17."

North Carolina decisions have consistently upheld the felony-murder doctrine involving a felony inherently dangerous to life. For example: breaking, entering and larceny, *State v. Thompson, supra;* robbery, *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970); escape from prison, *State v. Lee, supra;* rape, *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958); kidnapping, *State v. Streeton, supra;* arson, *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1 (1948).

In this case there was no necessity for a charge on second-degree murder or voluntary manslaughter because there was no evidence of either of these crimes. *State v. Doss, supra.* Thus, Judge Peel submitted the case to the jury under the only possible verdicts open to him under all the evidence in the case.

The assignments of error are overruled.

[23] Assignment of Error No. 2 contends that the sentence of death for the crime of murder in the first degree violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

This assignment must be sustained. *Woodson v. North Carolina, supra; State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97, decided this day. Thus, defendant's motion in arrest of the judgment imposing the death penalty must be allowed. The judgment imposing the sentence of death is vacated and, under the authority of 1973 North Carolina Sess. Laws, Ch. 1201, § 7 (1974 Sess.), a sentence of life imprisonment must be substituted in lieu thereof.

Accordingly, it is hereby ordered that this case be remanded to the Superior Court of Wayne County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for the first degree murder for which he has been convicted; and (2) that in accordance with this judgment the Clerk of the Superior Court issue commitment in substitution for the commitment heretofore issued. It is further ordered that the Clerk furnish to the defendant and his attorneys of record a copy of the judgment and commitment as revised in accordance with this order.

The defendant's brief has other assignments of error as follows, Numbers 8, 11, 14, 15, 37, 17, 34, 18, 26, 39, 41, 50, 51, 52, 59, 60, and 61. We have examined all of these and find no merit in any of them. In addition, we have searched the record for other errors and have found none prejudicial to defendant.

In the trial we find

No error.

Death sentence vacated and in lieu thereof life sentence imposed.

In re Lancaster

IN THE MATTER OF THURMAN P. THOMAS, GUARDIAN OF MARY AUGUSTA LANCASTER, INCOMPETENT

No. 100

(Filed 14 July 1976)

1. **Appeal and Error § 5; Insane Persons § 3— duty of courts to protect those under legal disability**

Those who by reason of legal disability are unable to preserve for themselves their legal rights are deserving of having those rights assiduously protected by the courts, including courts of last resort.

2. **Clerks of Court § 5; Appeal and Error § 5— protection of infants and incompetents — clerks of court — supervisory powers of Supreme Court**

The function of protecting infants and incompetents has been entrusted by statute to the clerk of superior court in the first instance, G.S. 33-1 *et seq.;* G.S. 35-2 *et seq.*, and the Supreme Court may exercise ultimate supervisory power over this function. N. C. Const., Art. IV, § 12(1); G.S. 7A-32(b).

3. **Guardian and Ward § 7; Insane Persons § 3— acts on behalf of incompetent — standing — complaints against guardian — sources of information**

Ordinarily the one who acts on behalf of an incompetent is his guardian, trustee, or guardian *ad litem* and the incompetent, being under a disability, is not accorded "standing"; but where the complaint is that the guardian himself is acting either wickedly, incompetently or in ignorance of the facts, the concept of "standing" must necessarily give way to the primary duty of the court itself as the ultimate guardian to protect the incompetent's interest, and in the performance of this duty the court must receive, and should welcome, any pertinent information or assistance from any source.

4. **Guardian and Ward § 4; Insane Persons § 4— sale of incompetent's property — objections raised by friend of incompetent**

In a proceeding for sale of lands owned by an incompetent, the clerk of court erred in striking allegations by a friend and former attorney of the incompetent raising issues as to whether a sale of the incompetent's lands was necessary or desirable.

5. **Appeal and Error § 22— refusal of clerk to file case on appeal — certiorari**

Where it was asserted that a proper case on appeal had been tendered to the clerk of superior court but that the clerk refused to file it, the proper action by the Court of Appeals, if an appeal was required, was not dismissal of the purported appeal, but rather issuance of the writ of certiorari to the end that the trial judge settle the case.

6. **Guardian and Ward § 4; Insane Persons § 4— order for sale of incompetent's lands — entry day after petition filed**

Entry of an order for the sale of an incompetent's lands one day after the petition was filed indicates a degree of haste not consistent

with that investigation and consideration usual and proper to be had in such proceedings.

7. **Guardian and Ward § 4; Insane Persons § 4— sale of incompetent's lands — statutes**

A proceeding to sell an incompetent's lands should comply with one or more of the following statutes: G.S. 33-31; G.S. 33-33; G.S. 35-10; G.S. 35-11.

8. **Guardian and Ward § 4— sale of ward's lands — satisfactory proof**

The "satisfactory proof" required under G.S. 33-31 for sale of a ward's property must be some proof in addition to the guardian's petition and must show the necessity for the proposed sale.

9. **Guardian and Ward § 4; Insane Persons § 4— sale of incompetent's lands — failure to consider objections — confirmation set aside — remand for hearing**

Confirmation of the sale of an incompetent's lands by the clerk and judge is set aside where the record shows that scant attention was paid to the factual basis for the proposed sale presented in the guardian's petition and that facially valid objections to the sale thereafter raised were never addressed, investigated, or answered. Upon remand the clerk, being scrupulous to observe applicable statutory requirements, shall hear such competent evidence as may be offered on the issues raised, shall make findings based thereon, shall recite the kind of proof he considered in making his findings, and based upon such findings shall determine whether to confirm the sale. The matter shall then come before a superior court judge in order that he may determine whether on the record then before him to confirm the sale.

ON petition for *writ of certiorari* pursuant to North Carolina Constitution, Art. IV § 12(1), and General Statute 7A-32(b).

On May 22, 1973, Mary Lancaster, upon an inquisition of lunacy, was adjudged to be incompetent for want of understanding to manage her own affairs. On June 14, 1973, Thurman P. Thomas was appointed her general guardian. On November 28, 1973, Thomas, as general guardian, filed a petition for public sale of some 285 acres of land owned by the incompetent allegedly consisting of eight contiguous tracts. The petition may be paraphrased as follows:

(1) The incompetent has been a patient in a rest home since June 7, 1973, and will likely remain there for the rest of her life at a cost of four hundred dollars per month.

(2) The incompetent's personal property has been exhausted except for $2,852.86.

(3) The incompetent owns two tracts of land; her home place consisting of approximately 82 acres and another 285-acre tract consisting of eight contiguous tracts (described by metes and bounds).

(4) The incompetent executed a promissory note on November 3, 1969, in the principal amount of $6283.94 with interest at six percent, secured by a deed of trust on her 82-acre tract. No payments have been made on this debt.

(5) Due to her incapacity for some years, the lack of maintenance and upkeep on the 285-acre tract has resulted in a deterioration of the farm buildings and tenant dwellings and poor condition of the land.

(6) Her funds will soon be exhausted in her normal upkeep and maintenance and it will be in her best interest to sell the 285-acre tract of land, first to discharge the indebtedness and then the remainder deposited in a savings account to earn interest and be used to maintain the incompetent.

The petition was verified by Thomas and signed by W. M. Jolly, Attorney.

On the next day, November 29, 1973, the Clerk of Superior Court of Franklin County, Ralph S. Knott, entered an order, finding in pertinent part as follows:

"2. That by said petition and other satisfactory proof, it appearing to and being found by the court as follows:

* * *

"(c) That since the 7th day of June, 1973, the said incompetent has continually been a patient at [a rest home] and that the cost to said ward is approximately $400.00 per month.

"(d) That the personal property of said incompetent has all been exhausted except for the sum of $2852.86 . . . .

"(e) That it is likely that said ward will remain a patient in [the rest home] . . . for the remainder of her life, and that the costs and expenses of said ward's maintenance in said rest home . . . will very likely exceed the sum of $400.00 per month.

"(f) That said ward is the owner of two tracts of farm land . . . . That one of said tracts of land is known as the home place of said ward . . . containing in the aggregate 82 acres, more or less. That according to the records of the . . . Register of Deeds, Mary Augusta Lancaster, executed a note in the principal amount of $6283.94 together with interest thereon at the rate of six per cent . . . from date until paid, interest payable on or before 3 November of each year, with the principal being due on demand, secured by a deed of trust of even date conveying the aforesaid 82 acres of land . . . .

"That . . . Mary Augusta Lancaster owns a tract of land containing in the aggregate 285 acres, more or less, consisting of eight contiguous tracts of land, more specifically described by metes and bounds in the petition and said 285 acre tract of land has an estimated tax valuation of $16,380.00.

"3. That after a careful investigation of the facts and circumstances alleged in the petition, the court finds as a fact that the buildings on the aforesaid 285 acre tract of land are farm buildings and tenant dwellings, and due to the said Mary Augusta Lancaster's incapacity for a number of years, there has been no maintenance or upkeep of said buildings and of the farm lands themselves, but said buildings have deteriorated and are in very poor condition, and said farm lands are also in poor condition for lack of proper upkeep.

"4. That the . . . indebtedness . . . is bearing interest at the rate of six per cent . . . and according to petitioner's information and belief no payments have been made on said interest since the making of said note and deed of trust, and . . . interest is rapidly accumulating and becoming an additional debt of said ward.

"5. That the court finds as a fact that the funds . . . will soon be exhausted in the normal upkeep and maintenance of said ward, and your petitioner [sic] verily believes that it will be to the best interest of said ward and will best subserve her estate, for the 285 acre tract of land to be sold for cash, and the net proceeds of said sale to be first used to discharge the indebtedness on [her] home tract of land . . . and that the remainder of said

proceeds be deposited by your petitioner [sic] in a savings account . . . to pay the charges for [her] maintenance and upkeep at [the rest home] . . . and other necessary expenses of said ward.

"6. That after an investigation of the facts and circumstances, the court further finds as a fact that the interests of the said Mary Augusta Lancaster would be materially promoted by a sale of the said 285 acre tract of land described in the petition and would best subserve her estate and said sale would be most advantageous to the said Mary Augusta Lancaster."

The clerk then ordered that W. M. Jolly be appointed Commissioner to sell the 285-acre tract at public auction for cash.

On December 19, 1973, John F. Matthews, a Franklin County attorney, filed a verified "Application" for appointment of a suitable guardian *ad litem* for the incompetent. His application may be paraphrased as follows:

(1) The petition for sale was inadequate to show that the interest of the incompetent would be materially promoted by the sale and the order of the clerk did not reveal that the facts had been ascertained by satisfactory proof.

(2) The promissee on the $6283.94 note was Macon Thomas Carter, deceased. His heirs have assured Matthews they do not intend to demand payment during the incompetent's lifetime.

(3) It is unreasonable to sell 285 acres of land worth approximately $150,000.00 to pay a $6283.94 debt (with accrued interest of $1689.03) that has not been demanded.

(4) The incompetent's lands have a tobacco allotment of 30,000 pounds which is capable of yielding an income of $5400.00 per year. 70 acres of crop land owned by the incompetent can yield an income of $700.00 a year and her dwelling on the 82-acre home tract can be rented for $720.00 a year. The incompetent receives $1250.00 per year in social security benefits and her gross income will be at least $8070.00 for 1974—more than enough to pay her expenses at the rest home.

(5) Sale of the land before her death will result in considerable tax liability on her capital gains that would otherwise never become due.

(6) The incompetent's general guardian is only interested in receiving commission on the sale for himself and his attorney and omitted from his petition that he had arranged to rent the tobacco allotment on the 82-acre home place.

The clerk, upon Matthews' application, ordered that Ruby Eaves Underwood, sister of the incompetent, be appointed guardian *ad litem*, that she be served with a copy of the petition for sale and allowed ten days to answer, and that the sale be stayed.

In Matthews' "Application" he alleged that he had been "general attorney" for the incompetent and "as her friend and attorney is under a continuing right and duty to protect her interests" and that as a practicing attorney he was under a continuing duty to assist the court in protecting the interests of the incompetent. According to a written instrument which appears in the record, Gary C. Carter and John F. Matthews agreed on December 24, 1973, that in consideration of Matthews' efforts to have a guardian *ad litem* appointed for the incompetent and to prevent the sale of her land Carter would guarantee him a fee of $1000.00 in the event Matthews was not compensated out of the estate of the incompetent for his efforts. Gary Carter is the only son of Macon Thomas Carter, deceased, and apparently the principal beneficiary under a will allegedly executed by the incompetent.

On December 31, 1973, Matthews filed a "Motion for Appointment of Different Guardian" alleging that a previously existing attorney-client relationship between Ruby Underwood and W. M. Jolly and Jolly's present interest in the sale as commissioner would render Ruby Underwood's guardianship *ad litem* suspect. He asked that a different guardian *ad litem* be appointed and listed twenty-two friends and neighbors as possibilities.

On January 10, 1974, Ruby Underwood, guardian *ad litem*, filed a verified answer to the petition for sale, basically admitting and supplementing its allegations with further facts and joining in the petition for the sale. However, she denied the validity of the $6283.94 debt and asked the court to order an

accounting of dealings with the incompetent before the appointment of Thurman Thomas. She also alleged that John Matthews did not represent the incompetent in any capacity and had no interest in the matter.

On January 18, 1974, John Matthews filed a verified "Reply" to the answer of the guardian *ad litem*. He again asserted his role as "friend" of the incompetent under Rule 17(c) of the Rules of Civil Procedure and his role as "friend of the court." He alleged in more detail his figures as to the incompetent's probable annual income ($8108.56 to $8664.61 per year). He suggested that the proposals for reinvestment of the incompetent's money would run afoul of statutes regulating investment of funds by fiduciaries. Although denying that any land should be sold he suggested as an alternative that the land be sold tract by tract rather than all at once. He also claimed possession as attorney for the incompetent of certain papers which may, upon her death, become her will, and asserted that a sale of the 285-acre tract would "defeat the testamentary intentions of Mrs. Lancaster as to the devolution of title to her land." Matthews requested removal of Ruby Underwood as guardian *ad litem*, recognition of himself as friend of the court, suspension of the sale until the validity of the debt could be determined, and an order that the guardian rent the "tobacco poundage, farm land and dwellings on the 285-acre section, and the 10% excess [tobacco poundage?] on the 82-acre home tract."

On July 30, 1974, the guardian *ad litem* requested a hearing on the matters raised by the pleadings.

On October 11, 1974, an order granting permission to the general guardian to borrow $2600.00 was entered by the clerk and approved by Resident Superior Court Judge Hamilton Hobgood.

On October 31, 1974 (after a hearing on October 23, 1974), the clerk, noting that Matthews stated he did not represent Gary C. Carter or any member of the Carter family, but that Gary Carter testified under oath that he had employed John Matthews as his attorney for the purpose of stopping the sale, found:

> (1) That John Matthews had a right under Rule of Civil Procedure 17(b)(3) to file an application for the appointment of a guardian *ad litem*.

(2) That except as contained in his motion, John Matthews had offered no sworn testimony or evidence to the court that Ruby Underwood was not a suitable and fit person to serve as guardian *ad litem.*

(3) That (for reasons stated) Ruby Evans Underwood, sister of incompetent, is a fit and suitable person to act as guardian *ad litem.*

(4) John Matthews does not come into court with "clean hands" as a friend of the court but was employed by Gary C. Carter to stop the sale.

The clerk concluded (styled as a finding of fact) "that Mr. John F. Matthews and Gary C. Carter have no legal standing in this proceeding and are not proper parties to said proceeding and that therefore, all pleadings filed subsequent to the application should be stricken by the court." The clerk ordered these pleadings stricken, rescinded his earlier stay order of December 21, 1973, and ordered W. M. Jolly as Commissioner to proceed with the sale according to the original order of November 29, 1973. To this order John Matthews excepted and gave notice of appeal to the Judge of Superior Court. Gary C. Carter filed an affidavit giving reasons why he was "greatly aggrieved" by the order.

On November 21, 1974, a "Statement of Case on Appeal" signed by and apparently prepared on behalf of the clerk, was filed. It recited all previous filings together with an allegation that on November 12, 1974, Gary Carter, through his attorney, B. T. Henderson II, had filed notice of appeal. On November 26, 1974, Matthews filed "Exceptions to Statement of Case on Appeal."

On December 20, 1974, Judge Hobgood entered an order (filed December 31, 1974) which recited that a hearing had been held upon an appeal by Gary Carter and John Matthews from the clerk's October 31, 1974 order. The first fifteen findings of fact were recitations of the procedural history of the case. Judge Hobgood then noted that at the hearing of the appeal Gary Carter and John Matthews gave sworn testimony and arguments of counsel were heard. His order then provided:

"IT APPEARING TO THE COURT and the court finds as a fact that John F. Matthews . . . on his own behalf, filed certain pleadings . . . without receiving permission or leave of the court . . . and that [he] has no interest whatsoever

in the subject matter herein involved and he was and is not a necessary or proper party to this proceeding.

"AND IT FURTHER APPEARING TO THE COURT and the court finds as a fact that Gary Charles Carter contended . . . that he is a prospective heir under the Last Will and Testament of Mary Augusta Lancaster who is still living. That the original will of Mary Augusta Lancaster was not introduced into evidence and even if it had been introduced into evidence, the same would fail to show any present legal interest which the said Gary Charles Carter has in the property of the said Mary Augusta Lancaster, she being still living. AND THE COURT FURTHER FINDS AS A FACT that Gary Charles Carter is neither a necessary or proper party to this proceeding.

"AND BASED UPON THE RECORD AND THE FOREGOING FINDINGS OF FACT the court concludes as a matter of law that neither . . . Gary Charles Carter nor John F. Matthews are necessary or proper parties to this proceeding and their appeal, in the discretion of the court should be dismissed.

"NOW, THEREFORE, IT IS BY THE COURT, ORDERED, ADJUDGED AND DECREED:

"1. That neither Gary Charles Carter nor John F. Matthews are necessary or proper parties to this proceeding.

"2. That the aforesaid appeals by Gary Charles Carter and John F. Matthews from the order issued on 31 October 1974 by [the clerk], in this proceeding, should, in the discretion of the court be and the same are hereby dismissed.

"3. That John F. Matthews and Gary Charles Carter are hereby dismissed as parties to this proceeding.

"4. That this proceeding, regarding matters other than the aforesaid appeals . . . is hereby retained for further order of this court, and the sale of the real estate of Mary Augusta Lancaster previously ordered by the [clerk] is stayed until such time as either said appeals are dismissed or ruled upon by the North Carolina Court of Appeals and certified to this court."

Apparently only Gary Carter gave notice of appeal from this order for Judge Hobgood on motion of the general guardian and the guardian *ad litem* ordered that Carter's appeal be dismissed on the ground of failure to make timely service of case on appeal, N. C. Gen. Stat. 1-287.1 repealed effective July 1, 1975, and on the ground that Carter had "abandoned" his appeal. Carter did not contest this determination. Judge Hobgood set aside the stay of the sale and directed W. M. Jolly as Commissioner to proceed with the sale in accordance with "the aforesaid order heretofore entered by the Clerk" (undoubtedly the original November 29, 1973 order).

On April 14, 1975 (after sale, upset bid, and resale), Mr. Jolly made a report of the resale for $158,601.00. On April 25, 1975, the clerk in a confirmatory decree found that the sales were "in all respects duly and properly made, and that the price of $158,601.00 for the whole of said lands is adequate, just and reasonable and the fair value of said lands." He ordered that the sale be confirmed, that expenses of the sale be paid, and that "an allowance . . . in the sum of $7,930.05 in lieu of commissions" be paid to Mr. Jolly. Judge Hobgood confirmed the clerk's decree on April 25, 1975, after finding that the sale "was proper and necessary and for the best interest of [the] Incompetent, and was in all respects duly and properly made and that the price of $158,601.00 . . . is a fair and adequate price . . . . " The last and highest bidders were Thomas E. Barham and wife, Doris P. Barham, June M. Privette and wife, Mary C. Privette.

No appeal appears in the record from this final order. The following, however, does appear:

"STATEMENT AS TO ADDITIONAL PARTS OF THE RECORD

Simultaneously with the docketing by the appellant of so much of the record proper as the Clerk of Superior Court is willing to certify, the appellant has filed in the Court of Appeals her petition that the Court of Appeals issue proper writs to the Clerk . . . requiring [him] to accept for filing certain parts of the record proper which [he] has heretofore refused to accept, including . . . exceptions and notice of appeal . . . [and] statement of case on appeal, including exceptions and assignments of error . . . . "

In an opinion by Morris, J., reported at 28 N.C. App. 295, 220 S.E. 2d 838 (1976) the Court of Appeals dismissed the appeal saying:

> "No notice of appeal, exceptions, or assignments of error appear in the record filed in this purported appeal. Mr. Matthews asserts that he, on 1 May 1975, handed to the clerk a notice of appeal but the clerk refused to file it. He then petitioned this Court for a writ of mandamus which was denied on 22 July 1975.
>
> "Mr. Matthews was, by order of court, dismissed as a party to this action. He took no appeal from that order. The court found that he had no standing in this litigation and no interest in the subject matter. From the evidence before us, those facts are abundantly clear.
>
> "The general guardian and the guardian ad litem have moved to dismiss the purported appeal. The motion is well taken."

On February 2, 1976, John Matthews, purporting to act as "attorney of record" for the incompetent, gave "notice of appeal" to this Court and filed a "petition for discretionary review" under General Statute 7A-31. On April 8, 1976, we, treating these filings by Matthews as a petition for certiorari pursuant to the North Carolina Constitution, Art. IV § 12(1), and General Statute 7A-32(b) (provisions for the exercise of our supervisory powers), allowed the same.

On April 21, 1976, the serious illness of John Matthews having been called to our attention, we appointed J. Harold Tharrington "to act as friend of the incompetent, and as such to argue the cause before this Court . . . and to make such further investigation of the matter and addendums to the record as he may deem advisable." In the appendix to Mr. Tharrington's brief appear documents which show that John Matthews had attempted to perfect an appeal from the April 25, 1975 decree of the clerk and confirmation thereof by Judge Hobgood by attempting to file on May 14, 1975, a "Statement of Case on Appeal" with the clerk. The clerk apparently refused to accept or file this document. This "Statement of Case on Appeal" contained:

> (1) Recitations concerning the hearing in December, 1974, before Judge Hobgood to the effect that (a) Judge Hobgood announced at the outset of the hearing that he

would confine it to a determination of the standing of Carter and Matthews in the proceeding; (b) there was offered into evidence by Carter a carbon copy of a purported last will and testament of the incompetent dated May 19, 1965, together with a codicil dated April 2, 1968, in which she named Macon T. Carter the principal beneficiary of her estate and if he should predecease her then his son, Gary Carter, would become the principal beneficiary; and (c) there was offered into evidence by Matthews a "Protest Against Sale of Land" signed by thirty "friends and neighbors" of the incompetent.

(2) A motion addressed to Judge Hobgood and proposed order declining to confirm the sale of the land. To this motion and order were attached: (a) Matthews' affidavit to the effect that for tax purposes the incompetent had a net basis in the 285-acre tract of $35,411.28 and if sold at $158,601.00 she would owe capital gain taxes in the sum of $38,656.06; and (b) documents from the guardianship file showing that the incompetent's two tracts of land had been rented in 1975 for 20 cents per pound for the tobacco poundage and $10.00 per acre for land other than that on which the tobacco was planted, and the guardian's annual account dated May 28, 1974, giving total receipts of $9,906.74 and total disbursements of $7,380.40.

The "Statement of Case on Appeal" included thirteen exceptions and eight assignments of error to the April 25, 1975 confirmatory decrees.

Special counsel also collected all the accounts made by the guardian from June 14, 1973, the date of his appointment, to April 7, 1976. The account began with $2,431.05 on hand. The following total receipts were collected and disbursements made (shown, unlike the accounts themselves, on an annual basis for ease of comparison):

June 14, 1973 — June 15, 1974	
Receipts:	$ 7,576.29
Disbursements:	8,070.45
June 15, 1974 — June 15, 1975	
Receipts:	$ 9,518.20
Disbursements:	11,239.16 (includes repayment of $2600 loan)

June 15, 1975 — April 7, 1976

Receipts:	$ 9,932.80
Disbursements:	9,729.76

Summary for the entire period would show $27,027.29 in total receipts, including $19,131.29 for farm and tobacco rental, and $29,039.37 in total disbursements, leaving a balance on hand of $418.97 as of April 7, 1976. Of the total disbursements $9,091.21 was attributable to legal and administrative fees and $11,209.02 to nursing home expense. An itemized breakdown shows:

Receipts:	
Social Security	$ 3,766.40
House Rental	1,528.00
Farm & Tobacco Rental	19,131.29
Loan Proceeds	2,600.00
Medicare	1.60
Total	$27,027.29
Disbursements:	
Wake Forest Rest Home	$11,209.02
Medical	1,476.03
Utilities	91.09
Insurance	1,147.06
Repairs	1,553.40
County Taxes	1,590.26
Legal & Administrative	9,091.21
Loan	2,757.32
Miscellaneous	123.98
Total	$29,039.37

Special counsel also presented surveys and aerial photographs showing that the 285-acre tract, allegedly contiguous, was in reality *six contiguous* parcels totaling 239 acres and *two separate non-contiguous* parcels of 38 acres and 8 acres, respectively.

J. Harold Tharrington, Special Counsel for Mrs. Mary Augusta Lancaster, Incompetent.

Yarborough, Jolly & Williamson, by E. F. Yarborough, Attorneys for Thurman P. Thomas, Guardian of the Estate of Mrs. Mary Augusta Lancaster, Incompetent.

In re Lancaster

Davis, Sturges & Tomlinson by Conrad B. Sturges, Jr., Attorneys for Mrs. Ruby Eaves Underwood, Guardian Ad Litem *for Mrs. Mary Augusta Lancaster, Incompetent.*

EXUM, Justice.

This case is a procedural morass. In the calm eye of the procedural hurricane, however, reposes the interest of the Court's ward, Mary Augusta Lancaster, and this Court's inescapable duty to protect it. We have, in order to exercise our supervisory powers, brought this entire matter before us for review. Our decision is to set aside both the clerk's order striking the allegations filed by Mr. Matthews and the confirmatory decrees of the clerk and judge and to remand for further proceedings and findings in accordance with this opinion.

[1] There is no principle more universally recognized in the law than this: Those who by reason of legal disability are unable to preserve for themselves their legal rights are deserving of having those rights assiduously protected by the courts including courts of last resort. "At common law the king, as parens patriae and fountain of justice, is the general protector of [infants and incompetents]." *Sullivan v. Dunne,* 198 Cal. 183, 244 P. 343, 345 (1926). In Las Siete Partidas, Part III, Title XXIII, Law XX (Spain ca. 1263 A.D., trans. Scott 1931) we read in reference to the appeals of widows and minors:

> "This is the case for the reason that although the King is required to protect all the people of his country he should especially protect such as these, since that they are, as it were, unprotected, and are more destitute of advice than others."

In England this duty of the highest legal authority to protect infants and incompetents was delegated to the Chancellor by the King. 1 W. Blackstone, Commentaries * 463. See e.g., *Duke of Beaufort v. Berty,* 1 Peere Williams 702 (Chancery 1721).

[2] In this state the function of the Chancellor has been entrusted by statute to the clerk of superior court in the first instance. N. C. Gen. Stats. 33-1 *et seq.,* 35-2 *et seq.; In re Propst,* 144 N.C. 562, 57 S.E. 342 (1907); *Duffy v. Williams,* 133 N.C. 195, 45 S.E. 548 (1903). This Court may exercise ultimate supervisory power over this function. N. C. Const., Art. IV § 12(1); N. C. Gen. Stat. 7A-32(b). "So careful is the law to

guard the rights of infants," *Moore v. Gidney,* 75 N.C. 34 (1876), and incompetents that we have chosen to exercise this supervisory power in this instance.

Ordinarily our legal system operates in an adversary mode. One incident of this mode is that only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement. *Henderson v. Matthews and Rogers and Newkirk and Lanier v. Henderson,* 290 N.C. 87, 224 S.E. 2d 612 (1976). There are, however, exceptions. In *Edwards v. Butler,* 244 N.C. 205, 92 S.E. 2d 922 (1956) this Court exercised its supervisory powers to benefit a non-appealing party in an *in rem* action. In *Elledge v. Welch,* 238 N.C. 61, 76 S.E. 2d 340 (1953) there was an action brought to sell land to make assets for a decedent's estate. One of the defendants who did not appeal was an adjudged incompetent widow. There was nothing *in the record* to indicate that her ostensible dower and homestead rights had been asserted by her guardian or investigated by the court. In remanding for ascertainment of whether those rights had been asserted and investigated we said that as an adjudged incompetent "her rights were committed to the care of the court . . . . In the exercise of our supervisory power we will assume jurisdiction on her behalf and treat errors committed against her as being before the Court and duly presented for review." *Id.* at 68, 76 S.E. at 345.

Another incident of the adversary mode is that only one with a "sufficient stake in an otherwise justiciable controversy" has "standing to sue." *Sierra Club v. Morton,* 405 U.S. 727, 731-732 (1972). Yet there are instances in our law where *any* person is given a right to proceed, e.g., in *qui tam* actions for a statutory penalty, N. C. Gen. Stat. 51-7, or in making application for the writ of habeas corpus, N. C. Gen. Stat. 17-5 ("Application . . . may be made . . . by any person in his behalf"). The reason for this departure from normal requirements of "standing" is that the "aggrieved party" is either too diffuse a class or is helpless to protect himself.

[3] Ordinarily the one who acts on behalf of an incompetent is his guardian, trustee, or guardian *ad litem* and the incompetent, being under a disability, is not accorded "standing." But where the complaint is that the guardian himself is acting either wickedly, incompetently or in ignorance of the facts, the

concept of "standing" must necessarily give way to the primary duty of the court itself as the ultimate guardian to protect the incompetent's interest. In the performance of this duty the court must receive, and should welcome, any pertinent information or assistance from any source. This principle was enunciated in *In re Propst, supra* at 568, 57 S.E. at 344:

> "While . . . [an incompetent] must be represented, in all judicial proceedings, by the guardian, it is entirely proper, either *in his own person or through any friend,* for him to call attention to any matter then pending and under the control of the Court, to the end that it may be investigated and his rights protected." (Emphasis supplied.)

Because of the failure to heed this principle the clerk and the judge below incorrectly focused their attention on the "standing" of Mr. Matthews; and the Court of Appeals, on the question of whether an appeal had properly been perfected by one with "standing" to do so.

[4, 5] It was error for the clerk to strike the allegations filed by Mr. Matthews. With regard to the purported appeal to the Court of Appeals Matthews asserted that he had tendered a proper case on appeal but that the clerk refused to file it. In this circumstance the proper action, if an appeal was required, was not dismissal, but rather issuance of the writ of certiorari to the end that the trial judge settle the case. *Lindsay v. Brawley,* 226 N.C. 468, 38 S.E. 2d 528 (1946); *Chozen Confections, Inc. v. Johnson,* 220 N.C. 432, 17 S.E. 2d 505 (1941).

[6] So far as the record shows scant attention was paid at the outset to the factual basis for the proposed sale presented in the general guardian's petition. The original order of the clerk was entered one day after the original petition was filed and simply repeated the allegations of the petition itself. In a similar case this Court remarked that a two day interlude between petition and order indicated a "degree of haste not consistent with that investigation and consideration usual and proper to be had in such proceedings." *In re Propst, supra.*

[9] If scant attention was paid to the initial factual issues in the petition, no attention whatever *so far as the record shows* was given to the facially valid objections to the sale thereafter raised. Mr. Matthews, whatever his motives, succeeded in raising serious questions regarding the sale which, according to

the record, were neither investigated nor answered by the clerk or the judge. They should have been and the record should so reflect.

On July 30, 1974, the guardian *ad litem* filed a "Request for Hearing" asking that the court "after proper notice to all parties hear evidence on the matters and things raised by the pleadings in this cause and enter such orders as will best protect the interest of the said Mary Augusta Lancaster." Pursuant to this request the clerk served notice on the general guardian with a copy to Mr. Matthews that he would "hold a hearing and receive evidence on all issues raised by the pleadings in this cause." At that point in the proceeding the major issues which had been raised were: (1) How will it materially promote the interest of the incompetent to sell 285 acres of land with an apparent fair market value of $158,000.00 when the land is unencumbered and producing income which when added to other income is within a few hundred dollars a year of meeting the incompetent's regularly recurring expenses? (We note that 31.3% of the incompetent's expenses were for administrative and legal fees. If this inordinately high sum could have been trimmed only slightly she would have had more than enough income to meet her expenses.) (2) Is the six thousand dollar debt a valid claim against the incompetent? If so, need it be paid forthwith? (3) Why sell land worth $158,000.00 when the sale of other smaller tracts or the negotiation of loans secured by the property may give the estate the liquidity it may need? (4) What is the federal and state income tax impact upon the proposed sale? Could this impact be lessened by a sale of a smaller tract or perhaps a sale where the purchase price is paid in installments?

At the hearing held on October 23, 1974, these issues *according to the record* were never addressed, investigated, or answered. It was the duty of the clerk to do so. It is conceivable that answers to all of these questions will demonstrate the advisability and even the necessity for this sale. It may be that the guardians, the clerk and the judge all have knowledge concerning these matters which impelled them to proceed with the sale. This knowledge, however, does not properly substitute for competent evidence and findings in the record. *Butler v. Weisler*, 23 N.C. App. 233, 208 S.E. 2d 905 (1974); *cf. McLean v. Breese*, 109 N.C. 564, 13 S.E. 910 (1891).

[7] Another difficulty in the case is the failure of the guardians and the clerk to state precisely the particular statute or statutes under which authority was found for this sale. There are four possible candidates (N. C. Gen. Stats. 33-31; 33-33; 35-10; 35-11) each with varying purposes and requirements. The proceeding before us should comply with one or more of these statutes.

General Statute 33-31 allows a guardian to apply for a sale of any part of his ward's estate by filing a verified petition showing that "the interest of the ward would be materially promoted by the sale . . . . " The truth of the petition must be "ascertained by satisfactory proof." The decree of sale must specify the "terms [of sale] as may be most advantageous to the interest of the ward."

[8] The "satisfactory proof" required under this statute must be some proof *in addition* to the guardian's petition and must show the necessity for the proposed sale. In *Harrison v. Bradley,* 40 N.C. 136, 144 (1847), Chief Justice Ruffin said:

> "The Court cannot forbear expressing a decided disapprobation of the loose and mischievous practice, adopted in this case, of decreeing the sale of an infant's land, upon *ex parte* affidavits offered to the Court, *without any reference to ascertain the necessity and propriety of the sale,* and the value of the property, so as to compare the price with it. The Court ought not act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by the report of the master or the finding of an issue . . . . " (Emphasis supplied.)

In *In re Propst, supra,* the petition for sale was verified only two days before the order of sale. There were no affidavits by disinterested persons regarding the necessity of the sale. This Court said:

> "This is unusual. The statute [N. C. Gen. Stat. 33-31] contemplates that, in addition to the verified petition of the guardian, the Clerk shall require other satisfactory proof of the truth of the matter alleged. The Judge, exercising the functions of a Chancellor, where sales of this character were made pursuant to proceedings in courts of equity, always referred the petition to the Clerk and Master, who

took evidence and reported his conclusions to the Court. *It is usual,* since these large and important equitable functions are conferred upon the clerks, *to accompany the petition with affidavits showing the necessity for the sale.* The practice is to be commended and should not, without good cause, be departed from. *Id.*, 57 S.E. at 344. (Emphasis supplied.)

General Statute 33-33 provides for paying debts of or demands on wards. The guardian is authorized to petition the clerk for "an order to sell *so much of the personal or real estate* as may be sufficient to discharge such debt or demand . . . . " (Emphasis supplied.) The order of sale must "particularly specify what property is to be sold and the terms of the sale . . . . " Under this section the clerk must first ascertain that there is a debt due. Only that specified part of the land necessary to pay off the debt is to be ordered sold. *Spruill v. Davenport,* 48 N.C. 42 (1855); *Leary v. Fletcher,* 23 N.C. 259 (1840).

General Statute 35-10 authorizes a sale when upon report of the guardian to the clerk it appears that the "personal estate" of a "mental defective, inebriate or mentally disordered person . . . has been exhausted, or is insufficient for his support" *and* when such person "is likely to become chargeable on the county." The order of sale "shall specify particularly the property thus to be disposed of . . . and shall be entered at length on the records of the court . . . . "

General Statute 35-11 applies when "it appears to the clerk, upon the petition of the guardian of any mental defective, inebriate or mentally disordered person, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance . . . or when the clerk is satisfied that the interest of . . . [such] person would be materially and essentially promoted by the sale . . . . " As used in General Statutes 35-10 and 35-11 "mental disorder" is defined by General Statute 35-1.1.

Under all four statutes the procedure to be followed is that provided by General Statute 1-339.1 *et seq.* for judicial sales.

The proceeding before us has the flavor of all four statutes. In the general guardian's original petition he alleges the per-

sonal property of the incompetent has been exhausted, N. C. Gen. Stat. 35-10, the existence of a debt, N. C. Gen. Stats. 33-33; 35-11, and that sale will be to the "best interest of said ward and will subserve her estate." N. C. Gen. Stats. 33-31; 35-11. The clerk's order is entered on the basis of "said petition and other satisfactory proof." N. C. Gen. Stat. 33-31. The clerk also finds "after investigation of the facts and circumstances . . . that the interest of the said Mary Augusta Lancaster would be materially promoted by a sale of the said 285 acre tract . . . and would best subserve her estate and said sale would be most advantageous . . . . " N. C. Gen. Stat. 33-31; 35-11. He orders a sale for cash, the proceeds of which after payment of all liens and costs of sale to be held by the guardian "for the payment of the legal debts and for the maintenance and support of said ward." N. C. Gen. Stats. 33-31; 33-33; 35-11.

On remand it should be determined which statute or statutes authorize the proceedings. Before confirming the sale, both the clerk and the judge should be satisfied the statutory requirements have been followed and that the record so reflects. Defects, if any, which may be found to exist in the initial order of sale based on failure to observe applicable statutory requirements may be cured by further proceedings prior to confirmation.

[9] Because we, too, must assiduously protect the interest of the incompetent and because this sale may well materially promote her interest or be necessary to pay valid past, present and reasonably anticipated future claims against her, and may satisfy statutory requirements we do not set aside the order of sale. Rather we set aside the clerk's and the judge's confirmation of the sale.

Confirmation of a judicial sale is a matter within the discretion of the court. This Court said in *Harrell v. Blythe*, 140 N.C. 415, 416-17, 53 S.E. 232 (1906):

> "Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and until it is obtained, the bargain is not complete . . . . Sales of this character are only conditional and are not complete until they have been reported to, and confirmed by the court. The bidder cannot complain of this rule, for he

> makes his offer to buy with the understanding that the whole matter is entirely under the control of the court and that his bid may be rejected and the sale set aside if, in the exercise of its sound discretion, the court should think proper to do so . . . . Rorer, in his work on Judicial Sales, sections 122 and 124, says that while the court will have a proper regard to the interest of the parties and the stability of judicial sales, it has a broad discretion in the approval or disapproval of a sale made under its decree; and, in section 126, he further says that the court is clothed with an unlimited discretion to confirm a sale or not, as may seem wise and just. Confirmation is consent, and, the court being the vendor, it may consent or not in its discretion."

At the time of confirmation it should appear *from the record* to the confirming authority that the sale will materially promote the interest of the incompetent, or be necessary to pay valid claims against her or for her regular maintenance. If from the record this determination cannot reasonably be made, confirmation should be withheld. "[A]fter a sale it ought to appear in like manner to be for the benefit of the infant to confirm it, otherwise there is great danger of imposition on the Court and much injury to infants." *Harrison v. Bradley, supra.*

When the sale came on for confirmation before the clerk and the judge this record was replete with unanswered factual issues and legal questions which we already have noted. The clerk and judge should have resolved these issues and questions before they exercised their discretion in favor of confirmation, and the record should so reflect.

We, therefore, remand the case to the Franklin County Superior Court to this end: The clerk being scrupulous to observe applicable statutory requirements shall hear such competent evidence as may be offered by the general guardian, the guardian *ad litem,* and special counsel for the incompetent, who shall continue to act in this capacity, on the issues which have been so far raised, shall make findings based thereon, and shall recite the kind of proof he considered in making his findings. Based upon these findings the clerk shall then determine whether to confirm the sale. The matter shall then come again before either the resident judge or a judge of superior court holding the courts of the district in order that he may determine whether on the record then before him to confirm the sale.

Remanded.

STATE OF NORTH CAROLINA v. ROBERT LEE THOMPSON AND WILLIE DAVIS McEACHERN

No. 45

(Filed 14 July 1976)

1. **Criminal Law §§ 34, 66— evidence showing defendant's commission of another crime — competency on question of identity**

In this prosecution for rape, testimony identifying defendant as one of two men who attacked and attempted to rape another woman some thirty minutes before the prosecutrix was abducted was competent and admissible to establish that he was also one of the men who raped the prosecutrix where the two attacks were similar in the following respects: (1) In both, the victims were approached as they sat parked in the same secluded lover's lane; (2) in both, the attackers were two black men—one medium in height and the other much shorter; (3) in both, the larger man had a nylon stocking pulled over the upper part of his face; (4) in both, all the victims were ordered from the cars and the men ordered to sit on the ground; (5) a sawed-off shotgun was used in both attacks; (6) the primary motive for both attacks was rape of the female victims; and (7) in both instances the perpetrators drove a car with unusually loud mufflers.

2. **Constitutional Law § 36; Rape § 7— invalidity of death penalty for rape — substitution of life imprisonment**

Since the decision of *Woodson v. North Carolina*, ... U.S. ....., invalidating the death penalty provision of G.S. 14-17, by implication also invalidated the death provisions of G.S. 14-21(a)(2), the statute under which defendant was convicted and sentenced to death for rape, the sentence of death imposed upon defendant must be vacated and a sentence of life imprisonment substituted in lieu thereof under the authority of N. C. Sess. Laws, c. 1201, § 7 (1973).

3. **Rape § 1— use of deadly weapon to procure submission**

A deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21(a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistence because of her fear that if she does not he will kill or injure her with the weapon.

4. **Rape § 5— first degree rape — sufficiency of evidence**

The State's evidence in a rape case was sufficient to permit the inference that defendant procured the victim's submission through the use of a deadly weapon and was sufficient to overcome defendant's motion for nonsuit of the charge of first degree rape where it tended to show: defendant participated in the abduction of the victim at gunpoint from a lover's lane and then drove to a secluded house he had rented while his codefendant threatened the victim with the gun; at the house the codefendant raped the victim in the automobile while

holding the gun in his hand; defendant told the victim to come with him and the codefendant, while still holding the gun, ordered her to do so; as defendant led the victim inside the house he told her if she did what he wanted her to do he would not let "the other guy" kill her; inside the house defendant continually cautioned her "to do just like he told her to do and [she] would not be killed"; the victim complied out of fear for her life; and the codefendant again raped the victim at gunpoint while defendant drove them back to town. Furthermore, the evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree rape on the theory that he aided and abetted the codefendant in his two rapes of the victim.

5. **Criminal Law §§ 83, 102— failure of defendant's wife to testify — improper jury argument —— duty of court to intervene**

The district attorney violated G.S. 8-57 by arguing to the jury that "I can't use a man's wife against him, but he can use his wife for himself. Wouldn't she be a good person to tell you when he came in and how he got in the house? Have you heard from her?" and, notwithstanding the failure of defendant's counsel to object to such argument, it was incumbent upon the trial judge, on his own initiative, to intervene and instruct the jury to disregard the district attorney's argument.

APPEAL by defendants pursuant to G.S. § 7A-27(a) from *Godwin, J.*, 9 June 1975 Session of ROBESON Superior Court.

Defendants were charged, in separate bills of indictment, with the first degree rape of Naomi Hardin on 8 February 1975. The two cases were consolidated for trial and, in separate verdicts, the jury found defendants guilty as charged. From the court's sentence imposing the death penalty, defendants appealed directly to this Court.

The State's evidence tended to show the facts summarized below.

On Saturday, 8 February 1975 at approximately 12:45 a.m., Jack Hardin and his wife, Naomi Hardin, who had been separated for a year, were sitting in his car in a wooded area close to the Lumber River, where they had gone to discuss their marital problems. They had been parked for five or ten minutes when the front doors of their car were suddenly opened by two black males. (At the trial Mrs. Hardin identified both men; Mr. Hardin was not able to identify or describe either except as to their general height and build.) The man on Mrs. Hardin's side of the car, whom she identified as defendant McEachern, was carrying a sawed-off shotgun; a nylon stocking masked the upper half of his face. The shorter of the two men, whom Mrs.

Hardin identified as defendant Thompson, was on Mr. Hardin's side of the car. A nylon stocking covered his entire head.

One of the men demanded that Mr. and Mrs. Hardin get out of the car. When Mrs. Hardin began to scream, McEachern put the shotgun into her side and told her to be quiet or he would kill her. When she continued to scream, McEachern pulled her from the car and slapped her several times, threatening her as he did so. Meanwhile defendant Thompson had escorted Mr. Hardin to Mrs. Hardin's side of the car.

When he had stopped her screaming McEachern directed Thompson to take Mrs. Hardin further into the woods and told Mr. Hardin to go to the rear of the car and to sit on the ground. Mr. Hardin did as he was told but, as he was squatting down, he grabbed some dirt, threw it into McEachern's face, and ran. McEachern caught him, knocked him to the ground, and rendered him unconscious by a blow from the gun. When Mr. Hardin regained consciousness Mrs. Hardin and the two men were gone.

According to Mrs. Hardin's testimony, as Thompson was leading her away from the car, she broke free and ran, but she had gone only a short distance when McEachern grabbed her. He put the shotgun into her side and said, "Come on, bitch, you going with us." At that point both McEachern and Thompson grabbed her by the arms and dragged her through the underbrush until they arrived at a light colored 1966 Plymouth Fury automobile. McEachern pushed her into the front seat and put a stocking "mask" over her head. The mask was thin and she could see through it. McEachern then got into the car on the passenger's side with the gun still in his hand. Thompson got into the driver's seat, removed his stocking mask and put it over Mrs. Hardin's head. He started the car and the three drove away from the wooded area, locally known as Lover's Lane. Mrs. Hardin noticed that the red oil or alternator light of the car blinked on and off as the motor ran. She also noticed that the car had a black interior, loud mufflers, and a three-speed, standard gear shift transmission.

Soon after driving away Thompson said, "I know a place where we can go." Mrs. Hardin continuously begged them to let her go, and McEachern kept telling her to be quiet or he would kill her. He still had the gun in his hands. McEachern soon began to fondle her breasts and directed her to remove the

pants suit she was wearing. She refused and in a short while the car pulled onto a rural road, drove up to a small house and stopped. Mrs. Hardin observed a mercury vapor night light located in the yard close to the house.

When the car stopped, Thompson got out. McEachern put the muzzle of the gun to Mrs. Hardin's head and again demanded that she remove her pants. Because of the gun Mrs. Hardin complied and McEachern had intercourse with her on the front seat of the car. All the while he kept the gun in his hand with the muzzle touching Mrs. Hardin's head. The car's interior dome light was on and she could see McEachern clearly.

While McEachern was still having intercourse with her, Thompson knocked on the car window. When he did so, McEachern directed Mrs. Hardin to go with Thompson. He remained at the car while Thompson then took her by the arm and led her inside the house to a bedroom. The mercury vapor light shone through the curtainless window of the bedroom, and Mrs. Hardin could see Thompson's face clearly. After Thompson told her to do as he directed or he would let McEachern kill her, he instructed her to sit on the bed and to remove her pants. At this time McEachern was apparently still outside at the car. Out of fear of McEachern and Thompson, Mrs. Hardin complied with Thompson's demands. Thompson then had intercourse with her. Afterwards he returned her to the car. While inside the house, however, Mrs. Hardin was able to lift the nylon stockings that were on her head and to adjust them so that she could see clearly.

At the car, Mrs. Hardin again tried to escape. McEachern grabbed her and said, "If you take another step I will blow your head off." Thompson then got into the driver's seat. At this point McEachern pushed Mrs. Hardin into the back seat of the car and got in with her, laying the shotgun in the front seat as he did so. He then demanded that she remove her pants again. When she protested he reached into the front seat, got the gun, and put the muzzle to her head. At this point the car drove away, headed toward Lumberton. Again, because the gun was at her head. Mrs. Hardin complied with McEachern's demands and he had intercourse with her a second time. As he was doing so, Thompson called out, "My God, man leave her alone, we are coming into town." McEachern then desisted. The gun was still in his hand.

Thompson drove to a wooded area and stopped. McEachern told Mrs. Hardin to get out and threatened to kill her if she ever told what had happened. He removed the stockings from her head while her back was toward him and threatened to blow her head off if she looked back. Mrs. Hardin ran from the car and, as she fled, she heard the car's loud mufflers as it pulled away.

Mrs. Hardin, who was a life insurance agent, selling debt insurance for the Coastal Plains Life Insurance Company, was familiar with the area where defendants left her, for it was in her sales territory. She ran to the house of Joe Pittman, an elderly black man to whom she had sold insurance. It was about 2:00 or 2:30 a.m. when she arrived at his house. She had great difficulty in wakening him and, when she did so, he was very frightened. He finally let her inside and she explained what had happened. He refused to take her to town because he had only a limited driving permit, and he was afraid the two men would be lying in wait for them. However, at 6:30 a.m. he took her to town and deposited her several blocks from her home. As she was running to her house Mrs. Hardin met her husband and brother. Along with law enforcement officers they had spent the night looking for her in the Lover's Lane area. Upon seeing them Mrs. Hardin became hysterical, and they took her home where she explained to them what had occurred. When the police arrived later she recounted to them the events of the past evening.

Subsequently she went with the police over the route defendants had taken from Lover's Lane to the house where they had raped her and from there to the spot where they let her out. On the following Tuesday evening she went to the police station to view a line-up. Upon arriving she saw the car which had been used in the attack upon her. In a line-up of nine black males of various complexions and sizes she identified both defendants. In addition to the testimony of Detective Sanderson, one of the investigating officers, as to Mrs. Hardin's statements to him, all of which corroborated her testimony, the State offered evidence tending to show that defendant Thompson was the owner of the car which had been used in the crime, and that in January 1975 he had rented the house to which Mrs. Hardin was taken from Jimmy Floyd. Mr. Floyd testified that Thompson was living in the house on 8 February 1975.

The State also adduced the testimony of Peggy Grainger and Danny Walters who had parked in the Lover's Lane about

11:00 p.m. on 7 February 1975. In substance, Grainger and Walters testified that defendant McEachern and a smaller accomplice, whom they could not identify, approached their car around 12:15 a.m. on 8 February. McEachern, who had a shotgun, ordered the two out of their car and he attempted to rape Miss Grainger. Grainger and Walters were able to ward off the attack, however. (Their testimony will be examined in greater detail in the opinion.)

Both defendants presented alibi defenses. In substance defendant Thompson's story was as follows: On the night of 7 February 1975 he left his girl friend's home at 11:30 p.m. He rode around until about 12:10 a.m., when he stopped to help McEachern clear his car from a brick wall with which he collided while backing out of someone's driveway. After they freed the vehicle, he followed McEachern to his brother's house where they left his car. From there Thompson drove the two to Mauney's Supermarket where he saw several girls he knew. About 12:20 a.m. Thompson got out of the car to talk with the girls. At that point McEachern gave Thompson $10.00 for the use of his car for a couple of hours. McEachern left in Thompson's car and Thompson stayed in the supermarket parking lot talking with the girls. When McEachern returned at about 1:45 a.m., Thompson took him home and then took the girls to a local night club. After leaving the girls, Thompson went to the home he shared with his wife, arriving there at about 2:00 or 2:15 a.m. Thompson's alibi was corroborated by the testimony of his girl friend, who stated that he left her house at 11:30 p.m., and by the testimony of two of the girls with whom Thompson said he talked at the supermarket while McEachern was using his car. These girls testified that they saw McEachern give Thompson $10.00 and then drive away in Thompson's car.

Defendant McEachern's alibi was as follows: On the night of 7 February he got his car stuck on a block wall while backing out a driveway. Thompson came by, helped him push the car off the wall and left. McEachern then went to his brother's house, where he sat outside by himself drinking whiskey. He does not know what time it was or how long he sat there because he does not have a watch. In any event, he went over to the home of Mrs. Eva Mae McKinnon and fell asleep while visiting there. He does not know how long he was there, but Mrs. McKinnon woke him up and told him to leave. As he was returning to his brother's house he encountered Keal Gay, an old

family friend. The two of them sat around outside his brother's house drinking and finally McEachern went inside and went to bed. Mrs. McKinnon testified that McEachern came to her house at about 10:00 or 10:30 p.m. on 7 February. He had been drinking and he fell asleep. She woke him up when she was ready to go to bed and McEachern left her house at 11:30 p.m. Keal Gay testified that he met McEachern on the street outside his brother's house at 11:50 p.m. The two sat around drinking together until 12:55 a.m. when he told McEachern he had better go home.

At the close of all the evidence defendants' motions for nonsuit were overruled, and the judge instructed the jurors who thereafter returned the verdicts from which defendants appealed.

Rufus L. Edmisten, Attorney General, William H. Boone, Associate Attorney, Myron C. Banks, Special Deputy Attorney General, for the State.

Everett L. Henry for defendant Thompson.

J. H. Barringer, Jr., for defendant McEachern.

SHARP, Chief Justice.

McEACHERN'S APPEAL

[1] On his appeal defendant McEachern brings forward four assignments of error, upon which he makes three contentions. The first (based upon assignments Nos. 5 and 9) is that the trial judge erred in admitting the testimony of Danny J. Walters and Peggy Grainger, which tended to show that McEachern was guilty of another and independent criminal offense.

As pointed out in the preliminary statement of facts, witnesses Walters and Grainger testified over defendant's objection, that on the night of 7 February 1975 they were "parking" in the Lover's Lane area where the abduction of Mrs. Hardin occurred. At approximately 12:15 a.m. (which was approximately one half hour before the attack on Mrs. Hardin) a man, whom they identified as defendant McEachern, came up to their car and pointed a sawed-off shotgun into the open car window. The man had a nylon stocking pulled over the upper half of his head. He was accompanied by a smaller man, whom neither Walters nor Grainger could identify. Defendant Mc-

Eachern ordered the two out of the car and asked if they had any money. He then directed Walters to "squat down" and told his accomplice to shoot him if he moved. Defendant then grabbed Miss Grainger and shoved her into the front seat of the car where he attempted to rape her. When Walters jumped up and rushed to the car in an effort to stop him McEachern struck him in the face with his fist. While McEachern was thus distracted, Miss Grainger managed to start her car and drive away. After she escaped, the two men took Walters' wallet and left. Walters heard them leave in a car which had very loud mufflers and which sounded as if it had a three-speed standard transmission. The car first proceeded in a direction away from the Lover's Lane, but immediately turned around and headed back in the direction from which it had started. Thereafter, neither Grainger nor Walters saw McEachern again until they both identified him in a line-up at the police station on the following Tuesday evening.

Defendant contends that introduction of this evidence violated the principle enunciated in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954) that generally "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." *Id.* at 173, 81 S.E. 2d at 365. Defendant concedes that there are well-recognized exceptions to this general rule but contends that none of them are applicable to the present case. With this contention we cannot agree.

The opinion in *McClain* enumerates eight exceptions to the general rule. Exception No. 4 reads as follows: "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *Id.* at 175, 81 S.E. 2d at 367. This exception has been applied in the following cases: *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944). *See also* 1 Stansbury's N. C. Evidence §§ 91-92 (Brandis rev. 1973); 29 Am. Jur. 2d *Evidence* §§ 320-22 (1967). Examination of several of them shows that the fourth exception is broad enough to cover the case presently before us.

In *State v. Tuggle, supra,* the defendant was charged with the armed robbery of one Smith and with the armed robbery and kidnapping of one Kiser. The evidence showed that at approximately 7:15 p.m. on 20 November 1972 Smith and Kiser were in a general merchandising store of which Kiser was the manager. An unmasked man came in with a shotgun and robbed Smith and the store's cash register. To make his escape, the man forced Kiser to drive him in Kiser's car to an area some distance from the store. At trial both Kiser and Smith, in addition to Kiser's daughter who had seen the man abduct her father, identified the defendant as the perpetrator of the crime. Over the defendant's objection the State introduced the testimony of a Mrs. Hicks, the manager of a convenience store situated within close proximity of the Kiser store. She testified that at 6:45 p.m. on 20 November 1972, an unmasked man, whom she identified as the defendant, came into the store carrying a shotgun. The defendant took the money from the cash register, forced Mrs. Hicks to the back of the store and left. On appeal the defendant argued that Mrs. Hicks's testimony was erroneously admitted because it tended to show he had committed an unrelated criminal offense. In an opinion by Chief Justice Bobbitt, this Court rejected the defendant's contention as follows: "Although in different counties, the distance from the Flash Market to Moorefield's Grocery was three and a half miles or less. The interval between the robbery at the Flash Market and the robberies at Moorefield's Grocery was brief. Both were committed hurriedly by an unmasked man. In each, the mode of procedure was the same, that is abrupt entrance into a lighted store with a shotgun pointed toward the occupant(s) and an immediate demand for the money. Proximity in place and time and similarities in method were relevant for consideration by the jury as to whether the man identified by her as the defendant and who had robbed the Flash Market was also the man who had committed the crimes for which defendant was on trial. We hold that the testimony of Mrs. Georgia Hicks was competent on the question of identity and properly admitted. *State v. McClain,* 282 N.C. 357, 362-63, 193 S.E. 2d 108, 111-12 (1972), and cases there cited." *Id.* at 522, 201 S.E. 2d at 888.

In *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972) the defendant was charged with rape. The victim, who identified the defendant at trial, testified that as she walked home alone

from the State University library late one night the defendant grabbed her from behind and threatened to kill her if she screamed. Thereafter, holding a metal teasing comb to her throat, he forced her to accompany him to his car. He then drove to a secluded spot where the rape occurred. Over the defendant's objection, the State introduced the testimony of another woman who was accosted a week later by a man whom she identified as the defendant. According to her, she had just returned home alone late one night and was leaving her car when the defendant grabbed her and threatened her. He held a metal comb to her throat and forced her to return to her car. The defendant then took her keys and drove away. Fortunately, police stopped the vehicle because of defective lights and his second victim was not sexually assaulted. On appeal we rejected the defendant's contention that the testimony of the second victim was incompetent because its sole purpose was to prove guilt of an independent and unrelated crime. The evidence was held admissible to identify the defendant as the perpetrator of the crime charged and to establish a plan or scheme embracing the commission of a series of related crimes.

After examining in detail the various similarities in the nature and manner of the attacks upon the two victims, Justice Huskins, writing for the Court, in *State v. McClain, supra,* said: "The enumerated similarities tend to show a *modus operandi,* a common plan embracing the commission of both crimes, and also establish a chain of circumstantial evidence tending to identify defendant as the man who raped Miss Elliott. Thus, evidence of the Conklin offense was admissible and should not be rejected because it incidentally proves defendant guilty of another crime. Its logical relevance to the rape of Miss Elliott is obvious. The trial judge instructed the jury to consider such evidence 'only as it relates to the identity of the defendant, Horace Ray McClain,' as the man who raped Miss Elliott on 13 October 1971. It was competent on the question of identity and properly admitted. (Cites omitted.)" *Id.* at 362-63, 193 S.E. 2d at 111-12.

Finally, in *State v. Perry, supra,* the defendant was charged with rape. The victim, who identified the defendant at trial, testified that during the course of the crime, the defendant told her he had just gotten out of prison on the previous day. Over the defendant's objection the State introduced evidence showing the defendant had been released from prison on the day pre-

ceding the rape. On appeal the defendant contended this evidence was incompetent because it showed his guilt of a separate, independent crime, unrelated to the one of which he was charged. After noting the rule that evidence of other offenses is inadmissible on the issue of the defendant's guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature charged, the Court said: "It is, however, equally well settled that evidence relevant to the question of the identity of the accused with the perpetrator of the offense with which he is presently charged is not rendered incompetent by the mere fact that it discloses the commission by him of some other criminal offense. . . . Where the identity of the defendant and the perpetrator of the offense with which he is charged is at issue, the evidence tending to show his commission of another criminal offense, and thereby to show his identity with the perpetrator of the offense with which he is presently charged, is not rendered incompetent by the fact that a witness has testified to such identity." *Id.* at 571, 169 S.E. 2d at 843.

The present case is controlled by these authorities. The crucial issue in the trial below was not whether Mrs. Hardin was raped in the manner in which she said she was but whether defendant McEachern was one of the two men who participated in the crime. The circumstances surrounding the attack on Walters and Grainger were similar to the attack upon Mrs. Hardin and her husband in the following respects: (a) In both, the victims were approached as they sat parked in the same secluded Lover's Lane; (b) in both, the attackers were two black men—one medium height and the other much shorter; (c) in both, the larger man had a nylon stocking pulled over the upper half of his face; (d) in both, all the victims were ordered from the cars and the men ordered to sit on the ground; (e) a sawed-off shotgun was used as a weapon in both attacks, (f) the primary motive for both attacks was rape of the female victims; and (g) in both instances the perpetrators drove a car with unusually loud mufflers. These similarities, coupled with the fact that the attacks occurred within one half hour of one another, point unmistakably to the conclusion that the same men who attempted to rape Miss Grainger did rape Mrs. Hardin. Thus, the testimony identifying the defendant as one of the two men who attacked Miss Grainger was competent and admissible to establish that he was also one of the men who raped Mrs. Hardin. McEachern's assignments Nos. 5 and 9 are overruled.

McEachern's assignment No. 10, upon which he bases his second contention, protests a portion of the solicitor's argument to the jury. As to this assignment, it suffices to say (1) that defendant made no objection to the argument at the time it was made, and (2) that the substance of the argument was that the jury should believe the State's witnesses and not defendant McEachern and his witnesses. Defendant has advanced no tenable argument to support his assertion that the solicitor's remarks improperly influenced the verdict, and we are satisfied that they did not. Assignment No. 10 is overruled.

[2] Defendant's third contention, based on his assignment No. 14, is that the court erred in imposing upon him the death penalty. This assignment must be sustained.

After the preparation of this opinion but before it was filed, the Supreme Court of the United States in *Woodson v. North Carolina,* ..... U.S. ....., 44 L. W. 5267 (1976), a five-to-four decision filed 2 July 1976, invalidated the death penalty provision of G.S. 14-17 (Cum. Supp. 1975). By necessary implication, this decision also invalidated the death provisions of G.S. 14-21(a)(2) (Cum. Supp. 1975), the statute under which defendant was convicted and sentenced to death. Therefore the judgment in case No. 75 CR 2366, which imposed the sentence of death upon defendant McEachern, is vacated; and, under the authority of N. C. Sess. Laws, c. 1201, § 7 (1973), (session of 1974), the sentence of life imprisonment is substituted in lieu thereof.

Accordingly, it is hereby ordered that, upon remand of this cause to the Superior Court of Robeson County, the presiding judge, without requiring the presence of defendant McEachern, shall enter a judgment of life imprisonment in lieu of the sentence of death heretofore imposed upon him for the first degree rape of which he has been convicted. Further, in accordance with this judgment, the clerk of the superior court will issue a new commitment in substitution for the commitment heretofore issued. At the same time the clerk will furnish to defendant McEachern and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

THOMPSON'S APPEAL

Defendant Thompson brings forward numerous assignments of error. Because of the disposition we are required to

make of his appeal it is necessary to examine only two assignments, Nos. 6 and 9.

First, we consider the assignment that the court erred in not granting Thompson's motion to nonsuit the charge of first degree rape. Specifically, defendant contends the evidence is insufficient to establish that Mrs. Hardin's resistance to him was overcome, or her submission procured, through his use of a deadly weapon.

In *State v. Dull,* 289 N.C. 55, 220 S.E. 2d 344 (1975), this Court examined the sufficiency of the evidence to withstand the defendant's nonsuit motion directed at the charge of first degree rape as defined in G.S. § 14-21(a)(2). In *Dull,* the State's evidence established that the defendant jumped into the victim's car as she was leaving the parking lot of a shopping center, pulled her head back with his left hand, and held an open knife against her throat with his right. The defendant told the victim to do as she was told and she would not get hurt. Then, with the knife still at her throat, he directed her to drive toward a certain highway. As she did so, the defendant put the knife away and the victim did not see it again. After several miles of travel the defendant directed the victim to stop the car. When she did he began to fondle her body, telling her he would kill her if she did not do as he said. The defendant then drove to a secluded spot where he had intercourse with the victim. She testified that she knew he still had the knife even though she did not see it at the time; that she was afraid the defendant would kill her; and that this fear caused her to submit to him.

In rejecting the defendant Dull's contention that the evidence was insufficient to establish that the victim's resistance was overcome or her submission procured by the use of a deadly weapon, we held: Accepting the evidence of the State as true "it is clear that the requirements of G.S. 14-21(a)(2) were met and that the submission of the prosecutrix was procured by the use of the open knife that the defendant placed at her throat when he first encountered her." *Id.* at 60, 220 S.E. 2d at 347. To make out a case of first degree rape the State was not required to show that the defendant continued "to display the deadly weapon in a threatening manner until the moment of the rape. The defendant told the prosecutrix she would not live to be nineteen if she did not cooperate with him. She had every reason to believe that he would carry out his threat to kill her.

Once the defendant had exhibited the knife and threatened the life of the prosecutrix with it, the knife continued in use as long as it was accessible to him." *Id.* at 60, 220 S.E. 2d at 347.

[3] The decision in *Dull* is authority for the proposition that a deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21(a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. In other words, the deadly weapon is used, not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by his threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use.

[4] The State's evidence brings its case against Thompson within the principles enunciated in *Dull.* Taking the evidence as true, as we must on a motion for nonsuit, *State v. Goines,* 273 N. C. 509, 160 S.E. 2d 469 (1968); *see also* 2 Strong's N. C. Index 2d *Criminal Law* § 106 (1967), it establishes that defendants McEachern and Thompson entered into a conspiracy to kidnap and rape the first woman they encountered in the Lover's Lane. Pursuant to this conspiracy, Thompson drove them to the Lover's Lane, participated in the abduction of Mrs. Hardin at gunpoint, and then drove to a secluded house he had rented for the crop season (1975) while McEachern threatened Mrs. Hardin with the gun. At the house McEachern raped Mrs. Hardin in the automobile while holding the gun in his hand and desisted only when Thompson signaled him by tapping on the window. Thompson then told Mrs. Hardin to come with him and, McEachern, while still holding the gun, ordered her to do so. As Thompson led Mrs. Hardin to a bedroom inside the house he told her if she did what he wanted her to do he would not let "the other guy" kill her. Inside the house Thompson continually cautioned her "to do just like he told her to do and [she] would not be killed." In fear for her life she complied with his demands and, when he had finished with her, he ordered her to "get out in the yard or the big guy would be coming in." The evidence shows that Thompson then drove the

three back into town in his car while McEachern was again raping Mrs. Hardin at gunpoint in the back seat of the automobile.

This evidence permits the inference that Thompson procured Mrs. Hardin's submission through the use of a deadly weapon and is sufficient to overcome defendant's nonsuit motion. The evidence tends to show that Thompson commanded the use of McEachern's gun and that the gun was immediately available to him upon a tap on the window. It also permits the inference that Mrs. Hardin submitted to Thompson only because of his threats to let "the big guy kill her" if she did not and because of her knowledge that the big guy's gun was instantly available to Thompson.

Furthermore, the evidence permits the inference that Thompson aided and abetted McEachern in his two rapes of Mrs. Hardin. As we said in *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967): "It is, of course, well settled that one who is present, aiding and abetting, in a rape actually perpetrated by another, is equally guilty with the actual perpetrator of the crime. *State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113 (1946); *State v. Hall,* 214 N.C. 639, 200 S.E. 375 (1939). Upon this ground even a woman may be convicted of rape, and a husband be guilty of raping his wife. (Cites omitted.)" *Id.* at 473, 153 S.E. 2d at 60. *See also* 2 Strong's N. C. Index 2d *Criminal Law* § 9 (1967).

As an aider and abettor Thompson would be criminally responsible for the acts of McEachern and would be guilty of first degree rape if McEachern was regardless of whether Thompson himself had actually raped Mrs. Hardin. Taken as true, Mrs. Hardin's testimony clearly establishes McEachern's guilt of first degree rape as defined by G.S. 14-21(a)(2) and Thompson's guilt as an aider and abettor to McEachern's crime. Thus on this ground alone defendant Thompson's nonsuit motion was properly denied. We next consider assignment No. 9.

As set out in the preliminary statement defendant Thompson offered evidence tending to establish an alibi defense. *Inter alia,* he stated that he arrived at his home at 2:00 a.m. and went in to bed. On cross-examination he was questioned about the circumstances surrounding his arrival home at that hour. The time was important because, according to Mrs. Hardin, her attackers would have still been with her at 2:00 a.m. He said

that when he got home his wife would not get out of bed to let him in and, because the screen door was locked, he had to crawl through a window into his house. Apparently, in response to the solicitor's question defendant said: "Yes, my wife knew it was me when I came through the window; she is not here in the courtroom; as I told you once before, she is in Connecticut."

After he testified, Thompson called several witnesses whose testimony tended to corroborate his alibi. He did not, however, call as a witness every person whom he said he had seen on the night in question. One of the witnesses he did not call was his wife.

[5] In his argument to the jury the solicitor the Honorable Joe Freeman Britt, attacked defendant's credibility and that of his alibi witnesses. The solicitor suggested that defendant had persuaded some of his friends to perjure themselves in his behalf. Then, in an effort to illustrate the weakness of defendant's alibi, the solicitor pointed out to the jury that defendant had not called as witnesses other people who, he said, had been in contact with him on the night in question and who could have easily corroborated his testimony. The solicitor implied that defendant had not called these people because he could not persuade them to lie for him. At this point the solicitor said: "He [defendant] says after he took the girls over there to the Patio and left them he came back home and slipped up the window and crawled in the house at 2:00 o'clock in the morning; that his wife knew he came in because his wife knows everything, he says. Have you heard from his wife? I can't use a man's wife against him, but he can use his wife for himself. Wouldn't she be a good person to tell you when he came in and how he got in the house? Have you heard from her?"

This argument was outlawed by G.S. § 8-57, which provides in pertinent part: "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. . . . "

Recently, in *State v. McCall,* 289 N.C. 570, 223 S.E. 2d 334 (1976), we considered the impact of G.S. § 8-57 and the cases which have applied it. In *McCall,* the defendant was charged with first degree murder of his wife's son. The homicide occurred before the defendant and his wife were married

and she was the only witness to it. Subsequent to the homicide, but prior to his trial, the defendant and his wife were married. At trial the defendant testified but his wife did not. Over his objection, the State cross-examined him concerning the timing of his marriage and his knowledge of the statute prohibiting the use of a spouse's testimony against the marriage partner. The district attorney, without objection, argued to the jury that the defendant had married his wife to silence her testimony and to prevent the truth from being known. He commented upon the statutory prohibition and argued that the defendant would have put his wife on the stand if her testimony would have been favorable to him. On appeal the defendant assigned as error the cross-examination and jury argument concerning the failure of his wife to testify in his behalf.

This Court in granting the defendant a new trial said: "The provisions of G.S. 8-57, and decisions of this Court interpreting and applying them, impel the conclusion that where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not. *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933 (1914). In such case it is the duty of the judge to act on his own motion. (Cites omitted.) The rule applies with equal force to the argument of counsel when evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense. When this occurs it is the duty of the judge *ex mero motu* to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact must be disregarded and under no circumstances used to the prejudice of the defendant." *Id.* at 577-78, 223 S.E. 2d at 338.

The decision in *State v. McCall, supra,* and the cases cited therein, control the decision on Thompson's assignment No. 9. As in McCall the solicitor's argument violates both the letter and the spirit of G.S. § 8-57. Indeed, it would be difficult to imagine a case where the wife's failure to testify would be potentially more prejudicial to a defendant. Here her testimony would have aided the establishment of his alibi. By highlighting to the jury the fact that she was not a witness, the district attorney, in violation of G.S. § 8-57, used the failure of the wife to testify for her husband to the prejudice of defendant. Notwithstanding the failure of the defendant's counsel to object to the argument it was incumbent upon the trial judge,

on his own initiative, to intervene and to instruct the jury to disregard the solicitor's argument. *State v. McCall, supra.* His failure to do so was error and, on the record before us, we cannot say that the error was harmless.

We feel constrained to point out that the primary error in this case is not the judge's but the solicitor's. The retrial which must be had in this case is necessitated by his flagrant disregard of a mandatory rule which has been well-known statutory law in this State for over a hundred years. *See State v. Alford,* 274 N.C. 125, 161 S.E. 2d 575 (1968).

The State has no greater asset than a vigorous solicitor, learned in the law and dedicated to its enforcement, who investigates and prosecutes the State's case according to the rules of law. In him the judge and jury, the public, and the accused can safely repose confidence. However, an able and vigorous solicitor who, in his zeal for conviction ignores a well known legal principle, serves no cause or person well—unless perhaps it be the guilty defendant who, on the retrial, escapes justice because intervening time has made unavailable a crucial State's witness. The taxpayers pay the expense of the retrial, another and unnecessary case is added to the already congested docket, justice is delayed not only in the particular case but also in others, witnesses are inconvenienced, and the strain upon all persons directly involved in the case—especially the victim of the crime—is compounded.

In both *State v. Peplinski,* 290 N.C. 236, 225 S.E. 2d 568, (filed 17 June 1976) and *State v. Covington, et al,* 290 N.C. 313, 226 S.E. 2d 629 (filed this day), Solicitor Britt successfully prosecuted the defendants for murder in the first degree. In each we found no prejudicial error. Yet we felt compelled to note that, except for the trial judge's prompt rulings and cautionary instructions and the overwhelming evidence against defendants, the solicitor's continued attempt to cross-examine his own witness in the one case and his improper argument to the jury in the other could well have needlessly required a new trial.

In *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975), we were forced to award a new trial in a first degree murder case because this same solicitor's "courtroom tactics transcended the bounds of propriety and fairness" and "were highly improper and incurably prejudical." We would not attempt to improve

upon the succinct and forceful statement of Justice Huskins, who wrote the opinion for the Court in *State v. Britt.* We repeat the essence of it here:

"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. . . . 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 the 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 the law ends, tyranny begins.' " *Id.* at 714, 220 S.E. 2d at 293.

It remains only to be said that the purpose of this repeated reprimand of the solicitor of the Sixteenth Judicial District is not to dampen his zeal as an advocate for the State but—since repetition is one method of teaching—to reiterate that prosecuting attorneys can best serve the cause of justice by themselves observing the law. *See State v. Miller,* 288 N.C. 582, 603, 220 S.E. 2d 326, 340-41 (1975) (Sharp, C. J., concurring).

As to defendant Thompson — New Trial.

As to defendant McEachern, Death Sentence Vacated, and in lieu thereof, Life Sentence Substituted. In the verdict—

No error.

CEDAR CREEK ENTERPRISES, INCORPORATED v. THE STATE OF NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES; EDWARD L. POWELL, INDIVIDUALLY & AS COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES; J. G. WILSON, INDIVIDUALLY & AS SUPERVISOR OF THE NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES LICENSE ENFORCEMENT DIVISION; LT. C. E. NANCE, INDIVIDUALLY & AS SUPERVISOR OF THE NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES PERMANENT WEIGH STATION NO. 203; J. E. EVERETTE, INDIVIDUALLY & AS NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES INSPECTION OFFICER; OTTIS F. JONES, SHERIFF OF CUMBERLAND COUNTY, NORTH CAROLINA

No. 87

(Filed 14 July 1976)

1. **Automobiles § 138; Taxation § 38— overweight vehicle — tax assessed — suit to prevent collection improper**

G.S. 20-91.1 providing that "No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Article" is applicable when there has been a tax assessed pursuant to G.S. 20-96, which provides for penalties and taxes which a vehicle owner must pay if his vehicle is found in operation on the highway over the weight for which such vehicle is licensed; therefore, G.S. 20-91.1 bars plaintiff's actions for injunctive and declaratory judgment relief from defendant's efforts to collect a tax from plaintiff pursant to the collection procedures provision in G.S. 20-99.

2. **Taxation § 38— no suit to enjoin collection of tax — suit for refund of tax proper — statute constitutional**

G.S. 20-91.1 providing that no suit should be brought to prevent collection of a tax but that the taxpayer should pay the tax and sue for a refund if such is not made within 90 days is constitutional.

DISCRETIONARY review heard prior to determination by the Court of Appeals under provisions of General Statutes 7A-31, to review summary judgment for defendant entered by *McKinnon, J.*, on 21 November 1975.

This case had its inception on 12 May 1975, when the agents of the Department of Motor Vehicles (now Division of Motor Vehicles) stopped plaintiff's truck while operating on a public highway in Cumberland County. The truck was weighed and found to be over the 4,000 pound weight limit for the license that was on the truck. This license tag had not been purchased for this particular truck but had in fact been removed from another vehicle. Plaintiff was assessed with (1) a license fee,

$355.50, (2) driver education, title and transfer fees, $3.00, and (3) a penalty for over-licensed weight, $2,080.00, as provided by G.S. 20-96 and G.S. 20-118. For unknown reasons plaintiff was given credit for being licensed for 4,000 pounds even though the license tag on its truck belonged to another vehicle. Plaintiff paid the license fee of $355.50 and the driver education, title and transfer fees of $3.00, but refused to pay the $2,080.00. The Department of Motor Vehicles gave notice to plaintiff that they would use the collection procedures provision in G.S. 20-99.

Thereupon on 17 July 1975, plaintiff filed a complaint in Cumberland County Superior Court seeking injunctive and declaratory judgment relief. The injunctive relief sought to prevent the use of the collection procedures provided in G.S. 20-99. The declaratory judgment relief sought to hold General Statutes 20-91.1, 20-96 and 20-99 unconstitutional. On the same day plaintiff obtained *ex parte* a temporary restraining order enjoining defendants from using the collection methods provided in G.S. 20-99 against plaintiff or plaintiff's property. The order was extended until 6 August 1975 at which time plaintiff was granted a preliminary injunction.

On 17 October 1975, defendants filed a motion for summary judgment with a supporting affidavit. On 10 November 1975, a hearing was held pursuant to this motion, and the court found that there was no genuine issue as to a material fact and defendants should prevail as a matter of law. The court further found that this cause was in part an action to enjoin the collection of a tax, to-wit, $2,080.00, and that such an action is prohibited by G.S. 20-91.1. The court additionally held that the cause was in part an action for declaratory judgment to hold a taxing statute unconstitutional and this action was also prohibited by G.S. 20-91.1. Finally the court found that G.S. 20-91.1, 20-96, and 20-99 were all constitutional. Thereupon the court dissolved the temporary injunction for that it was improvidently granted. Other pertinent facts will be set out in the opinion.

Donald W. Grimes for plaintiff appellant.

Attorney General Rufus L. Edmisten by Associate Attorney Isaac T. Avery, III for defendant appellees.

COPELAND, Justice.

Summary judgment entered for defendant raises three questions for our consideration: (1) Is G.S. 20-91.1 applicable

when there has been a monetary charge assessed pursuant to G.S. 20-96 and G.S. 20-118? (2) Does G.S. 20-91.1 bar plaintiff's actions for injunctive and declaratory judgment relief? (3) Are G.S. 20-91.1, G.S. 20-96 and G.S. 20-99 constitutional?

G.S. 20-91.1 provides as follows:

"No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of *any tax imposed in this Article.* Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax . . . and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. . . . " (Emphasis added.)

G.S. 20-96 provides as follows:

"It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover the empty weight and maximum load which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highway over the weight for which such vehicle is licensed, shall pay *the penalties prescribed in G.S. 20-118.* Nonresidents operating under the provisions of G.S. 20-83 shall be subject to the *additional tax provided in this section when their vehicles are operated in excess of the licensed weight or, regardless of the licensed weight, in excess of the maximum weight provided for in G.S. 20-118.* Any resident or nonresident owner of a vehicle that is found in operation on a highway designated by the Board of Transportation as a light traffic highway, and along which signs are posted showing the maximum legal weight on said highway with a load in excess of the weight posted for said highway shall be subject to the penalties provided in G.S. 20-118. Any person who shall willfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the *additional tax herein prescribed.*" (Emphasis added.)

G.S. 20-118 provides as follows:

"For each violation of the gross weight limitation for the vehicle or vehicle and load the owner of the vehicle *shall pay* to the Division *a penalty* for each pound of weight

of such vehicle or vehicle and load in excess of the weight limitations, including the five percent (5%), hereinbefore set out in this section for each vehicle or vehicle and load *in accordance with the following schedule. . . .* " (Emphasis added.)

[1] G.S. 20-91.1 applies to "any tax imposed in this Article." Since G.S. 20-91.1 is a section in Article 3 of Chapter 20 of the General Statutes of North Carolina and Article 3 consists of G.S. 20-38 through 20-183, G.S. 20-91.1 applies to a monetary charge made pursuant to G.S. 20-96 if it qualifies as "any tax" as that term is used in G.S. 20-91.1.

In the third sentence of G.S. 20-96 the applicability of this section to nonresidents operating under the provisions of G.S. 20-83 is explained. G.S. 20-83, which sets forth the registration requirements for nonresidents, provides no specific monetary charge for overloading a vehicle although subsection (c) therein does require payment of the same fees "as is required with reference to like vehicles owned by residents of this State." In the third sentence of G.S. 20-96 it is specified that nonresidents operating under G.S. 20-83 shall be subject to the "additional tax provided in this section when their vehicles are operated in excess of the licensed weight or . . . in excess of the maximum weight provided in G.S. 20-118." Since G.S. 20-83 provides no specific monetary charge for overloading, the phrase "additional tax provided in this section when their vehicles are operated in excess of the licensed weight or . . . in excess of the maximum weight provided in G.S. 20-118" refers to the overloading charge set out in G.S. 20-96.

The only monetary charge for overloading prescribed by G.S. 20-96 is the payment of "the penalties prescribed in G.S. 20-118." By labeling this required payment as an "additional tax," G.S. 20-96 effectively defines the "penalties prescribed in G.S. 20-118" that must be paid upon a violation of G.S. 20-96 as a "tax."

This proposition is buttressed by the fact that the last sentence of G.S. 20-96 again refers to the payment required by this section as an "additional tax." The last sentence of G.S. 20-96 makes a person who willfully violates this section guilty of a misdemeanor as well as being liable for the "additional tax" that is prescribed by this section. Since the only monetary charge prescribed by G.S. 20-96 is the payment of "the penalties pre-

scribed in G.S. 20-118," it follows that these charges again are equated with a "tax." On its face, this "tax" would qualify as "any tax" as used in G.S. 20-91.1.

This conclusion is further supported by an analysis of related statutes. Under the rules of statutory construction, statutes *in pari materia* must be read in context with each other. *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975). In particular, G.S. 20-91.2 provides as follows:

> "If the Commissioner of Motor Vehicles discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs, if any), such overpayment shall be refunded. . . . "

By using the word "tax" to include penalties, this section further indicates that the monetary charge prescribed in G.S. 20-96 was defined as a "tax" and was therefore subject to G.S. 20-91.1. Additionally, to say that G.S. 20-91.1 does not include the penalties prescribed in G.S. 20-118 but that the tax plus penalty and interest, if improperly charged, must be refunded as provided in G.S. 20-91.2 would be inconsistent. Also, it follows naturally that G.S. 20-91.1 applies both to what in other contexts may be termed a penalty since there would be no such penalty but for the tax. This result is further supported by the fact that the money received for a violation of G.S. 20-96 is treated the same way as other highway taxes in that the money is disbursed to the general highway fund of the Department of Transportation.

On the basis of the foregoing, we hold that G.S. 20-91.1 is applicable when there has been a tax assessed pursuant to G.S. 20-96.

The next question is whether G.S. 20-91.1 bars plaintiff's actions for injunctive and declaratory judgment relief? See Uniform Declaratory Judgment Act, G.S. 1-253 to G.S. 1-267. The language of G.S. 20-91.1 is clear. It declares that there shall be no suit brought for the purpose of preventing the collection of any tax imposed in that Article and defines the circumstances under which a suit may be brought. The General Statutes provide no exception.

Since G.S. 105-267 has language similar to that in G.S. 20-91.1, we are further guided by our Court's interpretation of

G.S. 105-267. Our Court has held that G.S. 105-267 and prior statutes having the same language establish the general rule that there shall be no injunctive or declaratory relief to prevent the collection of a tax, *i.e.*, the taxpayer must pay the tax and bring suit for a refund. *Housing Authority v. Johnson, Comr. of Revenue*, 261 N.C. 76, 134 S.E. 2d 121 (1964); *Development Co. v. Braxton*, 239 N.C. 427, 79 S.E. 2d 918 (1954); *Buchan v. Shaw, Comr. of Revenue*, 238 N.C. 522, 78 S.E. 2d 317 (1953). *See also Loose-Wiles Biscuit Co. v. Sanford*, 200 N.C. 467, 157 S.E. 432 (1931). Unlike G.S. 105-267 (and prior statutes having the same language), which is accompanied in the same subchapter by G.S. 105-379 (1972), there is no comparable statute accompanying G.S. 20-91.1 that permits equitable exceptions to the broad exclusionary language therein. Cases such as *Reeves Brothers, Inc. v. Town of Rutherfordton*, 282 N.C. 559, 194 S.E. 2d 129 (1973); *Hooker v. Pitt County*, 202 N.C. 4, 161 S.E. 542 (1931); *Barber v. Benson*, 200 N.C. 683, 158 S.E. 245 (1931), which enunciate limited, statutorily based exceptions (see G.S. 105-379 (1972) and North Carolina Code of 1931, § 7979) to the rule that there shall be no injunctive or declaratory relief to prevent the collection of a tax, do not dictate similar exceptions in our case. Rather, they evidence the fact that our Court has strictly applied G.S. 105-379 and related statutes except for the narrow exceptions permitted by accompanying statutes.

On the basis of the foregoing, we hold that the similar language of G.S. 20-91.1 effectively bars plaintiff's actions for injunctive and declaratory relief except insofar as plaintiff challenges the constitutionality of the bar created by G.S. 20-91.1, and incidentally the constitutionality of G.S. 20-96 and G.S. 20-99.

We have determined that the monetary charge provided in G.S. 20-96 (the overload statute) would qualify as "any tax" as used in G.S. 20-91.1. G.S. 20-99 sets out the remedies available for the collection of all taxes and penalties under the provisions of Article 3 of Chapter 20. Since these statutes, as well as all others included in Article 3 of Chapter 20, are covered by the bar of G.S. 20-91.1, a determination that G.S. 20-91.1 is constitutional is conclusive as to plaintiff's challenge of the constitutionality of G.S. 20-96 and G.S. 20-99.

[2] In order to determine the constitutionality of G.S. 20-91.1, we again are guided by our Court's decisions relating to the simi-

lar statute, G.S. 105-267. In *Kirkpatrick v. Currie,* 250 N.C. 213, 108 S.E. 2d 209 (1959), our Court held that the procedure of G.S. 105-267, requiring the taxpayer to pay the tax under protest and bring a suit for a refund was constitutional, affording the taxpayer an opportunity to be heard and according him due process. For similar reasons, we hold that G.S. 20-91.1 is constitutional. Furthermore, we hold that G.S. 20-91.1 is constitutional as applied in barring plaintiff's challenge of the constitutionality of G.S. 20-96 and G.S. 20-99.

We find additional support for this conclusion in recent United States Supreme Court decisions dealing with the Anti-Injunction Act, a similarly worded statute adopted originally by Congress in 1867, which reads as follows:

> " . . . No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Int. Rev. Code of 1954, § 7421(a).

In *Bob Jones University v. Simon,* 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed. 2d 496 (1974), plaintiff sought to restrain defendant from revoking its tax-exempt status and from removing plaintiff's name from a list that gave assurance to donors that contributions to plaintiff would constitute charitable deductions. The Court held that application of the Anti-Injunction Act did not deny due process to plaintiff because plaintiff had access to certain review procedures or in the alternative it could pay the taxes and sue for a refund. *See Note,* 11 Wake Forest L. Rev. 337 (1975), entitled *Taxation, § 7421(a), Prohibition Against Suits to Restrain the Assessment or Collection of a Tax.*

Bob Jones held that *Enochs v. Williams Packing Co.,* 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962) was controlling. *Enochs v. Williams Packing Co., supra* at 7, 82 S.Ct. at 1129, 8 L.Ed. 2d at 297, held that the Anti-Injunction Act bars a suit to enjoin the collection of the tax involved unless it is "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim."

Plaintiff has completely failed to bring itself within the narrow exception enunciated in *Williams Packing, supra. See also Commissioner v. Shapiro,* ..... U.S. ....., ... S.Ct. ....., 47 L.Ed. 2d 278 (1976); *Laing v. United States,* ..... U.S. ....., 96 S.Ct. 473, 46 L.Ed. 2d 416 (1976).

We further note that whether the monetary charge assessed pursuant to G.S. 20-96 and G.S. 20-118 is, in fact, in a constitutional sense, as opposed to its statutorily defined meaning, a tax or a penalty does not alter the fact that the bar created by G.S. 20-91.1 is constitutional. The Supreme Court of the United States stated that it has abandoned distinctions between revenue-raising and regulatory taxes. *Bob Jones University v. Simon, supra* at 741, 94 S.Ct. at 2048, 40 L.Ed. 2d at 511, 512 (Footnote 12 citing *Sonzinsky v. United States,* 300 U.S. 506, 513, 81 L.Ed. 772, 57 S.Ct. 554 (1937)). Thus, it follows that whether it is a revenue-raising or regulatory tax, the bar created by G.S. 20-91.1 is constitutional.

Accordingly, in the summary judgment entered by Judge McKinnon for the defendant we find

No error.

HARTFORD ACCIDENT & INDEMNITY COMPANY, ET AL PLAINTIFFS v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, ET AL DEFENDANTS
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL PLAINTIFFS v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, ET AL

No. 91

(Filed 14 July 1976)

1. **Constitutional Law § 13— police power — public health — constitutional limitations**

While the police power is an inherent power of sovereignty and its exercise is especially favored in the regulation of the use of property and of individual conduct for the purpose of promoting the health of the public, the legislative power in this field is not unlimited but is subject to specific limitations imposed by the N. C. and U. S. Constitutions and to the general limitation thereof that the interference with individual liberty, or with the right of an owner of property to use it as he sees fit, must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree, in comparison with the probable public benefit.

2. **Constitutional Law § 13; Physicians, Surgeons and Allied Professions § 11— Health Care Liability Reinsurance Exchange Act — unconstitutionality**

The Health Care Liability Reinsurance Exchange Act, which requires all insurance companies licensed to issue in this State poli-

cies of "general liability insurance" to write policies for health care liability insurance in this State, to be members of the Health Care Liability Reinsurance Exchange, and to share in the losses of the Exchange, violates the Law of the Land and Equal Protection Clauses of Article I, § 19, of the N. C. Constitution and the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.

APPEAL by the Commissioner of Insurance from *Bailey, J.*, at the 3 November 1975 Session of WAKE, heard prior to determination by the Court of Appeals.

These are 59 proceedings, each brought against the Commissioner of Insurance, hereinafter called the Commissioner, by one or more insurance companies, consolidated for hearing and determination in the Superior Court and upon appeal. They fall into two groups. The first group is composed of 25 actions for declaratory judgments in each of which the plaintiffs pray that Chapter 427 of the Session Laws of 1975, entitled "An Act to Establish a Health Care Liability Reinsurance Exchange," hereinafter called the Act, presently codified as Article 18C of Chapter 58 of the General Statutes, be declared unconstitutional and void, that its enforcement against the plaintiffs be enjoined and that certain orders of the Commissioner, purporting to be entered pursuant to the provisions of such Act, be set aside. The second group is composed of 34 proceedings, pursuant to G.S. 58-9.3, to obtain judicial review of the said orders of the Commissioner.

In yet another proceeding, the North Carolina Health Care Liability Insurance Exchange, hereinafter called the Exchange, filed in the Superior Court its petition for review of the same orders of the Commissisoner. By order of Bailey, J., it was made a party defendant to the second group of proceedings, its interest being the same as the interests of the petitioners therein, insofar as the validity of the Commissioner's orders is concerned. The Exchange filed its brief in the Supreme Court as appellee in the second group of cases, taking no part in the appeal from the judgment entered in the first group of cases, wherein a declaratory judgment of the unconstitutionality of the Act was sought.

Bailey, J., entered in each group of cases a judgment in which he made voluminous and detailed findings of fact and conclusions of law, substantially all of the material findings of fact being made pursuant to pre-trial stipulations, others being

pursuant to testimony of and exhibits offered by witnesses for the plaintiffs concerning procedures leading to the issuance of the orders in question and the economic experience of the plaintiff companies in the writing of health care liability insurance in North Carolina under premium rates fixed by orders issued by the Commissioner. Though he did not stipulate the data so shown to be correct, the Commissioner did not introduce evidence in conflict with such evidence of the plaintiffs.

In each judgment, Bailey, J., adjudged that the Health Care Liability Reinsurance Exchange Act is unconstitutional and of no force and effect and that the Commissioner's orders in question are "unlawful, invalid, and of no force and effect." He enjoined the Commissioner from suspending the licenses of the plaintiffs, or taking any other action against them, on account of any failure by them to comply with the provisions of the said Act or any rule, order or regulation issued thereunder.

The plaintiff insurance companies are duly licensed by the State of North Carolina to engage in the business of issuing policies of "general liability insurance," as that term is defined in G.S. 58-173.37(6), which is part of the Act. With few exceptions, none of the plaintiff companies has engaged in or desires to engage in the issuing in North Carolina of policies of health care liability insurance. The St. Paul Fire & Marine Insurance Company, hereinafter called St. Paul, which insures approximately 80 per cent of the doctors practicing in this State, has, in recent years, sustained substantial losses in the writing of health care liability insurance in North Carolina under the premium rates established by orders of the Commissioner. In recent years, both the number and the size of claims for medical malpractice have increased substantially.

The testimony of expert witnesses for the plaintiffs, which is not controverted, is to the effect that health care liability insurance, also called medical malpractice liability insurance, is a type of insurance requiring highly specialized knowledge and skill on the part of actuaries, agents and claim adjusters. Bailey, J., so found. He also found, there being evidence to such effect, that other plaintiff companies, if required to write such insurance in North Carolina, would probably not have a sufficient volume of such business to justify the employment by them of personnel possessed of the high degree of technical training required to carry on such business efficiently and that their present personnel is not qualified to do so.

Medical malpractice insurance is unique among the various types of liability insurance in that the overwhelming majority of claims for medical malpractice are not filed until two or more years after the alleged malpractice occurred. This increases the difficulty of determining what is an adequate premium to be charged for an "occurrence" policy; i.e., a policy insuring against liability for an "occurrence" in the policy year regardless of when the claim is filed. For this reason, among others, expert witnesses for the plaintiffs testified, that, in their opinion, the writing of such insurance would be more hazardous for inexperienced companies, such as the great majority of these plaintiffs, than for experienced companies, such as St. Paul.

Bailey, J., found as a fact that the writing of medical malpractice insurance requires specialized training and expertise in numerous areas, including the adjustment and settling of claims, and that the nature of medical malpractice insurance is such that a company required to enter that insurance field without experience and qualified personnel "could easily suffer serious losses in this line of insurance." He further found, there being evidence to that effect, that no company presently writing medical malpractice insurance voluntarily accepts all of the applications therefor tendered to it. That is, there are licensed providers of health care service which such companies regard as uninsurable. The Act here in question provides that every resident of this State holding a valid license to practice herein a health care profession is an "eligible risk" and any insurer is required by the Act to insure any such "eligible risk," with the right in the insurer to cede (i.e., transfer the profit or loss) such business to the Exchange, which, in turn, will allocate the profits or losses to its member companies according to a prescribed formula. Thus, losses due to the inexperience of the insurer, as well as those due to other causes, are required to be borne proportionately by all companies.

Bailey, J., also found that the medical malpractice insurance rates prescribed by the orders of the Commissioner of which the plaintiffs complain are "grossly inadequate and will require the plaintiffs to write medical malpractice insurance in North Carolina at confiscatorily low rates which will result in substantial losses to said plaintiffs" and that the plan for the operation of the Exchange prescribed by the Commissioner in the said orders was not in accord with the provisions of the Act.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, for John Randolph Ingram, Commissioner of Insurance.

Young, Moore, Henderson & Alvis by Charles H. Young.

Allen, Steed, Pullen, P.A. by Arch T. Allen and Arch T. Allen, III.

Bode & Bode, P.A. by Robert V. Bode.

Broughton, Broughton, McConnell & Boxley, P.A. by William G. Ross, Jr.

Cockman, Aldridge & Davis by John E. Aldridge, Jr.

Gulley & Green by Charles P. Green, Jr.

Jordan, Morris & Hoke by John R. Jordan, Jr.

Jordan, Wright, Nichols, Caffrey & Hill by William L. Stocks.

Manning, Fulton & Skinner by John B. McMillan.

Maupin, Taylor & Ellis, P.A. by Wm. W. Taylor, Jr.

Sanford, Cannon, Adams & McCulloch by Robert W. Spearman.

Smith, Moore, Smith, Schell & Hunter by O. Max Gardner, III.

Teague, Johnson, Pattterson, Dilthey & Clay by Woodrow Teague.

Attorneys for plaintiff appellees.

Bailey, Dixon, Wooten, McDonald & Fountain by J. Rufffin Bailey for North Carolina Health Care Liability Reinsurance Exchange.

LAKE, Justice.

G.S. 58-72, not part of the Act of 1975 here in question, provides:

> "*Kinds of insurance authorized:*—The kinds of insurance which may be authorized in this State, subject to other provisions of this Chapter, are set forth in the following

paragraphs. *Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure.* * * *

"(13) 'Personal injury liability insurance,' meaning insurance against legal liability of the insured, * * * arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as a result of negligence in rendering expert, fiduciary or professional service, * * *

"(14) 'Property damage liability insurance,' meaning insurance against legal liability of the insured, * * * arising out of the loss or destruction of, or damage to, the property of any other person, * * * ." (Emphasis added.)

Pursuant to this statute, St. Paul and a few other companies have engaged in the writing of medical malpractice insurance in North Carolina, but most of the plaintiff companies have elected not to write such insurance but to limit their liability insurance writing to insurance against other types of liability.

In 1975, the Act here in question was enacted. It is codified as Article 18C of Chapter 58 of the General Statutes, G.S. 58-173.34 et seq. It purports to deprive the plaintiffs of this election. Its provisions pertinent to the decision of this appeal are as follows (emphasis added throughout):

G.S. 58-173.34. *"Declarations and purpose of the Article.*—It is hereby declared by the General Assembly of North Carolina that the availability of health care liability insurance for physicians and surgeons * * * hospitals and others engaged in the healing practicing arts is necessary for the economic welfare of the State and that without such insurance health care services may be severely curtailed; and that while the need for such insurance is increasing, the supply is not adequate and is likely to become less adequate in the future; and that present plans to provide adequate health care liability insurance in North Carolina have not been sufficient to meet the needs of our citizens. It is further declared that *the State has an obligation to provide an equitable method whereby every insurer licensed to write general liability insurance in North Carolina be required to meet this market demand.*

It is the purpose of this Article to define this obligation and provide a *mandatory* program to assure an adequate supply of health liability insurance coverages in the State of North Carolina."

G.S. 58-173.37. *"Definitions.*—As used in this Article:

"(1) 'Cede' or 'Cession' means the act of transferring *the profit or loss of otherwise unacceptable business* (to the extent permitted in the plan of operation) *from the individual insurer to all insurers* through the operation of the Exchange. * * *

"(4) 'Eligible risk' means a person who is a resident of this State who holds a valid license to practice or perform in this State a given health care profession * * * including but not limited to * * * physicians, surgeons, dentists, nurses, nurse anesthetists, physiotherapists, medical or X-ray laboratories, chiropractors, chiropodists, optometrists, osteopaths and blood banks * * *

"(6) 'General liability insurance' means insurance against legal liability of the insured as authorized under G.S. 58-72(13) and (14), excluding insurance against liability arising out of the ownership, operation, maintenance and use of a motor vehicle * * *

G.S. 58-173.38. *"North Carolina Health Care Liability Reinsurance Exchange; creation; membership.*—(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Health Care Liability Reinsurance Exchange *consisting of all insurers licensed to write and engaged in writing within this State general liability insurance* or any component thereof *except* town and county mutual insurance associations and assessable mutual companies * * * . *Every such insurer, as a prerequisite to further engaging in writing such insurance in this State, shall be a member of the Exchange and shall be bound by the rules of operation thereof* as provided for in this Article and as promulgated by the board of governors. *No company may withdraw from membership in the Exchange unless it ceases to write general liability insurance in this State or ceases to be licensed to write such insurance.* * * *

G.S. 58-173.42. "*General obligations of insurers.* — Except as otherwise provided in this Article all insurers *as a prerequisite to the further engaging in this State in the writing of general liability insurance* or any component thereof shall accept and insure *any applicant therefor who is an eligible risk* if cession of the particular coverage and coverage limits applied for are permitted in the Exchange. All such insurers shall equitably share the results of any health care liability insurance business ceded to and through the Exchange and shall be bound by the acts of their agents in accordance with the provision of this Article."

G.S. 58-173.44. "*The Exchange; functions; administration.*—(a) The operation of the Exchange shall assure the availability of *all* health care liability insurance coverages *to any eligible risk* by means of reinsurance and *the Exchange shall accept for transfer to the account of all members the profit or loss of the business ceded* in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either. * * *

"(e) The Exchange shall require each member to adjust losses for ceded business * * * in the same manner as other insurance losses are adjusted and to effect settlement where settlement is appropriate; * * *

"(i) * * * [P]ower and responsibility for the * * * operation of the Exchange is vested in the board of governors, which power and responsibility include but are not limited to the following: * * *

"(8) To establish fair and reasonable procedures for the sharing among the members of profit and loss on Exchange business and other costs, charges, expenses, liabilities, income, property and other assets of the Exchange and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's direct written premium for general liability insurance or by any other fair and reasonable method. * * *

G.S. 58-173.46. "*No limit on cessions; compulsory cessions.*—Upon receipt by the company of a risk *which it does not elect to retain,* the company shall follow such procedures for ceding the risk as are established by the plan of opera-

tion. A company *may* cede to the Exchange one hundred percent (100%) of its health care liability insurance business in North Carolina. In order to prevent significant adverse selection resulting from cessions to the Exchange, the board of govenors upon a finding of significant adverse selection *shall require* one hundred percent (100%) ceding by *all members* of the coverages on any of the separate eligible risk categories enumerated in G.S. 58-173.37(4). There shall be a presumption that significant adverse selection exists if for any period of one year or more the result from dividing the losses incurred by the premiums earned on business ceded to the Exchange is in excess of one hundred and five percent (105%) of the result of dividing the losses incurred by the premiums earned on business retained by the members.

G.S. 58-173.47. "*Approval of rates.*—The premium rates that may be charged on all health care liability insurance, including premiums ceded to the * * * Exchange shall be established from time to time by the Commissioner * * * on the basis of the latest available statistical data submitted by rating bureaus or insurers authorized to write general liability insurance in this State. Every rating bureau * * * or insurer * * * may submit proposed changes in rates * * * to the extent necessary to produce rates and classifications which are reasonable, adequate, not unfairly discriminatory and in the public interest, or the Commissioner, upon his own motion, may, upon the latest available statistical data, order a reduction or increase in rates. Any premium rate change shall be established by the Commissioner only after due notice and hearing as provided in G.S. 58-9.2 and with full rights of appeal * * *. The rate so established by the Commissioner shall be reasonable, adequate, not excessive, not unfairly discriminatory and in the public interest. Such rates shall not be deemed unreasonable, inadequate, excessive, unfairly discriminatory or not in the public interest if they are adequate to defray the total cost of the Exchange system and if they make adequate provision for premium rates for the future which will provide for anticipated losses, anticipated loss adjustment expenses, other anticipated expenses attributable to the selling and servicing of this line of insurance, and a fair and reasonable underwriting profit. * * *."

The General Assembly has, in G.S. 58-173.34, above quoted, determined and declared that unless health care liability insurance is available to persons engaged in the practice of the healing arts, such health care services in this State may be severely curtailed, that the supply of such insurance available to such practitioners in this State is not adequate and plans, in effect prior to the passage of the North Carolina Health Care Liability Insurance Exchange Act, are inadequate to supply the need for such insurance. We accept these determinations by the General Assembly, there being evidence in the record tending to show the reasonableness thereof.

[1] The police power of the State extends to all of the great public needs. *Noble State Bank v. Haskell,* 219 U.S. 104, 111, 31 S.Ct. 186, 55 L.Ed. 112 (1911). It is an inherent power of sovereignty and its exercise is especially favored in the regulation of the use of property and of individual conduct for the purpose of promoting the health of the public. *Graham v. Insurance Co.,* 274 N.C. 115, 124, 161 S.E. 2d 485 (1968); *Roach v. Durham,* 204 N.C. 587, 591, 169 S.E. 149 (1933); *Shelby v. Power Co.,* 155 N.C. 196, 71 S.E. 218 (1911). Even in this field, however, the legislative power is not unlimited but is subject to specific limitations imposed by the Constitution of this State and the Constitution of the United States. It is also subject to the general limitation thereof that the interference with individual liberty, or with the right of an owner of property to use it as he sees fit, must have a reasonable relation to the accomplishment of the legislative purpose and must not be unreasonable in degree, in comparison with the probable public benefit. *In Re Hospital,* 282 N.C. 542, 193 S.E. 2d 729 (1973); *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18 (1968); *State v. Warren,* 252 N.C. 690, 694, 114 S.E. 2d 660 (1960); *Winston-Salem v. R. R.,* 248 N.C. 637, 642, 105 S.E. 2d 37 (1958); *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854 (1940); *State v. Perley,* 173 N.C. 783, 92 S.E. 504 (1917), aff'd, 249 U.S. 510.

The wisdom of legislation, which is within the power of the General Assembly, is not for this Court to determine and the determination by the General Assembly that a factual situation exists, giving rise to the public need which the statute is designed to remedy, will not be disturbed by this Court where there is any reasonable basis for such determination. However, the further declaration by the General Assembly in G.S.

58-173.34 that "the State has an obligation to provide an equitable method whereby every insurer licensed to write general liability insurance in North Carolina be required to meet this market demand" does not fall within this sound principle inherent in the separation of the powers of government made by the Constitution. The determination of the existence of an obligation resting upon the State and of the power of the State to require a specified group of persons or corporations to supply an existing public need are questions of law, the ultimate authority for the determination of which is in this Court.

Assuming, without deciding, that the State of North Carolina has an obligation to provide some equitable method whereby those whom it licenses to practice one of the healing arts may procure insurance against liability for injuries caused by their negligence in such practice, it does not necessarily follow that the State has power to conscript certain persons or corporations, or a certain group thereof, and require such draftees to supply the need at their risk or expense. As Mr. Justice Holmes, speaking for the Supreme Court of the United States, said in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 67 L.Ed. 322 (1922), "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

[2] We do not have before us the question of whether it would be within the authority of the Legislature to appropriate public funds for the providing of health care liability insurance in order to supply the need which the General Assembly, in G.S. 58-173.34, has declared to exist. We now express no opinion upon that question. The question for our determination is this, May the General Assembly, having found such need to exist, require all insurance companies licensed to issue in this State policies of "general liability insurance," subject to specified exceptions, to supply, at their own risk and expense, the need for health care liability insurance, such companies not having heretofore engaged in the business of writing insurance of that kind, having no desire to write such insurance and having never held themselves out as willing to do so? We hold that the General Assembly does not have that power and, consequently, the Act in question is unconstitutional and void.

The above quoted definition of "general liabilitiy insurance," contained in the Act, includes insurance against liability for personal injury and insurance against liability for property damage. Prior to the adoption of the Act here in question, G.S. 58-72 expressly provided that nothing in Chapter 58 of the General Statutes required any insurance company to insure every kind of risk it was licensed to insure. This, of course, would not, of itself, prevent a change of this State policy by subsequent legislation. However, G.S. 58-72 makes it clear that the mere obtaining of a license to write insurance against liability for property damage, or for personal injury, was not an undertaking by the licensee to write policies insuring against liability for medical malpractice.

The record before us makes it abundantly clear that the issuance of policies of health care liability insurance is a part of the broad field of the insurance business separate and distinct from the issuance of policies protecting owners of buildings from liability for personal injury to persons using such buildings, from the issuance of policies protecting the producer of commodities from liability for injuries to users thereof, from the issuance of policies protecting promoters of athletic events or other entertainments from liability for injury to participants or spectators, and from a myriad of other types of liability insurance policies. If this did not appear from the record, it is a matter of such common knowledge that we could properly take judicial notice of it. Stansbury, North Carolina Evidence (Brandis' Revision) § 11.

Quite clearly, a company which has been carrying on a business of insuring against liability for property damage only would be thrown, by the Act in question, into a type of business utterly foreign to its undertaking and experience. It is further abundantly clear from the record that to compel such company, against its will, to write health care liability insurance for whatever health care provider may see fit to apply to it therefor would subject the company to a risk of financial disaster. It is no answer to the objection of such company that the Act provides for its "ceding" of all health care liability policies to the Exchange. By definition in the Act, G.S. 58-173.37(1), such ceding simply transfers "the profit or loss" of such policy from the writing company to the Exchange. The writing company may, by the Act, G.S. 58-173.44(e), be, nevertheless, required to handle, and thus incur the expense of, the adjustment and

settlement of claims under such policy, and must bear its proportionate part of the losses, not only on its own policies but on those ceded by all other companies to the Exchange. G.S. 58-173.44(i)(8). Thus, a company writing but a few policies, itself, on which no loss is sustained, may be severely crippled financially by the writings of other equally inexperienced and equally reluctant insurers.

Furthermore, an experienced, efficient, successful writer of health care liability insurance, which elects to cede no policies to the Exchange, may be assessed by the Exchange for its proportionate part of losses incurred by the Exchange upon policies issued by other companies. G.S. 58-173.44. Membership in the Exchange, and so participation in its losses, is made mandatory by this Act and no company issuing any form of insurance against liability for personal injury or property damage, except as provided in the Act, may withdraw from the Exchange without ceasing to write all forms of such liability insurance in this State. G.S. 58-173.38.

It is no answer to the complaint of the insurance company, objecting to being drafted by the State for this alleged public service, that the Act contemplates, in G.S. 58-173.47, the establishment of premium rates for such insurance which will be "reasonable" and "adequate" and sufficient to yield "a fair and reasonable underwriting profit" over and above "anticipated losses" and "anticipated expenses." The losses and expenses "anticipated" by the Commissioner in the establishment of premium rates may easily prove substantially less than those actually incurred. The record shows, with disturbing clarity, that this has been the experience in the past of companies voluntarily writing such insurance, even though those companies are possessed of qualified employees having the expertise incident to years of experience in the business and even though those companies have, heretofore, had the right to reject applicants deemed by them uninsurable, a right which the Act undertakes to abolish. But, even if it could be assumed that premium rates would be established sufficient to assure the company "a reasonable underwriting profit," the Law of the Land Clause of Article I, § 19, of the Constitution of North Carolina, providing that no person shall be deprived of his liberty but by the Law of the Land, would forbid the State so to conscript the plaintiff companies for this service. By reason of this constitutional provision, the simple statement, "I don't want to," is

still a sufficient answer to some governmental demands of this State.

By the definition of "general liability insurance" contained in G.S. 58-173.37(6), companies issuing only automobile liability insurance are exempt from this legislative conscription of liability insurance carriers into the proposed army of health care liability insurers. No reasonable basis for this classification of liability insurance companies appears. The Act, therefore, also violates the provision in Article I, § 19, of the Constitution of North Carolina which states, "No person shall be denied the equal protection of the laws."

Of course, the business of writing insurance against liability for personal injury and property damage is such that the State may lawfully regulate it in the public interest. This is axiomatic. It does not follow, however, that one engaging in such business in this State is subject to whatever regulation thereof the State may see fit to impose. We need not, upon the present appeal, determine whether the State may constitutionally require a company voluntarily engaging in the health care liability insurance business to insure all licensed providers of health care services against liability for their negligence in their practice. See: G.S. 20-279.34(2) as to compulsory participation in a similar plan by automobile liability insurance companies; *Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118 (1967). This Act requires the writing of such insurance by companies who never have engaged, and do not want to engage and are not equipped to engage, in the business at all. This, Article I, § 19, of the Constitution of North Carolina forbids.

The State may not, consistent with the Law of the Land Clause of Article I, § 19, of the Constitution of North Carolina, or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, require such a company to engage in such a business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the State and in which it wants to be, and is, engaged.

While the State may, and does, require one desiring to engage in the business of writing insurance against liability for personal injury or property damage to obtain a license, the State may not, as a condition to the issuance of such license, require the applicant to engage in and carry on an entirely

different kind of business. "A State cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them." *Roller v. Allen,* 245 N.C. 516, 525, 96 S.E. 2d 851 (1957). In *Aetna Casualty & Surety Co. v. Commissioner of Insurance,* 358 Mass. 272, 263 N.E. 2d 698 (1970), the Supreme Judicial Court of Massachusetts said, "The writing of insurance is a lawful business and the Commonwealth may not impose unconstitutional conditions upon the exercise of the right to engage therein." There, the Massachusetts Court was speaking specifically of the right of a company to engage in the insurance business without being required to submit to confiscatory premium rates established by the State. The principle, however, applies equally to the right to engage in one branch of the insurance business without being required to engage in another separate, distinct branch thereof.

The Supreme Court of the United States has held that a private carrier cannot be converted, against his will, into a common carrier by mere legislative command and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States forbids a State to bring about the same result by imposing, as a condition precedent to the issuance of a license to one who desires to engage in the business of a private carrier, a requirement that the applicant become a common carrier. *Frost Trucking Co. v. Railroad Commission of California,* 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). Similarly, a state may not, as a condition to the issuance of a license, exact from the licensee a waiver of his right to exercise a constitutional right such as the right to remove litigation to the Federal Courts. *Terral v. Burke Construction Co.,* 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352 (1922); *Lee v. Renfro,* 257 Ala. 679, 60 So. 2d 849 (1952). Thus, the State may not, as a condition precedent to the right of the plaintiffs to retain their licenses to engage in the business of insuring against liability for personal injury or property damage from other risks, require them to enter into the entirely separate and distinct business of insuring against liability for personal injury resulting from the practice of medicine.

The Act contains a severability clause, providing: "If any provision or part of this Article or application thereof is held invalid, the invalidity shall not affect other provisions, parts or application of the Article which can be given effect without

the invalid provisions or application, and to this end the provisions of this Article are severable." Session Laws of 1975, Chapter 427, § 2. However, it is specifically declared in G.S. 58-173.34 that the purpose of the entire Act is to impose, upon all companies licensed to write in North Carolina insurance against liability for personal injury or property damage, a mandatory program for the writing by them of health care liability insurance. All parts of the Act are related to, and designed to accomplish, this unconstitutional purpose. Therefore, the entire Act is in excess of the power of the General Assembly under the Constitution of this State.

The orders of which the plaintiffs complain depend for their validity upon the Act here in question. They purport to be issued pursuant thereto. The Commissioner does not contend that they find support in any other statutory delegation of authority to him. Consequently, the orders in question are also invalid and it is not necessary for us to consider whether the Superior Court was correct in holding that these orders were invalid for the further reason that they were not issued in accordance with the provisions of the Act. The result would be the same if they were so issued. Similarly, it is not necessary for us to consider the validity of other reasons advanced by the judgment of the Superior Court for its conclusion that the Act in question is unconstitutional.

Both in the judgment entered in the group of actions for a declaratory judgment and in the judgment entered in the group of proceedings seeking judicial review of the orders of the Commissioner, the Superior Court concluded correctly that the Health Care Liability Reinsurance Exchange Act is unconstitutional and properly adjudged it to be of no force and effect. We affirm those conclusions and the resulting judgments.

Affirmed.

BETTY THORNE NANTZ v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA AND THE NORTH CAROLINA STATE BOARD OF PERSONNEL

No. 94

(Filed 14 July 1976)

1. **Master and Servant § 10— contract of employment — termination**

A contract of employment which contains no provision concerning its duration or the means and procedures by which it might be terminated, even though it expressly refers to the employment as a regular, permanent job, is terminable at the will of either party irrespective of the quality of performance by the other party.

2. **Master and Servant § 10— employment by State — no property right in job**

Employment by the State of N. C., or by one of its political subdivisions or agencies, does not *ipso facto* confer tenure or a property right in the position.

3. **Administrative Law § 4; Constitutional Law § 33— administrative hearing — silence of employee — right of protection against self-incrimination inapplicable**

Any adverse inferences drawn by the State Personnel Board from petitioner's failure to testify at the hearing before it did not amount to an impairment of her constitutional protection against self-incrimination, since such inferences are not precluded where the protection is claimed by a party to a civil cause.

4. **Administrative Law § 5— action against State Personnel Board — power only to recommend — judicial review improper**

Clearly, G.S. 126-4(9) (repealed, effective 1 February 1976) authorized the State Personnel Board, upon an appeal to it by a dismissed employee, to do no more than make an advisory recommendation to the department head, and it was not authorized to direct reinstatement of the dismissed employee; therefore, its determination was not an "administrative decision" as defined by G.S. 143-306 and so was not subject to judicial review pursuant to G.S. 143-307.

5. **Administrative Law § 5; Master and Servant § 10— dismissal of employee of State agency — judicial review improper**

Since G.S. 96-4 does not contemplate judicial review of a simple administrative action such as the employment, promotion, demotion or discharge of an employee, but contemplates a determination of rights and duties of persons, organizations or corporations subject to the regulatory authority of the agency, the action of the Employment Security Commission in discharging petitioner was not subject to judicial review, unless petitioner had a constitutional right to an agency hearing prior to her dismissal.

6. **Administrative Law § 4; Master and Servant § 10— dismissal of employee of State agency — due process — notice and hearing**

Petitioner, whose employment with the Employment Security Commission was terminated because of her refusal to aid the agency in its investigation of anonymous letters alleging mismanagement and sexual misconduct by employees in the office in which petitioner worked, was not deprived of liberty without a hearing and, therefore, without due process of law, since petitioner had no property right in her employment and thus was not entitled to a hearing; even so, petitioner was given adequate notice and an opportunity to be heard before her dismissal by the Commission and after dismissal by the State Personnel Board; and the action of the Commission in dismissing petitioner was not such as would damage her good name in the community or bar her from other employment.

APPEAL by petitioner from the decision of the Court of Appeals, reported in 28 N.C. App. 626, 222 S.E. 2d 474, affirming judgment for the defendants by *Alvis, J.*, at the 13 June 1975 Session of WAKE, *Vaughn, J.*, dissenting.

For a number of years Mrs. Nantz was employed as Labor Market Analyst in the Charlotte office of the Employment Security Commission. She was discharged by the State Director of the Commission. She sought review of this action by the State Personnel Board. That Board concluded the action of the Commission was justified. The petitioner then filed her petition for further review in the Superior Court of Wake County, asking that the petitioner be reinstated in her employment and reimbursed for wages and other benefits of which she had been deprived by the action of the Commission. The Superior Court dismissed the petition as to the State Personnel Board for the reason that the Board is not an administrative agency as defined by G.S. 143-306(1) in that it is not authorized to make decisions but merely makes recommendations and, therefore, the court was without jurisdiction under G.S. 143-306 to review its recommendation. The Superior Court denied the motion of the Commission that the action be dismissed as to it. Thereupon, the matter came on for a hearing upon the record as between the petitioner and the Commission.

The Superior Court concluded: There is no statute in North Carolina which secures job tenure to State employees; the Commission has no authority to enter into contracts with its employees assuring them of continuing employment; the record shows no conduct by the Commission leading the petitioner to expect continued employment; the sole reason for the petitioner's

dismissal was her failure to cooperate with the Commission in its investigation of a matter seriously affecting the exercise of its official duties; the action of the Commission is based upon substantial cause and is not capricious or arbitrary; the record does not show damage to the petitioner's good reputation and such damage cannot be assumed; the petitioner had not shown that her ability to obtain other employment has been substantially diminished by the action of the Commission; the record does not support the petitioner's claim that her refusal to provide for the Commission the requested information arose from a claim of a constitutional right to refrain from incriminating herself or that the Commission improperly inferred guilt of the petitioner from the exercise of that right; the dismissal of the petitioner by the Commission has not violated any of her constitutional rights; the petitioner has not shown she was entitled to a due process procedure but it appears that she has been accorded due process of law; the petitioner has failed to substantiate her allegations that the action of the Commission was not supported by competent, material and substantial evidence. Thereupon, the court ordered that the petitioner's dismissal by the Commission be affirmed and this cause dismissed.

The Court of Appeals affirmed, noting that G.S. 126-2 et seq. effective 1 February 1976, has no application to the present case. The dissent of Vaughn, J., is not directed to the merits of the matter but is upon the ground that the Superior Court did not have jurisdiction to act upon the petition for review and the appeal to the Court of Appeals should have been dismissed.

The record of the hearing before the State Personnel Board, upon which the Superior Court acted, tends to show:

In October 1973, the then Director of the Commission received through the mail an anonymous letter intimating that "affairs (male & female)" were going on in the Charlotte office of the Commission and that promotions were made "on such a basis." The Director suspected that an employee of the Charlotte office might have responsibility for such letter due to the wording of the letter and the attachment thereto of certain "internal documents" relating to the management of the Charlotte office. Subsequently, another anonymous letter was received by the Governor and by the Chairman of the Commission. This referred to the assistant manager of the Charlotte office as the "paramour of the manager."

The Commission employed an expert examiner of disputed documents to compare the anonymous letters with documents which the Commission determined to have been typed upon a typewriter in the home of the petitioner. The expert reported that the documents in question were typed upon the same typewriter.

The Director of the Commission thereupon held a conference with the petitioner. The petitioner did not cooperate. When confronted with the report of the expert to the effect that the anonymous letters were written on the typewriter in her home, the petitioner refused to make any comment whatsoever or to assist the Director and his staff in investigating the incident. She neither confirmed nor denied that she was responsible for or knew about the anonymous letters.

The letters had a detrimental effect upon the operation of the Charlotte office, causing hesitancy on the part of the manager and assistant manager to carry on their work together in the customary manner and disrupting the morale and efficient operation of the office. In the opinion of the Director of the Commission, the letters impaired the reputation and efficiency of the agency as a whole and of the Charlotte office in particular. The investigation of the Commission revealed no evidence whatever of any improper conduct by employees in the Charlotte office.

The Director of the Commission offered to place the petitioner in another office of the Commission, within commuting distance, the only vacancy therein being at a slightly lower salary. This the petitioner rejected. Thereupon, she was dismissed. To continue her employment in the Charlotte office would have required that she work in the same office with the manager and assistant manager so accused in the anonymous letter. In the opinion of the Director of the Commission, this would not be conducive to efficient operation of the office.

Rufus L. Edmisten, Attorney General, by William H. Guy, Associate Attorney, for State Personnel Board.

H. D. Harrison, Jr., Garland D. Crenshaw, Howard G. Doyle and Thomas S. Whitaker for Employment Security Commission.

Bailey, Brackett & Brackett, P.A., by Ellis M. Bragg for Petitioner.

LAKE, Justice.

We are not here concerned with Ch. 667 of the Session Laws of 1975, modifying G.S. Ch. 126 concerning the State Personnel System and making provision for employee appeals of grievances and disciplinary action. That Act, by its terms, did not become effective until 1 February 1976. For the same reason, we are not here concerned with Ch. 1331 of the Session Laws of 1973, establishing procedures for the conduct of proceedings before administrative agencies and establishing a code of administrative regulations. That Act provided that it would become effective 1 July 1975 and "shall not affect any pending administrative hearings." By Ch. 69 of the Session Laws of 1975, the 1973 Act was amended to change its effective date to 1 February 1976. We thus express no opinion herein as to procedures to be followed in the dismissal of an employee of a State agency subsequent to 1 February 1976. The petitioner's employment was terminated as of 18 January 1974. The judgment of the Superior Court was entered 13 June 1975.

[1, 2] The petitioner was not a public officer elected for a specified term. She was an employee, and nothing in the record indicates the presence of any provision in her contract of employment concerning its duration or the means and procedures by which it might be terminated. As we said in *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971), "Nothing else appearing, such a contract of employment, even though it expressly refers to the employment as 'a regular, permanent job,' is terminable at the will of either party irrespective of the quality of performance by the other party." No statute of this State conferred upon State employees, such as this petitioner, tenure or the right to judicial review of an administrative action terminating the employment. Employment by the State of North Carolina, or by one of its political subdivisions or agencies, does not *ipso facto* confer tenure or a property right in the position. *Still v. Lance, supra; Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961); *Freeman v. Gould Special School District*, 405 F. 2d 1153 (8th Cir. 1969). Mere longevity of employment, even though the employee's service be of excellent quality, does not confer upon the employee such property right, *Still v. Lance, supra.*

[3] The petitioner does not contend and nothing in the record suggests that her dismissal from employment was in retaliation

for her exercise of a constitutional right or was for the purpose of discouraging her exercise of such right. See, *Cafeteria Workers v. McElroy, supra.* The petitioner asserts, on appeal, that at the hearing before the State Personnel Board her guilt of participation in the writing of the above mentioned anonymous letters was inferred by the Board from her failure to testify and this, she says, amounts to an impairment of her constitutional protection against self-incrimination. The record does not show any claim of this constitutional privilege by the petitioner at the hearing before the State Personnel Board. She simply remained silent, neither admitting nor denying participation in the writing and sending of such letters nor offering any explanation of or refutation of the opinion of the Commission's expert witness that the letters were typed on the same typewriter as other documents, shown by another witness to have been typed upon the typewriter of the petitioner.

In *Baxter v. Palmigiano,* ..... U.S. ....., 96 S.Ct. 1551, 47 L.Ed. 2d 810 (decided 20 April 1976), the Supreme Court of the United States had before it for review disciplinary action taken by prison authorities of California against an inmate who remained silent at his administrative hearing. The Court said:

> "Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' 8 Wigmore, Evidence 439 (McNaughton Ed. 1961). * * * The short of it is that permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice; and there is no basis in the record for invalidating it as applied to Palmigiano in this case."

At the time of the petitioner's discharge, the hearing by the State Personnel Board and the review of the matter by the Superior Court, G.S. 126-1 to G.S. 126-6 (repealed, effective 1 February 1976, by Session Laws of 1975, Ch. 667) established a State Personnel System but contained no provision conferring tenure upon State employees. G.S. 126-4 provided:

> *"Powers and duties of State Personnel Board.*—Subject to the approval of the Governor, the State Personnel

Board shall establish policies and rules governing each of the following:

* * *

"(6) The appointment, promotion, transfer, demotion, suspension, and separation of employees.

* * *

"(9) Hearing of appeals of applicants, employees, and former employees and the issuing of *advisory recommendations* in all appeal cases. (Emphasis added.)

"(10) Such other programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and reasonable system of personnel administration."

The Personnel Manual, in effect at the time of the actions of which the petitioner complains, contains no rule or other provision limiting the authority of the head of a department of State Government to dismiss an employee. In § 16.190, it provided:

"*Disciplinary action:* Any action taken *at the discretion of the department head* for the purpose of penalizing an employee by any one or combination of the following: (a) suspension from the payroll on leave—without—pay for a period to be determined by the department head, (b) transfer, (c) demotion, or (d) dismissal." (Emphasis added.)

[4] Clearly, G.S. 126-4(9) authorized the State Personnel Board, upon an appeal to it by a dismissed employee, to do no more than make an advisory recommendation to the department head. It was not authorized to direct reinstatement of the dismissed employee.

The Employment Security Commission is authorized by G.S. 96-4(d) to appoint, fix the compensation and prescribe the duties and powers of its employees. Nothing in the Employment Security Law (G.S. Ch. 96) confers tenure upon employees of the Commission. The Employment Security Law, in G.S. 96-4(m), provides for the holding of hearings by the Commission "for the purpose of determining the rights, status and liabilities of any 'employing unit' or 'employer' " as defined by the law. From such determination a dissatisfied party may appeal to the Superior Court. Even in those hearings, it is provided

by G.S. 96-4(p), "The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties." Both the Administrative Procedure Act, G.S. Ch. 150A and Art. 33A of Ch. 143 of the General Statutes, entitled, "Rules of Evidence in Administrative Proceedings Before State Agencies," which latter provision was in effect at the time of the matters of which the petitioner complains, though subsequently repealed effective 1 February 1976, expressly exempt the Employment Security Commission from their provisions. G.S. 150A-1; G.S. 143-317(1).

[5] Article 33 of Ch. 143 of the General Statutes, entitled, "Judicial Review of Decisions of Certain Administrative Agencies," which was in effect at the time of the actions of which the petitioner complains, though subsequently repealed, effective 1 February 1976, defines "Administrative Agency" to include any State commission or department authorized by law to make administrative decisions, "except [among others] those * * * whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor." As noted above, G.S. 96-4 makes provision for judicial review of administrative decisions of the Employment Security Commission determining the rights, status and liabilities of "employing units" and "employers." Thus, those determinations by the Employment Security Commission are not subject to judicial review under the provisions of Art. 33 of Ch. 143 of the General Statutes. Furthermore, that Article provides for judicial review of "administrative decisions," which term is defined 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." We think it clear that this statute does not contemplate judicial review of a simple administrative action such as the employment, promotion, demotion or discharge of an employee, but contemplates a determination of rights and duties of persons, organizations or corporations subject to the regulatory authority of the agency. Thus, unless the petitioner had a constitutional right to an agency hearing prior to her dismissal, the action of the Employment Security Commission in discharging her was not subject to judicial review and its motion to dismiss should have been allowed by the Superior Court.

[4] The Superior Court was clearly correct in dismissing the proceeding as to the State Personnel Board. The authority of that Board was expressly limited by statute to the making of an advisory recommendation. Thus, its determination was not an "administrative decision" as defined by G.S. 143-306 and so was not subject to judicial review pursuant to G.S. 143-307. The State Personnel Board did not discharge the petitioner or take any action depriving her of any property or contract right. The action of which the petitioner complains was taken by the Employment Security Commission, her employer. It was an administrative act but not an "administrative decision" subject to judicial review under Art. 33 of Ch. 143 of the General Statutes, unless the petitiner was entitled as a matter of constitutional right to an agency hearing prior to her discharge.

[6] We think it clear that the petitioner was not entitled, as a matter of constitutional right, to such a hearing. The petitioner contends that she has been deprived of a property right without a hearing in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and in violation of the similar provision of Art. I, § 19, of the Constitution of North Carolina. We disagree.

In the very recent case of *Bishop v. Wood*, ... U.S. ..... , ... S.Ct. ..... , ... L.Ed. 2d ..... (decided 10 June 1976), the Supreme Court of the United States said the sufficiency of such claim of property right in public employment must be decided by reference to state law, citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), where the Court said:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those benefits."

As above noted, nothing in the law of this State or in the petitioner's contract of employment created any such right in the plaintiff. Consequently, as the Court said in *Bishop v. Wood, supra*, "Petitioner's discharge did not deprive [her] of a property interest protected by the Fourteenth Amendment." In *Board of Regents v. Roth, supra*, the Court held that the university professor, without tenure, did not have a constitutional

right to a statement of reasons and a hearing on a state university's decision not to rehire him for another year.

The petitioner also contends that she has been deprived of liberty without a hearing and, therefore, without due process of law. In *Board of Regents v. Roth, supra,* the Court said:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' * * * In such a case, due process would accord an opportunity to refute the charge before university officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor, or integrity' is at stake.
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. * * *
>
> "Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."

In *Bishop v. Wood, supra,* with reference to the claim of deprivation of liberty without procedural due process, the Court said:

> "Petitioner's claim that he has been deprived of liberty has two components. He contends that the reasons given for his discharge are so serious as to constitute a stigma that may severely damage his reputation in the community; in addition, he claims that those reasons were false. * * *

"In *Board of Regents v. Roth*, 408 U.S. 564, we recognize that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far 'to suggest that a person is deprived of "liberty" when he simply is not retained in one position but remains as free as before to seek another.' * * * *This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.*

"In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. * * *

"Petitioner argues, however, that the reasons given for his discharge were false. Even so, the reasons stated to him in private had no different impact on his reputation than if they had been true. And the answers to his interrogatories, whether true or false, did not cause the discharge."

In the present case, the action of the Employment Security Commission was not such as would damage the petitioner's good name in the community or bar her from other employment. In fact, the record shows that the Commission offered her other employment in another office of the Commission and discharged her only when she refused the transfer. Having ample evidence, from which it might infer the petitioner's participation in or knowledge of the writing of letters implying serious misconduct by her fellow employees, the writing of which letters, in the opinion of the Director of the Commission, jeopardized the efficient operation of the office in which the petitioner was employed, the Commission removed the petitioner

from that office because of her refusal to assist the Commission in determining the responsibility for such letters. The action of the Commission was not made public by it.

We find in this record no basis for holding that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, or the comparable provision of the State Constitution, conferred upon the petitioner a right to a hearing by the Employment Security Commission before it discharged her. However, the record clearly shows that the petitioner, before her discharge, or her prior suspension, was fully informed by the Director of the Commission of the nature of the conduct of which she was suspected and of the evidence of her participation therein. Before the State Personnel Board, the hearing attended by her, the Director of the Commission and the witnesses against her, she was again fully informed of these matters and had the opportunity to cross-examine these witnesses, which she did, and to present any refutation, defense or explanation she thought proper. She declined to make any comment whatever.

We find no basis in this record for a conclusion that any right of the petitioner under the Constitution of the United States, the Constitution of North Carolina, the statutes of this State, or her contract of employment has been violated by her discharge.

The petitioner undertook to appeal from the decision of the Court of Appeals on the ground that Judge Vaughn dissented therefrom and on the ground that substantial constitutional questions were involved in the decision. Judge Vaughn did not dissent, but filed an opinion which, in effect, concurred in the result reached, for the reason that the Superior Court had no jurisdiction and the appeal to the Court of Appeals should have been dismissed, which view is in accord with our own, hereinabove expressed. Thus, the opinion of Judge Vaughn, though inaptly designated a dissent, did not constitute a ground for appeal to this Court under G.S. 7A-30. Nevertheless, because of the constitutional question raised, the petitioner had standing to appeal to this Court under that statute.

Affirmed.

State v. Wells

STATE OF NORTH CAROLINA v. KELVIN KEITH WELLS

No. 55

(Filed 14 July 1976)

1. **Rules of Civil Procedure § 45; Witnesses § 10— subpoena to obtain testimony of witness — method of issuance**

A subpoena for the purpose of obtaining the testimony of a witness in a pending cause, criminal or civil, must be issued by the clerk of superior court for the county in which the trial is to be held at the request of any party. In fact, such subpoena may be issued (1) by the clerk, (2) by any judge of the superior court, judge of the district court, or magistrate, or (3) by the party or his attorney. G.S. 8-59; G.S. 1A-1, Rule 45.

2. **Constitutional Law § 31— absent witnesses — failure of court to issue instanter subpoena — no error**

Defendant's rights under the Sixth and Fourteenth Amendments to the U. S. Constitution were not abridged by the trial court's failure to issue an instanter subpoena for two of defendant's alibi witnesses, since defendant made no attempt to place the witnesses under subpoena, one of the witnesses had already been examined and cross-examined, the record did not show what additional favorable testimony defendant sought to elicit from him or what testimony the other witness would have given, and the record did not show why these witnesses were absent after the first day of the trial.

3. **Criminal Law § 112— reasonable doubt — necessity for instruction absent request**

Absent request, the trial court is not required to define reasonable doubt, but if it undertakes to do so, the definition must be substantially correct.

4. **Criminal Law § 112— reasonable doubt — definition proper**

The trial court's definition of reasonable doubt as "a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be" was in accord with definitions approved by the Supreme Court.

5. **Burglary and Unlawful Breakings § 6— intent to commit rape — definition of rape proper**

The trial court's definition of rape as "forcible sexual intercourse with a woman against her will" was proper.

6. **Burglary and Unlawful Breakings § 6— intent to commit rape — failure to instruct on lesser included offenses of rape — no error**

Where defendant was charged with burglary in the first degree — breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein, *i.e.*, the felony of rape, it was not error for the trial court to fail to delineate

the difference between rape, assault with intent to commit rape, and simple assault.

7. **Burglary and Unlawful Breakings § 1— intent to commit felony — burglary complete though intent abandoned**

The crime of burglary is completed by the breaking and entering of the occupied dwelling of another in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted.

8. **Burglary and Unlawful Breakings § 6— raising window — jury instruction on breaking proper**

In a prosecution for first degree burglary where the evidence disclosed that one window in the prosecuting witness's apartment, although closed, had a broken lock and that, after the burglary, marks were found on the frame of that window at a point where some instrument would necessarily be used to open it, the trial court properly and correctly charged that the moving and raising of the window would be a breaking within the meaning of the law.

9. **Burglary and Unlawful Breakings § 6— jury instruction on entry — no error**

In a prosecution for first degree burglary the trial court's statement that, as a matter of law, walking into and entering the bedroom of the prosecuting witness would be an entry into her sleeping apartment was not an expression of opinion.

10. **Burglary and Unlawful Breakings § 6— "sleeping apartment" — expression of opinion by court — no prejudicial error**

Though the trial court in a first degree burglary prosecution expressed an opinion on the evidence by stating that the prosecuting witness's apartment was a "sleeping apartment," such error was harmless, since no issue was raised as to whether the apartment in question was a "sleeping apartment," and defendant himself told the jury, in effect, that the prosecuting witness's apartment was a "sleeping apartment."

11. **Criminal Law § 168— jury instructions — inadvertence corrected — no prejudicial error**

Where an inadvertence complained of occurs early in the trial court's charge but is not called to the attention of the court at the time, and is later corrected, the occurrence will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled.

12. **Criminal Law § 118— contentions arising from evidence or lack of it — instructions proper**

The trial court's instruction that the jury should consider all contentions of defendant and the State and any other legitimate contentions arising out of the evidence or lack of evidence whether they had been called to the jury's attention or not was proper.

Justice EXUM dissenting.

State v. Wells

DEFENDANT appeals from judgment of *Seay, J.*, 1 December 1975 Session, FORSYTH Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging first degree burglary. It is alleged in the bill that on 25 March 1975, about the hour of twelve in the nighttime of the same day, with force and arms, defendant did unlawfully, feloniously, and burglariously break and enter the dwelling apartment of Annie Mae Walker, located at 2655 Pendleton Drive, Apartment # 1, Winston-Salem, North Carolina, with the felonious intent to commit the crime of rape upon the said Annie Mae Walker, she being a female person actually occupying the dwelling apartment at the time.

Annie Mae Walker, the prosecuting witness, testified that on 25 March 1975 she lived in Apartment # 1 at 2655 Pendleton Drive in Winston-Salem. The apartment has a front and back door and six windows. Before retiring for the night she locked the doors and checked the windows to see if they were locked. All windows were closed but the lock on one window in the back bedroom was broken and could not be locked. As was her custom, she left a light burning in the bathroom. There was a street light about five feet outside her bedroom window and she could see anyone in her bedroom even though all the other lights in the apartment were turned off.

She was awakened about 4:45 a.m. on the night in question by a black male lying on top of her kissing her on the neck. She looked up and asked him how he got into her house. He did not answer and she started screaming. He put his hand over her mouth and told her to shut up, that all he wanted was some sex. She told him that her boyfriend would kill him, whereupon he got up, walked around the bed, turned back and looked at her and repeated, "All I wanted was some sex," and left by the back door. Her assailant was wearing only shorts and a black T-shirt. He was barefooted. She observed his face and features and heard his voice.

Mrs. Walker further testified that she immediately went upstairs to a friend's apartment and called the police. When officers arrived she told them what had happened and described her assailant as short and dark skinned with a medium-sized Afro and a beard. She told Detective Lawson she would recognize the boy if she ever saw him again.

About two days later Annie Mae Walker spotted defendant standing in a group of boys outside her apartment. At the time he was clad in a blue shirt and was wearing sunglasses. She called Detective Lawson the next day and told him she had seen her assailant and had learned his name was Calvin Wells. On 3 April 1975 she swore out a warrant for defendant's arrest and he was arrested about 9:15 a.m. the following day. She identified defendant in court and stated that she had no doubt whatsoever that "that is the man who entered my apartment on the 25th of March 1975, and that I discovered on top of me—that is him."

Officer K. H. Blevins with the Winston-Salem Police Department testified that on 25 March 1975 at approximately 5 a.m. he received a call to go to 2655 Pendleton Drive. On arrival he talked with Annie Mae Walker and she related what had occurred. He observed the back window with the broken lock and called an identification officer to the scene to check for fingerprints. Officer Shaw made the fingerprint check and found none. Inspection of the window with the broken lock, however, did reveal marks on the frame in a position where some instrument would have to be used to open the window.

Detective Lawson testified that he talked with Mrs. Walker about 8 a.m. on the morning of 25 March 1975. She told him the doors and windows were closed; that she was awakened about 5 a.m. by a black male lying on top of her; that she started screaming and he said, "Shut up, all I want is some sex"; that she continued to scream and he got up and went out the back door; that her assailant was a black male, about twenty-five years old, with a medium beard, medium Afro, dark complexion, and wearing a black T-shirt and checked shorts.

Defendant's evidence tends to establish alibi. Defendant took the stand and denied any involvement in the crime. He testified that he was staying in Apartment 5 at 2655 Pendleton Drive on the date in question but did not know at that time that Annie Mae Walker lived in the same apartment building just two doors away. He said he had met her "a long time ago" in the downtown mall when her husband, who was with her, introduced him. He admitted that on March 25 he knew she lived in the vicinity of his apartment.

Defendant further testified that on the morning of March 25 he was at Willie Mackie's house playing cards from midnight until dawn the next morning. He swore that on the day of his arrest he was not wearing checked shorts and a black T-shirt but was wearing pants and no shirt at all. He emphatically denied the charges against him and testified that he had never been in Mrs. Walker's apartment—on March 25 or any other date.

Willie Mackie, a defense witness, corroborated defendant's testimony. He stated that defendant was playing cards at Mackie's home the entire time from about 9:30 to 10:00 p.m. on March 24 until after daylight on March 25. Mackie also testified that among those present in addition to defendant were Otis Mack and Davida Duncan.

Defendant's mother testified that defendant lives with her and she tends to his laundry and clothing; that to the best of her knowledge defendant does not own any checked shorts and black T-shirt and in fact never wears a T-shirt of any kind.

Elsie Williams testified that she lives in Apartment 3 at 2655 Pendleton Drive, directly above Annie Mae Walker's apartment; that she is normally able to hear noises or disturbances about the building, including the sound of voices in the apartment below hers; that on the night in question she did not hear or see anything unusual and did not hear any screaming in the apartment of the prosecuting witness.

Officer Lawson, testifying for the State in rebuttal, reaffirmed his testimony to the effect that, when arrested, defendant was wearing a black T-shirt and checked shorts and "was attempting to put on a pair of pants." Following his arrest, defendant wanted to put on some other clothes and was permitted to do so.

The trial judge submitted as permissible verdicts (1) guilty of burglary in the first degree, or (2) guilty of felonious breaking or entering, or (3) guilty of non-felonious breaking or entering, or (4) not guilty. The jury convicted defendant of burglary in the first degree and he was sentenced to life imprisonment. He appealed to the Supreme Court assigning numerous errors.

White and Crumpler by Fred G. Crumpler, Jr. and Melvin F. Wright, Jr., attorneys for defendant appellant.

Rufus L. Edmisten, Attorney General; William H. Boone, Associate Attorney; and Myron C. Banks, Special Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Upon the call of this case defendant and his witnesses were present and ready for trial. The prosecuting witness had not been notified the case was calendared for trial that day and was not in court. The trial court issued an instanter subpoena to require her presence. She was brought into court and the trial proceeded. At the end of the first day of the trial, defense witness Willie Lee Mackie was on the witness stand and had been examined and cross-examined. The court recessed for the day, and when it reconvened at 9:30 a.m. the following morning, Mackie was not present. Defendant was ordered to proceed with his other witnesses. He examined two witnesses and then, after a 38-minute recess to wait for Mackie and Davida Duncan to arrive, the State recalled Officer Lawson in rebuttal and examined him. Defendant himself then took the stand and offered rebuttal evidence. Willie Lee Mackie never returned to court and was unavailable for further questions on redirect examination. Davida Duncan never returned. Neither of these witnesses was under subpoena and neither had been excused. Failure of the court to issue an instanter subpoena for these witnesses or to declare a mistrial is the basis for defendant's first assignment of error. He contends he has been denied his Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor." He further contends that he was denied equal protection of the laws when the court issued an instanter subpoena for the prosecuting witness but refused to exercise the same power on behalf of the defendant.

The right of an accused to reasonable notice of a charge against him and an opportunity to be heard in his defense are basic rights and include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. *In re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The right of an accused to offer the testimony of witnesses and to compel their attendance by compulsory process, if necessary, is a basic ingredient of the right to present a de-

fense, *i.e.*, the right to present the defendant's version of the facts, as opposed to the prosecution's, so the jury may decide where the truth lies. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967). Since defendant's right to compulsory process to compel the attendance of witnesses is not debatable, the question remains whether such right was violated under the circumstances of this case.

[1] The record before us reflects that defendant's two alibi witnesses, Willie Lee Mackie and Davida Duncan, were present in court on 3 December 1975—the first day of the trial. Although both were important witnesses, neither had been subpoenaed. A subpoena for the purpose of obtaining the testimony of a witness in a pending cause, criminal or civil, *must* be issued by the clerk of superior court for the county in which the trial is to be held at the request of any party. In fact, such subpoena may be issued (1) by the clerk, (2) by any judge of the superior court, judge of the district court, or magistrate, or (3) *by the party or his attorney.* G.S. 8-59; G.S. 1A-1, Rule 45, Rules of Civil Procedure. Every witness under subpoena in a criminal prosecution must continue to attend from day to day and from session to session until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned, and in default thereof shall forfeit and pay $80.00 for the use of the State or the party summoning him. G.S. 8-63. When witnesses are not under subpoena, no penalty is prescribed for failure to attend; and their absence places no obligation upon the trial judge to subpoena them.

[2] We said in *State v. Graves,* 251 N.C. 550, 112 S.E. 2d 85 (1960): "We do not suggest that an accused may be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and the court have a duty to see that he has *opportunity* for so doing." (Emphasis added.) Here, defendant's lack of diligence in placing his witnesses under subpoena when he had ample opportunity to do so, thus requiring their attendance from day to day, forestalls his belated attempt to place responsibility on the trial judge for their

absence. Willie Lee Mackie had been examined and cross-examined already. What additional favorable testimony defendant sought to elicit from him is not shown. Nor does the record reflect what evidence Davida Duncan would have given. Moreover, the record is silent as to why these witnesses were absent on the second day of the trial. It could be that no one told them to return. Viewing the circumstances in their totality, we hold that defendant's rights under the Sixth and Fourteenth Amendments were neither denied nor abridged by the actions of the trial court. Defendant's first assignment of error is overruled.

[4] Defendant's second assignment of error is based on the trial court's definition of reasonable doubt. He defined it as follows:

> "A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt."

[3] Absent request, the trial court is not required to define reasonable doubt, but if it undertakes to do so, the definition must be substantially correct. *State v. Shepherd,* 288 N.C. 346, 218 S.E. 2d 176 (1975).

[4] We think the court's definition of reasonable doubt is substantially correct and accords with the more elaborate definitions approved by this Court in many cases. *See State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519 (1967); *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954); *State v. Steele,* 190 N.C. 506, 130 S.E. 308 (1925); *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466 (1922). When the various definitions of reasonable doubt, approved in numerous decisions, are distilled and analyzed, the true meaning of the term is adequately expressed in the brief definition here assigned as error. Brevity makes for clarity and we think the jury fully understood the meaning of reasonable doubt as that term is employed in the administration of the criminal laws. Defendant's second assignment is overruled.

Defendant contends the trial court erred in its definition of rape and in failing to explain the difference between rape, assault with intent to commit rape and simple assault. This constitutes defendant's third assignment of error.

[5] The court defined rape as "forcible sexual intercourse with a woman against her will." We find no fault with this definition. In *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969), we said: "Rape is the carnal knowledge of a female person by force and against her will." The challenged definition is synonymous with this one. The meaning is the same.

[6] Moreover, the trial judge was not required to delineate the difference between rape, assault with intent to commit rape, and simple assault. Defendant was not charged with rape. Rather, he was charged with burglary in the first degree—breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein, *i.e.,* the felony of rape. Felonious intent is an essential element of the burglary which the State must allege and prove, "and the felonious intent proven, must be felonious intent alleged. . . . " *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27 (1965). In an indictment for burglary it is not enough "to charge generally an intent to commit 'a felony' in the dwelling house of another. The particular felony which it is alleged the accused intended to commit must be specified. . . . The felony intended, however, need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony, where the State is relying only upon the charge of burglary. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent . . . to commit therein the crime of larceny, rape, or arson. [Citations omitted.]" *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923).

[7] So it is here. The indictment having specified defendant's ulterior intent, *i.e.,* the intent to commit rape, the State was required to prove that intent at the time of the breaking and entering in order to make out the offense of burglary. Hence, with respect to the burglary, there was no necessity to charge on unrelated matters such as assault with intent to commit rape or simple assault. Even though they are lesser included offenses of the crime of rape, they are not lesser included offenses of the burglary alleged in the bill of indictment. The actual commission of the intended felony (rape) is not essential to the crime

of burglary. *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974). The crime of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted. *State v. Allen, supra; State v. McDaniel,* 60 N.C. 245 (1864); *accord, State v. Thorpe,* 274 N.C. 457, 164 S.E. 2d 171 (1968). Here, these principles were included in the trial judge's charge, to wit: " . . . that at the time of the breaking and entering, the defendant Kelvin Wells, intended to commit the felony of rape, that is to have forcible sexual intercourse with Annie Walker against her will."

In our view the charge of the court correctly defined the offense of rape and properly applied the law relevant thereto with respect to the burglary charged in the bill of indictment. "Whether the ulterior criminal intent existed in the mind of the person accused, at the time of the alleged criminal act, must of necessity be inferred and found from other facts, which in their nature are the subject of specific proof. It must ordinarily be left to the jury to determine, from all the facts and circumstances, whether or not the ulterior criminal intent existed at the time of the breaking and entry. In some cases the inference will be irresistible, while in others it may be a matter of great difficulty to determine whether or not the accused committed the act charged with the requisite criminal purpose." *State v. Allen, supra.* So, here, the evidence is sufficient to support, but not require, the permissible inference that defendant intended to commit rape *at the time he broke and entered* Annie Mae Walker's sleeping quarters. It was for the jury to determine, under all the circumstances, his ulterior criminal intent. *State v. Bell, supra.* Defendant's third assignment of error is overruled.

Defendant's fourth assignment of error is grounded on the contention that the trial court violated G.S. 1-180 in charging on the elements of burglary. The following portion of the charge is challenged by this assignment:

> "I charge that for you to find the defendant, Kelvin Wells, guilty of burglary in the first degree as charged in

the bill of indictment, the State . . . must prove these seven things . . . beyond a reasonable doubt:

First, that on the occasion herein . . . there was a breaking by the defendant, Kelvin Wells. [Members of the jury, the raising of a window, that is the moving of the window, the raising of it, the window being into the apartment house of Annie Walker, would be a breaking.]

EXCEPTION NO. 4

[Second, the State must prove that the defendant . . . entered the sleeping apartment of Annie Walker, walking around into the bedroom and entering into the bedroom of Annie Walker would be an entry into her sleeping apartment.]

EXCEPTION NO. 5

[Third, that the building . . . that was broken into and entered, was a sleeping apartment, that is a place where somebody regularly sleeps. Members of the jury, the apartment described for you herein located at 2655 Pendleton Drive, Apartment number one, is a sleeping apartment.]

EXCEPTION NO. 6

[Fourth, the State must prove that the tenant in Apartment number one, Annie Walker, did not consent to the breaking and entering.]

EXCEPTION NO. 7

Fifth, that it was in the nighttime when the breaking and entering was done.

[Sixth, that at the time of the breaking and entering the defendant Kelvin Wells intended to commit the felony of rape, that is to have forcible sexual intercourse with Annie Walker against her will.]

EXCEPTION NO. 8

And, seventh, that Annie Walker was in the apartment, the sleeping apartment, at the time of the breaking and entering."

The bracketed portions of the charge represented by Exceptions 4, 5, 6, 7 and 8 constitute defendant's fourth assignment of error.

Defendant concedes in his brief that "the trial court correctly informed the jury that proof of all . . . elements of burglary must be established beyond a reasonable doubt." He argues, however, that "throughout the discussion of the crime of burglary and the elements that comprise and are essential to this crime, the trial court made numerous references to material facts which constituted his opinion" in violation of the proscription that "no judge in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved." *State v. Mitchell,* 193 N.C. 796, 138 S.E. 166 (1927).

For the reasons which follow, we find no merit in this assignment.

The constituent elements of burglary in the first degree are: (1) The breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972).

[8] Exception No. 4 is addressed to the portion of the charge on "breaking." The evidence discloses that one window in Annie Mae Walker's apartment, although closed, had a broken lock and that, after the burglary, marks were found on the frame of that window at a point where some instrument would necessarily be used to open it. In that factual setting the trial court properly and correctly charged that the moving and raising of the window would be a breaking within the meaning of the law. *See State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). There is no merit in Exception No. 4.

[9] Exception No. 5 challenges the portion of the charge dealing with "entering." Here, the trial judge merely explained the legal principles involved by saying that, as a matter of law, walking into and entering the bedroom of Annie Walker would be an entry into her sleeping apartment. *See State v. Henderson, supra.* The statement is not a matter of opinion but a matter of law. There is no merit in Exception No. 5.

[10] Defendant contends the trial court, rather than the jury, decided the question whether the apartment of Annie Mae Walker was a "sleeping apartment." By Exception No. 6 defendant challenges the court's instruction that "the apartment described

for you herein located at 2655 Pendleton Drive, Apartment number one, is a sleeping apartment." Defendant contends this language amounted to a prejudicial expression of opinion requiring a new trial. He relies on *State v. Cuthrell*, 235 N.C. 173, 69 S.E. 2d 233 (1952), which holds that the trial court in charging a jury "may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue."

The judge's affirmative statement that "the apartment described for you herein located at 2655 Pendleton Drive, Apartment number one, is a sleeping apartment," is a violation of G.S. 1-180, but we consider it entirely harmless in the factual context of this case. *See State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950); *accord, State v. Holden*, 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683 (1972); *State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960). *Compare State v. Cuthrell, supra.* Here, except by the plea of not guilty, no issue was raised as to whether the apartment in question was a "sleeping apartment." This fact distinguishes this case from *State v. Cuthrell, supra.* All the State's evidence tends to show that Annie Mae Walker lived and slept there. Thus it was, in fact, a "sleeping apartment." *State v. Foster*, 129 N.C. 704, 40 S.E. 209 (1901). Defendant himself testified that he knew where Annie Mae Walker lived—"it's two apartments down from the apartment building I live in." On cross-examination he testified: "The Pattons lived in that apartment before she moved in it. . . . I said I lived two apartments below that one. . . . The Pattons lived there before she moved in." The only permissible inference arising on that evidence is that Annie Mae Walker lived in Apartment No. 1 and regularly slept there. Defendant himself told the jury, in effect, that the Walker apartment was a sleeping apartment. He never contended otherwise. His defense was alibi. In this context, the statement challenged by Exception No. 6, while erroneously invading the province of the jury, was not prejudicial. There is no reasonable possibility that the error complained of contributed to defendant's conviction, *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963), or that a different result likely would have ensued had the erroneous language been omitted. *See State v. Perry, supra.* Thus it was harmless beyond a reasonable doubt. There is no merit in Exception No. 6.

The questions raised by Exceptions 7 and 8 are not discussed in defendant's brief. No reason or argument is stated or

authority cited in support of these exceptions. They are therefore deemed abandoned under Rule 28, Rules of Appellate Procedure, 287 N.C. 679 at 741 (Appendix 1975). Defendant's fourth assignment of error is overruled.

Four permissible verdicts were submitted to the jury: (1) Guilty of first degree burglary, or (2) guilty of felonious breaking or entering, or (3) guilty of nonfelonious breaking or entering, or (4) not guilty. After defining and discussing the permissible guilty verdicts, the court summarized in the following language: "So, in this case, you may render one of the following verdicts: You may find the defendant guilty as charged of first degree burglary or you may find him guilty of felonious breaking or entering or you may find him not guilty; just as you find the facts to warrant from all the evidence in the case applying thereto the law as given to you by the court." By inadvertence the judge omitted from this summary nonfelonious breaking or entering as one of the permissible verdicts. This constitutes defendant's fifth assignment of error.

[11] The record reveals that in the final mandate to the jury the able trial judge corrected his inadvertence by defining, *for the second time,* the lesser included offense of nonfelonious breaking or entering, and by including it in the possible verdicts that might be returned. Thus the court's earlier inadvertence was rectified and any possible misunderstanding that might have been caused by it was removed. We regard the occurrence as completely lacking in prejudicial effect. Where, as here, the inadvertence complained of occurs early in the charge but is not called to the attention of the court at the time, and is later corrected, the occurrence will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled. *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). *See State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Withers,* 271 N.C. 364, 156 S.E. 2d 733 (1967). Defendant's fifth assignment of error is overruled.

[12] After summarizing the evidence and stating the contentions of the parties, the court charged the jury as follows:

> "Now, I have not given you all of the contentions of the defendant nor of the State. The contentions of counsel are one of the incidents of trial. [Counsel are officers of the court and the law makes it your duty to consider all of

the contentions made by counsel for the defendant and the district attorney for the State and to consider any other legitimate contentions arising out of the evidence *or lack of evidence* whether it has been called to your attention by the court or not.]" (Emphasis added.) EXCEPTION NO. 10

Defendant argues in his brief that it was the duty of the trial court to instruct the jury that it was entitled to consider any other contentions arising out of the evidence, *or lack of evidence,* whether it had been called to the jury's attention or not. To quote the brief: "By failing to instruct on the term 'lack of evidence,' the trial court committed prejudicial error and thereby committed grounds for a new trial."

Since the trial judge charged precisely what defendant contends he should have charged, it seems apparent that counsel has misread the record. In any event, prejudicial error is not shown in the portion of the charge embraced by this assignment. Defendant's sixth assignment is therefore overruled.

A careful review of the entire record reveals that defendant received a fair trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

Justice EXUM dissenting.

Defendant's primary defense was alibi. Indeed, even after verdict and judgment he proclaimed his total innocence. This was a jury question resolved by the jury against defendant under proper instructions.

There was, however, another jury question raised by the evidence upon which the jury was not properly instructed. The majority opinion accurately states the evidence of the prosecutrix. One reasonable interpretation of that evidence is that the intruder intended to persuade the prosecutrix to engage in consensual, albeit illicit, sexual intercourse. The factual basis for this interpretation is that upon the slightest resistance by the prosecutrix the intruder desisted from his attempt saying, "All I wanted was some sex."

The indictment for first degree burglary charged that defendant broke and entered with the intent to commit the crime

of rape. With regard to the *mens rea* of this crime the trial judge charged the jury that it must find that defendant "intended to commit the felony of rape, that is to have forcible sexual intercourse with [prosecutrix] against her will." No further explanation of the nature or quantum of force defendant intended to use was given.

Where the element of the force intended to be used is not really contested this bare bones definition might be enough. On the evidence in this case, however, it is prejudicially insufficient. "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)." *State v. Patterson,* 288 N.C. 553, 575, 220 S.E. 2d 600, 616 (1975) (Exum, J., dissenting).

The very nub of this case is the intent of defendant as he broke and entered. How much force, if any, did he intend to use to obtain sexual intercourse with the prosecutrix? Under the instructions as given the jury might have believed that the force involved in merely kissing and putting a hand over prosecutrix's mouth was the force referred to in the judge's instruction. The jury may have understood that if defendant *intended* to use only that "force" which was *in fact* used then he had the intent to rape necessary for conviction of burglary in the first degree. The law is, of course, otherwise; for if defendant *intended* to do only what was *in fact done,* i.e., kissing, putting a hand over prosecutrix's mouth and desisting upon her slightest resistance, he would not have had the requisite intent to rape.

The trial judge should have put the principal question in the case in clearer focus for the jury. He should have instructed that defendant, at the time he broke and entered, must have had the intent to have forcible sexual intercourse with the prosecutrix against her will *and* that the force he intended to use must have been force *sufficient to overcome any resistance*

she might make. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923); *cf.* N.C.P.I.—Crim. 207.11 (April 1974).

In *Allen,* a prosecution for burglary with intent to rape, the evidence was that prosecutrix was awakened at night by a cold hand touching her thigh under the bed covering. Her husband was also in bed with her. Defendant's evidence was that he was in a drunken condition and did not know what he was doing. The trial judge refused a requested instruction that the State must show an intent by defendant to accomplish his purpose, notwithstanding any resistance the prosecutrix might make. This was held to be reversible error. This Court said, *State v. Allen, supra* at 307, 119 S.E. at 506:

> "So, under the charge of a felonious and burglarious breaking and entering of the presently occupied dwelling-house or sleeping apartment of another, in the night-time, with intent to commit the crime of rape upon the person of any female therein, it is necessary, before the prisoner can be convicted of burglary in the first degree, to show the requisite, specific intent on his part, at the time of the breaking and entry, of gratifying his passions on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part."

The specific intent required to be proved in this case is identical to the specific intent required to be proved in prosecutions under General Statute 14-22 for assault with intent to rape. Justice Stacy cited as authority in *Allen* just such a case, *State v. Massey,* 86 N.C. 658 (1882). In prosecutions under General Statute 14-22 this Court has consistently held it to be reversible error to fail to instruct the jury that defendant must intend to use whatever force might be necessary to have sexual intercourse with the prosecutrix notwithstanding any resistance she might make. *State v. Moose,* 267 N.C. 97, 147 S.E. 2d 521 (1966); *State v. Heater,* 229 N.C. 540, 50 S.E. 2d 309 (1948); *State v. Walsh,* 224 N.C. 218, 29 S.E. 2d 743 (1944); *cf. United States v. Short,* 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954) and N.C.P.I.—Crim. 207.30 (June 1972). In *Moose* and *Walsh* there is nothing in the opinion to indicate that defendant requested that such an instruction be given and the instructions as given were construed to permit a guilty verdict upon a jury's finding of an intent to use some lesser degree of force or persuasion.

State v. Allen, supra, is distinguishable only in that here there was no request at trial for the correct instruction. I believe, however, that a defendant is entitled to full and complete instruction on an essential element of the offense charged even without request. N. C. Gen. Stat. 1-180; *State v. Ardrey,* 232 N.C. 721, 723, 62 S.E. 2d 53, 55 (1950); *State v. Merrick,* 171 N.C. 788, 795, 88 S.E. 501, 505 (1916); *cf. State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973).

Taken together, General Statute 1-180, *State v. Allen, supra, State v. Moose, supra,* and *State v. Walsh, supra,* require that defendant be given a new trial for failure of the trial court adequately to declare and explain the law relative to the requisite specific intent notwithstanding defendant's failure to make a request for such an instruction.

I vote for a new trial.

PAUL BILLINGS v. JOSEPH HARRIS COMPANY, INC.

No. 50

(Filed 14 July 1976)

Agriculture § 9.5; Uniform Commercial Code § 15— disease bearing seed purchased — disclaimer and limitation clause of seller effective to prevent liability

G.S. 25-2-316 providing for exclusion or modification of warranties is not in conflict with the N. C. Seed Law, and it clearly permits a seller of seed, just as a seller of other merchandise, to incorporate in his contract a disclaimer of any warranty of merchantability or of fitness for purpose, provided the language of the disclaimer mentions merchantability and the disclaimer is conspicuously written; therefore, defendant's disclaimer and limitation clause on a cabbage seed purchase order and on the outside of the package in which the seeds were shipped which was conspicuous and mentioned merchantability was effective to avoid liability of defendant for disease bearing seed sold to plaintiff.

ON *certiorari* to the Court of Appeals to review its decision, reported in 27 N.C. App. 689, 220 S.E. 2d 361, affirming partial summary judgment in favor of the defendant, entered by *Wood, J.,* at the 14 April 1975 Session of ALLEGHANY.

The plaintiff, a farmer in Alleghany County, brought this action against the defendant, a seed merchant having its principal

place of business in Rochester, New York. The action was removed on the ground of diversity of citizenship to the United States District Court for the Middle District of North Carolina. In that court the defendant moved for summary judgment. Hearing the matter on the pleadings, affidavits, evidence, briefs and oral argument, United States District Judge Ward determined that the United States District Court was without jurisdiction for the reason that "the plaintiff cannot, to a legal certainty, recover in excess of $10,000, exclusive of interest and costs," and ordered the case remanded to the Superior Court of Alleghany County.

In the Superior Court, the defendant moved for summary judgment of dismissal, alleging the plaintiff's claims are *res judicata* by reason of the judgment of the United States District Court and that there is no genuine issue as to any material fact and the defendant is entitled to summary judgment for failure of the complaint to state a claim upon which relief can be granted. The Superior Court heard this motion upon the record compiled in the United States District Court, made findings of fact, drew conclusions of law and adjudged "that partial Summary Judgment be and it is hereby entered against plaintiff and his claim is hereby dismissed except as to any claim he might have based upon defendant's express warranty that its seeds conform to the label descriptions as required by Federal and State Seed Laws, and in any event defendant's liability thereon shall be limited to the maximum amount of $440.00."

The complaint alleges in substance: The plaintiff, a farmer, grows cabbage commercially; he ordered from the defendant, through its salesman, a specified variety of cabbage seed sufficient to plant 50 acres; the defendant shipped cabbage seed to the plaintiff, who planted them in his seed bed and from there transplanted the cabbage plants to his field, using the normal and accustomed methods for planting, transplanting and caring for the seed, plants and growing crop; after transplanting, the growing plants were found to be infected with a disease called "Black Leg" and all of them rotted before harvest time by reason of such disease; "Black Leg" is caused by a fungus which is seed-borne; because of the disease of the plants the plaintiff experienced a total crop failure whereby he was damaged in the amount of $50,000; the defendant knew or should have known the purpose for which the seed were purchased—the growing of cabbage commercially.

The answer of the defendant admits that the plaintiff purchased from the defendant 23 pounds of specified varieties of cabbage seed for a total price of $440.00 plus shipping cost. The answer further alleges that the written order, signed by the plaintiff, constituting the contract of sale, specifically provided:

> "Notice to Buyer: Joseph Harris Company, Inc. warrants that seeds and plants it sells will conform to the label description as required under State and Federal seed laws. It makes no warranties, express or implied, of merchantability, fitness for purpose, or otherwise which would extend beyond such descriptions, and in any event its liability for breach of any warranty or contract with respect to such seeds or plants is limited to the purchase price of such seeds or plants.
>
> "Joseph Harris Company, Inc. further limits to the purchase price any liability of any kind on account of any negligence whatsoever on its part with respect to such seeds or plants.
>
> "By acceptance of the seeds or plants herein described, the buyer acknowledges that the limitations and disclaimers herein described are conditions of sale and that they constitute the entire agreement between the parties regarding warranty or any other liability."

The answer further alleges that this provision appeared legibly on the outside of the package in which the seed were shipped to the plaintiff. The answer pleads this contract provision in bar of the plaintiff's right to recover anything and further pleads it in limitation of the plaintiff's recovery, if any, to the sum of $440.00.

In answer to interrogatories submitted to him by the defendant, the plaintiff admitted that his copy of the order placed with the defendant contained the above quoted provisions set forth in the defendant's answer. He further acknowledged in answering such interrogatories that the seed shipped to him were of the variety ordered.

The printed order blank upon which the plaintiff's order for cabbage seed was submitted to the defendant bears prominently upon its face, immediately below the name and address of the plaintiff, the "notice to buyer" set forth in the defend-

ant's answer, the negation of warranties and the limitation of liability printed in capital letters throughout.

An affidavit of the defendant's president, submitted in support of its motion for summary judgment, states: Seeds sold by the defendant to the plaintiff were purchased by the defendant from Ferry Morse Seed Company of California. The 20 pounds so sold to the plaintiff were part of a lot of 150 pounds purchased by the defendant from the Ferry Morse Seed Company, which lot was, in turn, part of a quantity of 7,000 pounds sold by Ferry Morse. The defendant has had no indication of any disease discovered in any plants produced from seed contained in the 7,000 pound lot sold by Ferry Morse, all of which seed were grown in California. (Seed grown in California are unlikely to be infected with "Black Leg.")

The affidavit of Dr. Charles W. Averre, offered by the defendant in support of the motion for summary judgment, shows that Dr. Averre is the Extension Plant Pathologist of North Carolina State University, that he visited the plaintiff's cabbage field while the crop in question was growing thereon and found the crop to be a total loss due to "Black Leg," which is caused by a fungus known to persist in the soil and to be seedborne. The disease was reported "fairly prevalent that year" in the United States and was "widespread in Alleghany County." Dr. Averre was unable to give an opinion as to which of specified possible origins of the disease was the source of the fungus which caused the loss of the plaintiff's crop.

The 1953 Year Book of Agriculture, attached as an exhibit to the plaintiff's deposition, shows that the fungus which produces "Black Leg" subsists on infected plant debris for 1 or 2 years in the soil and in infected seed.

In opposition to the defendant's motion for summary judgment, the plaintiff introduced the affidavit of Roger Murdoch, Alleghany County Agricultural Agent. This was to the effect that he inspected the plaintiff's crop and found the 50 acre field "totally infested" with Black Leg, except for two or three rows on the edge of the field which rows had been planted with plants from a source other than the plaintiff's plant bed (i.e., a source other than the seed sold by the defendant). These two or three rows were not infected with the disease. The plaintiff's plant bed "was totally infested with the disease." This plant bed was on newly cleared, high ground and cabbage had never

previously been planted thereon or nearby, so that "it was not possible for there to have been any run-off across the land contaminating the plant bed from other lands upon which cabbage had been grown." In the opinion of Mr. Murdoch, "Black Leg" is the result of contaminated seed.

The Superior Court found as a fact that "both defendant's invoice and seed package" contained the above quoted disclaimer of warranty and limitation of liability which were "conspicuously placed thereon." The court concluded that the complaint, construed in the light most favorable to the plaintiff, states a claim for relief based upon breach of warranty but upon no other legal theory, that the disclaimer by the defendant was conspicuous, was communicated to the plaintiff and formed part of the contract, that, thereby, the defendant had effectively limited its liability for breach of warranty to the amount of the purchase price of the seed and, therefore, "to a legal certainty, plaintiff cannot recover in excess of $440.00 from defendant in this action." Accordingly, the Superior Court entered judgment as above stated.

In the statement of facts preceding the opinion of the Court of Appeals, it is said that the plaintiff admitted signing the purchase order. No such admission appears in the record. Perhaps the admission was made in the course of the oral argument in the Court of Appeals. The record does show the plaintiff signed his answers to the defendant's interrogatories and signed a verification of his complaint. His name appears on the order, in close proximity to the above quoted limitation of liability provision, in a handwriting which appears to be the same as that in the signatures to the answers to the interrogatories and the verification of the complaint.

In its opinion the Court of Appeals said:

> "While defendant argues that the order of the federal court, from which no appeal was taken, is *res judicata* as to the issues presented on this appeal, we do not decide that question. We affirm the judgment appealed from on the ground that defendant, by the disclaimer set forth on the order blank *which plaintiff signed,* limited its maximum liability to return of the purchase price of the seed. (Emphasis added.)

* * *

"Plaintiff further contends that he ought not [to] be bound by the provisions of the Uniform Commercial Code as he is illiterate. *It is admitted that he signed the order form.* The law appears well settled in this State that, in the absence of fraud, duress or undue advantage tending to mislead a party, when a person affixes his signature to a document he is bound thereby. [Citations omitted.] There was no showing of fraud, duress or undue advantage tending to mislead plaintiff." (Emphasis added.)

McElwee, Hall & McElwee by John E. Hall and Arnold L. Young for plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson, George L. Little, Jr., and Steven E. Philo for defendant.

LAKE, Justice.

The plaintiff relies upon our decision in *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971). That case is distinguishable from the present case for two reasons. First, there the defendant delivered the wrong kind of seed, whereas, in the present case, the plaintiff admits that he received the exact kind of seed he ordered. Thus, in the present case, there was no violation of the North Carolina Seed Law through false labeling of seed. In the Gore case, we held that a provision in the contract limiting the seller's liability for delivering falsely labeled seed to the purchase price of the seed was contrary to the public policy of this State as declared in the North Carolina Seed Law and was, therefore, invalid. That question is not involved in the present litigation. Second, as we expressly stated in the Gore case, the transaction there having occurred prior to the effective date of the Uniform Commercial Code in North Carolina, the provisions of that Act were not applicable to the Gore case. G.S. 25-10-101. Here the purchase of seed out of which the present litigation arose occurred after the Uniform Commercial Code took effect in this State. Thus the provisions of the Code do apply to this case.

The disclaimer of warranty clause, with which we are presently concerned, provides expressly that the seller makes no warranty of merchantability and no warranty of fitness for purpose and no other warranty except a warranty that the

seed conform to the label descriptions required by Federal and State Seed Laws. Thus, it excludes any warranty against the presence in the seed of a disease.

The printed order blank further provides that the seller's liability for breach of any warranty (i.e., warranty of conformity to the label description) is limited to the return of the purchase price. This latter provision is the one which we held contrary to the public policy of the State as declared in the North Carolina Seed Law in *Gore v. Ball, Inc., supra.* It is not involved in this action.

The Uniform Commercial Code, which took effect in this State on 30 June 1967, provides in G.S. 25-2-316:

> "*Exclusion or modification of warranties.*—(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (§ 25-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> "(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'
>
> * * *
>
> (4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§ 25-2-718 and 25-2-719)."

This statute is not in conflict with the provision of the North Carolina Seed Law referred to in *Gore v. Ball, Inc., supra.* It clearly permits a seller of seed, just as a seller of other merchandise, to incorporate in his contract a disclaimer of any warranty of merchantability or of fitness for purpose provided he

complies with the conditions stated in subsection (2). In the present case, the disclaimer clause complies with those conditions.

In G.S. 25-2-719 the Uniform Commercial Code provides:

"*Contractual modification or limitation of remedy.*— (1) *Subject to* the provisions of subsections (2) and (3) of this section and of *the preceding section* [25-2-718] on liquidation and limitation of damages,

"(a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, *as by limiting the buyer's remedies to return of the goods and repayment of the price* or to repair and replacement of nonconforming goods or parts; and

"(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

"(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

"(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable *but limitation of damages where the loss is commercial is not.*" (Emphasis added.)

In G.S. 25-2-718, referred to in the above quoted section, the Uniform Commercial Code provides:

"*Liquidation or limitation of damages; deposits.*—(1) Damages for breach by either party may be liquidated in the agreement but *only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach,* the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. * * * " (Emphasis added.)

Since in the present case we do not have any breach by the seller of a warranty of conformity to label, i.e., the type of

seed ordered was actually delivered, we express no opinion as to whether, where there has been such a breach, a limitation of the buyer to the recovery of the purchase price is "reasonable in the light of the anticipated or actual harm caused by the breach."

We note that the official comment to G.S. 25-2-719 by the committee which drafted the Uniform Commercial Code states:

> "Under this section parties are left free to shape their remedies to their particular requirements and *reasonable* agreements limiting or modifying remedies are to be given effect.
>
> "However, it is of the very essence of a sales contract that at least minimum *adequate* remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article *in an unsconscionable manner* is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. * * * " (Emphasis added.)

For the reasons hereinabove stated, we find no error in the judgment of the Superior Court prejudicial to the plaintiff, and the decision of the Court of Appeals affirming that judgment is, therefore, affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. THAROY DAVIS AND JOSEPH C. FOSTER

No. 68

(Filed 18 August 1976)

1. **Homicide § 12— indictment in statutory language — sufficiency to charge first degree murder**

A bill of indictment drawn in the words of G.S. 15-144 was sufficient to support a conviction of murder in the first degree.

2. **Constitutional Law § 31; Criminal Law § 80— discovery — fishing expedition — work product of police**

A defendant is not entitled to the granting of a motion for a fishing expedition nor to receive the work product of police or State investigators.

3. **Criminal Law § 98— defendant's presence at trial — rule not extended to pretrial hearings**

The strict rule that an accused cannot waive his right to be present at every stage of his *trial* upon an indictment charging a capital felony is not extended to require his presence at the hearing of a pretrial motion for discovery when he is represented by counsel who consented to his absence, and when no prejudice resulted from his absence.

4. **Constitutional Law § 30— 2 months between arrest and preliminary hearing — 3 months between preliminary hearing and trial — no denial of speedy trial**

Defendants were not prejudiced where the record showed that one was arrested on 2 February 1974 and the other on 4 February 1974, counsel was hired by one defendant's parents and appointed for the other defendant, a preliminary hearing was held on March 7 and trial took place during the 10 June 1974 session of superior court, neither defendant demanded a preliminary hearing earlier than March 7 nor a trial before June 10, and there was no evidence that the State purposely delayed defendants' trial or that any prejudice resulted to either defendant by reason of any delay in the proceedings.

5. **Criminal Law § 92— defendants charged with same crime — consolidation proper**

The trial court did not abuse its discretion in consolidating defendants' cases for trial where they were charged with the same crime.

6. **Criminal Law § 98— sequestration of witnesses — discretionary matter**

The sequestration of witnesses is a matter in the trial judge's discretion.

7. **Criminal Law § 87; Witnesses § 1— witnesses not on list furnished defendant — allowance of testimony discretionary**

Permitting witnesses, whose names were omitted from the list of potential witnesses furnished defendants prior to trial, to testify

was a matter within the discretion of the trial judge, not reviewable in the absence of a showing of an abuse of discretion.

8. **Jury § 7— jurors opposed to death penalty — challenge for cause**

The trial court did not err in allowing the State to challenge for cause four jurors, one of whom stated unequivocally that his mind was "made up" with reference to defendants' guilt or innocence, and three of whom stated without equivocation that their opposition to capital punishment was such that they would refuse to return a verdict of guilty of murder in the first degree even though the evidence satisfied them beyond a reasonable doubt of defendants' guilt.

9. **Homicide § 21— murder of store owner — robbery of store clerk — sufficiency of evidence**

In a prosecution of defendants for murder of a store operator during a robbery of the store employee, evidence was sufficient to be submitted to the jury where it tended to show that a clerk in the store identified defendants as two of the three men who were in the victim's store on the occasion of the robbery and homicide, the clerk related events which took place while the men were in the store, and the clerk's testimony tended to implicate all three in the robbery; a witness testified that on the day of the crime, from noon until 5:00 p.m., the defendants and two others were at her home, five miles from the victim's store; the father of one defendant testified that defendants and two others left his home, located four and one-half miles from the store, about 8:00 p.m. on the day of the crime; the brother of one defendant testified that after he, defendants, and another person left his father's house at 8:00 p.m. on the day they bought a jack for the other defendant's tape recorder and thereafter played basketball at a friend's house, they stopped at a store with a tree and gas tank in the yard, defendants went inside where they were joined a couple of minutes later by the fourth passenger in the car, leaving the brother alone in the car, and in two or three minutes the three came back to the car and drove away.

10. **Criminal Law § 87— voir dire examination — no leading questions**

In a prosecution for murder committed during the robbery of a store employee, the record reveals no extensive or prejudicial leading of the robbery victim by the solicitor on the *voir dire* to determine the competency of the victim's in-court identification of defendants.

11. **Criminal Law § 66— photographic identification — no impermissible suggestiveness**

A robbery victim's photographic identification of defendants was not the result of impermissible suggestiveness, nor did it result from procedures creating a substantial likelihood of irreparable misidentification where the evidence tended to show that the victim had ample opportunity to observe the defendants at the time of the robbery; on different occasions officers showed the victim at least 60 black and white photographs of black males and the victim identified none of these as being photographs of the men she saw in the store on the night of the crime, though on three occasions a photograph of each defendant taken from his high school annual was among those shown

her; about six weeks after the crime officers showed the victim albums containing color pictures of black males, and containing one current photograph of each defendant; the victim immediately identified defendants' photographs; and the officers at no time made any comment to the victim concerning the photographs being shown her or their progress in solving the case.

12. Criminal Law §§ 21, 175— preliminary proceedings — rules of evidence relaxed

In a hearing before the judge on a preliminary motion to determine the admissibility of evidence, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, though not suspended, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found.

13. Criminal Law § 66— voir dire on identification testimony — improper hearsay testimony — sufficiency of competent testimony to allow identification

Testimony on *voir dire* by a robbery victim that defendants were the men she saw in the store on the night of the crime was competent and sufficient evidence, unaided by the hearsay testimony of another witness on *voir dire*, to sustain the trial court's findings that the victim's identification of defendants "was based on her independent observation at the time and scene of the robbery and homicide and was not influenced or tainted by other identification acts or procedures prior to the calling of the case for trial."

14. Criminal Law § 116— failure of one defendant to testify — jury instruction — no error

Where one defendant made no request for a jury instruction on his failure to testify, but the trial court interrupted his charge to ask if defendant desired such an instruction, the court's subsequent statement to the jury that defendant had the election to testify or not as he saw fit and that his failure to testify should create no presumption against him was not prejudicial to the defendant who did testify in his own behalf, even though the court failed to add that the defendant's silence should not influence the jury's decision in any way and that his failure to testify should not be considered against the testifying defendant.

15. Homicide § 25— first degree murder — defendants acting together — instructions proper

In a prosecution for robbery and first degree murder when the trial court's charge is construed as a whole, the jury must have understood the judge to mean that if they were satisfied beyond a reasonable doubt that defendants were acting together while in the course of or attempt to rob the murder victim's store, and that either one of them shot and killed the victim both would be guilty of first degree murder, but the issue of the guilt of each defendant was to be considered individually.

16. Criminal Law § 126— polling the jury — ministerial act — performance by deputy clerk proper

Polling the jury is clearly a ministerial act which, even in a capital case, may be performed by the deputy clerk of court in the presence and under the supervision of the trial judge.

17. Criminal Law § 26; Homicide § 31— murder in perpetration of robbery — separate punishment for robbery improper

Since defendants were both convicted of common law robbery of a store clerk and robbery was used to prove an essential element of the charge of murder in the first degree of the store owner for which each defendant was also convicted and sentenced, separate judgments imposing additional punishment for the robbery cannot stand.

18. Constitutional Law § 36; Homicide § 31— first degree murder — death penalty invalid

Because the U. S. Supreme Court in *Woodson v. N. C.*, ... U.S. ..., invalidated the death penalty provisions of G.S. 14-17, the statute under which defendants were convicted and sentenced to death, each defendant's motion in arrest of judgment imposing upon him the death penalty must be allowed. Common sense and rudimentary justice demand that the maximum permissible sentence of life imprisonment now be imposed upon a person convicted of first degree murder or rape committed between 18 January 1973, the date of *S. v. Waddell*, 282 N.C. 431, and the enactment of Ch. 1201, N. C. Sess. Laws (1973, 2d Session 1974) which rewrote G.S. 14-17, and the contention that the only permissible punishment is a maximum of ten years' imprisonment under G.S. 14-2 is unrealistic.

APPEAL by defendants from *Lanier, J.*, 10 June 1974 Session of the Superior Court of LENOIR, docketed as Case No. 51 at the Fall Term 1974, argued as Case No. 34 at the Spring Term 1975.

In separate bills of indictment, drawn under G.S. 14-87 and G.S. 15-144 and returned 11 March 1974, each defendant was individually charged (1) with the robbery of Edna Barwick with firearms and (2) with the murder of George A. Grant on 28 December 1973. The four cases were consolidated for trial. In separate verdicts each defendant was found (1) guilty of the common law robbery of Mrs. Barwick and (2) guilty of the first degree murder of George A. Grant. Upon the verdicts of guilty of first degree murder each defendant received a death sentence; upon the verdicts of guilty of common law robbery each defendant received a sentence of ten years imprisonment to commence upon the expiration of the sentences in the murder cases. Each defendant appealed from the sentence of death directly to this Court under G.S. 7A-27(a). The appeal of each

from his conviction of common law robbery was certified to this Court under G.S. 7A-27(a) for simultaneous, initial appellate review.

Uncontradicted evidence tends to show that the deceased, Grant, was the owner-operator of a general merchandising store located in a rural area in Lenoir County. In the front store yard, which was well lighted, were two gas pumps and a large oak tree. Shortly before 8:30 p.m. on 28 December 1973, Mr. Grant was killed during the course of a robbery of the store. Mrs. Barwick, who was employed by him as a clerk, was working at the time.

Immediately upon the impanelment of the jury, the court conducted a *voir dire* hearing to determine whether Mrs. Barwick would be allowed to make an in-court identification. On *voir dire*, she testified as to her observation of the men who committed the robbery and murder and identified defendants as participants. (Mrs. Barwick's testimony in this regard was essentially the same as her later testimony before the jury and, for that reason, it will be stated only in the resume of the evidence presented to the jury.) Relevant to the admissibility of her in-court identification the evidence presented at the *voir dire* tended to show the additional facts set out below.

Mrs. Barwick testified as follows:

Thirty or forty minutes after the incident she told investigating officers, Deputy Sheriff Garris, and SBI Agent Slaughter, that the men who entered the store were kind of tall, in their early twenties, not clean shaven, and they had short Afro haircuts. One of them was wearing a yellowish toboggan with a red and green stripe around it.

In the days that followed Mrs. Barwick said, on at least ten diffferent occasions the officers brought her eight to twelve black and white photographs of black men. Some of these photographs were submitted to her more than once, but she was not able to identify any of them. On one occasion she viewed a lineup of ten young black men at the Wayne County jail. She told Garris that none of the men who were in the store at the time of the robbery was in that lineup, but that the face of the second man from the left resembled the one who wore the toboggan. (At this point in her testimony she indicated Joseph Foster.)

It was not until 15 February 1974, when Officers Garris, Slaughter, and O'Quinn showed her two colored "photographic lineups" (State's Exhibits 8 and 9) that she identified the pictures of Davis and Foster as two of the men who were in Sparky Grant's grocery at the time of the robbery. She said that when she saw those pictures she "just knew they were the ones." In answer to the solicitor's question, "Now, how positive are you of your identification of these two young men?" Mrs. Barwick answered, "I just know I'm sure, yes, I know I'm sure."

Upon cross-examination on the *voir dire* Mrs. Barwick was asked if she had seen a striking resemblance between any person in the color photographs and any person in the black and white photographs which had been exhibited to her before 15 February 1973. She replied that she thought she had seen some before but she wasn't positive until she saw the color photographs. Counsel for defendants then handed her State's Exhibits 2-A through 2-J, and she indicated that she now thought picture 2-I was a picture of one of the persons who came in Grant's store on 28 December 1973; that it bore such a striking resemblance to defendant Davis it could have been a picture of the individual who was in the store. (This picture was not a picture of Davis.)

Mrs. Barwick said further that at the time she was shown Exhibits 8 and 9 she had read in the paper that certain individuals whom she did not know had been arrested for the robbery and homicide in question and were in the Lenoir County jail. She did not ask the officers who brought her the pictures, or anybody else, if the two she selected were persons they had in jail, and nothing said to her at the time indicated that they were. On previous occasions when she had asked them "if they had any evidence or anything," they had always told her they could tell her nothing. She was never told that the suspects were persons living in the community.

At the conclusion of Mrs. Barwick's testimony on *voir dire* the court heard SBI Agent Slaughter. His testimony, both on *voir dire* and before the jury, with reference to the descriptions which Mrs. Barwick gave him, as well as her account of the events which followed their entrance, was substantially the same. It will be summarized hereafter.

SBI Agent Slaughter and Deputy Sheriff Garris both testified on *voir dire* with respect to the pretrial identification

procedures they employed. According to them, they talked with Mrs. Barwick several times a week over a period of seven weeks. On at least six occasions they showed her photographs. On three of these occasions, all before 15 February 1973, black and white pictures of defendants, taken from a three or four-year-old high school annual, were among those exhibited. These pictures were first included among a group of "loose" photographs, introduced in evidence on *voir dire* as State's Exhibits 3A through 3Z and 3A-1-2. Later Mrs. Barwick was shown these black and white pictures of defendants as part of various "albums." These albums (State's Exhibits 4, 5, 6, and 7) were manila folders in each of which had been pasted four to five black and white photographs of black males. S-4 contained defendant Davis' picture; S-5 contained defendant Foster's; S-6 contained both pictures; S-7 contained no picture of either. Mrs. Barwick failed to identify the black and white photographs of defendants either as part of the loose ones presented to her or when included in the albums.

At this point in the *voir dire* hearing, Deputy Garris testified that the police had arrested one James Hodges in late January in connection with the present crime. Over defendants' objections Deputy Garris stated that Hodges told him that he, along with defendants, was at Grant's store on 28 December. He was outside when he heard a shot. He ran inside and saw defendant Davis with a gun in his hand holding a white lady while Foster was taking money from the cash register. Acting pursuant to this information, police arrested Davis and Foster in early February 1974.

Upon their arrest, defendants were photographed in color and their pictures placed in two albums. (State's Exhibits 8 and 9.) On 15 February, Agent Slaughter and Deputy Garris showed those albums to Mrs. Barwick. They asked her to look at the pictures and determine whether she could identify anybody among them. There was no discussion of the photographs. After looking "a couple of minutes" she identified the photographs of Davis and Foster as being the two people who had been in the store on the night of the robbery. Several minutes afterwards, she said to Agent Garris, "These are the two that were in the store, aren't they?" He told her he could make no statement as to any identification she made, and the officers then left.

At the conclusion of the *voir dire,* Judge Lanier found facts relative to Mrs. Barwick's opportunity to observe the men who committed the robbery and homicide. He also made substantial factual findings concerning the pretrial identification procedures employed by Agent Slaughter and Deputy Garris which were summarized above. Judge Lanier concluded "as a matter of law" that Mrs. Barwick's in-court identification of defendants Davis and Foster was based on her independent observation at the time and scene of the crime and it was not influenced or tainted by other pretrial identification acts or procedures.

To this ruling each defendant objected and excepted to the findings as being insufficient to support the court's conclusion "relative to the in-court identification." Each defendant "renewed his motion to suppress the testimony and identification by Edna Barwick." Each defendant also objected to the court's failure to find certain evidentiary facts which they contended diminished the reliability of Mrs. Barwick's identification.

After the court's determination that her in-court identification would be admissible Mrs. Barwick, a 44-year-old widow of ten years, testified before the jury, in summary, as follows:

For eight months prior to 28 December 1973 she had worked as a clerk in the store of Sparky Grant, a 45-year-old married man living with his family. She had been Sparky's "girl friend" for ten years and was in love with him. On Thursday evening, 27 December 1973, they had closed the store at 9:00 p.m. and gone to her home, ten miles away. At 4:00 a.m. she drove him back to the store, where she left him at 4:30 a.m. and returned home. When she reported for work at 10:30 that morning she had had four hours sleep. Except for the hour between 1:00 and 2:00 p.m. Mrs. Barwick remained in the store until after Grant was shot about 8:30 p.m.

At approximately 8:10 p.m. Grant and Mrs. Barwick were preparing to close the store. He was in the storage room, and she was stocking the drink cooler when Julia Green, who lived in a trailer in the store yard, came in and made a purchase. After Julia left, her daughter, Sandra, came in and also made a purchase. When Sandra left, Mrs. Barwick went back to restocking the drink cooler, standing about two feet from the front door.

A short time after Sandra left, Mrs. Barwick "glimpsed up" and saw two bare headed black males come in the door. At

that time she did not "get a mental picture of what they looked like as individuals." One went to the beer cooler and one went back where she lost sight of him. This man she made no effort to describe or identify. However, she did see the one at the beer cooler, and she identified him as the defendant Tharoy Davis. She observed him pull back the door to the cooler, reach in with his right hand, and pull out a carton of Miller High Life beer. "I was looking at him," she said. At that time she thinks she did get a mental picture of him. She immediately filled the drink box and went inside the counter area to the cash register. At that time Grant was in the storage room.

It was only a few seconds after Mrs. Barwick lost sight of the man who went to the back that Davis placed the beer on the counter, and she "waited to put the beer in the bag and for him to pay [her]." She then faced him across the counter, a foot and a half away, and she observed him standing there. He had two or three dollar bills in his left hand but made no attempt to pay her. Mrs. Barwick's first effort to bag the beer was unsuccessful because the bag she had pulled from under the counter was too small. She got another and was putting the carton in the bag when she heard a loud gunshot in the back of the store. At that time there was nobody in the store but the two men, Grant, and Mrs. Barwick.

The shot was followed immediately by the sound or someone running from the back to the front of the store, on her left as she faced the back of the store. At the same time she was also conscious that the man who had brought the beer to the counter had moved and was "coming back of, to the inside of the counter" where she was. Then someone, whom she did not see, grabbed her from behind. She does not know who grabbed her because she did not see him but she thinks it was Davis, the man who was standing at the counter when the gun went off. He bent her head over with his body, and pulled her toward him. With his right arm around her he held both her arms so that neither was free.

Mrs. Barwick described herself at the moment as being "just scared to death" because she was afraid she was going to be shot. At that point someone snatched open the cash register, which contained between two and three hundred dollars, and she saw two hands taking out the money. At the time she was grabbed she heard someone enter the store, and a second

later she observed a third hand go into the register. In all, she saw three black hands remove money from the cash register, but at no time was she able to see whose hands they were although she was certain they belonged to three different people. The left hand of the person holding her went into the cash drawer. She saw another hand and a bare arm come across the counter where the beer was, and a third hand and arm came from the other side of the counter.

When all the money was withdrawn Mrs. Barwick heard two people leave the store. She turned and looked toward the door. There she saw a man, whom she later identified as defendant Foster, standing two or three feet from the door and three feet from her. He had on a yellowish toboggan with a green and red stripe around it, which he was trying to pull over his face. He was wearing baggy khaki pants and a faded blue jean coat. The man "stood there a few seconds trying to pull the toboggan down and then went out the front door running pretty fast." In all it was "just a few seconds" from the time she was grabbed before she saw Foster. At that time she got "a mental picture of him." In her opinion "the last one in the store and the last one out of the store was the same person."

Mrs. Barwick never saw either defendant or anyone else with a gun. She had never seen either one before the time of the robbery, and the individual who brought the beer to the counter never spoke a word to her.

As soon as the men left, Mrs. Barwick ran to the back of the store where she found Sparky lying on the floor dead. He had been shot in the temple.

Mrs. Barwick's first act was to call the Goldsboro telephone operator, seeking emergency assistance. At that time it was about 8:30 p.m. She then went to Julia Green's trailer. After telling Julia and her friend, Ed Sutton, that Sparky had been shot and requesting them to call the sheriff or the rescue squad, she returned to the store. After a few minutes alone at the store Mrs. Barwick, feeling so "nervous and shocked" that she "couldn't stand it longer," went back to the trailer somewhere between 8:30 and 8:45 p.m. and asked Julia and Sutton to come and stay with her. At her request Julia called Grant's brother, and Sutton called Mrs. Grant.

In due course Lenoir County Deputy Sheriff Garris and SBI Special Agent Slaughter came to the store. Mrs. Barwick

tried to tell them, as best she could, what had happened and to describe the persons who were in the store at the time of the shooting and robbery.

She told the officers that the three young blacks came into the store and she described two of them. The one she saw in the door, she described as wearing a beige or yellowish toboggan with a green and yellow stripe around it, khaki pants, and a faded-out blue jean coat. The one who got the beer looked like "he might have had a short Afro haircut" and looked like he was "kind of tall." He wore a blue knit shirt and dark pants, and didn't look "two clean shaven."

In response to the solicitor's questions Mrs. Barwick stated that she was positive "that the defendant Tharoy Davis was in Sparky Grant's grocery store on the night of December 28, 1973, purchasing beer at the time of the gunshot." She said she was also positive that "the defendant, Joseph Foster, was in Sparky Grant's grocery store near the door very shortly after the gunshot on the night in question."

Julia Green testified that she went to the store about 8:05 p.m., stayed only a few moments, and returned home. Her daughter, Sandra, went to the store immediately thereafter and was gone only several minutes. At about 8:30 p.m. Mrs. Barwick came to her trailer visibly shaken and crying. Mrs. Barwick told her "that three colored guys had shot Sparky." Julia's daughter, Sandra, testified that when she went to the store she saw Mr. and Mrs. Bowden, whom she knew. He was sitting in a big green car near the gas pumps. In the store she saw Mrs. Bowden with whom she later went outside. At that time Mr. Grant was outside the store at the ice machine getting Mrs. Bowden some ice. The Bowdens drove away.

Clarence Jones, Jr., a witness for the State, whose name was not furnished to defendants prior to trial, testified over their objection, in summary, as follows:

Around 8:00 p.m. on 28 December 1973 Jones left his home and drove three miles to Sparky Grant's grocery store. As he went into the store yard he saw a late model Mercury, either blue or green, leave the gas pumps. He saw no other vehicles in the immediate vicinity of the store. As he entered the store he saw Mrs. Barwick and Sparky Grant standing at the counter together. They were not engaged in conversation, and the place

seemed very quiet to him. When he spoke to them and remarked that he wanted something to eat they made no response. During the five or six minutes he was in the store buying some cakes and bananas, Sandra Green came in and made a purchase. To his knowledge, only Mr. Grant, Mrs. Barwick, and Sandra Green were in the store.

John D. Foster, the 20-year-old brother of defendant Joseph Foster, aged 21, and a first cousin of defendant Davis, was also under indictment for the murder of Sparky Grant. He was not tried with defendants but was called as a witness for the State. He gave testimony on direct examination which tended to show:

On Friday, 28 December 1973, he and Joseph were home on leave from the Army. John D. was staying with his friend, Ethel Mae Leftwridge; Joseph, with Tharoy Davis' mother, his aunt. During the afternoon of December 28th, John D., Joseph, Tharoy, and James Hodges, the 20-year-old brother of Ethel Mae Leftwridge, got together at Central Heights near Goldsboro. At that time John D. was "pretty well high." James Hodges, whose nickname is "Juney Boy," had also been drinking but not as much as John D. They all "went somewhere," first into Goldsboro to get a jack for Tharoy's tape recorder and then to Kinston, in Tharoy's white 1967 Mustang. Tharoy drove; Joseph sat on the front seat by him; John D. and Juney Boy occupied the back seat. They went to the home of Jack Foster, the father of John D. and Joseph, who lives in Lenoir County near Seven Springs, several times before they found him there about dark.

After 8:00 p.m. the four left Jack Foster's and started home. En route they stopped at a store in the yard of which was a gas tank and a tree, which could have been a pecan or an oak. Tharoy and Joe got out and went in the store. They had been gone a couple of minutes when James got out of the car. John D. remained in the back seat partly asleep. He believes James went in the store, for he came back and asked him for a dime to get a pack of cigarettes. John D. did not give him any money. James again left the car and in about two or three minutes they all came back. The car then went straight to Goldsboro. Tharoy "drives pretty fast and he took off regular, like he usually does." John D. "just fell off to sleep and did not hear any discussion in the car." John D. said that he was sure Tharoy Davis and Joseph Foster went in the store first and together and that Hodges went in thereafter.

On cross-examination John D. stated that he was "first arrested for this" on 3 February 1976 at Fort Jackson and brought back to Kinston; that he had discussed his testimony in this case with his own attorney and with the solicitor; that he was testifying for the State because he wanted to get out of jail; that because of statements which had been made to him concerning his testimony he hoped the case against him was going to be dismissed, and he believed it would be. His further testimony on cross-examination, summarized, except when quoted, tended to show:

The first day he was in the Kinston jail he told Special Agent W. L. Slaughter of the SBI that while he was at home on furlough in December he saw Tharoy Davis on the *Thursday* after Christmas and requested Tharoy to take him and Juney Boy to see his father, Jack Foster. Tharoy and Joe "had agreed" to do it. When they went they left the Central Heights area in the afternoon. He and Juney Boy had been drinking all the morning. After spending some time in Goldsboro the four arrived at Jack Foster's house in the late afternoon. He was not at home; so they went to Newman's Store to inquire about him. From there they went to Lou Kornegay's home where Tharoy, Joseph and Juney Boy played basketball until dark. From there they went to Uncle Smith's house for twenty minutes before returning to Jack Foster's home. He had just come in from a hog killing. Thereafter John D. and Joseph cut some firewood for their father and about 8:00 p.m. they left.

John D. further testified that at no time while he was with the other three that day did he see any guns or hear anyone discuss robbing a store. He did not see Tharoy or Joe with money in their hands, wadded up. He did not recall at what store they last stopped or how long they were there. He heard no gunshot on any occasion, and whenever they went back to Goldsboro they may have driven "a little bit faster, not much so. It was late at night." None of the four had a large Afro haircut, and all were clean shaven.

John D. also testified: "While we were at my father's house, my father asked Tharoy and Joe to come back on Saturday and take him and Mildred [his wife] to Farmville to Mildred's parents' house."

On redirect examination John D. said: "While we were at my dad's place I know that somebody tried to borrow some

money, just enough to get a loaf of bread. Me, Tharoy Davis, Joseph, my father and James, all tried to scrape up and get a loaf of bread. . . . " When questioned about whether he had accompanied defendants to Jack Foster's home on Thursday the 27th or Friday the 28th, he stated, "I talked to Tharoy Davis on Thursday. And he picked me up the next day. I don't know what day it was he picked me up."

Over defendants' objections John D. further testified that last summer—it could have been in the tobacco season—he saw Joseph with a .38 pistol. It was in a holster "just laying in the foot at the boot of his car."

Lucinda Carol Kornegay testified that she lived about five miles from Sparky Grant's grocery and that she knows Jack Foster, John D. Foster, Joseph Foster, Tharoy Davis, and James Hodges. On Friday, December 28, 1973, between 3:00 and 3:30 p.m., they came to her house in a white Mustang, and John D., Tharoy and Joseph played basketball until leaving at about 5 p.m.

The testimony of Jack Foster, the father of John D. and Joseph Foster, tended to show: He (Jack) lived four and one half miles from Sparky Grant's grocery. On Friday afternoon, 28 December 1973, he killed hogs for Mr. Nathan Hardy. Jack got home about 7:00 p.m., and thirty minutes later, Joseph, John D., Tharoy, and a boy Jack didn't know came to his house. This boy "had a boggan, tam, or what it looked like. . . . It was dark looking, it was about dark when they came there." While there John D. cut some wood for his father and unsuccessfully tried to borrow some money from him. Jack told Tharoy that he and his wife wanted to go to Farmville on Saturday, and Tharoy agreed to take them. After having something to eat the boys left at 8:00 p.m., and Jack did not see any of them again until Saturday morning when Joseph and Tharoy came by to take him and his wife to Farmville.

The State called as a witness William E. Smith, a deputy sheriff of Lenoir County, whose name was not on the list of witnesses furnished defendants prior to trial. Smith, who was the first officer to arrive at the scene, was substituted for Deputy Sheriff Pelletier, who became unable to testify after

the trial began. Over defendants' objection he testified, in substance, as follows:

On the night of December 28th he was on duty in the Seven Springs area of Lenoir County. About 8:23 p.m. he received a call to go to Sparky Grant's grocery to investigate an armed robbery and shooting. Upon his arrivel he saw Julia Green and Mrs. Barwick standing in the store yard. Mrs. Barwick came to his car and said, "He's been shot." She further advised him that she had been robbed. Upon entering the store he saw a six-pack carton of Miller High Life beer on the counter, the open cash register with only a few pennies in it, and some money on the floor. In the back of the store he found Sparky's body.

Mrs. Barwick then told Smith that three colored males had been involved. She described the first one "as being slender built with a blue jean jacket and blue jean trousers and a light beard. It looked like he hadn't shaved; it wasn't thick." The second man, she said, had a medium-light complexion, was heavy set, small and "the hair was not too short." The third man was taller and slender and dark skinned. Smith made no notes of what she told him, and he instructed her to wait and give the information to Deputy Sheriff Garris and the other officers when they arrived.

William S. Slaughter, Special Agent of the SBI and Deputy Sheriff Garris arrived at the store about 9:43 p.m. The body had been removed. They found Deputies Smith and Pelletier and Mrs. Barwick there. As Slaughter entered the store he saw a six-pack of Miller High Life beer in a paper bag on the left counter. He also observed two one dollar bills and a quarter on the opposite side of the counter, the right side. On the counter back of the cash register he found an opened pack of Kool cigarettes.

Slaughter's testimony as to what Mrs. Barwick (whom he described as "very upset") told him had occurred follows:

"She stated that at approximately 8:15 two black males entered the store; that one black male went to the rear of the store and another one went to the beer cooler; that the one at the beer cooler obtained a six pack of Miller High Life bottled beer and brought it back to the counter and he was paying for it or had four $1.00 bills in his hand and she was attempting to put a bag over the beer when she heard a loud noise; that

one of the Negro males grabbed her and held her and she heard the one in the back of the store going to the front of the store."

At this point the record discloses the following:

"Mr. Spence [attorney for Joseph Foster]: Request instructions, your Honor. No Ruling. The defendants each object and except to the Court's failure to rule. Exception No. 540."

Mr. Slaughter then continued his account of what Mrs. Barwick had told him. She had said that while one was holding her a third Negro male entered the store. The first one who went to the back of the store was in his early twenties, about five feet, six to eight inches tall, "medium but muscular built," dark complexion, round facial features, wearing dark clothes, hair cut "about a three-inch Afro." However, on cross-examination, Slaughter said that term was his; that Mrs. Barwick hadn't said "Afro." When he asked her to estimate the length of the hair "she held her fingers at approximately this height" (witness demonstrated with two fingers). She told Slaughter that the second individual was also in his early twenties, about the same height and build, dark complexion, and had "a medium Afro." He wore dark clothes, a pullover sweater or shirt with buttons down the front. The third individual was described as tall and heavier built. He had a lighter complexion and was wearing a yellow toboggan with green stripes around it and a waist-length jacket.

According to Slaughter the approximate height of Joseph Foster is five foot, seven and a half inches tall and his complexion is dark. His approximate weight is 135-140 pounds. Tharoy Davis is approximately five feet, ten or eleven inches tall, and his complexion is medium to dark.

In the course of his examination of the premises Slaughter photographed the inside of the building and did "latent lift work," which is an attempt to recover latent fingerprints. He recovered prints from the carton of beer on the counter and the beer cooler. He was unable to get any from the cash register, the counter, or the package of Kools. His search of the premises revealed four firearms in the store—two .22 caliber rifles in the corner of the bedroom, a .22 caliber pistol underneath the mattress, and a .22 caliber pistol underneath the counter below the cash register. In Grant's truck in the store yard he found a gun or rifle. He also found a pistol in Mrs. Barwick's car and a .22 caliber, semi-automatic rifle at her home.

On the morning of December 29th Agents Slaughter and Bailey watched Dr. Nye and Dr. Hillman perform the autopsy upon the body of Sparky Grant. Bailey testified that, upon examining the wound he concluded it was inflicted by a .38 caliber bullet. Dr. Nye pointed out to them the path of the bullet, and they observed that the exit wound was in the top of the head. Acting upon this information he and Slaughter returned to the store to search for the projectile which killed Grant. Once there Slaughter started looking for the bullet. In consequence, he found a .38 caliber bullet hole on the 7th window and then found the bullet. A thorough search of the floor area of the store revealed no cartridge casings.

On January 3, 1974, Slaughter and Bailey acquired from Mrs. Barwick the purple blouse she was wearing on the night of December 28th. Bailey took it, the latent fingerprints and firearms from the store and also those belonging to Mrs. Barwick to the SBI Laboratory in Raleigh. There F. M. Hearst, Jr., an expert in firearms and toolmark identification, examined the .38 caliber bullet taken from the window casing and concluded that it could not have been fired by any of the six weapons Slaughter had collected. Mr. Glenn Glesne, an expert laboratory analyst in the field of chemistry, blood and body fluids, analyzed the purple blouse which Mrs. Barwick was wearing the night of the homicide and obtained negative results for blood and gunpowder particles.

Stephen R. Jones, an expert in the identification of fingerprints, testified that he got fingerprints from the deceased, Sparky Grant, Mrs. Barwick, and defendants Davis and Foster. He examined the eight latent fingerprints submitted to the SBI Laboratory by Agents Slaughter and Bailey. He was able to identify two of them as the prints of Mrs. Barwick from the carton of Miller High Life beer and two as the prints of Grant from the package of Kools. The other four lacked sufficient characteristics to make any identification whatever.

Dr. S. W. Nye, an expert pathologist, testified that for the bullet which killed Grant to have left such powder burns on his face, it was "fired at a distance of greater than 12 inches and perhaps less than 24 inches." In his opinion it was a .32 caliber or larger. It could have been a .38 caliber. He did not believe it was as small as a .22 caliber.

At the close of the State's evidence each defendant moved to dismiss the charges against him for insufficient proof and renewed his motion to strike the testimony of Mrs. Barwick. The motions were denied and defendants offered evidence.

The testimony of defendant Tharoy Davis, except when quoted, is summarized below:

He is 19 years old and a native of Goldsboro. Having dropped out of school in the twelfth grade, he joined the Army in September 1973. Immediately after he finished his basic training he purchased a 1967 white Mustang. In December 1973 his hair was short—"not even an inch long"—, and he had no beard.

Tharoy has never seen, or been in Sparky Grant's store. He never saw Sparky, and he had never seen Mrs. Barwick prior to the preliminary hearing in this case. He did not go into Grant's grocery on either Thursday or Friday, December 27th or 28th. Neither he nor anyone in his car had a gun on either of those days, and he was not present on any occasion during the 1973 Christmas holidays when a store was robbed or a storekeeper shot.

He came to his mother's home in Goldsboro on 18 December 1973 from Fort Gordon, Georgia, where he was stationed. His cousin, Joseph Foster, who also lived with his mother, arrived on December 19th from Fort Dix, New Jersey.

About 2:30 p.m. on the Thursday after Christmas, Tharoy and Joseph, riding in Tharoy's white Mustang, picked up John D. and Juney Boy Hodges, both of whom had been drinking. John D. requested Tharoy to take him to see his father, Jack Foster. After a stop in Goldsboro to purchase a jack for Tharoy's tape recorder, the four drove to Jack Foster's home in Lenoir County. Jack was not there so they went to James Kornegay's house, where everybody played basketball until "dusk dark" except Tharoy "and the Kornegay dude,"who kept shooting by the porch light. When they left, being thirsty from playing basketball, the group drove to Rock Newman's store. "There is not a big oak tree near that store." Tharoy had only twelve cents; so he asked Joseph to buy him a soda.

From Newman's store they went to the home of John Smith to see his daughter Catherine, who was a cousin of Joseph and John D. Foster. After about an hour and forty-five minutes

with the Smiths, about 8:00 p.m., the four returned to the home of Jack Foster. They found him sorting scraps from some hogs he had killed. They stayed at Jack Foster's "a good two hours or two and a half hours more." John D. and Joseph helped their father chop some wood, and Tharoy promised to take Jack and his wife to Farmville on Saturday. At 10:30 p.m. they left and returned to Goldsboro without making any stops. They "dropped John D. and Juney Boy off at Central Heights," where they lived, and at 11:00 p.m. they returned to the home of Tharoy's mother, who was waiting up for them.

The following morning, Friday, December 28th, Tharoy and Joe slept until 11:00, when Mrs. Davis fixed breakfast for them. About noon Tharoy and Joseph took the white Mustang to a truck stop at which his brother-in-law, Rufus McColl, worked as a mechanic. With McColl's help he and Joseph put some fog lights and silver dust flaps on Tharoy's car. From there Tharoy and Joseph went to Raeford, where they visited the Campbells, nephews and nieces of his sister. They also went to the home of Mabel Bullock, where they stayed until 11:00 p.m. before returning to Goldsboro.

According to arrangements he had made with Jack Foster on Thursday Tharoy went with Joseph to Jack's home on Saturday and drove Jack and his wife to Farmville. He returned them to their home about 4:30 p.m., and he and Joe then drove back to Goldsboro without stopping. He remained in Goldsboro until 5 January 1974, when his leave was up.

In response to a phone call from his mother he came back to Goldsboro the following week and "learned that someone named Bob Garris was looking for him for doing something that he hadn't done." He called Mr. Garris and inquired what he wanted with him. He was told they just wanted to ask him a few questions, and he talked with Garris and Slaughter in Goldsboro. He "was not afraid right then because he knew he hadn't done anything. He later did become afraid." With reference to their questions Tharoy testified: "I told them I was at Jack Foster's house on Friday, December 28th. That statement is true in a way and false in a way. . . . I told them that I was at Jack Foster's house but I didn't tell them that I was there on the 28th. . . . I didn't mean the 28th, I told him that I came there but not on the 28th."

With reference to John D.'s testimony, that after they left the home of Jack Foster they stopped at a store which had a big oak tree in the yard, Tharoy said, "John D. must have been talking about Mr. Rock Newman's store when he referred to a big tree." However, he also said, "There is not a big oak tree near that store." With reference to Jack Foster's testimony that the defendants left his home about 8:00 p.m. on Friday, December 28th, and that Tharoy took him to Farmville on the following day, Saturday, the 29th, Tharoy said that Jack Foster is an alcoholic who was drunk when he took him to Farmville and that "he is telling a story on me." With reference to the testimony of Lou Kornegay he said that she probably deliberately lied on him; that she didn't like him "no way." He said that he failed to tell the officers that he went to Raeford on December 28th because he couldn't think; that this was his first time in trouble and he was confused; that he did not know what was going on.

Mabel Bullock, called as a witness by defendant Davis, testified that Tharoy and Joseph came to her home in Raeford to see her daughter Patricia about 8:00 p.m. on 28 December 1973; that neither had long hair nor an Afro. She was in their presence for about an hour, and they left sometime between 9:00 and 10:00. She had never seen either one before that night. They were both well mannered and behaved during the time they were in her home.

Rufus McColl, called as a witness by defendant Davis, testified that he is married to Tharoy's sister. On the Friday after Christmas, December 28, 1973, Tharoy and Joseph came to the 117 truck stop in Goldsboro, where he then worked, to borrow an electric drill from him. He lent them the drill and showed them how to put fog lights on Tharoy's white Mustang and how to adjust his muffler. When he left the truck stop premises at 2:00 p.m. Tharoy and Joseph Foster were still there. That night about 8:00 he saw John D. Foster and Juney Boy Hodges in Central Heights.

Defendant Foster's evidence consisted of the testimony of Jacqueline Terresa Jackson. In substance she said that on Friday, 28 December 1973, she went from Charlotte to the home of Mabel Bullock in Raeford, arriving there about 5:00 p.m.; that about 7:30 p.m. she and Patricia Bullock encountered Joseph Foster at a neighborhod store. He offered to take them

"down the street because he was going that way." He took them two doors past Patricia Bullock's house to the home of Patricia Campbell, where he had left Tharoy. He and Tharoy came back at 8:00, and they sat around in the dining room and talked until 9:30, when Joseph, Tharoy, and the two Patricias went across the street to a club until 11:30. At that time Tharoy and Joseph left the club. The two Patricias remained there until about midnight.

At the close of all the evidence each defendant renewed his motion for a judgment of nonsuit and to suppress the testimony of Edna Barwick. These motions were denied.

Judge Lanier submitted to the jury the question of each defendant's guilt of armed robbery or common law robbery and of murder in the first degree. With reference to the indictments for murder the judge charged the jurors that if they were satisfied beyond a reasonable doubt that either Tharoy Davis or Joseph Foster shot and killed George A. Grant while they were committing, or attempting to commit a robbery each would be guilty of murder in the first degree.

After deliberating an hour and a half the jury found each defendant guilty of common law robbery and murder in the first degree.

Rufus Edmisten, Attorney General, and Lester V. Chalmers, Assistant Attorney General, for the State.

John E. Duke for Tharoy Davis, defendant appellant.

William D. Spence for Joseph C. Foster, defendant appellant.

SHARP, Chief Justice.

In the record on appeal defendant Foster lists 103 assignments of error. Of these he brings forward 19, setting them out in his brief in the manner required by Rule 28, Rules of Practice in the Supreme Court, N.C.G.S. Vol. 4A, Append. I (1970). Defendant Davis lists 104 assignments, all except No. 104, being identical in number and content with those of Foster. Davis has attempted to bring forward all but three of his assignments. In general disregard of Rule 28, Rules of Practice in the Supreme Court, he has attempted to correlate all 101 of them within seven groups. He essayed an impossible task—as would

we were we to undertake to accommodate this opinion to any such categorization. Our consideration of the record and briefs, however, reveals that relatively few require consideration. In the beginning, we dispose of the 12 assignments (abandoned by Foster) which Davis marshals in his Groups I and II.

Group I assignments, all but one of which involve pretrial motions, are that the court erred (A) in refusing to quash the bill of indictment; (B) in refusing to allow defendants' motion for discovery "in its entirety"; (C) in hearing defendants' discovery motions without the presence of Davis; (D) in failing "to hold a preliminary hearing until after defendant had been in jail several weeks"; (E) "in refusing to dismiss for lack of a speedy trial"; (F) in granting the State's motion to consolidate Davis's trial with that of Foster; and (G) in refusing defendants' motion to sequester the witnesses.

Neither error in the court's rulings on these motions nor prejudice resulting therefrom has been made to appear.

[1] (A) The bill of indictment was drawn in the words of G.S. 15-144. It was, therefore, sufficient to support a conviction of murder in the first degree. *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972), *modified,* 283 N.C. 99, 195 S.E. 2d 33 (1973).

[2] (B) The court's order upon defendants' motions for discovery entered under the then applicable statute, G.S. 15-155.4 (N.C.G.S. Vol. 1C, Cum. Supp. 1974) (repealed by 1973 N. C. Sess. Laws c. 1286, § 26) made available to them all information to which they were entitled. Had the court allowed either of the defendants' motions "in its entirety" he would have had to require every law enforcement officer who worked on this case to compile a daily log of his activities throughout his investigation and the State to surrender, without discrimination, its entire work product. For instance, Davis demanded "any and all statements made by any persons to the investigating officers"; and Foster demanded "a list of the names and addresses of all persons interviewed by agents of the State which the State [did] not intend to produce as witnesses at the time of trial, and the specific reasons why the State [would] not call said witnesses." A defendant is not entitled to the granting of a "motion for a fishing expedition nor to receive the work product of police or State investigators." *State v. Davis,* 282 N.C.

107, 111-12, 191 S.E. 2d 664, 667 (1972). *See State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972).

[3] (C) The record discloses that the order entered upon defendant Foster's motion for discovery was made applicable to Davis by consent of his counsel. Further, the following statement appears in Davis's brief: "Although defendant's attorney admittedly made no request that the defendant be allowed to be present at the hearing before Judge Browning . . . it is submitted that the Court erred in not requiring the defendant's physical presence." Not so. The strict rule that an accused cannot waive his right to be present at every stage of his *trial* upon an indictment charging a capital felony, *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969), is not extended to require his presence at the hearing of a pretrial motion for discovery when he is represented by counsel who consented to his absence, and when no prejudice resulted from his absence. *See Brown v. State*, 225 Md. 349, 170 A. 2d 300 (1960); Annot., "Presence at Trial—Law Argument," 85 A.L.R. 2d 1111 (1962).

[4] (D)-(E). The record reveals Davis was arrested on 2 February 1974 and between then and February 12th (exact date undisclosed) his parents employed Mr. John E. Duke to represent him. As privately employed counsel, Mr. Duke represented Davis at his preliminary hearing on March 7th and at his trial during the week of June 10th. After Davis's conviction and upon his affidavit of indigency, on June 16th the court appointed Mr. Duke to represent him on appeal to this Court. Defendant Foster was arrested on 4 February 1974, and, on 6 February 1974, Mr. William D. Spence, his present counsel, who has represented him throughout, was appointed as his attorney. The record discloses no request or demand by either defendant for a preliminary hearing earlier than March 7th nor for a trial before June 10th. Further, it is not suggested that the State purposely delayed defendants' trial or that any prejudice resulted to either defendant by reason of any delay in the proceedings. *See State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). *State v. Ball*, 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965).

[5] (F). The State's motion to consolidate the trial of the two defendants was addressed to the sound discretion of the presiding judge, and there is no basis for a contention that he abused

his discretion. "Ordinarily, consolidation is appropriate when the offenses charged are of the same class and are so connected in time and place that evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other(s)." *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 414, 177 S.E. 2d 874, 876 (1970). Obviously this is such a case.

[6] (G). The sequestration of witnesses is likewise a matter in the trial judge's discretion and the record suggests no abuse. *See State v. Clayton,* 272 N.C. 377, 385-86, 158 S.E. 2d 557, 563 (1968).

[7] Included in Group I is Davis's assignment No. 3, that the court erred in permitting Clarence Jones, Jr., and Deputy Sheriff William E. Smith (witnesses for the State whose names were omitted from the list of potential witnesses furnished defendants prior to trial) to testify. It is apparent from the record that the omission of the names of these two witnesses neither deprived defendants of a fair trial nor resulted in any prejudice to them. The testimony of Clarence Jones in no way implicated either defendant in the robbery and murder at Grant's grocery. Deputy Sheriffs Smith, Garris, and Pelletier, and SBI Agent Slaughter were the officers who made the preliminary investigation at the store on the night of the homicide. Smith was called as a witness to substitute for Pelletier, whose name was on the list but who had become unable to testify during the trial. Bad faith on the part of the State in omitting the names of Jones and Smith is not indicated. Permitting these witnesses to testify was a matter within the discretion of the trial judge, not reviewable in the absence of a showing of an abuse of discretion. *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975). None has been shown. This misplaced assignment is without merit and is also overruled.

[8] Defendant Davis's Group II assignment of errors challenge the court's ruling allowing the State to challenge four jurors for cause. One stated unequivocally that his mind was "made up" with reference to defendants' guilt or innocence. As we interpret the answers of the other three challenged jurors to questions put to them by the solicitor on *voir dire,* each stated without equivocation that his opposition to capital punishment was such that he would refuse to return a verdict of guilty of murder in the first degree even though the evidence satisfied

him beyond a reasonable doubt of defendants' guilt. The four challenges were properly allowed. *See State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Bernard*, 288 N.C. 321, 218 S.E. 2d 327 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974). *See also State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976).

[9] Assignment No. 77 is that the judge erred in overruling defendants' motions of nonsuit. The State's evidence, which we have taken pains to set out in considerable detail in the preliminary statement, was clearly sufficient to withstand these motions. Measured by the applicable and oft-stated rule *(see State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966)), the testimony of the following witnesses sufficed to take the case to the jury on the question of defendants' guilt of the felony murder for which they were convicted: (1) Mrs. Barwick's identification of defendants as two of the three men who were in Grant's store on the occasion of the robbery and homicide and her chronology of the events occurring while they were in the store, which tended to implicate all three in the robbery; (2) Lucinda Carol Kornegay's testimony tending to show that on Friday, 28 December 1973, from noon until 5:00 p.m. the defendants, John D. Foster, and Hodges were together at her home, five miles from Sparky Grant's store; (3) Jack Foster's testimony that defendants, John D. Foster, and Hodges left his home, located four and one-half miles from the store, about 8:00 p.m. on 28 December 1973; and (4) the testimony of John D. Foster that, after he, defendants, and Hodges left Jack Foster's home about 8:00 p.m. on the day they got a jack for Tharoy's tape recorder and thereafter played basketball at Lou Kornegay's house, they stopped at a store with a tree and a gas tank in the yard; that Tharoy and Joe Foster went into the store and "a couple of minutes later" Hodges went in leaving him alone in the car; that in two or three minutes thereafter the three came back and Tharoy drove straight to Goldsboro.

Defendants' evidence, which tended to show that on 28 December 1973 at the time of the robbery and homicide in question they were in Raeford and that John D. Foster and Hodges were in Central Heights, was inconsistent with the State's evidence. It was therefore not for consideration in passing upon the motion for nonsuit. *See* 2 Strong's N. C. Index 2d *Criminal Law* § 104 (1967).

The State's case was largely dependent upon Mrs. Barwick's identification of defendants. In assignment No. 18 defendants assert that the trial judge erred in permitting Mrs. Barwick to testify that defendants were two of the three people who were in the store on the occasion when she was robbed and Grant was killed. By this assignment they raise the crucial question in the case.

Specifically defendants contend: (1) On the *voir dire* to determine the competency of Mrs. Barwick's in-court identification of defendants, the court permitted the solicitor to ask such leading questions that he became the witness and supplied the answers which the State needed to prove its case. (2) Mrs. Barwick's testimony disclosed her observations of the men who were in the store to have been totally inadequate to form the basis for the identification of any person. (3) Her in-court identification of defendants was the result of the "impermissibly suggestive pretrial photographic identification procedues" employed by the investigating officers, and the judge's findings to the contrary, made at the conclusion of the *voir dire,* are not supported by the evidence. (4) The judge's findings of fact on *voir dire* were influenced by the incompetent testimony of Deputy Sheriff Garris that Hodges told him he was in the automobile outside Grant's store when he heard a shot whereupon he ran inside where he saw Davis, gun in hand, holding a white lady while Foster was getting the money from the cash register.

We discuss the foregoing contentions seriatim.

[10] (1) Our examination of the record reveals no extensive or prejudicial leading of the witness Barwick by the solicitor on *voir dire.* On the contrary, it shows that he was unable to overcome Mrs. Barwick's determination "to tell it" in her own way and not to overstate her observations at the time, and that she successfully resisted all attempts by the solicitor to lead her. However, "it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal." *State v. Greene,* 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974). *See State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965); 1 Stansbury's N. C. Evidence § 31 (Brandis Rev., 1973). Defendants' assignments charging prejudice from the solicitor's leading questions are overruled.

[11] (2)-(3) In the record we find no evidence which would support a finding that Mrs. Barwick's photographic identification of defendants was the result of "impermissible suggestiveness" or resulted from procedures creating a substantial likelihood of irreparable misidentification. *See Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27 (1973); *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972). All the evidence tends to show: On different occasions between 28 December 1973 and 15 February 1974 Officers Slaughter and Garris showed Mrs. Barwick at least 60 black and white photographs of black males. She identified none of the pictures as being photographs of the men she saw in the store on the night of 28 December 1973, although on three occasions a photograph of each defendant taken from his high school annual was among those shown her. On 15 February 1974, however, the officers handed her two folders, State's Exhibits 8 and 9, and asked her to "see if she could identify anybody on these." Nothing further was said. *See State v. McNeil,* 277 N.C. 162, 172, 176 S.E. 2d 732, 737-38 (1970), *cert. denied,* 401 U.S. 962, 28 L.Ed. 2d 245, 91 S.Ct. 967 (1971). Exhibit 8 contained a colored photograph of Davis in a "line-up" of seven colored photographs; Exhibit 9 contained Foster's picture in a similar line-up of colored photographs. Mrs. Barwick looked "a couple of minutes" and then pointed to the Davis picture in Exhibit 8 and to Foster's in Exhibit 9 and said, "This one and that one." At the officer's request she put her initials and the date, "2-15-74," under each picture. Prior to that time Mrs. Barwick had made no identification, either from photographs or a police line-up of individuals. She had, however, told the officers that several of the photographs, and one man in the line-up resembled one of the men she saw in the store at the time of the robbery.

Mrs. Barwick knew that two suspects had been arrested and were in jail on 15 February 1974, but she had seen no pictures of them and did not know their names. On this occasion she asked the officers no questions because (she said) on previous occasions when she had inquired of them "if they had any clues or anything" they had always responded that they could tell her nothing. However, several minutes *after* she had initialed and dated the pictures she asked the officers if "they" were "the men." The officer told her they could make no comment on her identification and left.

At this state of the proceedings Mrs. Barwick's inquiry whether the pictures she had identified were "the men" would seem to evidence only a natural curiosity to know if the men on whom she "had put the finger" were the men the officers had arrested.

We have carefully examined all the photographs and albums which the officers exhibited to Mrs. Barwick and, like the trial judge, we attach no significance to the fact that on three occasions she failed to identify high school pictures of the two defendants among the 60 black and white photographs submitted to her. In our view, the boyish photographs taken from high school annuals, "three or four years old" on 28 December 1973, bear no identifiable resemblance to the colored pictures of defendants taken on the second or third day of February 1974—less than 40 days after the homicide. In the intervening three or four years between high school and 28 December 1973 defendants had become men and members of the armed forces. However, it is not without significance that when Mrs. Barwick was shown current photographs of defendants she quickly picked *both* from a collection of 14 pictures of men of comparable age, size, and color as the persons she saw in the store on the occasion of the robbery. When asked to explain how she recognized the defendants when she saw their pictures in Exhibits 8 and 9 she said, "I don't know how I was able to know it, I just did. Like I would know anybody else I had really seen. I don't know, I just knew it when I saw the pictures."

Defendants argue strenuously that Mrs. Barwick's observations of the men who came in the store on the night of the robbery and homicide were only casual glimpses, patently insufficient to form the basis of a reliable identification. They have construed the literalness and caution in Mrs. Barwick's testimony, not as evidence of a fixed purpose not to deviate in the most minute detail from the facts as they were impressed upon her mind at the time, but as manifesting an ultimate uncertainty of her identifications. The record does not support such a conclusion. Mrs. Barwick's testimony indicates that when she registered a mental picture she said so; when she didn't she said so. See *State v. McNeil, supra.* Indubitably she had ample opportunity to observe the man who took the beer from the cooler and brought it to the counter where she stood. She said she thought she got a mental picture of him during these two

procedures, and she identified him as defendant Tharoy Davis. In answer to the solicitor's question whether she was positive that "Tharoy Davis was in Sparky Grant's grocery store on the night of December 28, 1973 purchasing beer at the time of the gun shot," she said, "I am sure it was him."

The mental picture she said she got of the man she identified as defendant Joseph Foster was obtained when, after she had heard two others leave, she saw him standing six feet from her at the front door, trying to pull over his head a yellowish toboggan with a green and red stripe around it. She described his wearing apparel as khaki pants and a faded blue jean coat. Prima facie, she did get a mental picture of the man standing there. When the solicitor asked her if she was positive that defendant, "Joseph Foster, was in Sparky Grant's grocery near the door very shortly after the gunshot on the night in question," she replied, "I am sure."

Defendants also contend that upon cross-examination on the *voir dire* and at the trial Mrs. Barwick invalidated her identification of Davis as one of the men who entered the store on 28 December 1973 when she said State's Exhibit S-2-1, a black and white photograph which was not a picture of Davis, bore such a striking resemblance to one of the individuals she saw that night that it could have been he. At the time she gave this testimony on *voir dire* she pointed to Davis and said, "It looks like that one over there to me . . . I'm talking about the one at the end with the white coat and blue shirt." On cross-examination before the jury she adhered to her opinion that Exhibit S-2-1 could have been the man she saw go to the beer cooler "because it looks like the Davis boy to me. I know now that this is not his photograph. What I am saying is that the picture resembles this fellow over there."

In our view S-2-1 does indeed resemble the color photograph of Davis, and—presumably—the judge and the jury, who saw both the photograph and Davis, agreed with Mrs. Barwick that it did. In any event, this comparison was just one of the facets of the entire evidence, all of which was for consideration of the judge on *voir dire* and the jury at the trial.

Finally, defendants assert that the trial judge's findings on *voir dire* and his conclusion that Mrs. Barwick's in-court identification of defendants was admissible was "tainted" by the incompetent testimony of Deputy Sheriff Garris that Hodges

told him he and defendants were at Grant's store on the night of the robbery-homicide; that after hearing a shot he ran inside and saw Davis, gun in hand, holding a white woman while Foster emptied the cash register. Defendants contend that without the assurance of this hearsay evidence Judge Lanier would not have found Mrs. Barwick's observations a sufficient basis for her identification.

[12] Garris's challenged testimony is, of course, a classic example of inadmissible hearsay, and it was clearly incompetent. Defendants' objections should have been sustained. Decisions of this Court recognize, however, that in a "hearing before the judge on a preliminary motion, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found." *Cameron v. Cameron,* 232 N.C. 686, 690, 61 S.E. 2d 913, 915 (1950). *See Mayberry v. Insurance Co.,* 264 N.C. 658, 142 S.E. 2d 626 (1965); *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954); 1 Stansbury's N. C. Evidence § 4a (Brandis rev. 1973). The rule enumerated in these decisions is also the rule in the federal courts.

In *United States v. Matlock,* 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974), the Supreme Court said, ". . . the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence. . . .

"That the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed on November 20 last year [1973] when the Court transmitted to Congress the proposed Federal Rules of Evidence [Rules 104(a) and 1101(d)(1)]. . . . The rules in this respect reflect the general views of various authorities on evidence. 5 J. Wigmore, Evidence § 1385 (3d ed. 1940); C. McCormick, Evidence § 53, p. 122, n. 91 (2d ed. 1972). *See also* Maguire & Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L.J. 1101 (1927)." *Id.* at 172-74, 39 L.Ed. 2d at 250-51, 94 S.Ct. at 994-95.

Seemingly, Judge Lanier in the trial below interpreted the quoted statement from *Cameron v. Cameron, supra,* to mean that upon a *voir dire* or other preliminary judicial inquiry every rule of evidence is suspended. Such an interpretation is not in accord with the law of this State. While our reports abound with decisions in which the rules were relaxed, this Court has never subscribed to Professor Wigmore's premise that, "In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply. . . ." 3 J. Wigmore, Evidence § 1385 (2d ed. 1923). *See also* 5 J. Wigmore, Evidence § 1385 (Chadbourn rev. 1974). Indeed, as stated by Maguire and Epstein in an article discussing the Wigmore *proposition,* "Nothing is clearer than that a trial judge in any jurisdiction will be reversed for lack of enough material and competent evidence to support his finding, no matter how much inadmissible evidence there was in his favor. That is to say, if the judge stands convicted beyond a reasonable doubt of having decided on the basis of improper evidence neither Greenleaf nor Wigmore nor Willes has power to absolve him." Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L.J. 1101, 1116-17 (1927). *See also* C. McCormick, Evidence §§ 53, 60 (2d ed. 1972).

Unquestionably it is the rule in this jurisdiction that a judge's findings of fact will be reversed where it affirmatively appears they are based in whole or in part upon incompetent evidence. *Hicks v. Hicks,* 271 N.C. 204, 155 S.E. 2d 799 (1967); *Mayberry v. Insurance Co., supra; Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668 (1958); *Reid v. Johnston, supra.* The safe practice, therefore, is for the trial judges to adhere to the rules of evidence. However, " 'in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision.' (Cite omitted.) And the court's finding of fact will not be reversed unless based only on incompetent evidence. (Cites omitted.) If the findings are supported by competent evidence, they are binding on this Court even though there is evidence to the contrary." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.,* 279 N.C. 313, 319-20, 182 S.E. 2d 373, 377 (1971); *Mayberry v. Insurance Co., supra;* 1 Stansbury's N. C. Evidence § 4a (Brandis rev. 1973).

In the absence of affirmative evidence to the contrary, we shall continue to indulge the presumption that judges learned

in the law have based their findings upon competent evidence. However, we take this occasion to point out that this presumption is weakened when, over objection, the judge admits clearly incompetent evidence. "[S]o far as we continue the rules we ought to live up to their spirit." 36 Yale L.J., *supra* at n. 5, 1102. We also note another fact which is not without significance in the administration of justice; the objecting party against whom incompetent evidence has been admitted will rarely share the appellate court's faith that the trial judge, in finding the facts, was governed by correct rules of law. He and his counsel will be prepared to agree with the commentator who remarked, "Nature does not furnish a jurist's brain with thought-tight compartments to suit the convenience of legal theory, and convincing evidence once heard *does* leave its mark." 36 Yale L.J., *supra* at 1115. The defendant and his attorney can also be counted on to distrust the following assertion of the trial judge who preferred not to contend with the rules of evidence: " '[T]his Court, after 35 years, can skim the cream off and let the whey and clabber go to the pigs.' " *General Metals v. Manufacturing Co.*, 259 N.C. 709, 712, 131 S.E. 2d 360, 362 (1963). Suffice it to say that adherence to the rudimentary rules of evidence is desirable even in preliminary *voir dire* hearings. Such adherence invites confidence in the trial judge's findings.

[13] In this case, Mrs. Barwick's testimony that defendants were the men she saw in the store on the night of 28 December 1973 was competent and sufficient evidence, unaided by the Garris hearsay, to sustain the court's findings that her identification of defendants "was based on her independent observations at the time and scene of the robbery and homicide and was not influenced or tainted by other identification acts or procedures prior to the calling of the case for trial." Since defendants offered no evidence on *voir dire* and the testimony of the State's witnesses was uncontradicted the court's findings of fact meet minimum requirements. However, as we have heretofore pointed out in a number of cases, they do not conform to the better practice. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976).

Here we note that the jurors, who did not hear the incompetent testimony which Officer Garris gave on *voir dire,* found Mrs. Barwick's testimony creditable and accepted her identification of defendants after hearing defendants' evidence tend-

ing to establish an alibi and Davis's specific denial that he had ever been in Grant's grocery or participated in robbing Mrs. Barwick. Mrs. Barwick's identification of Davis was positive, and it is a fair inference from all the evidence that, if Davis was in the store and a participant in the robbery, defendant Foster and his brother, John D. Foster, were also participants. Obviously the jury found it significant, and not mere coincidence, that Mrs. Barwick, who had previously declined to identify any person, on 15 February 1974 identified *both* defendants in a photographic line-up when, for the first time, she saw recent pictures of them.

The court's conclusions of fact on *voir dire* are supported by plenary, competent evidence, which is also uncontradicted. They are, therefore, conclusive on appeal. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27 (1973); *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *Morse v. Curtis,* 276 N.C. 371, 172 S.E. 2d 495 (1970). *See State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968). Defendants' assignment No. 18 is overruled.

[14] Defendant Davis, *who testified in his own behalf,* assigns as error, assignment No. 81, the action of the judge in interrupting his charge to address the following inquiry to counsel for defendant Foster, "Mr. Spence, do you want me to charge on your client's decision not to testify?" Mr. Spence replied that he did. Whereupon, Judge Lanier instructed the jury that defendant Joseph C. Foster had the election to testify or not as he saw fit and that his failure to testify "shall not create any presumption against him." Davis's assignment No. 82 is that, to this instruction, Judge Lanier failed to add, "Therefore, his silence is not to influence your decision in any way." Although not the subject of an assignment of error, Davis now contends that it was also prejudicial error for the court not to charge that Foster's failure to testify should not be considered against Davis.

We disapprove the manner in which the judge handled the failure of Foster to testify. This Court has emphasized and reemphasized that it is better for the court "to give *no instruction* concerning the failure of defendant to testify unless he requests it. . . ." *State v. Bryant,* 283 N.C. 227, 234, 195 S.E.

2d 509, 513 (1973), and cases cited therein. In this case, defendant Foster had made no such request, and for the court to have broached the matter in the presence of the jury by an interruption of his charge was indeed a breach of technique. However, counsel for Foster obviously thought the judge's instruction had taken care of the matter for, in his discriminating selection of the assignments of error which he would press on appeal, he did not bring forward assignment No. 81, and we can perceive no prejudice to Davis from it. Had Davis deemed the judge's question to Mr. Spence inimical to him, an immediate request that the court give the instructions, which he now contends it was error to omit, would have been appropriate. Here we note that Davis's testimony as a witness for himself was of equal probative value to Foster. Further it was corroborated by a witness offered by Foster. Davis's assignments of error Nos. 81 and 82 are overruled.

In his sixth category defendant Davis, without citation of authority or supporting argument, lists twelve assignments to the charge in addition to the two considered above. Illustrative of these are: "80. The court erred in not giving a complete charge on reasonable doubt. Ex. No. 681 (R. p. 472)" . . . "No. 83. In that the court erred in its charge on circumstantial evidence. Ex. No. 684 (R. p. 473). Defendant Davis feels that the court did not give a complete charge on 'circumstantial evidence' and that the brief charge was erroneous." Of Davis's 14 assignments to the charge Foster brings forward only one, assignment No. 90, which asserts that the court "erred in instructing the jury on 'acting in concert' so as to, in effect, charge the jury that it should convict both defendants if either one is found guilty."

Notwithstanding defendant Davis's failure to comply with well established appellate rules, in view of the sentences involved, we have carefully examined the charge as a whole and with particular reference to each assignment of error. Although the charge falls short of being a model, when it is read as a whole—just as the jury heard it—we find no reason to believe that the jury was misled as to the applicable law. The applicable rule is stated in 7 Strong's N. C. Index 2d *Trial* § 33 (1968) as follows: "A charge will be construed contextually as a whole, and when, so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sus-

tained, even though the instruction might have been more aptly given in different form."

[15] The crucial question in this case was the identity of the men who robbed the cash register in Grant's grocery on the night of 28 December 1973. When the charge is construed as a whole we think the jury must have understood the judge to mean that if they were satisfied beyond a reasonable doubt that Davis and Foster were acting together while in the course of or attempt to rob Grant's store, and that either one of them shot and killed Grant both would be guilty of first degree murder, but the issue of the guilt of each defendant was to be considered individually.

The assignments of error included in defendant Davis's Groups IV, V, and VII embrace the assignments which Foster brings forward in his brief under questions VII, VIII-a, XI, XII, and XIII. All challenge the court's rulings upon the admission and exclusion of evidence. After examining each assignment we have concluded that most are without merit and that there is no reasonable possibility that any erroneous admission or exclusion of evidence might have contributed to the convictions. *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied,* 414 U.S. 1160, 39 L.Ed. 2d 112, 94 S.Ct. 920. *See* 1 Strong's N. C. Index 2d *Appeal and Error* § 49 (1967).

[16] Both defendants assign as error the action of the court in allowing the jury to be polled by the deputy clerk of the Superior Court of Lenoir County. "In the absence of any statutory provision as to the method of conducting a poll of the jury, the matter is within the discretion of the trial judge. The polling is usually conducted by the trial judge, or by the clerk of the court under the supervision of the judge." 76 Am. Jur. 2d *Trial* § 1122 (1975). In *State v. Boger,* 202 N.C. 702, 163 S.E. 877 (1932), this Court recognized the "right of a defendant in a criminal action tried in a court of this State to have the jurors *polled by the judge or under his direction,* when a request for such poll is made in apt time, after an adverse verdict has been returned by the jurors. . . ." *Id.* at 703, 163 S.E. at 877 (emphasis added). Polling the jury is clearly a ministerial act which, even in a capital case, may be performed by the deputy clerk of court in the presence and under the supervision of the trial judge. Defendants' assignment No. 94 is overruled.

[17] We have considered the entire record in this case as well as each of the defendants' assignments of error with care commensurate with the sentences from which they appealed. Having done so, we find no error which, in our opinion, influenced the verdicts. We therefore affirm the verdicts. However, the motion of each defendant in arrest of judgment upon his conviction of common law robbery must be sustained. Since the robbery was used to prove an essential element of the charge of murder in the first degree for which each was also convicted and sentenced, separate judgments imposing additional punishment for the robbery cannot stand. *See State v. McZorn,* 288 N.C. 417, 219 S.E. 2d 201 (1975) (death sentence vacated 6 July 1976, ____ U.S. ___), cases cited therein, and *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49 (1973). Assignments of error Nos. 99 and 103 are sustained and the judgments upon defendants' conviction under indictments 74CR1249 and 74CR1103 are arrested.

[18] After the preparation of this opinion, but before it was filed, the Supreme Court of the United States in *Woodson v. North Carolina,* ___ U.S. ___, 96 S.Ct. 2978, 44 L.W. 5267 (1976), a plurality decision filed 2 July 1976, invalidated the death penalty provision of G.S. 14-17 (Cum. Supp. 1975), the statute under which the defendants Woodson and Waxton were convicted of first degree murder and sentenced to death. This statute is the codification of Ch. 1201, N. C. Sess. Laws (1973, 2d Session 1974). Defendants in this case, Davis and Foster, were not sentenced to death under that statute. We must, however, consider the effect of the *Woodson* decision upon the sentence of death imposed upon them.

Davis and Foster were sentenced under G.S. 14-17 (1969) *before* it was rewritten by Ch. 1201 (effective 8 April 1974) and *after* it was interpreted by this Court in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (decided 18 January 1973). At that time, in pertinent part, G.S. 14-17 provided:

"A murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . shall be deemed murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison. . . . "

In *Waddell* all the members of this Court concurred in the view that the decision of the Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), held that the Eighth and Fourteenth Amendments prohibit the infliction of the death sentence if the applicable statute permitted either judge or jury to impose that sentence as a matter of discretion, and that, because G.S. 14-17 (1969) gave the jury the "unbridled" discretion to impose either the life or death sentence, no death sentence could be executed under it. In *Waddell* the majority of this Court held that the *Furman* decision invalidated only the proviso of the statute permitting a jury to recommend life imprisonment and that the portion of the statute mandating the death penalty remained intact.

In *Woodson* the Supreme Court noted that the effect of the *Waddell* decision was a statute which "survived as a mandatory death penalty law." ___ U.S. at ___, 96 S.Ct. at 2982, 44 L.W. at 5269. Thus it is plain that G.S. 14-17 (1969), as it was interpreted by *Waddell*, is unconstitutional under the rationale of *Woodson*, which, in effect, nullified this Court's holding in *Waddell*. Consequently, we are now in the same legal position relative to the punishment for crimes which were punishable by death under G.S. 14-17 (1969) between 18 January 1973 and 8 April 1974 as we were in the post-*Furman* and pre-*Waddell* period.

For crimes committed or tried during that period this Court consistently vacated the death sentence and ordered a sentence of life imprisonment imposed in lieu thereof. *See, e.g., State v. Waddell, supra; State v. Frazier*, 283 N.C. 99, 195 S.E. 2d 33 (1973); *State v. Chance*, 283 N.C. 102, 194 S.E. 2d 858 (1973); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972). Where the trial court imposed a sentence of life imprisonment this Court affirmed the judgment. *State v. Alexander*, 284 N.C. 87, 199 S.E. 2d 450 (1973). In an instance where the death penalty could not be imposed because of *United States v. Jackson*, 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968) and *Pope v. United States*, 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), this Court ruled that life imprisonment was the appropriate judgment, *State v. Childs*, 280 N.C. 576, 187 S.E. 2d 78 (1972).

Both common sense and rudimentary justice demand that the maximum permissible sentence of life imprisonment now be imposed upon a person convicted of first degree murder or rape committed between *Waddell* and the enactment of Ch. 1201 which rewrote G.S. 14-17. This interpretation is bolstered by the General Assembly's enactment of Ch. 1201, § 7, N. C. Sess. Laws (1973, 2d Session 1974), effective 8 April 1974, which specifically provided: "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment." The policy underlying this statute is by analogy as applicable to the invalidation of the mandatory death penalty declared by the *Waddell* interpretation as it is to the invalidation of the mandatory death penalty law enacted by the General Assembly, both of which were invalidated by *Woodson*. This statute manifests the General Assembly's intent to eliminate any possibility that, because of the action of the Supreme Court, the punishment for a crime for which it had mandated the death penalty would be left in limbo between its sessions.

The contention that, with reference to first degree murder (or a rape) committed prior to the 1975 Act, the only permissible punishment is a maximum of ten years' imprisonment under G.S. 14-2 (1969) is unrealistic. It is noted that the punishment for *second* degree murder is now imprisonment for life or a term of years, G.S. 14-17 (Cum. Supp. 1975), and for manslaughter, up to twenty years, G.S. 14-18 (1969). Murder in the first degree is obviously the most serious of the felonious homicides. (Similarly, the punishment for second degree rape is imprisonment for life or a term of years, G.S. 14-21 (Cum. Supp. 1975), and for assault with intent to commit rape, imprisonment up to fifteen years, G.S. 14-22 (1969).)

We hold, therefore, that the punishment for the defendants in this case is life imprisonment. For that reason, each defendant's motion in arrest of the judgment imposing upon him the death penalty must also be allowed. Therefore, the judgment in case No. 74CR1248 imposing the sentence of death upon defendant Foster and the judgment in case No. 74CR1102 imposing the sentence of death upon defendant Davis are vacated, and sentences of life imprisonment substituted in lieu thereof.

Accordingly, it is hereby ordered that these cases be remanded to the Superior Court of Lenoir County with directions (1) that the presiding judge, without requiring the presence of defendants, enter as to each defendant a judgment imposing life imprisonment for the first degree murder of which he has been convicted; and (2) that in accordance with these judgments the clerk of superior court issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish to each defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

In No. 74CR1103 (Davis, armed robbery)—judgment arrested.

In No. 74CR1102 (Davis, murder)—death sentence vacated and, in lieu thereof, life sentence substituted.

In No. 74CR1249 (Foster, armed robbery)—judgment arrested.

In No. 74CR1248 (Foster, murder)—death sentence vacated and, in lieu thereof, life sentence substituted.

In the verdicts—no error.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BOLICK v. BOLICK

No. 179 PC.

Case below: 29 N.C. App. 421.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976. Motion of defendant to dismiss appeal allowed 14 July 1976.

BRYAN v. PROJECTS, INC.

No. 190 PC.

Case below: 29 N.C. App. 453.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

CONSTRUCTION CO. v. HIGHWAY COMMISSION

No. 112 PC.

Case below: 28 N.C. App. 593.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 June 1976.

DOWNEY v. DOWNEY

No. 170 PC.

Case below: 29 N.C. App. 375.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1976.

HEWETT v. SUPPLY CO.

No. 159 PC.

Case below: 29 N.C. App. 395.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

INDUSTRIES, INC. v. CONSTRUCTION CO.

No. 166 PC.

Case below: 29 N.C. App. 270.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

IN RE APPEAL OF BOSLEY

No. 177 PC.

Case below: 29 N.C. App. 468.

Petition by David E. Bosley for discretionary review under G.S. 7A-31 denied 14 July 1976.

LeMAY v. TOXAWAY CO.

No. 205 PC.

Case below: 29 N.C. App. 616.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 14 July 1976.

MARKHAM v. SWAILS

No. 161 PC.

Case below: 29 N.C. App. 205.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 14 July 1976.

MILLARD v. HOFFMAN, BUTLER & ASSOC.

No. 197 PC.

Case below: 29 N.C. App. 327.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PENNINGER v. BARRIER

No. 195 PC.

Case below: 29 N.C. App. 312.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1976.

RAFTERY v. CONSTRUCTION CO.

No. 202 PC.

Case below: 29 N.C. App. 495.

Petition by defendant Clark Equipment Co. for discretionary review under G.S. 7A-31 allowed 14 July 1976.

SMITH AND ASSOCIATES v. PROPERTIES, INC.

No. 176 PC.

Case below: 29 N.C. App. 447.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. BROWN

No. 178 PC.

Case below: 29 N.C. App. 409.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. CURRY & ATKINSON

No. 181 PC.

Case below: 29 N.C. App. 615.

Petition by defendant Atkinson for discretionary review under G.S. 7A-31 denied 14 July 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. CHAPMAN

No. 142 PC.

Case below: 29 N.C. App. 185.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1976.

STATE v. HAYES

No. 173 PC.

Case below: 29 N.C. App. 356.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 14 July 1976.

STATE v. JOHNSON & GOODS

No. 199 PC.

Case below: 29 N.C. App. 616.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. MALLOY

No. 182 PC.

Case below: 29 N.C. App. 422.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. MONTGOMERY

No. 32.

Case below: 29 N.C. App. 421.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 July 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. SCULLEY

No. 180 PC.

Case below: 29 N.C. App. 422.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. SHARRATT

No. 184 PC.

Case below: 29 N.C. App. 199.

Petition by defendants for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE v. STALEY

No. 111 PC.

Case below: 28 N.C. App. 730.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 14 July 1976.

STATE v. STAPLETON

No. 37.

Case below: 29 N.C. App. 363.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 14 July 1976.

STATE v. WILLIAMS

No. 198 PC.

Case below: 29 N.C. App. 408.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 14 July 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

TRAVIS v. McLAUGHLIN

No. 191 PC.

Case below: 29 N.C. App. 389.

Petition by defendant McLaughlin for discretionary review under G.S. 7A-31 denied 14 July 1976.

WEYERHAEUSER CO. v. SUPPLY CO.

No. 204 PC.

Case below: 29 N.C. App. 235.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 14 July 1976.

WILLIAMSON v. WALLACE

No. 194 PC.

Case below: 29 N.C. App. 370.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 14 July 1976.

STATE OF NORTH CAROLINA v. HARRY HUNTER

No. 44

(Filed 1 September 1976)

1. **Constitutional Law § 32— out of state counsel not permitted — right to counsel not abridged**

Defendant was not denied his right to counsel under the Sixth and Fourteenth Amendments to the U. S. Constitution by the trial court's refusal to allow a S. C. solicitor from the district in which defendant's beach motel was located to represent defendant in this N. C. prosecution, since defendant was represented by an able N. C. attorney and by the S. C. attorney who normally handled defendant's business affairs.

2. **Criminal Law § 91— continuance to obtain additional counsel — denial proper**

The trial court did not err in denying defendant's motion to continue the case in order to permit him to employ additional counsel, since defendant was represented by two attorneys and there was no indication or allegation that he even wished to obtain another lawyer or that other counsel was necessary to prepare adequately the defense.

3. **Criminal Law § 169— objectionable testimony — similar testimony admitted without objection — no prejudice**

Defendant was not prejudiced by testimony concerning his participation in a separate crime since testimony of like import was thereafter admitted without objection.

4. **Criminal Law § 34— defendant's participation in other crimes — evidence admissible**

In a prosecution of defendant for first degree murder and armed robbery or attempted robbery where the court submitted to the jury only the issue of defendant's guilt as an accessory before the fact to murder, evidence of defendant's participation in other breakings, enterings and larcenies together with other evidence showing the relationship of the defendant with the other men involved in the crimes tended to establish a common plan or scheme embracing the commission of a series of larcenies so related to each other that proof of these other crimes tended to prove the crime charged and to connect the accused with its commission; therefore, the trial court properly admitted evidence of defendant's participation in other crimes.

5. **Criminal Law § 43— slides of murder victim's wounds — admissibility**

The trial court did not err in allowing the jury to view slides of the wounds of a murder victim, since the slides were relevant upon the question of cause of death and the slides illustrated the testimony of a medical witness.

6. **Criminal Law § 10— accessory before the fact — proof required**

To convict defendant of being an accessory before the fact the State must prove (1) that the defendant counseled, procured, com-

manded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime.

7. **Homicide § 21— accessory before the fact to murder — sufficiency of evidence**

In a prosecution for accessory before the fact to murder, evidence was sufficient to be submitted to the jury where it tended to show that defendant was not present when the crime was committed, the principal committed the crime, defendant told one of the parties to the crime that the victim kept a substantial amount of money on him or in his possession which they could steal, defendant told another person that he would help set up the crime, defendant informed his companions in the crime that he planned to have the larceny occur while the victim dined at his house, defendant later informed them that they would have to catch the victim at home because defendant did not know where the money was, defendant showed his cohorts where the victim's home was, he instructed them to come back to his house after the "job," and it was understood that defendant was to get 25% of the money stolen.

8. **Criminal Law § 112— proof beyond a reasonable doubt — sufficiency of instructions**

Though two sentences of the trial court's instructions as to the elements of the crime that the State must prove in order for the jury to find defendant guilty failed to inform the jury that such proof must be shown by evidence establishing the enumerated elements beyond a reasonable doubt, such failure did not amount to a violation of G.S. 1-180, since the court's charge as a whole made it clear to the jury that each element had to be proved by evidence establishing the same beyond a reasonable doubt.

9. **Homicide § 25— accessory before the fact to murder — jury instructions proper**

In a prosecution of defendant for accessory before the fact to murder, the trial court's instructions (1) concerning the immediate causal connection between the counseling of the principal by the defendant and the commission of the crime by defendant, (2) as to whether defendant and the principal entertained the common design that the principal take money from the person or presence of deceased by violence or intimidation, and (3) summarizing the evidence were proper.

10. **Homicide § 25— felony-murder — failure to instruct on elements of underlying felony — no prejudicial error**

Although the trial court should have spelled out the essential elements of the underlying felony of attempted armed robbery in its instructions as to what the State must prove to convict defendant of being an accessory before the fact to felony-murder, his failure to do so was not prejudicial error because: (1) the occurrence of the attempted armed robbery was not disputed and thus was not in issue under the evidence of the case, (2) defendant failed to request specifically instructions on the underlying felony, (3) the court did

define "attempted armed robbery" as "attempted robbery with a firearm," and (4) these terms were essentially self-explanatory under the circumstances of this case.

Judge EXUM concurs in result.

Justice LAKE dissenting.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 18 August 1975 Criminal Session of UNION County Superior Court.

On two separate indictments, proper in form, defendant was charged (1) with first-degree murder of William Benjamin Potts and (2) with armed robbery or attempted robbery of William Benjamin Potts. The court submitted to the jury only the issue of his guilt as an accessory before the fact to murder. The jury returned a verdict of guilty, and a sentence of life imprisonment was imposed.

The evidence for the State tended to show the following: Billy Wade Devine, Gary Allen Watkins, and James Earl Locklear had pleaded guilty to second-degree murder of Potts at a previous term and received life sentences. Devine and Watkins testified for the State.

The defendant had lived at Myrtle Beach, South Carolina, during the summer months for many years. He was past 60 years in age and was married to his present wife in 1974. He owned and operated the Bay Shore Motel at Myrtle Beach, South Carolina. He had a home in Union County, North Carolina, located between Monroe, North Carolina, and Pageland, South Carolina. It was his custom to spend the winter season at his Union County home.

Gary Watkins testified that he supported himself by stealing and that he and Charles Duncan (also known as Charles Evans) had not worked at any lawful occupation for at least 3½ years. Watkins, who was with Duncan and another man at the time, met the defendant about August, 1973, at the Bay Shore Motel.

Billy Devine testified that the defendant and Charles Duncan were not friends of his. They were just people who put him onto "jobs" (larcenies). In the summer of 1974, Devine met the defendant at the Bay Shore Motel in the presence of Watkins and Duncan.

Devine and Watkins first visited the defendant with Duncan at the defendant's Union County home in the summer or winter of 1974. Prior to 7 February 1975, Devine visited the defendant about three times at his Union County home. Watkins visited the defendant there a total of three or four times.

Devine, Watkins, and Duncan visited the Bay Shore Motel six or seven times during the 1974 summer, and the defendant was there on every occasion. Devine and Watkins paid rent there only once or twice. The inference was that generally no rent was charged.

During the summer of 1974, the defendant discussed a "job" with Devine and Watkins involving the theft of a safe from the home of Tony Thompson at Myrtle Beach. The defendant told them the Thompson family had some money because they owned Dino's Restaurant. He gave Watkins the tools to open the safe. When Watkins and Devine broke into the house through the back door on 21 July 1974, they unexpectedly encountered a Greek lady, whom Watkins threw to the floor and tied up with the assistance of Devine. They hauled the safe away, but it was found to be empty when they opened it. They dumped the safe in a canal.

During the summer of 1974, the defendant, Charles Duncan, Devine, and Watkins had a conversation about breaking into the Atlas Construction Company at Myrtle Beach and stealing some diamonds and guns. The defendant explained to the others what could be obtained and where the company was located. Watkins, Devine, and Duncan broke into the establishment on 30 August 1974. No diamonds were found, but they did take thirty guns of various descriptions. These were brought back to the Bay Shore Motel, and the defendant picked out two or three guns for himself. One of these was a .25 Colt Automatic Pistol (identified in evidence as State's Exhibit 1), which was later found as a result of a valid search at the Bay Shore Motel on 14 May 1975 when the defendant reached in a drawer and handed it to officers. Another of these was a Police Special .38 Pistol (identified as State's Exhibit 2), which Devine testified Watkins had on 7 February 1975 and was found on that date under the driver's side of the front seat of the Grand Prix automobile that Watkins was operating. It was apparently understood that anyone who planned a "job" would receive a part of the proceeds. The remaining guns were disposed of by

Duncan, and the money was distributed among Duncan, Devine, and Watkins.

On the night of the Atlas Construction Company break-in or immediately afterwards, the defendant told Devine about two men, a Mr. Potts in Union County and a Mr. Cato in Pageland, South Carolina, nearby. The defendant said they kept a substantial amount of money on them or in their possession that the defendant and Devine could steal. The defendant also discussed these two men and the available money with Watkins. The defendant told him that he would help set it up for them.

Another break-in and larceny was discussed by Gary Watkins and the defendant. He suggested a house that was owned by Allison Davis and located just past Ocean Drive in North Myrtle Beach. He described the house and said that the Davis family had a lot of money because they paid cash for a Mercedez-Benz and still had a safe in the house. On 17 December 1974, Devine, Watkins, and Duncan broke into the house through a back door but found no safe and left.

About two weeks before 7 February 1975, the defendant told Watkins that he would invite Mr. Potts for supper and Watkins and the others could break in the Potts' house and take the money.

About a week before 7 February 1975, Devine, Watkins, Duncan, Locklear, and a Curt Petty drove in Duncan's 1974 Grand Prix automobile to the home of defendant Hunter in Union County. They went to Hunter's home to find out if he had any further information on Mr. Cato or Mr. Potts. When they arrived, Locklear and Petty stayed in the car while the others went inside. Devine showed Hunter his .9 mm. Automatic Pistol, later identified as State's Exhibit 3. Hunter wanted to trade the .25 Colt Automatic Pistol that he had received from the Atlas Construction break-in for the .9 mm. Automatic Pistol. Devine declined, saying that he would be laughed at if he tried armed robbery with a .25 Colt Automatic. As Devine, Watkins, and Duncan were getting ready to leave. Hunter told him that he would try to arrange for Mr. and Mrs. Potts to come to his house for dinner and they could go and take the money at the Potts' house, but at the time he had not found out where the Potts kept the money. Later he indicated to Watkins that they would have to catch Potts at his home because Hunter did not know where the money was. He stated that

Potts had had an eye operation and could not see well. Hunter pointed out the nearby house of Potts to them. Hunter told Devine that they were to come back to Hunter's house after the robbery if anything went wrong.

On 7 February 1975, Devine, Watkins, and Locklear were in a motel in Mecklenburg County, North Carolina. Devine was in danger of being caught concerning a breaking and entering in South Carolina, and they had to leave the motel rapidly. Later that afternoon, Devine and Watkins had a conversation with Duncan and borrowed his Grand Prix automobile. Devine, Watkins, and Locklear then left Charlotte, North Carolina, and drove to Monroe. On the way they stopped and broke into a veterinarian's office for the purpose of stealing some drugs, but stole money instead and then proceeded to the home of Potts. Watkins was driving and let out Devine and Locklear at the Potts' house. They went to the door, and Devine asked to use the telephone. He was permitted in the house with his pistol (State's Exhibit 3) under his coat. Potts came to the door, and as Mrs. Potts was about to show him the telephone, Devine thought he saw a pistol in Potts' hand. Potts grabbed at Devine's arm, and Devine started shooting. He thought Potts fired back, and Devine continued shooting. Devine did not know how many times he shot. Potts died as a result of the gunshot wounds. Mrs. Potts turned on the burglar alarm.

Devine and Locklear fled from the Potts' house to defendant Hunter's house nearby. Hunter came out and asked what was wrong. Devine said that nothing was wrong. He indicated they were supposed to meet Watkins there. Hunter asked them in, but they stayed inside only a few moments. About that time, Hunter came out and said, "Somebody has been shot. Get the hell out of my yard. I don't want nobody to see you." Devine and Locklear left by a route through the woods. When they were about 500 yards from Hunter's house, they saw Watkins drive up at Hunter's house. They were afraid to return and watched as Watkins drove away. Devine discarded his pistol and coat. They walked some six miles and were later apprehended. When Watkins drove up in the Grand Prix, he was told by Hunter to "get the hell out" and was soon apprehended near Monroe. Hunter had told Devine and Watkins to come back to his house after the "job." It was understood that Hunter was to get twenty-five percent of the money stolen.

After the shooting occurred, Mrs. Potts called her neighbors, and in turn the Hunter residence was called. Apparently this happened about the time that Devine and Locklear arrived. Neither Hunter nor his wife went to the home of Potts that evening, and neither Hunter nor his wife have been to the Potts' house since the murder. Hunter and Mrs. Potts had been reared together as children in Pageland, South Carolina.

The Sheriff's Department made a prompt investigation and, in the course of it, called Hunter about 12 o'clock that night. Hunter told the Sheriff about Devine, Watkins, Locklear, and Duncan's being at his home on the afternoon of February 7 but on that night never mentioned that Devine, Locklear, and Watkins visited his house about 10:00 p.m. that evening. The sheriff talked to Hunter again the next morning. Mrs. Hunter was not present although the sheriff understood she would be there. On this occasion Hunter told the sheriff about Devine, Locklear, and Watkins' coming by the house about 10:00 p.m., the night before. He had no particular explanation for why they came to his house at that time.

Hunter testified for the State when Devine, Watkins, and Locklear pled guilty to second-degree murder. He had previously identified them from photographs on 8 February 1975 when Sheriff Fowler was at his house.

In the course of the investigation, the pistol that Devine had discarded was located at the place he indicated. Tracks were found leading from the Potts' house to the Hunter house and away from it. The jacket of Devine was found along the route. Sunglasses that Devine had lost as he was running away were also located.

Devine and Watkins did not agree to testify against Hunter until after they had been sentenced for second-degree murder. Watkins was incarcerated in the prison camp at Lillington, and Devine was in Central Prison. Some time after Watkins was sentenced to prison, his father committed suicide because of what had happened to his son. Watkins' mother came to the prison camp and talked to him. As a result Watkins contacted Sheriff Fowler, who met with Watkins' attorney and the District Attorney at the prison camp at Lillington, whereupon Watkins proceeded to implicate defendant Hunter. Later Devine did likewise.

On 1 May 1975, a man named Richard Mears contacted the defendant at Myrtle Beach. He told the defendant that he had talked with Charles Duncan in Charlotte about purchasing stolen jewelry from Hunter. On 3 May 1975, the defendant told Mears that he wanted "to place a contract on Devine and Watkins." They discussed the terms for this proposed killing, and it was agreed that Hunter would pay Mears $5,000 to kill the two. He paid him $100 in advance for expenses. In the course of the conversation, the defendant told Mears that he had planned the robbery of Potts and that Watkins and Devine, instead of doing the robbery, broke into a store and later went berserk when they attempted to rob the "old man." Mears also discussed this "contract" with Hunter on 6 and 8 May 1975.

The State offered corroborative evidence from officers at Myrtle Beach that there were break-ins at Myrtle Beach in the summer of 1974 as Devine and Watson had testified.

Defendant's evidence tended to show:

Duncan received a telephone call from Sheriff Fowler about 11:40 p.m. on the night of the murder. The call concerned the Grand Prix automobile that Duncan had loaned Devine and Watkins. Duncan denied knowing anything of the break-ins at Myrtle Beach. Duncan had known the defendant for 4½ years. He indicated that he might see Devine and Watkins two or three days each week in the Charlotte area. He denied committing any crimes for Hunter. His business was buying and selling merchandise ranging from TV's to guns. He denied ever seeing Richard Mears. Duncan admitted to having served a total of 15½ years in prison for breaking, entering, and larceny. At the time of the murder, Duncan was wanted on a burglary charge and was running from the law. He went to the jail to see Watkins and Devine several times while they were awaiting trial. Duncan said neither Watkins nor Devine ever told him that the defendant was involved in the robbery and murder.

The defendant testified that he had operated a motel and liquor store at Myrtle Beach for the past 17 years. He had a residence south of Monroe, which he occupied during the winter months. He knew Duncan, Watkins, Devine, and Locklear. He admitted that Duncan, Watkins, and Devine stayed at his motel at Myrtle Beach but said he did not know Locklear before 7 February 1975. Duncan, Watkins, Devine, and Locklear came to his house on the afternoon of 7 February 1975. Duncan and

Watkins spoke briefly with Mrs. Hunter, who was in the bedroom. Afterwards, Duncan, Watkins, Devine, and Locklear inquired as to when the motel would open. Watkins and Devine had asked several times for work at the motel. The defendant denied any conversation about Potts with Duncan, Watkins, or Devine at any time.

Devine and Locklear came to Hunter's house between 10:00 and 10:30 p.m. on the night of 7 February 1975. They said that Watkins was supposed to pick them up. Hunter invited them in to look at television. While this was happening, his wife was on the telephone, and he heard her say "Oh, no." She ran down the hall and told him that Mr. Potts had been shot and robbed. He went back to the living room, and Devine and Locklear were gone. Potts' name had never been mentioned by them.

Shortly after Devine and Locklear left, two neighbors, Mr and Mrs. Goodall, came in and borrowed a shotgun. Shortly thereafter, Gary Watkins arrived. He rang the back doorbell and asked about Devine and Locklear. Hunter told him they had left. Nobody mentioned Potts.

Hunter had a conversation with Sheriff Fowler about midnight. He said he told Sheriff Fowler about Devine, Locklear, and Watkins' coming to his house that night and that they with Duncan had been by his house that afternoon. The next morning, Sheriff Fowler called again and wanted to see Hunter and his wife. When the sheriff and others arrived at Hunter's house, his wife, who had gone to the doctor, was not there. On this occasion, Hunter identified pictures of Devine, Locklear, and Watkins and again told the sheriff about their being there the afternoon before as well as later that night. Hunter said Devine and Watkins knew Mr. and Mrs. Potts, having met them at his house about a week before. Hunter had no knowledge of Potts' financial condition but traded at his store from time to time, changed money, and cashed checks. Hunter said that he did not go to Potts' house the next day because he was waiting for the sheriff. He had called Mrs. Potts two or three times since then, but she was never in a position to see him and his wife.

Hunter identified State's Exhibit 1, the Colt Automatic .25. He said Gary Watkins had pawned it to him at the beach for $25. This gun was kept by Hunter at the beach. Hunter admitted to having dealings with Devine and Watkins, having bought

two shotguns from them in December 1974 for $400. He admitted seeing Richard Mears on 14 May 1975 when the defendant was in the jail in Conway, South Carolina, for possession of a stolen pistol, State's Exhibit 1, but denied ever seeing him prior to that time or talking to him about killing Devine and Watkins as alleged by Mears. He also denied having ever benefited from anything stolen by Watkins or Devine and having ever discussed any crimes with them. Charles Duncan was a good friend with whom he had been out on a social basis two or three times. He did not know what Duncan's business was. Hunter said he had not been to the Potts' store for 8 weeks before Potts' death because he had a bad back. He had known Mrs. Potts since he was a small boy, and she was his friend. He denied ever discussing Potts or Cato with Devine, Watkins, or Locklear.

He said he did not go to the Potts' house on the night of the killing because his wife was sick and asked him to stay home. He did not go later because Mrs. Potts was upset. He cooperated with the sheriff. He had never been arrested for anything prior to 14 May 1975. When he paid Devine and Watkins $400 for the two shotguns in December 1974, the check was written by Mrs. Potts and made out to cash and later cashed by Duncan from a man named Ross, who had been called by Hunter.

Elizabeth Ann Hunter, the wife of defendant, said she knew Duncan, Devine, and Watkins. She was married to the Defendant in 1974. She said that at her request the defendant did not go to the Potts' house on the night of the murder because of her ill health. She talked to Sheriff Fowler the next morning but told him she had to go to the doctor.

Duncan, Devine, and Watkins had been to Hunter's house in Union County two or three times. They stayed at the motel at the beach during the summer of 1974 and always paid their bills. Mrs. Hunter was a close friend of Duncan and his girl friend. They were in and out of the motel during August and September, 1974, as well as the July 4th weekend of that year. Duncan always paid his room rent in cash. Mrs. Hunter's doctor said she did not have an appointment with him on February 8 but she came to his office.

Some witnesses from Myrtle Beach gave the defendant a good reputation.

On rebuttal State's Evidence tended to show the following: Sheriff Fowler talked with Mrs. Hunter about midnight on 7 February 1975 when she told him that Duncan, Devine, Watkins, and another man came to their house in the afternoon and she spoke with two of them briefly. However, she said nothing at that time about Devine, Locklear, and Watkins' coming back that night about ten o'clock. Neither did she tell him about going to the doctor when he talked to her on the morning of February 8. She agreed to meet him but was gone when he arrived. Two Myrtle Beach officers gave the defendant a bad reputation but admitted that he had never been arrested for anything.

It has been difficult for us to ascertain the facts from the brief of defendant and the State. The facts in defendant's brief cover 80 pages. The State's brief had no statement of facts, except as discussed in the assignments of error. We note that Rule 28(b) (2) of the Rules of Appellate Procedure, among other things, requires that the appellant's brief " . . . should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review." The State is not required by Rule 28(c) of the Rules of Appellate Procedure to state the facts unless there is some disagreement.

Because of the failure to comply with the rules, it has been difficult for us to glean the facts from a complicated situation.

Other pertinent facts will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John M. Silverstein for the State.

James E. Griffin, Charles D. Humphries, Robert M. McInnis (on brief, from North Myrtle Beach, South Carolina) and Sam J. Ervin Jr., for defendant.

COPELAND, Justice.

[1] Defendant contends that the court erred in not permitting James M. Long of the South Carolina Bar to represent Hunter at the trial. He says that this action of the trial court denied him his right to counsel under the Sixth and Fourteenth Amendments. As authority for this position he cites *United States v. Johnston,* 318 F. 2d 288 (6th Cir. 1963) and *United States v.*

Bergamo, 154 F. 2d 31 (3d Cir. 1946). The present case is distinguishable from these cases on the basis of its facts.

Defendant was ably represented by local counsel in Union County, Mr. James Griffin, as well as by a South Carolina attorney by the name of Mr. Ralph Stroman, who normally handled defendant's business affairs. On 18 August 1975, the date set for the trial of this case, defendant made a motion to admit counsel James M. Long to appear in the case. The trial judge made an exhaustive inquiry, and it was determined that Mr. Long was the solicitor (chief prosecuting attorney) for the Fifteenth Judicial Circuit in South Carolina, which included Horry County, in which Myrtle Beach is located. § 1-255 of the Code of Laws of South Carolina (1962) provides:

> "The solicitors may defend any persons brought to trial before any criminal courts of this State when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

Long told the trial court that he had been retained by defendant on 5 May 1975, after having been informed by District Attorney Lowder of Union County that a bill of indictment had been returned against Hunter in Union County. Mr. Stroman had been contacted by the defendant about this matter several days before Mr. Long was contacted. Mr. Griffin was retained by defendant about 1 June 1975.

District Attorney Lowder told the trial court that Mr. Long had originally been requested to assist him in the arrest of Mr. Hunter but he received no help from Mr. Long. In fact, Long assisted Hunter in making bond on the murder charge.

Sometime after Long was retained, criminal charges were brought against defendant Hunter in Long's district. Long indicated that these cases were being handled by his assistants. The Attorney General of South Carolina filed a writ in the Supreme Court of South Carolina to restrain Mr. Long from participating in South Carolina in cases involving defendant Hunter. After Mr. Long explained that his assistants were handling the prosecution in South Carolina and that he was totally removed from the South Carolina prosecution, the matter was withdrawn by the Attorney General. At the time of this motion, however, the matter was still before Chief Justice Lewis of the Supreme Court of South Carolina.

It is well settled that an out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the Court. *Thomas v. Cassidy,* 249 F. 2d 91 (4th Cir. 1957), *cert. denied,* 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed. 2d 533 (1958); *Cooper v. Hutchinson,* 184 F. 2d 119 (3d Cir. 1950); *Parker v. Parker,* 97 So. 2d 136 (Fla. App. 1957); *State v. Kavanaugh,* 52 N.J. 7, 243 A. 2d 225 (1968), *cert. denied,* 393 U.S. 924, 89 S.Ct. 254, 21 L.Ed. 2d 259 (1968); *Manning v. Railroad,* 122 N.C. 824, 28 S.E. 963 (1898); *Smith v. Brock,* 532 P. 2d 843 (Okl. 1975); 7 Am. Jur. 2d, Attorneys at Law, § 10 (1963 and Cum. Supp. June, 1976); 7 C.J.S. Attorney and Client § 15(b) (1937 and Cum. Supp. 1976).

G.S. 84-4.1 (1975 and 1975 Supp.) gives the conditions that must be met by out-of-state attorneys in order for them to be admitted to practice for limited purposes in North Carolina. Subsection 6 thereof states:

> "Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application."

Our Court in *Manning v. Railroad, supra* at 828, 28 S.E. at 964 had this to say concerning nonresident counsel:

> "[T]he appearance of such counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed. The statute forbids the courts from allowing non-resident counsel (when citizens of other States and not holding license from this Court) from practicing habitually in our courts, and they cannot acquire the right to do so."

In *Smith v. Brock, supra,* Oklahoma considered a rule of practice analogous to our G.S. 84-4.1. The foreign attorney had in the past engaged in disorderly and disruptive tactics in both the Oklahoma and Texas Courts. The Oklahoma Court declined to permit the out-of-state counsel to appear. The Oklahoma Supreme Court relied in part on *State v. Kavanaugh, supra,* wherein that court rejected Mr. F. Lee Bailey's contention that the defendant had a constitutional right to select an attorney who was not a member of the New Jersey Bar. In denying his right to appear, the New Jersey and Oklahoma Supreme Courts quoted with approval the following from *Thomas v. Cassidy, supra:*

" 'It is well settled that permission to a non-resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. [Cases cited.]' " *Smith v. Brock, supra* at 848.

The Oklahoma Supreme Court in *Smith v. Brock, supra* at 850, also quoted with approval the following statement made in *Cooper v. Hutchinson, supra* at 122:

"The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.

"The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice."

From the very beginning it is clear that Mr. James E. Griffin would be the lead counsel in the case. It is well known that Mr. Griffin is one of the leading trial attorneys in Union and surrounding counties. The District Attorney made it clear to Mr. Griffin approximately 1 June 1975 that he would object to having Mr. Long appear in the case on behalf of defendant. The trial judge permitted Mr. Stroman, defendant's personal attorney in Horry County, South Carolina, to appear with Mr. Griffin. Certainly under this set of facts, defendant cannot contend he was prejudiced by the court's decision. His constitutional right to counsel was not abridged.

It is interesting to note that the 1976 South Carolina General Assembly (recently adjourned) required all solicitors to

serve as full-time employees for the State of South Carolina effective 1 January 1977, but those in office on 1 July 1976 whose terms expired in 1979 were not required to comply during their terms. "An Act . . . To Provide That Solicitors In This State Shall Be Full Time Beginning January 1, 1977 And To Provide Exceptions. . . . " R 819, S 785. Approved the 30th day of June, 1976.

The decision of Judge Rousseau was made solely in his discretion. He acted wisely and properly to insure compliance with Canon 9 of the Code of Professional Responsibility of the North Carolina State Bar (G.S. Vol. 4A (Cum. Supp. 1975)), which states:

> "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." See DR9-101(B).

Canon 5 of the Code of Professional Responsibility states:

> "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." See DR 5-105.

Additionally, our law makes it a crime for a full-time district attorney to practice law. G.S. 84-2 (1975). This assignment of error is overruled.

[2] Under the second assignment of error, defendant contends that the court erred in denying the motion of defendant to continue the case in order to permit defendant to employ additional counsel.

When this motion was made, Mr. Griffin stated that it was "to allow Mr. Hunter to obtain other counsel if he so desires." There was no indication or allegation that the defendant even wished to obtain another lawyer or that other counsel was necessary to adequately prepare the defense. In fact, defendant's counsel, Mr. Griffin, declined to argue this motion. As previously noted, Mr. Griffin had been aware for more than two and one-half months that the District Attorney would object to Mr. Long's appearance in the case. It is apparent from the foregoing that defendant had ample time to arrange for the services of another attorney in addition to Mr. Stroman and Mr. Griffin if he so desired.

The constitution guarantees that the defendant and his counsel shall have a reasonable time to prepare the case for trial. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964),

cert. denied, 377 U.S. 1003, 84 S.Ct. 1939, 12 L.Ed. 2d 1052 (1964); *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962); *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949). The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution and by Article 1, §§ 19 and 23 of the North Carolina Constitution. *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972), *cert. denied,* 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972). However, under the facts of this case, we do not believe any substantial issue concerning these constitutional guarantees is even involved. Certainly, defendant has not been prejudiced by the court's failure to continue the case for this purpose. The motion for continuance was properly denied. *State v. Harrill,* 289 N.C. 186, 221 S.E. 2d 325 (1976); *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948). The assignment of error is overruled.

Under Assignments of Error 9-13, 16, 17, 19, 20, 25-32, 34-36, 38-40, defendant contends the court erred in admitting evidence of other offenses committed by the defendant.

As a general rule, 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. However, this rule is subject to certain well recognized exceptions. In the landmark case of *State v. McClain,* 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954), the sixth exception which we will subsequently discuss, is stated as follows:

> "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."

As stated in *McClain,* for a determination of whether evidence of other distinct crimes properly falls within any of the recognized exceptions, "[t]he acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it

reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the Courts to rigid scrutiny. . . . Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *State v. Lyle,* 125 S.C. 406, 417, 118 S.E. 803, 807 (1923); *accord, State v. McClain, supra* at 177, 81 S.E. 2d at 368; *State v. Gregory,* 191 S.C. 212, 221, 4 S.E. 2d 1, 4 (1938). In borderline cases the courts scrutinize whether the probative value of the evidence outweighs the undue prejudicial effect that may result. 22A C.J.S. Criminal Law § 683 (1961).

Defendant specifically objects to the State's evidence showing that the defendant was an accessory before the fact to crimes involving breaking and entering with intent to commit larceny, these crimes being committed (1) by Devine and Watkins at the home of Tony Thompson in Myrtle Beach on 21 July 1974, (2) by Duncan, Devine, and Watkins at the Atlas Construction Company in Myrtle Beach on 30 August 1974, and (3) by Duncan, Devine, and Watkins at the home of Allison Davis in North Myrtle Beach on 19 December 1974.

[3] The admission of the testimony to which defendant objected concerning the breaking, entering, and larceny of the Atlas Construction Company cannot be regarded as prejudicial because testimony of like import was thereafter admitted without objection when Richard Mears was testifying for the State. *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). *See also State v. Carey,* 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Grace,* 287 N.C. 243, 213 S.E. 2d 717 (1975). Defendant's contention that there was no requirement for him to object to the testimony of Mears on this subject because he made a "line objection" within the meaning of G.S. 1A-1, Rule 46(a)(1) (1969) is without merit. The rationale behind this rule of civil procedure is persuasive, and we might later determine that the concept of this rule is applicable in an appropriate criminal case, *e.g.,* where the trial judge sanctions the use of such con-

tinuing objections. However, this rule provides that "when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." Defendant has merely taken general objections. At no time has he made an objection to a specified line of questioning so as to bring himself within the scope of the rule by asserting, for example, that the line of questions involves testimony irrelevant for stated reasons: *See generally* 1 Stansbury's N.C. Evidence, § 30 (Brandis Rev. 1973).

[4] The admission of the evidence as to the breaking, entering, and robbery of the empty safe at the Tony Thompson home and the breaking and entering with intent to steal the money in the safe at the Allison Davis home was, under the *acid test* enunciated in *State v. McClain, supra*, logically relevant for the purpose of proving the defendant's participation as an accessory before the fact to the murder of Potts in the attempted armed robbery. The defendant's participation as an accessory before the fact was a material fact in issue. In fact, this was the crucial issue going to the heart of defendant's defense.

Scrutiny of this evidence shows that it was admissible under the sixth exception to the general rule stated in *State v. McClain, supra*. Evidence of these offenses in context with other evidence showing the relationship of the defendant with the other men involved tended to establish a common plan or scheme embracing the commission of a series of larcenies so related to each other that proof of these other crimes tended to prove the crime charged and to connect the accused with its commission.

Evidence of these collateral crimes was relevant to show that, in fact, the defendant was aiding, counseling, and assisting the same group of men to serve as the instrumentalities by which the defendant profited from the larcenous scheme he concocted. The collateral crimes and the principal crime were connected by the following facts: (1) that the situs of the crimes and residences of the defendant were in close proximity (place), (2) that they occurred within a seven-month period during which the defendant and the other men were continuously in close contact (time), (3) that they were committed for the purpose of larceny (type of crime), (4) that the defendant counseled essentially the same principals, was familiar with

the targets involved, and provided the same kind of information for all of the crimes (method), (5) that essentially the same principals at the situs involved committed the crimes (principals).

A detailed analysis of the facts in this case shows that the defendant provided Watkins with the same kind of counsel and information for the Thompson and Davis crimes as he had provided to him for the Potts and Atlas Construction Company crimes. The defendant also provided Devine the same kind of counsel and information for the Thompson crime as he had provided to him for the Potts and Atlas Construction Company crimes. The evidence further indicated that Duncan was similarly informed by the defendant as to the Potts and Atlas Construction crimes. Furthermore, other evidence showing the kind of relationship that the defendant, Duncan, Devine, and Watkins had, indicated that all of them participated with the defendant in the planning of all these crimes. The defendant, Duncan, Devine, and Watkins were in close contact with each other during this seven-month period, and they were continually pursuing a common plan or scheme to commit larceny in areas in close proximity to the homes of the defendant and about which he was familiar and provided them information. On the night of the Atlas Construction Company larceny or immediately afterwards, the defendant began his discussions with Devine concerning the robbery of Mr. Potts and a Mr. Cato, who lived nearby in Pageland, South Carolina.

Other evidence showed that Devine and Watkins were principals at the situs of all the crimes. Duncan was a principal at the situs of the crimes committed against the Atlas Construction Company and Davis. Evidence of the principal crime and the collateral crimes showed that the residences of the defendant were used as places to meet for purposes of planning as well as for purposes of distributing any proceeds owed to the defendant or making a rendezvous in case of trouble.

In *State v. Grace, supra,* we held concerning that robbery case that the challenged evidence relating to three previous robberies of similar establishments by the same persons and by the use of the identical pistol in the hands of the defendant on each occasion was admissible under the sixth exception to the general rule set forth in *State v. McClain, supra.* The same principle applies in our case and renders the evidence of the collateral

offenses admissible. *See also State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962); 22A C.J.S. Criminal Law § 683 (1961). The facts in *State v. Grace, supra*, concerned a principal at the situs rather than an accessory before the fact and the evidence of similar crimes might also have been applicable on the question of identity. Still the cases are similar in that for each crime the role and identifying characteristics of the defendant remained the same and thus tended to show the defendant's role in the principal crime.

These assignments of error are overruled.

[5] Under Assignments of Error 41 and 42, defendant contends that the trial court erred in allowing the jury to view, and admitting into evidence, slides of the victim's wounds.

The record indicated that the trial court denied introduction into evidence of photographs but permitted the jury to view several slides on a screen in the courtroom, giving the following proper instruction:

> "These photographs, or slides, are introduced for the purpose of illustrating the Doctor's testimony, if you find that it does illustrate his testimony, and for no other purpose. They are not to be considered by you as substantive evidence, but only for the purpose of illustrating the Doctor's testimony, if you find that it does illustrate his testimony."

After this instruction was given, the doctor explained what each slide portrayed as the picture was shown on the screen. There were only 6 of these, one of the chest, one of the upper chest and face, one of the back, one of an arm, and two close-ups of the entrance wound in the chest. Each showed wounds received and appeared to be relevant upon the question of the cause of death. Under the circumstances, the fact that the slide photographs depicted a gruesome or gory spectacle does not render them inadmissible. *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242 (1976); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972), *death penalty vacated*, 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295 (1972).

Under Assignment of Error No. 46, defendant contends the court erred in denying his motion for a nonsuit.

In considering this question, the evidence must be considered in the light most favorable to the State, and the State must receive the benefit of every inference that can reasonably be drawn therefrom. 2 Strong, N. C. Index 2d, Criminal Law, § 104 (1967 and March, 1976, Supp.)

[6] To convict the defendant of being an accessory before the fact the State must prove (1) that the defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime. *State v. Branch, supra; State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 (1961).

[7] Defendant does not contest the fact that the evidence shows that he was not present when the crime was committed and that the principal committed the crime. Furthermore, although defendant argues otherwise, there is plenary direct as well as circumstantial evidence showing that he counse'ed, procured, commanded, encouraged, or aided Devine, Locklear, and Watkins to commit the offense.

The defendant told Devine that Mr. Potts of Union County kept a substantial amount of money on him or in his possession that they could steal. He also discussed Mr. Potts and the available money with Watkins and told Watkins he would help set it up for them.

When the defendant asked Devine to trade guns, Devine told the defendant that he would be laughed at if he tried armed robbery with a .25 Colt Automatic. The defendant informed Devine, Watkins, and Duncan that he planned to have the larceny occur while the Potts dined at his house, but later he indicated to Watkins that they would have to catch Mr. Potts at his home because the defendant did not know where the money was. The defendant showed Devine, Locklear, and Watkins where the Potts' home was. He told Devine and Watkins to come back to his house after the "job." It was understood that Hunter was to get twenty-five percent of the money stolen.

The above evidence, especially as supported by the defendant's admissions as testified to by Mears and the additional evidence indicated in the statement of facts, is more than ample to overcome the motion for nonsuit. This assignment is without merit and overruled.

[8] Under Assignments of Error Nos. 47 through 54, defendant contends the trial court did not declare and explain to the jury the law arising on the evidence in the case as required by G.S. 1-180 (1969).

Defendant complains that two sentences of the court's instructions as to the elements of the crime that the State must prove in order for the jury to find him guilty failed to inform the jury that such proof must be shown by evidence establishing the enumerated elements beyond a reasonable doubt. Defendant's argument rests solely on the fact that the words "beyond a reasonable doubt" are not used in the two sentences. Defendant totally overlooks the fact that at the beginning of the charge the trial court stated that defendant "is presumed to be innocent, and the State of North Carolina must prove to you that the defendant is guilty beyond a reasonable doubt." The court then gave a complete definition of reasonable doubt. Moreover, when first listing the initial elements of the crime, the court specifically required the proof to be beyond a reasonable doubt. Similarly, at the conclusion of the charge when reciting all the elements of the crime, the court again specifically required that the proof be beyond a reasonable doubt. Finally, the court concluded, "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." A charge must be read contextually, and when this is done, it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt. *State v. Branch, supra; State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). This contention of defendant is without merit.

[9] Defendant argues that the court erred in failing to charge the jury that in order to find the defendant guilty as an accessory before the fact to murder, the counseling of the principal by the defendant must have had an immediate causal connection to the commission of the crime by the principal. Since, in effect, this is precisely what the charge of the court required, defendant's argument is without merit. In this case, the trial court adequately stated the three essential elements that must concur in order to justify conviction of the defendant as an accessory before the fact: (1) he must have counseled, procured, commanded, or knowingly aided Billy Devine to attempt to commit armed robbery; (2) he must have not been present when the killing and attempted armed robbery occurred; and

(3) the principal, Billy Devine, murdered William Benjamin Potts while attempting to commit armed robbery. *State v. Branch, supra; State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970) ; *State v. Bass, supra;* G.S. 14-5 (1969). Inherent in the first element as charged by this court is the requirement that the counsel, procurement, command, or aid have a causal connection to the commission of the crime. Otherwise, there would be no real counsel, procurement, command, or aid. That the trial court in fact required an immediate causal connection is most clearly shown by the final mandate of the trial court. The court charged that the jury must find the defendant not guilty unless they found that "before the killing was committed the defendant, that is, Harry Hunter, pointed out the Potts Residence and store to Billy Devine and told Billy Devine Mr. Potts had a large sum of money and told him that he couldn't locate the money and that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money, and that in so doing the defendant, Harry Hunter, counseled or procured, or commanded or knowingly aided Billy Devine to attempt to commit armed robbery and that the defendant was not present at the time of the killing. . . . " Since there was no special request for the particular instruction that defendant now believes should have been given, since such an instruction was in effect given, and since the question of the causal connection herein raised was not disputed or in issue under the evidence of the case (the central issue being whether the defendant counseled, procured, or commanded the principal at all), there can be no prejudice to defendant. *See generally State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975) ; *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506 (1967) (discussed herein).

Defendant maintains that the charge failed to require the jury to find that the defendant and Devine entertained the common design that Devine take money from the person or presence of the deceased by violence or intimidation and that the taking was to be done with a felonious intent. The above recitation of part of the final mandate shows that the trial court in fact required the jury to find that the defendant told Devine "that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money." Defendant's position is without merit because the charge that he now urges should have been given was in essence given.

Defendant asserts that the court's summary of the evidence when instructing on the law was prejudicial to defendant because it ignored and excluded evidence given by the slayer, Devine, which was favorable to defendant. This evidence was the testimony of Devine that the defendant planned for the larceny to occur while he had the Potts over to his house for dinner and the fact that Devine never testified definitely whether these plans were later changed to contemplate a robbery while the Potts were at their home. In fact, the trial court included this testimony in its recapitulation of evidence although it did not underscore the testimony that was not given. Moreover, the court omitted the testimony of Watkins favorable to the State that the defendant "changed his mind, and [said] we'd have to catch him at his home because he didn't know where the money was." Certainly, in the absence of a request for an addition to the court's recapitulation of the evidence, defendant cannot successfully maintain that there is reversible error. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). The jury was properly instructed that it was "to decide from the evidence which you have heard what the facts are." Moreover, the final mandate to the jury that they find (from circumstantial evidence impliedly) that the defendant told Devine "that he would have to rob Mr. Potts when he was at home" placed an even greater burden on the State than required by law. If the jury determined that a conspiracy existed, it clearly would have been adequate for purposes of convicting the defendant that he have told this to Watkins and that Watkins passed this information on to Devine. Defendant has failed to show any error prejudicial to him.

Defendant additionally contends that the court failed to charge the essential elements of armed robbery or an attempt to commit armed robbery so the jury could determine (1) whether Devine murdered Potts while committing or attempting to commit an armed robbery upon him and (2) whether the defendant was an accessory before the fact to such murder. He particularly emphasizes the fact that the court failed to charge that an essential element of armed robbery is "a felonious intent" and in some sufficient form explain and define the term "felonious intent."

[10] Although the court should have spelled out the essential elements of the underlying felony of attempted armed robbery

in its instructions as to what the State must prove to convict defendant of being an accessory before the fact to felony-murder, his failing to do so was not prejudicial error for the following reasons: (1) the occurrence of the attempted armed robbery by Devine, Locklear, and Watkins was not disputed and thus not in issue under the evidence in the case, (2) defendant failed to specially request instructions on the underlying felony, (3) the court did define "attempted armed robbery" as "attempted robbery with a firearm," and (4) these latter terms were essentially self-explanatory under the circumstances of this case.

Although "reasonable doubt" is not an element of a crime, it is the standard by which all elements must be proved to the jury for defendant to be found guilty. Thus, the jury's understanding of that term is as practically important as the jury's understanding of the elements of the crime. Nonetheless, the trial judge is not required to tell the jury what "reasonable doubt" is unless requested so to do. *State v. Rankin, supra; State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied,* 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973); *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971). In part, this is because "[t]he term 'reasonable doubt' is more easily understood than defined." *State v. Edwards,* 286 N.C. 140, 146, 209 S.E. 2d 789, 793 (1974). Additionally, this is because the term is essentially self-explanatory, as is also true for the term "attempted robbery by a firearm," especially in a functional sense so far as this jury's decision is concerned because there is no real dispute as to the "felonious intent" or the actual occurrence of the attempted armed robbery and the crime charged is accessory before the fact to murder while attempting armed robbery.

In *State v. Cole, supra,* we cited with approval the following quotation from 26 Am. Jur., Homicide § 533, at 527 (1940), "[W]here, upon the undisputed facts, it clearly and conclusively appears to a moral certainty that the unlawful act complained of was the proximate cause of death, a failure so to charge, especially where there was no request so to charge, is not reversible error." Our Court held, "There being 'no evidence tending to prove that deceased's death was due to some cause other than injuries inflicted by the accused,' an instruction on proximate cause was unnecessary, and especially when there was no request therefor." *State v. Cole, supra* at 387-88, 154 S.E. 2d at 511. This case is an example of the principle that how

much the law needs to be explained in the charge depends on the evidence presented.

State v. Sanders, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976), is another example of a case where the court's charge on an element of the crime might have raised serious problems but did not where the element complained about was not disputed or in issue under all the evidence. In that case, we stated that the court's charge as to the crime of willful and malicious damage to occupied personal property by means of explosives had portions that were not models of clarity. Defendant contended that the charge only required that there be injury to the person occupying the personal property and did not require that there be injury to the personal property. We determined that when the charge was read contextually, the court's reference to the crime as "damaging personal property, it being occupied at the time, by use of explosives" and its giving to the jury a sheet of paper immediately before they retired repeating the fact that this was the crime involved, prevented there being any prejudicial error. We also noted that "[a]ll of the evidence showed extensive damage to the automobile [the personal property] as well as serious injury to Stout [the person]."

In *State v. Vinson, supra*, defendant complained in a rape case that the trial judge failed to define "sexual intercourse" and thus failed to charge that rape required penetration by the male organ. The evidence disclosed two completed acts of intercourse, and there was no evidence to the contrary. Justice Huskins, speaking for our Court, said:

> "Although defendant's plea of not guilty required the State to prove penetration beyond a reasonable doubt, the defense was not grounded on lack of penetration. Under these circumstances, the term 'sexual intercourse' conveyed the idea of completed intercourse, including penetration, and the jury must have so understood." *State v. Vinson, supra* at 342, 215 S.E. 2d at 72.

As in the case of *State v. Vinson, supra*, the element in our case that was not defined, *i.e.*, the attempted armed robbery, was essentially self-explanatory and that element was not disputed and thus not in issue under all the evidence. Defendant Hunter's defense was not grounded on the absence of attempted armed robbery and the murder resulting therefrom. Rather, it

was grounded on the contention that he did not participate in the planning of the attempted armed robbery and did not counsel, procure, or command the principals Devine, Locklear, and Watkins to commit the attempted armed robbery.

In *State v. Spratt,* 265 N.C. 524, 526-27, 144 S.E. 2d 569, 571-72 (1965), our Court enunciated the principle that while G.S. 1-180 requires the court to "declare and explain the law arising on the evidence," the comprehensiveness and specificity "of the definition and explanation of [the essential element] 'felonious intent' required in a charge [on attempted armed robbery] depends on the facts in the particular case." In that robbery case we held that the essential element of taking with "felonious intent" was defined with sufficient comprehensiveness and specificity where the court old the jury, in effect, that before they could return a verdict of guilty, they must find that defendant attempted to take the property with "intent to rob." The Court reasoned:

> " 'Rob' or 'robbery' has a well defined meaning and imports an intent to steal. [Citation omitted.] The word 'rob' was known to the common law and the expression 'intent to rob' is a sufficient definition of 'felonious intent' as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose." Id.

The Court therein quoted with approval the following language:

> " '[W]here the defense was an alibi and the evidence developed no issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, the instructions may be upheld notwithstanding a failure to charge in specific terms with respect to an intent to steal.' 77 C.J.S., Robbery, § 49, pp. 514, 515. [Citations omitted.]" Id.

Since in our case defendant was charged with being an *accessory before the fact* to felony-murder, the need for a full definition of the underlying felony of attempted armed robbery was analogous to the need for a full definition of "felonious intent" in *State v. Spratt, supra,* where the charge was attempted armed robbery. In both cases, the jury was required to find that all the "central" elements existed, including "an attempted armed robbery" in our case and "a felonious intent" in *State*

v. Spratt, supra. In both cases, however, the court failed to define or charge as to all the inner elements of the central elements of the crimes charged. The fact that in the armed robbery case of *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965) the court did not even charge the jury that in order to convict defendant as a principal, they must find the central element of "felonious intent" distinguishes that case from *State v. Spratt, supra,* and the present case.

If counsel for defendant had desired further elaboration on the term "armed robbery" or anything else, he should have requested it when the court concluded the instruction and asked counsel to step to the bench. We believe that the trial court has adequately instructed on all the substantial features of the case, and if the defendant desired a more detailed instruction as to any subordinate feature, then counsel should have made an appropriate request. This they failed to do. *State v. Vinson, supra; State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43 (1944); *State v. Hendricks,* 207 N.C. 873, 178 S.E. 557 (1935); *State v. O'Neal,* 187 N.C. 22, 120 S.E. 817 (1924).

For the aforementioned reasons, defendant's assignments of error as to the charge are overruled.

Because of the serious nature of the crime for which defendant has been convicted, we have examined all the assignments of error in the record proper and find no prejudical error.

Defendant was "entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953); *accord, State v. Cogdale,* 227 N.C. 59, 40 S.E. 2d 467 (1946); *State v. Beal,* 199 N.C. 278, 154 S.E. 604 (1930). A fair trial the defendant has had and we find

No error.

Justice EXUM concurs in result.

Justice LAKE dissenting.

The defendant appeals from a sentence to imprisonment for life for the crime of being an accessory before the fact to a murder committed in the perpetration of an attempt to commit

robbery with a firearm. The jury found him guilty of that offense. The evidence fully supports the verdict. There was no prejudicial error in the admission of that evidence. There was, however, error in the failure of the trial judge to instruct the jury as to all the elements of the offense with which the defendant was charged and of which he was convicted. This the trial judge was required to do by G.S. 1-180.

The judge instructed the jury:

"Now, the defendant was originally charged with murder in the first degree. However, you will not be called upon to find the guilt or innocence of the defendant on this charge, but you will be called upon to find the guilt or innocence of the defendant on a lesser included offense, that is, accessory before the fact of murder in the perpetration of attempt to commit robbery with a firearm, commonly called armed robbery, *the meaning of which I will explain to you later on.* (Emphasis added.)

* * *

"Now, lady and gentlemen, as I said, the defendant has been accused of accessory before the fact of murder in the perpetration of an attempt to commit robbery with a firearm, which in common language is armed robbery.

"Now, I charge that for you to find the defendant guilty as an accessory before the fact of murder in the perpetration of attempted robbery with a firearm, the State must prove the following things beyond a reasonable doubt. First, the State must prove and prove beyond a reasonable doubt that murder in the perpetration of attempted armed robbery was committed by Billy Devine. Now, in order to find that Billy Devine committed murder in the perpetration of an armed robbery, the State must prove 2 things beyond a reasonable doubt, that is, that Billy Devine shot William B. Potts while committing or attempting to commit armed robbery, and, second, that the shooting proximately caused William Benjamin Potts' death.

* * *

"So I repeat, in order to find the defendant guilty of this charge, you first must find that murder in the perpetration of attempted robbery was committed by Billy Devine, and in order to find that you must find Billy

Devine shot Mr. Potts while committing or attempting to commit armed robbery, and that the shooting proximately caused Mr. Potts' death.

"Coming back to what the State must prove, again, that before the crime was committed, the defendant, that is, Harry Hunter, counseled, procured, commanded or knowingly aided Billy Devine to commit or attempt to commit armed robbery. And finally, the State must prove that the defendant was not present when the killing of William Benjamin Potts occurred.

* * *

"Therefore, lady and gentlemen, I charge if you find from the evidence beyond a reasonable doubt that on or about February 7, 1975, Billy Devine committed murder in the perpetration of attempt to commit robbery, that is, that Billy Devine shot William Benjamin Potts while attempting to commit armed robbery and the shooting proximately caused William Benjamin Potts' death and that before the killing was committed the defendant, that is, Harry Hunter, pointed out the Potts residence and store to Billy Devine and told Billy Devine Mr. Potts had a large sum of money and told him that he couldn't locate the money and that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money, and that in so doing the defendant, Harry Hunter, counseled or procured or commanded or knowingly aided Billy Devine to attempt to commit armed robbery and that the defendant was not present at the time of the killing, it would be your duty to return a verdict of guilty of accessory before the fact of murder."

In a charge otherwise free from error the trial judge inadvertently failed to instruct the jury as to the elements of the offense of robbery, the underlying felony which made the killing of Mr. Potts murder.

Since robbery (or attempt to rob) is an essential element of the offense for which the defendant was put on trial, G.S. 1-180 required the judge to instruct the jury as to the elements of robbery. We may not lawfully assume that this was nonprejudicial error on the theory that everyone knows what robbery is. No such assumption may lawfully be made when a defendant is charged with the crime of robbery itself. See:

State v. Logner, 269 N.C. 550, 551, 153 S.E. 2d 63 (1967); *State v. Fulford,* 124 N.C. 798, 32 S.E. 337 (1899). Similarly, no such assumption may lawfully be made when he is charged with a crime of which robbery is an essential element.

"A correct charge is a fundamental right of every accused." *State v. Orr,* 260 N.C. 177, 181, 132 S.E. 2d 334 (1963). As Justice Barnhill, later Chief Justice, said in *State v. Friddle,* 223 N.C. 258, 261, 25 S.E. 2d 751 (1943), "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved." G.S. 1-180 confers upon litigants, including defendants charged with crime, a substantial legal right to have the jury instructed as to the law upon all substantial features of the case. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Brady,* 236 N.C. 295, 72 S.E. 2d 675 (1952); *State v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53 (1950). The judge must charge the jury as to what constitutes the essential elements of the offense for which the defendant is brought to trial. *State v. Hairr,* 244 N.C. 506, 94 S.E. 2d 472 (1956).

To convict the defendant of the offense of being an accessory before the fact to a murder committed in the perpetration of an attempt to commit robbery, the jury would have to find that the killing was committed in the course of an attempt to commit robbery. To so find, the jury would have to know what constitutes robbery. The instructions given the jury do not contain any definition of that offense.

FIELDCREST MILLS, INC. v. J. HOWARD COBLE, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 67

(Filed 1 September 1976)

1. Taxation § 29— merger of corporations — loss carryover — continuity of business enterprise

The continuity of business enterprise test formulated in *Libson Shops, Inc. v. Koehler,* 353 U.S. 382 (1957), and adopted by the N. C. Supreme Court in *Distributors v. Shaw, Comr. of Revenue,* 247 N.C.

157 (1957), controls the availability of a loss carryover deduction to successor corporations under G.S. 105-130.8.

2. **Taxation § 29— merger of corporations — loss carryover — continuity of business enterprise**

The continuity of business enterprise test means that where a loss corporation and a gain corporation are merged, pre-merger losses may be offset against post-merger gains only to the extent that the business [or group of assets] which was previously operating at a loss is now operating at a profit.

3. **Taxation § 29— merger of parent and subsidiary — loss carryover of subsidiary — no continuity of business enterprise**

Where a wholly owned subsidiary performed a manufacturing service required by the parent corporation in its own production and also conducted 40% of its business with others, the two corporations filed separate state income tax returns as required by state law and consolidated returns as permitted by federal law, the subsidiary experienced net operating losses for a couple of years and was thereafter merged into the parent in a tax-free re-organization, the parent subsequently conducted the same businesses the separate corporations had previously conducted, and following merger the division which had previously been the subsidiary continued to operate at a loss, there was no continuity of business enterprise so as to permit the parent to offset against post-merger profits attributable solely to its pre-merger assets the net operation loss deduction incurred by the former subsidiary prior to merger.

ON *certiorari* to review the decision of the Court of Appeals, reported in 23 N. C. App. 157, 208 S.E. 2d 394 (1974), which affirmed the judgment of *Winner S.J.*, at the 4 February 1974 Session of the Superior Court of ROCKINGHAM, docketed and argued as Case No. 19 at the Spring Term 1975.

Plaintiff, a Delaware corporation authorized to do business in North Carolina and having its residence and principal place of business in Rockingham County, brought this action under G.S. 105-267 for the refund of corporate income taxes paid by plaintiff for the year 1970. The facts were stipulated and are summarized below.

Plaintiff is a manufacturer of household textiles including bedding and bath products. Some of these products are printed with designs by utilizing a process called "screen printing." Foremost Screen Print, Inc. (Foremost) was organized by plaintiff as a Delaware corporation in 1962 for the principal purpose of screen printing textile products for plaintiff. In 1963 a plant was constructed for this purpose near Stokesdale, North

Carolina, and shortly thereafter operations of Foremost, which had previously been conducted in New Jersey were terminated.

When Foremost was organized, plaintiff owned all of the 1600 issued and outstanding shares of voting preferred stock and 400 of the 800 issued and outstanding shares of common stock of Foremost. On 10 March 1967 plaintiff acquired the additional 400 shares of common stock and, from that date until 31 December 1969, Foremost was a wholly owned subsidiary of plaintiff.

Throughout its corporate existence Foremost engaged solely in the process of "screen printing." During the year 1969, 63.4% of Foremost's receipts resulted from transactions between plaintiff and Foremost; the remainder came from screen printing for other customers. Certain management personnel of Foremost were employees of plaintiff during 1969, but plaintiff billed Foremost for their salaries on 31 December 1969. Foremost operated in one plant with 290 employees.

During the years preceding and including 1969, plaintiff and Foremost were calendar-year taxpayers and were members of an affiliated group of corporations which filed consolidated federal income tax returns.

In 1969, Foremost incurred a net economic loss of $485,164.00 as reported on its North Carolina income tax return for that year. The loss resulted solely from business transactions within North Carolina, and Foremost was not required to allocate and apportion the loss as provided in G.S. 105-130.4.

On 31 December 1969, through a statutory merger under Section 253, General Corporation Law of the State of Delaware, Foremost was merged with plaintiff. The merger was treated for federal income tax purposes as a nontaxable transaction under Section 332, Internal Revenue Code of 1954, which provides for the liquidation of a subsidiary into its parents. The total assets of Foremost received by plaintiff was $1,767,999.00, and the net value of these assets was $1,221,337.00. After the merger plaintiff continued the screen printing operations of Foremost at the same location, with the same equipment and employees, in the same manner and using the same accounting methods as prior to the merger. Plaintiff also continued to operate as it had before the merger.

During the year 1970, in its operation of the business formerly conducted by Foremost, plaintiff incurred an economic loss of approximately $302,000.00. Plaintiff, which continued to be a calendar-year taxpayer, claimed a deduction on its North Carolina income tax return for 1970 of $485,164.00. The deduction was taken under G.S. 105-130.8 for the net economic loss incurred in 1969 by Foremost.

In auditing plaintiff's 1970 return defendant disallowed plaintiff's claimed deduction, made a related adjustment of plaintiff's deduction for contributions to North Carolina donees, and assessed additional taxes against plaintiff in the amount of $27,654.35. Plaintiff filed objections and, at a hearing on 1 November 1972, the Commissioner of Revenue sustained the assessment.

Plaintiff paid defendant the additional taxes plus interest ($27,654.35 plus $3,180.25) in February 1973 and made a written demand for refund in March 1973. The tax was not refunded within 90 days and plaintiff filed suit for the assessed amount under G.S. 105-267.

Judge Winner heard the case on the facts stipulated above and sustained the Commissioner. He concluded that plaintiff was presently carrying on a business in which it had not engaged prior to the merger "and that therefore there was no continuity of business enterprise." Further, he concluded that "a different business entity is claiming the loss carryover than incurred the loss"; that plaintiff was not entitled to deduct the loss carryover of its subsidiary Foremost and therefore not entitled to recover the additional taxes assessed. The Court of Appeals affirmed the judgment of the Superior Court and, upon plaintiff's petition, we allowed certiorari.

Womble, Carlyle, Sandridge & Rice by Leon L. Rice, Jr., and John L. W. Garrou for plaintiff appellant.

Rufus L. Edmisten, Attorney General, and George W. Boylan, Assistant Attorney General, for defendant appellee.

SHARP, Chief Justice.

The facts of the present case can be reduced to the following formula. "A," a parent corporation, incorporates "B," a wholly owned subsidiary, to perform a vital manufacturing service required by "A" corporation in its own production. "B" not

only provides the service to "A" corporation, but 40% of its business is conducted with others. The two corporations operate as parent and subsidiary, filing separate state income tax returns as required by state law and consolidated income tax returns as permitted by federal law. After "B" experiences net operating losses for a couple of years it is merged into "A" corporation in a totally tax-free reorganization. Thereafter "A" corporation conducts the same businesses the separate corporations had previously conducted. In the year following the merger the division of "A" corporation, which was formerly "B" corporation, continued to operate at a loss. On "A's" post-merger federal income tax return, however, the pre-merger net operating loss attributable to "B" corporation is allowed as a carryover deduction under § 381 of the Internal Revenue Code (I.R.C.) of 1954 and is used to offset post-merger income generated by the previous assets of "A" corporation.

This appeal presents the question whether, under the present state corporate tax statutes (specifically, G.S. 105-130.8 (1972)), "A" corporation (Fieldcrest) can offset against post-merger profits attributable solely to its pre-merger assets the net operating loss deduction incurred by constituent corporation "B" (Foremost) prior to the merger. Resolution of this question requires us to construe and apply G.S. 105-130.8.

This provision is patterned after the net operating loss carryover deduction found in the 1939 federal Internal Revenue Code, and this Court in construing it has looked to and relied upon federal cases applying the analogous federal deduction. *Distributors v. Currie, Com'r. of Revenue,* 251 N.C. 120, 110 S.E. 2d 880 (1959); *Distributors v. Shaw, Com'r. of Revenue,* 247 N.C. 157, 100 S.E. 2d 334 (1957). Therefore, in order to comprehend the state deduction completely and to apply it properly, the history of net operating loss carryover deductions under the federal and state tax statutes, as well as the judicial decisions construing them, must be examined.

The net operating loss carryover deduction was first introduced into the I.R.C. in 1918, Revenue Act of 1918, ch. 18 § 204(b)—Comment, The Loss Carryover Deduction and Changes in Corporate Structure, 66 Colum. L. Rev. 338, 339 (1966)—in an effort to allow a taxpayer to average his income by balancing losses incurred in lean years against profits earned in lush ones. "The fundamental proposition underlying the car-

ryover concept is one of tax equity: a taxpayer with a given aggregate income over a period of years whose annual returns vary between profit and loss should not be required to bear a greater tax burden than another taxpayer with the same aggregate income who suffers no annual losses." Comment, 66 Colum. L. Rev. at 339. The deduction, however, had the potential of allowing easy tax avoidance when the taxpayer seeking to claim it was not the one who actually incurred the loss. For many years it was a common practice for a high-profit corporation to acquire, often very cheaply, a loss corporation with a huge accumulated net operating loss. The two corporations would merge, the non-profitable business would be terminated, and the surviving corporation would attempt to offset its income by deducting the net operating losses that were previously generated by the submerged loss-corporation. In order to prevent such abuses, the I.R.S. the courts, and ultimately Congress found it necessary to set rules and guidelines governing the availability of the deduction, particularly in the area of successor corporations.

To understand the judicial limitations, the language of the initial federal tax statutes allowing the deduction must be examined. "The operative portion of all the carryover sections prior to the 1954 Code used substantially the same phraseology. *See, e.g.,* Revenue Act of 1924, ch. 234, § 206(b), 43 Stat. 260 ('If, for any taxable year, it appears . . . that *any taxpayer* has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of *the taxpayer* for the succeeding taxable year.' [emphasis added]); Int. Rev. Code of 1939, § 122(b)(1) ('If for any taxable year . . . *the taxpayer* has a net operating loss . . . ' [emphasis added])." Comment, Net Operating Loss Carryovers and Corporate Adjustments, 69 Yale L.J. 1201, 1207 n. 22 (1960).

Because of this statutory language, the I.R.S. and judicial opinions had a tendency to focus on the identity of "the taxpayer" who incurred the loss and whether it was the same as "the taxpayer" who sought the deduction. The I.R.S. maintained that *the corporate entity,* rather than *its shareholders,* was the taxpayer within the meaning of the statute. It therefore allowed the deduction only if the corporation claiming it was operating under the same corporate charter as the corporation which experienced the loss. Conversely, "if the corporation which claimed the deduction was operating under a different charter from the

corporation which sustained the loss, the carryover was disallowed even though the shareholders and business remained as they were before the change in charter." Comment, 69 Yale L.J. at 1207. The U.S. Supreme Court adopted this "entity theory" in *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 78 L.Ed. 1348, 54 S.Ct. 788 (1934).

In *New Colonial* an existing corporation (Colonial Ice Co.) was experiencing financial difficulties. Pursuant to an agreement between the corporation's creditors and its shareholders a new corporation, New Colonial Ice Co., was formed. All of the assets of the existing corporation were transferred to New Colonial in return for its corporate shares. This stock was then transferred to the shareholders of the existing corporation in a share for share exchange for the outstanding stock of the old corporation. Thereafter New Colonial continued the same business and sought to deduct against its income net operating losses sustained by the older corporation. Although the shareholders of the two corporations remained the same and the same business was conducted, the U. S. Supreme Court denied the deduction on the basis that the corporate entity claiming the deduction was not the same corporate entity that had experienced the loss. In other words the "taxpayer" seeking the deduction was not the "taxpayer" that had incurred the loss. The Court expressly rejected the argument that since the shareholders of the two corporations remained the same, the two corporations should be considered the same entity for tax purposes. The Court noted, "As a general rule a corporation and its shareholders are deemed separate entities and this is true in respect of tax problems." 292 U.S. at 442, 78 L.Ed. at 1353, 54 S.Ct. at 791.

Although the "entity" doctrine espoused in *New Colonial* flourished, see Becker, Loss Carryovers and the *Libson Shops* Doctrine, 32 U. Chi. L. Rev. 508, 510 (1965), it was not equitable and did not comport with market reality. Under the doctrine the availablility of the deduction depended on the form of the transaction. Thus, if "A" corporation, operating at a profit, merged with "B," a loss corporation, and thereafter conducted its same business under the corporate charter of "A" or under a new corporate charter, the net operating loss deduction would be unavailable since the legal entity claiming the deduction would not be the same legal entity that generated the loss. How-

ever, if the same "A-B" merger took place and the business were conducted under the corporate charter of "B" the carryover would be allowed since the legal entity claiming the deduction also sustained the loss. This doctrine often led to easy tax avoidance and resulted in inequitable taxation. *See* Alprosa Watch Corp., 11 T.Ct. 240 (1948); 69 Yale L.J. at 1209-11.

To avoid its undesirable consequences lower federal courts sought to distinguish *New Colonial* and to allow the deduction and other tax attributes to survive, whenever there was a continuity of enterprise between the two merging corporations and the resulting corporation and where the merger was achieved pursuant to statute. *See Newmarket Mfg. Co. v. United States,* 233 F. 2d 493 (1st Cir. 1956), *cert. denied,* 353 U.S. 983 (1957); *Stanton Brewery, Inc. v. Commissioner,* 176 F. 2d 573 (2d Cir. 1949). *Compare Koppers Co. v. United States,* 133 Ct. Cl. 22, 134 F. Supp. 290 (1955), *cert. denied,* 353 U.S. 983 (1957). *See also* 66 Colum. L. Rev. 341-42, 69 Yale L.J. at 1207-16; 32 U. Chi. L. Rev. at 510-512; Levine & Petta, Libson Shops—A Study in Semantics, 36 Taxes 445 (1958). In most of these cases, however, the deduction would have clearly been available but for the merger. As the courts sought to avoid the impact of the entity doctrine, the case law became murky and confused. 32 U. Chi. L. Rev. at 512.

Finally, Congress responded and the 1954 revision of the Internal Revenue Code included specific provisions regulating the availability of net operating loss deductions to successor corporations. "Section 381 [of the 1954 I.R.C.] repudiated the entity doctrine insofar as it had been applied to bar transfer of loss carryovers in certain corporate reorganizations. The section provides that an acquired corporation's carryover, in addition to a number of other tax attributes, shall pass to the acquiring corporation in five specified tax-free acquisitions." 66 Colum. L. Rev. at 343-44. Basically Section 381 authorizes a carryover "when there has been: (1) a liquidation of a subsidiary, (2) a statutory merger or consolidation, (3) the acquisition by a corporation of substantially all the assets of another corporation in exchange solely for its voting stock; (4) a transfer of substantially all the assets of a corporation to a controlled corporation followed by liquidation of the transferor corporation, or (5) a mere change of the place of organization, identity or form of a corporation." *Id.* at 344, n. 33. Under present § 381 the allowance of the deduction depends upon the economic effects

of the reorganization rather than upon the form of the transaction. As a part of its effort to prevent unwarranted tax avoidance through the carryover deduction, however, Congress enacted § 382, which places objective limitations upon the availability of the loss carryovers permitted under § 381. *Id.* at 344. These objective criteria work to deny or limit the deduction where there has been a significant change in the ownership of the resulting corporation as compared with the ownership of the acquired corporation coupled with a change in the acquired corporation's business activity. *See Id.* at 344 and n. 35.

Obviously the 1954 I.R.C. sections did not apply to pre-1954 corporate reorganizations, and it was not until 1957 that the United States Supreme Court sought to clarify the availability of the net operating loss carryover deduction to successor corporations in corporate reorganizations governed by the 1939 Code.

In *Libson Shops, Inc. v. Koehler,* 353 U.S. 382, 1 L.Ed. 2d 924, 77 S.Ct. 990 (1957), 17 corporations were incorporated by the same promotors—16 of the corporations sold women's apparel at retail and one, Libson Shops, Inc., provided management services for the other sixteen. The stock in all 17 corporations was held by the same individuals in the same proportions. However, each of the retail corporations was operated separately and filed separate tax returns. In 1949 the sixteen retail corporations were merged pursuant to state law into the one management service corporation. Following the merger, Libson Shops, Inc., conducted the entire business of the sixteen retail corporations. "Thus, the effect of the merger was to convert 16 retail businesses and one managing agency, reporting their incomes separately, into a single enterprise filing one tax return." *Id.* at 383, 1 L.Ed. 2d at 926, 77 S.Ct. at 991. Three of the retail corporations had, prior to the merger, experienced net operating losses and after the merger, these same units of the consolidated corporation continued to sustain losses. In the year following the merger, Libson Shops, Inc., sought to deduct from its gross income the net operating loss sustained by the three constituent corporations prior to the merger. The applicable code provision authorizing the deduction, § 122(b) of the I.R.C. of 1939, read as follows: "If for any taxable year . . . the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the three succeeding taxable years. . . . " The I.R.S., relying on the entity theory of *New*

Colonial, contended that the carryover deduction was unavailable because the "taxpayer" claiming it, Libson Shops, Inc., was not the same corporate entity as the "taxpayer" (the three constituent corporations) which had sustained the loss. The United States Supreme Court declined to base its decision on the entity doctrine. Nonetheless, adopting the Government's alternative argument, it denied the deduction. The Court said: "The Government contends that the carryover privilege is not available unless there is a continuity of business enterprise. It argues that the prior year's loss can be offset against the current year's income only to the extent that this income is derived from the operation of substantially the same business which produced the loss. Only to that extent is the same 'taxpayer' involved.

"The requirement of a continuity of business enterprise as applied to this case is in accord with the legislative history of the carry-over and carry-back provisions. Those provisions were enacted to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years and to strike something like an average taxable income computed over a period longer than one year. There is, however, no indication in their legislative history that these provisions were designed to permit the averaging of the pre-merger losses of one business with the post-merger income of some other business which had been operated and taxed separately before the merger." *Id.* at 386-87, 1 L.Ed. 2d at 927-28, 77 S.Ct. at 992-93.

The Court then distinguished *Libson Shops, Inc.,* where it said "several businesses" were involved, from *Newmarket Mfg. Co. v. U. S.,* 233 F. 2d 493 (1st Cir. 1956), a case involving a "single business." In this regard the Court said: "This difference is not merely a matter of form. In the *Newmarket* case, *supra,* a corporation desiring to change the state of its domicile caused the organization of a new corporation and merged into it. The new corporation sought to carry back its post-merger losses to the pre-merger income of the old corporation. But for the merger, the old corporation itself would have been entitled to a carry-back. In the present case, the 16 sales corporations, prior to the merger, chose to file separate income tax returns rather than to pool their income and losses by filing a consolidated return. Petitioner is attempting to carry over the pre-merger losses of three business units which continued to have losses after the merger. Had their been no merger, these busi-

nesses would have had no opportunity to carry over their losses. If petitioner is permitted to take a carry-over, the 16 sales businesses have acquired by merger an opportunity that they elected to forego when they chose not to file a consolidated return." Id. at 388, 1 L.Ed. 2d at 928-29, 77 S.Ct. at 994.

In conclusion, the Court reemphasized that the carry-over deduction was not intended to provide a windfall for merged corporations or to "give the merged taxpayer a tax advantage over others who have not merged." Thus, the deduction was not available to Libson Shops, Inc., since there was no continuity of business between it as a consolidated corporation and its pre-merger constituent parts. Libson Shops, Inc., was not "entitled to a carry-over since the income against which the offset [was] claimed was not produced by substantially the same businesses which incurred the losses." *Id.* at 390, 1 L.Ed. 2d 929, 77 S.Ct. at 994.

Since the *Libson* decision, the I.R.S., the federal courts, and tax commentators have struggled with the concept of "the continuity of business enterprise" and its meaning has been less than clear. Perhaps this confusion results from the fact that "there are at least three elements involved in the concept of 'continuity of business enterprise,' namely, corporate entity, assets, and ownership. *Libson Shops* denies a loss carryover if entity and assets are different from those producing the loss, even if ownership does not change." Reese, Reorganization Transfers and Survival of Tax Attributes, 16 Tax L. Rev. 207, 220, n. 59 (1961).

The I.R.S.'s response to the *Libson* decision came in Revenue Ruling 59-395, which applied to corporate mergers and acquisitions governed by the 1939 Code. The Ruling attempted to delineate the criteria for determining when one business is "substantially the same" as another. Basically, it provided that "[f]ollowing a statutory merger or consolidation, the net operating losses of an 'absorbed constituent' corporation [could] be carried forward to the extent that such losses offset income of the 'resultant' corporation attributable to *assets:* (1) acquired by it from the absorbed constituent, *and* (2) 'used in continuing the prefusion business of such absorbed constituent.' . . . The ruling also provides that where the merged or consolidated corporations had filed a consolidated return in the loss year *and* the resultant corporation 'conducts the same busi-

ness as previously operated by the constituent corporation,' carryovers are allowable 'on the same basis as if the group . . . represents, collectively, after the merger or consolidation, the same taxable enterprise as before that event." 69 Yale L.J. at 1219-20.

Not surprisingly, the lower federal courts generally construed the *Libson Shops* decision along the same lines as the I.R.S. did in Revenue Ruling 59-395. Although the courts were not completely consistent, a few general patterns can be discerned in their application of *Libson Shops*. Carryovers have been denied where there has been a change of assets, and stock ownership has also changed hands, Huyler's, Inc., 38 T.Ct. 773 (1962), *aff'd* 327 F. 2d 767 (7th Cir. 1964), and where commonly owned corporations doing business and filing taxes separately, merged and then sought the benefit of carry-over deductions against the resultant corporation's income which had not been generated by the loss corporation's assets. *See Frank IX and Sons Virginia Corp. v. Commissioner*, 375 F. 2d 867 (3rd Cir. 1967), *cert. denied* 389 U.S. 900 (1967). The carry-over deduction has been allowed, however, where a parent and its subsidiaries have previously filed consolidated or affiliated returns, and after merger have attempted to offset post-merger income of the resulting corporation with a pre-merger loss of the subsidiary. *See* Joseph Weidenhoff, Inc., 32 T.Ct. 1222 (1959). This accords with the principle that since there was, prior to the merger, a single tax enterprise because of the consolidated returns, the deduction is permissible.

The courts have consistently followed Revenue Ruling 59-395 when "A" and "B" corporations merge and the businesses of both are continued. In this situation the pre-merger losses of each constituent corporation may be offset against post-merger income of the resultant corporation only to the extent that the post-merger income is produced by the same business or assets of that particular submerged corporation. *See Allied Central Stores, Inc. v. Commissioner*, 339 F. 2d 503 (2d Cir. 1964), *cert. denied* 381 U.S. 903 (1965); *Julius Garfinckel & Co., Inc. v. Commissioner*, 335 F. 2d 744 (2d Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). These decisions tend to concentrate on the principle that the deduction is not permissible when, but for the merger, it would be unavailable.

The *Libson Shops* case, of course, spawned numerous articles in Law Reviews and other legal publications as various com-

mentators struggled with the concept of continuity of business enterprise. At least three interpretations of the case emerged:

First, "*Libson* was commonly interpreted as enunciating a 'but for' test: the deduction was permitted if, but for the reorganization, the loss corporation would be able to utilize the deduction." 66 Colum. L. Rev. at 347. This "but for" approach stemmed from the Supreme Court's desire to prevent a merged corporation from gaining, through merger, a tax advantage over non-merged corporations. The "but for" approach seems, however, to be merely a restatement of the second interpretation of the *Libson* case. This second approach, which can be called the assets approach, construes the phrase "substantially the same business" as referring to the physical assets of the corporations involved. 16 Tax L. Rev. at 220. *See also* 69 Yale L.J. at 1219-26. Under this view the premerger losses generated by the physical assets of the acquired corporation may be used to offset the post-merger profits of the resulting corporation which are generated by those assets but such such losses may not be offset against the resulting corporation's post-merger profits attributable to the acquiring corporation's pre-merger physical assets. A third approach has been described in Levine & Petta, Libson Shops—A Study in Semantics, 36 Taxes 445, 447-48 (1958)—as follows: "In order to determine whether 'substantially the same business' is carried on . . . the starting point [should] be an examination of the busines of the predecessor which sustained the loss. This business should then be compared with the business of the successor corporation. If the business is the same, there is continuity; the successor is the same taxpayer as the predecessor, and the loss carries over. If the business is not substantially the same, there is no continuity; the successor is a different taxpayer, and the loss does not carryover.

. . . .

"The Court's decision in the light of the facts in *Libson* demonstrates that there can never be continuity of business where two separately chartered corporations each operate a separate business and thereafter amalgamate, because the two businesses of the amalgamated corporation are different from the single business of each of the pre-amalgamated corporations. The only time that there can be continuity is where one of the corporations carries on so little business activity that the amalgamated corporation would continue only one business."

Although *Libson Shops* interpreted and applied the net operating loss carryover deduction sections of the 1939 federal tax code, it has had a dramatic impact upon this Court's interpretation of the analogous state corporate tax statutes. To understand how and why this is so, the North Carolina experience with the net operating loss deduction must be examined.

The "net economic [operating] loss" deduction has been a part of the N. C. corporate tax statutes since 1943. (N. C. Sess. Laws, ch. 400, § 4, subsection (g) (4) (1943); N. C. Sess. Laws, ch. 708, § 4, subsection (i) (1945); N. C. Sess. Laws, ch. 1110 § 3 (1967).) Since 1945 the language of the N. C. statute authorizing the deduction has been very similar to § 122(b) of the 1939 I.R.C. Thus present G.S. 105-130.8 enacted in 1967 provides in pertinent part:

"Net economic losses sustained by *a* corporation in any or all of the five preceding income years shall be allowed as a deduction *to such* corporation subject to the following limitations:

"(1) The purpose in allowing the deduction of a net economic loss of a prior year or years is that of granting some measure of relief *to the corporation* which has incurred economic misfortune or which is otherwise materially affected by strict adherence to the annual accounting rule in the determination of net income. The deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of *the corporation* so as to result in a net economic loss as hereinafter defined." (Emphasis added.)

The statute currently speaks of the deduction as being available to *the corporation* which sustained the loss just as the I.R.C. of 1939 spoke of the deduction being available to *the taxpayer*. Until 1967 the statute made the deduction available to "taxpayers who have incurred economic misfortune. . . ." *See* Vol. 2D of the N. C. Gen. Stat. § 105-147(9)(d) (1965). Thus, it is not surprising that in 1957, when this Court was first called upon to decide whether a loss incurred by one corporation would be available to a successor corporation, we sought to ascertain whether *the taxpayer* (or in current statutory terms, *the corporation)* which had sustained the loss was the same *taxpayer* (or *corporation)* as the one claiming the deduction.

This Court in *Distributors v. Shaw, Com'r. of Revenue,* 247 N.C. 157, 100 S.E. 2d 334 (1957) had to consider the following situation. Goodwill Distributors, Inc. (Northeast), Goodwill Distributors, Inc. (Northern) and Goodwill Distributors (Mid-Atlantic) all merged pursuant to state statute into one corporation, Goodwill Distributors, Inc. (Northern). Thereafter Northern sought to carry over a premerger net operating loss experienced by Mid-Atlantic to offset Northern's postmerger income. The Commissioner of Revenue disallowed the deduction. Northern paid the additional tax assessed under protest and sued for its recovery. The record did not reveal what businesses the three corporations carried on prior to the merger, nor did it indicate what business the emerging corporation conducted. Finally, the record did not reveal which group of assets had produced the post-merger income. On this record the Court reversed a judgment on the pleadings entered in plaintiff's favor. In doing so, it adopted the "continuity of business" rationale of Libson Shops. After reviewing federal cases that considered the question the Court said: "These cases emphasize the necessity of a continuing business of the kind and character by the corporation whose loss is claimed as a deduction from income earned by another." *Id.* at 161, 100 S.E. 2d at 336. The Court, quoting from *Libson Shops* indicated that the deduction was not intended to confer, upon a merged corporation, a tax benefit that would not have been available to it but for the merger. Thus, the case was remanded for a new trial since the record was not sufficient to show a continuity of business enterprise between Goodwill (Mid-Atlantic), the loss corporation, and Goodwill (Northern) the resulting corporation. (Companion cases involving other Goodwill Distributors corporations were decided in the same way and were filed the same day. *Distributors v. Shaw, Com'r. of Revenue,* 247 N.C. 163, 100 S.E. 2d 338 (1957); *Distributors v. Shaw, Com'r. of Revenue,* 247 N.C. 164, 100 S.E. 2d 338 (1957).)

Distributors came before this Court again in 1959, *Distributors v. Currie, Com'r. of Revenue,* 251 N.C. 120, 110 S.E. 2d 880. This time the parties had stipulated the relevant facts and the trial judge again entered judgment for plaintiff. The stipulated facts showed that prior to the merger all three corporations had been engaged in the distribution of books and Bibles and that, while each had its own territory, there was substantial overlap in the areas served by the corporations. After the

merger the same character of business was conducted in the same territories in which the constituent companies had operated prior to the merger. Also "there was a continuity of ownership and continuance of the same business after the merger in that the same owners or persons held the business in the same proportion after the merger as before. The succeeding business was a continuation without change of the merging businesses." *Id.* at 125, 110 S.E. 2d at 883. It was clear, however, that the taxpayer was attempting to offset post-merger income generated by the assets of Northern and Northeast with a pre-merger loss attributable to Mid-Atlantic. On these facts, this Court again relied on Libson Shops and found that there was no continuity of business and that *the* taxpayer claiming the deduction was not *the* taxpayer that had experienced the loss. The Court said:

"We take note here that the Court in the *Koehler* case [*Libson Shops, Inc. v. Koehler*] did not base its decision on the theory that plaintiff was not the 'same taxable entity' as those corporations which suffered the loss. [This is clearly a reference to the corporate entity doctrine of New Colonial.] It did not reject the separate entity theory in express terms, but chose to place the decision on other grounds. We do not reject that theory. There are situations in which justice may well require its application. But we adhere to the reasoning in the *Koehler* case as the basis for decision in the case before us.

. . .

"The decision in the *Koehler* case rests on a lack of 'continuity of business enterprise.' This expression has a definite and well defined meaning. There is a continuity of business enterprise when the income producing business has not been altered, enlarged or materially affected *by the merger.*

. . .

"The facts do not support the conclusion [that there was a continuity of enterprise in the present case.] It is true that the constituent corporations, before the merger, and the resulting corporation, after the merger, engaged in sales and distribution of Bibles, books and literature of the same type and kind, the resulting corporation conducted business in the same territory as had the three constituent corporations before the merger, the resulting corporation had the same stockholders as the constituent corporations before the merger and the stockholders

owned the stock in the same proportion as before. But this does not constitute 'continuity of business enterprise' according to the meaning of that term as applied in such cases.

"The facts in this case are analogous with those in the *Koehler* case. Before the merger the three corporations operated separate territories, though somewhat overlapping, made separate incomes and filed separate income tax returns. By virtue of the merger a larger and more expanded business came into being and included all of the former income producing businesses. There was no continuity of the business of either of the constituent corporations. By reason of the merger, a new and more extensive enterprise has emerged. This new enterprise did not suffer the loss and cannot claim a deduction therefor." *Id.* at 126-127, 110 S.E. 2d at 884-85.

The Court, in the course of its opinion, cited two federal court cases *(Newmarket Manufacturing Co. v. United States,* 233 F. 2d 492 (1st Cir. 1956) and *Cotton Mills v. Commissioner,* 61 F. 2d 291 (4th Cir. 1932)), as illustrating when there would be a continuity of business enterprise so that the carryover deduction would be available to the resulting corporation. In both these cases the acquiring corporations had little or no physical assets prior to the merger and conducted no substantial business activity. After the merger the resulting corporation's assets consisted almost totally of the assets of the acquired corporation and the resulting corporation's business enterprise was the same business as the acquired corporation had conducted premerger. In this context the resulting corporation was allowed to carryover the net operating loss deduction of the acquired corporation since there was a continuity of business enterprise between it and the acquired corporation. In other words, the acquired corporations' businesses which in these cases had produced the post-merger income had not been materially altered, enlarged or affected by the merger.

The Court of Appeals had to consider a similar problem in *Poultry Industries v. Clayton, Comr. of Revenue,* 9 N.C. App. 345, 176 S.E. 2d 367, *cert. denied,* 277 N.C. 351, 177 S.E. 2d 900 (1970). There Holly Farms, Inc., was formed to serve as the parent corporation of thirty-two wholly owned subsidiaries which dealt with various aspects of the poultry raising industry ranging from hatcheries to processing plants. The overall plan was to have a complete, vertically integrated corporation. Pur-

suant to this plan several mergers of the various wholly owned subsidiaries were effected. In the mergers the directors, officers, etc. of each subsidiary were all the same. The particular merger before the court was the merger of Lovette Poultry into Mocksville Feed in May 1964 and the merger of Davie Poultry into Mocksville Feed in November 1964. After the merger the three entities conducted the same business they had as before but under the corporate charter of Mocksville Feed. On its 1965 income tax return Mocksville Feed attempted to carry over pre-merger losses attributable to both Lovette and Davie Poultry to offset its combined post-merger income. The Commissioner disallowed the deduction, the taxpayer paid and brought a successful suit to recover the taxes paid. The Commissioner appealed and the Court of Appeals reversed the judgment, in an opinion by Parker, J., finding that there had been no continuity of business and thus the corporation (Mocksville) which was claiming the deduction was not the same corporation that experienced the loss. In reaching this conclusion the Court of Appeals relied on *Distributors* and *Libson*. The Court noted that prior to the merger Mocksville did not conduct the businesses carried on by Lovette and Davie but that Mocksville did conduct them after the merger. Also neither Lovette nor Davie conducted the businesses handled by Mocksville before the merger. Thus, as a result of the merger, the businesses of Lovette and Davie were altered and expanded. Therefore there was no continuity of business as that term was used in *Goodwill*. The Court rejected the argument that the deduction should be allowed since the mergers were a part of a vertical organization which was motivated by legitimate business reasons rather than by tax avoidance. The Court concluded by saying:

"We also note that while Congress changed [§ 122(b) of the I.R.C. of 1939, as interpreted in Libson Shops] by enactment of § 381 of the Internal Revenue Code of 1954, no similar amendment to the N. C. Revenue Act has been enacted by the North Carolina General Assembly. Five regular biennial sessions of the North Carolina General Assembly have occurred since Supreme Court rendered its decision in *Distributors v. Currie, supra*. The absence of any pertinent amendment for so long a period would indicate approval by the legislature of the Court's construction of its statute." *Id.* at 352, 176 S.E. 2d at 372.

[1] Undoubtedly the *Libson Shops — Distributors* doctrine still controls the availability of the carryover deduction to succes-

sor corporations under G.S. 105-130.8. (Indeed the parties do not contend otherwise.) Our General Assembly has clearly rejected the more liberal carryover provisions found in the 1954 I.R.C. In 1967 the General Assembly enacted comprehensive corporate income tax statutes separating the corporate income tax statutes from the individual income tax statutes for the first time. N. C. Sess. Laws, ch. 1110, § 3 (1967). That year, also for the first time, our corporate income tax statutes were keyed to the federal corporate income tax provisions. Thus, G.S. § 105-130.3 (Cum. Supp. 1975) presently provides: "Every corporation doing business in this State shall pay annually an income tax equivalent to six percent (6%) of its net income or the portion thereof allocated and apportioned to this State. The net income or net loss of such corporation shall be the same as 'taxable income' as defined in the Internal Revenue Code in effect on January 1, 1975, subject to the adjustments provided in G.S. 105-130.5." As an indication of the General Assembly's rejection of the 1954 I.R.C. carry-over provisions, G.S. 105-130.5 (Cum. Supp. 1975) provided when it was enacted in 1967, and currently provides, (1) that in determining a corporation's State net income there shall be *added* to the corporation's federal taxable income "the net operating loss deduction allowed by the Internal Revenue Code," G.S. § 105-130.5(a) (6) ; and (2) there shall be *subtracted* from the federal taxable income "losses in the nature of net economic losses sustained by the corporation in any or all of the five preceding years pursuant to the provisions of G.S. 105-130.8," G.S. § 105-130.5(b) (4).

The General Assembly in its comprehensive revision of the corporate income tax statutes, however, reenacted as G.S. 105-130.8, with only slight modification, the existing net operating loss deduction found in old G.S. § 105-147(9) (d).

[1] The first *Distributor* case was decided in 1957. If the General Assembly had disapproved of this Court's adoption of the *Libson Shops* doctrine, it is inconceivable that they would not have registered their disapproval in the 1967 revision of the tax statutes. Indeed, the slight changes made suggest an adherence to the *Libson Shops* doctrine or even to the entity doctrine of *New Castle*. This is true because, prior to the 1967 revision, the carry-over deduction read in part as follows: "Losses in the nature of net economic losses sustained in any or all of the five preceding income years arising from business transactions or to capital or property . . . subject to the following limitations: 1.

The purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief to *taxpayers* who have incurred economic misfortune . . . and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the *taxpayer* such as to result in a net economic loss as hereinafter defined." (Emphasis added.) Vol. 2D of N. C. Gen. Stat. § 105-147(9)(d) (1965). As previously quoted, G.S. 105-130.8 presently provides: "Net economic losses *sustained by a corporation* in any or all of the five preceding income years shall be allowed as a deduction *to such corporation* subject to the following limitations: (1) The purpose in allowing the deduction of a net economic loss of a prior year or years is that of granting some measure of relief *to the corporation* which has incurred economic misfortune. . . . The deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of *the corporation* so as to result in a net economic loss as hereinafter defined." (Emphasis added.) We do not believe that these changes in the wording amount to a rejection of the *Libson Shops* doctrine. If anything they suggest an even firmer insistence that *the corporation* claiming the deduction be *the corporation* that experienced the loss. Therefore, in determining whether these two corporations are the same we will continue to apply the continuity of business enterprise test formulated in *Libson Shops* and adopted by this Court in *Distributors*.

As indicated, both parties fully agree that the *Libson Shops* doctrine controls the availability of the carry-over deduction to a successor corporation under G.S. 105-130.8. The parties disagree, however, with regard to their interpretation of the doctrine and its application to the present case.

[2, 3] In our view *Libson Shops* and *Distributors* adopted primarily what has been described as an assets test. Therefore the continuity of business test as applied by this Court comports substantially with the 1959 Federal Revenue Ruling. In other words, the continuity of business enterprise theory "means that where a loss corporation and a gain corporation are merged, pre-merger losses may be offset against post-merger gains only to the extent that the business [or group of assets] which was

previously operating at a loss is now operating at a profit. Furthermore, the business referred to in the sentence above does not mean the formal legal entity but rather the bundle of assets, which previously constituted the pre-merger business unit." *Foremost Dairies, Inc. v. Tomlinson,* 238 F. Supp. 258, 262 (M.D. Fla. 1963) *aff'd* 341 F. 2d 580 (5th Cir. 1965). Applying this test to the present case, it is clear that there was no continuity of business between Foremost and Fieldcrest. The pre-merger losses which gave rise to the attempted deduction here were generated by the assets of Foremost. After merger these assets produced no income but continued to be operated at a loss. Thus there was no post-merger income generated by the assets of Foremost or by the business known as Foremost against which the pre-merger Foremost losses could be offset.

As indicated, some tax commentators described *Libson Shops* as adopting a "but for" approach to the deduction. 66 Colum. L. Rev. 338 (1966). Others suggested ways of applying the continuity of business test. *See* 36 Taxes 445. In our view these various approaches are merely restatements of the assets approach and are not substantively different from one another. In other words, they are merely different shorthand statements referring to the same group of policy concerns. This is readily shown by applying these approaches to the present case.

For example if the "but for" interpretation of *Libson Shops* were applied there would still be no continuity of business in the present case, and plaintiff would not be entitled to the deduction. Had Foremost remained a separate corporation, it would not have been able to claim the deduction since it operated at a loss. But for the merger there would be no income against which to offset the loss. Therefore the deduction should be denied since *Libson Shops* and *Distributors* both stressed that the net operating loss carryover deduction should not be used to give merged corporations a tax advantage over non-merged entities. In other words, the *Libson-Distributors* doctrtine seeks to prevent the reaping of a tax "windfall" from the mere fact of a merger.

Similarly, if we employ the analysis found in Levine & Petta, Libson Shops—A Study in Semantics, 36 Taxes 445 (1958) it is again clear that the deduction is not permissible in the present case. If one compares the pre-merger assets and business of Foremost (the loss-corporation) with the post-

merger business and assets of the resulting corporation, it is clear that the business of Foremost was materially altered and enlarged by the merger. Therefore there is no continuity of business between Foremost and the resulting corporation. From this it follows that the corporation claiming the deduction was not the corporation which sustained the loss, and consequently, the deduction must be denied.

The employment of these various approaches and interpretations of the *Libson Shops* doctrine emphatically establishes that there is no continuity of business in the present case within the confines of that doctrine. Plaintiff, nonetheless, contends that the rule should be different where a parent and subsidiary who filed consolidated returns prior to merger have merged and seek to carry over the deduction. *Libson* (353 U.S. at 388, n. 7, 1 L.Ed. 2d at 928, 77 S.Ct. at 993), subsequent federal cases, and the 1959 Revenue Ruling all recognize this distinction and allow the deduction in such circumstances. This different treatment is grounded on the fact that prior to the merger, the parent and subsidiary are, because of the consolidated returns, one single taxable enterprise. Merger does not affect the singleness of the taxable enterprise and the corporations do not acquire through merger a tax advantage they would not otherwise have had. However, the fact that plaintiff here, prior to the merger, filed a consolidated federal tax return with Foremost does not affect the availability of the State tax deduction. In this State parent and subsidiary corporations must, unless otherwise directed, file separate returns (G.S. 105-130.14 (1972)). The corporate tax statutes strive hard to isolate and keep separate the incomes of the two corporations (G.S. 105-130.5(a) (9) and (b) (2) (Cum. Supp. 1975); 105-130.6 (1972)). They are, for State tax purposes, separate corporations and separate taxable entities. Thus, there is no room for the contention that prior to merger they were but one single enterprise and that, therefore, the carry-over deduction should be allowed.

Plaintiff also contends that the parent corporation should always be allowed to carry over, after merger. its subsidiary's losses because, in real economic terms, the shareholders of the parent are, in effect, the owners of the subsidiary and the ones who incurred the economic misfortune. Reduced to its essentials, this argument is that the deduction should be allowed since there is a continuity of ownership prior to and after the merger. We do not find this argument a sufficient ground upon

which to distinguish *Libson* and *Distributors*. In both those cases there was complete continuity of ownership with all shareholders owning the same proportion of the resulting corporations as they did of the constituent. Despite this fact, the deductions were denied in both instances.

In conclusion we emphasize that this appeal does not involve questions of the economic wisdom or equitableness of the present carryover provision. It may very well be that the carryover provisions of the 1954 I.R.C. accord taxpayers fairer treatment and better comport with market realities. If they do, then it is for the General Assembly to decide whether they are desirable for this State and to enact them into law if they find that they are. It is this Court's function to interpret the tax laws, as all other statutes, in accordance with the legislative intent. In our view, to allow the deduction which plaintiff claims here would require us to overrule the *Distributors* cases. Such action would constitute, not judicial interpretation of G.S. 105-130.8 but rather, judicial enactment of the carry-over provisions of the 1954 I.R.C. This we are unwilling to do. The decision of the Court of Appeals is, therefore,

Affirmed.

JAMES F. TAYLOR, ANNE S. TAYLOR, JASPER W. DUNN III, LINDA L. DUNN, RICHARD R. PATTY, AND NELL H. PATTY, HUBERT O. WHITAKER AND THERESA G. WHITAKER, HERBERT J. DAVIS AND CAROLYN DAVIS v. THE CITY OF RALEIGH, NORTH CAROLINA; TOM BRADSHAW, JR., MAYOR AND MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA; AND CLARENCE E. LIGHTNER, JESSE O. SANDERSON, ROBERT W. SHOFFNER, ALTON L. STRICKLAND, MICHAEL BOYD, AND ELIZABETH REID, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA; AND W. E. MANGUM

No. 72

(Filed 1 September 1976)

1. **Municipal Corporations § 2— standing to attack annexation ordinance**

Private citizens had no standing to seek judicial review of a municipal ordinance annexing a noncontiguous area.

2. **Declaratory Judgment Act § 1; Municipal Corporations § 30— validity of zoning ordinance — declaratory judgment**

The validity of a municipal zoning ordinance, when directly and necessarily involved, may be determined in a properly constituted

action under the Declaratory Judgment Act; however, this may be done only when challenged by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby.

3. **Municipal Corporations § 30— standing to attack rezoning ordinance**

Plaintiffs' standing to attack a rezoning ordinance must be considered and determined with reference to whether the rezoning ordinance itself directly and adversely affects them.

4. **Equity § 2— laches — motion for summary judgment**

The defense of laches is frequently raised by summary judgment motion; when it so raised the plaintiff is permitted to counter by showing a justification for the delay, and whenever this assertion raises triable issues, defendant's motion will not be granted.

5. **Equity § 2— laches — burden of proof**

Laches is an affirmative defense which must be pleaded, and the burden of proof is on the party who pleads it.

6. **Municipal Corporations § 30; Declaratory Judgment Act § 1— attack on zoning ordinance — declaratory judgment action**

A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under G.S. 1-254 for a declaratory judgment.

7. **Equity § 2; Declaratory Judgment Act § 1— laches — declaratory judgment action**

The equitable doctrine of laches is applicable in an action for a declaratory judgment.

8. **Municipal Corporations § 30— petition for rezoning — notice of plans for multi-family units**

A petition to a city's governing body to reclassify an area zoned for single-family dwellings so as to permit the construction of multi-family dwellings or apartment houses is notice to all interested persons that the applicant, if his petition is allowed, has present plans to construct multi-family units in the rezoned area.

9. **Municipal Corporations § 30; Equity § 2— delay in attack on rezoning ordinance — laches**

A delay in seeking a determinaton of the invalidity of a properly enacted zoning ordinance until after expenditures are incurred in reliance upon the ordinance, or an amendment thereto, may constitute laches or inequitable conduct barring judicial relief.

10. **Municipal Corporations § 30; Equity § 2— laches — failure to challenge rezoning ordinance — no knowledge of necessity for easements**

The fact that plaintiffs were unaware at the time a rezoning ordinance was enacted that an easement would be condemned across their properties for the installation of water and sewer lines to serve rezoned property constitutes no reasonable excuse for the plaintiffs' failure to assert their right, if any, to challenge the rezoning ordinance.

11. Rules of Civil Procedure § 56— summary judgment based on defendant's own affidavit

In an action to invalidate a rezoning ordinance, summary judgment was properly entered for defendants on the basis of the defendant landowner's own affidavit where there were only latent doubts as to the credibility of the affiant and plaintiffs did not challenge the statements in the affidavit as required by G.S. 1A-1, Rule 56, §§ (e) or (f).

12. Municipal Corporations § 30; Equity § 2— attack on rezoning ordinance — laches

Plaintiffs were barred by laches from attacking a rezoning ordinance where their action to invalidate the ordinance was not brought until two years and twenty-two days after the ordinance was adopted and defendant landowner had spent in reliance on the ordinance $23,267.56 for architectural fees for design of an apartment development to be placed on the rezoned land, engineering fees for the design of a sewer line to serve the land, and related attorney fees.

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

ON *certiorari* to review the decision of the Court of Appeals, 22 N.C. App. 259, 206 S.E. 2d 401 (1974), affirming the summary judgment entered in favor of defendants by *Hobgood, J.*, on 13 August 1973, in the Superior Court of WAKE County, docketed and argued at the Fall Term 1974 as Case No. 82.

Plaintiffs instituted this action on 12 January 1973 for a judgment declaring "unlawful, invalid and void" two ordinances adopted by the City Council of Raleigh: "Ordinance No. (1970) 22 ZC 91," adopted 21 December 1970, hereafter called the Rezoning Ordinance, and "Ordinance No. (1972) 211," adopted 20 March 1972, hereafter called the Annexation Ordinance. Plaintiffs also seek to enjoin defendant City of Raleigh from proceeding to condemn easements across the properties of plaintiffs for the purpose of constructing a sewer outfall to property of defendant W. E. Mangum.

The properties of plaintiffs and an 85-acre tract of Mangum land are beyond, but within a mile of, the corporate limits of Raleigh. Mangum's 85-acre tract extends north from the intersection of Duraleigh Road and Edwards Mill Road. It is an extensive area previously zoned R-4 by Raleigh's comprehensive zoning ordinance. Except for the dwellings of Mangum and of Mangum's sister, the 85-acre tract is open land. Plaintiffs' properties are in the same zoning area. The structures thereon are single-family dwellings, constructed in compliance with R-4

regulations. All are located in the Laurel Hills Subdivision, which lies generally to the north of Mangum's 85-acre tract.

The Rezoning Ordinance changed the classification of 39.89 acres of Mangum's 85-acre tract from R-4 to R-6, a reclassification which would permit Mangum to construct a proposed 200-unit apartment development. The 39.89 acres rezoned constitute the southern portion of Mangum's 85-acre tract and the portion farthest from plaintiffs' properties. The northern portion remains in the R-4 classification.

The Annexation Ordinance annexed the 39.89 acres previously rezoned from R-4 to R-6. No other property was annexed.

On 2 January 1973 the City Council of Raleigh adopted resolutions authorizing and directing the institution of the following separate condemnation proceedings by the City of Raleigh: one against James F. Taylor and wife, Anne S. Taylor; one against Jasper W. Dunn III and wife, Linda L. Dunn; one against Richard R. Patty and wife, Nell H. Patty; one against Hubert O. Whitaker and wife, Theresa G. Whitaker; and one against Herbert J. Davis and wife, Carolyn Davis. These five proceedings were instituted in February and March of 1973, which was one to two months after the commencement of this action. The respondents therein collectively are the plaintiffs in this action.

In each condemnation proceeding the City of Raleigh seeks to acquire an easement for the project designated "Laurel Hills Sewer Outfall." In each, the easement sought is over that part of the lands of respondents, "lying within the boundaries of the utility easements, shown as parcel(s) [designating the parcel number(s) applicable to the respondents in each case] on a map entitled 'Sanitary Sewer Easement for W. E. Mangum, Raleigh, North Carolina,' dated June 1972, prepared by Rose, Pridgen & Freeman Engineering Associates, Inc. . . . "

In each condemnation proceeding, pleadings were filed and commissioners were appointed. The commissioners reported their findings in respect of the compensation to which the respondents were entitled. Defendants excepted to the orders appointing commissioners and to the commissioners' reports. The record before us shows no further activity in the condemnation proceedings. Presumably, they lie dormant pending decision on this appeal.

In attacking the Rezoning Ordinance, plaintiffs, in summary alleged: The Rezoning Ordinance is arbitrary and capricious. It is not based on any rational considerations of the general welfare of the plaintiffs or the citizens of the City of Raleigh, but was enacted solely to accommodate Mangum. It is contrary to the comprehensive zoning and land use plan of the City of Raleigh in that: (1) It "creates a density incompatible with that of the surrounding property"; (2) it constitutes unlawful spot zoning, "the rezoning of a single tract in the midst of a larger area otherwise zoned"; and (3) it constitutes unlawful contract zoning, "because it was enacted in reliance upon the representations of the defendant W. E. Mangum as to the type project he would build and maintain on the subject property if it were rezoned."

In attacking the Annexation Ordinance, plaintiffs, in summary, alleged: The Annexation Ordinance is arbitrary and capricious. It is not based on any rational considerations of the general health, safety or welfare of the plaintiffs or of the citizens of the City of Raleigh, but was enacted solely to accommodate Mangum. The record fails to show "that or how the City of Raleigh would be able to provide the same services to the annexed area, territory or subdivision in the same manner in which other areas within the municipal boundaries . . . are served." It was enacted "in reliance upon vague and indefinite plans and proposals for water and sewer service to the property when no plans had been made for the acquisition of the right of way for said sewer line. . . . "

Separate answers were filed by (1) defendant Mangum, and (2) by defendant City of Raleigh, its mayor, and the members of its City Council, hereafter referred to as the answer of the City of Raleigh. All motions and contentions referred to as having been made by defendant City of Raleigh should also be understood as having been made by its mayor and the members of its City Council. In their answers defendants asserted the validity of both ordinances. As further defenses, and as the basis for motions to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), defendants alleged (1) that plaintiffs' action for a declaratory judgment declaring the Rezoning Ordinance void was not filed until two years and twenty-two days after its adoption and is barred by "all applicable" statutes of limitations and by laches; (2) that plaintiffs are not residents of the City of Raleigh or of the area annexed by the Annexation Ordi-

nance and do not have standing to attack that ordinance; and (3) that plaintiffs failed to file a petition within thirty (30) days to review the Annexation Ordinance as required by G.S. 160-453.18.

Plaintiffs' petitions for temporary orders to restrain *the institution* of condemnation proceedings and, later, *the further prosecution* thereof, were denied.

Defendants' motions to dismiss the present action on the grounds alleged in their further defenses were denied by Judge Hobgood by order dated 21 March 1973. Prior to the entry of this order, to wit, on 19 January 1973, defendant Mangum had filed his afidavit dated 18 January 1973, identified as Exhibit G and referred to below.

On 6 February 1973 defendant Mangum filed a motion for summary judgment "on the pleadings, on the ground that the undisputed facts appearing therein entitle the defendant to such summary judgment as a matter of law." This motion was denied by Judge Hobgood on 21 March 1973.

The case on appeal states that a motion for summary judgment, *filed by plaintiffs* on 18 April 1973, came on for hearing before Judge Hobgood on 12 June 1973; that it was stipulated at that hearing that *"there was no genuine issue as to any material fact in regard to said motion";* and that, at that hearing, plaintiffs submitted their Exhibits 4 through 33 in support of their motion and defendants submitted their Exhibits I and J in opposition thereto. (Our italics.)

Plaintiffs' Exhibits 4 through 33 are records, inclusive of petitions and excerpts from minutes of the City Council and of the City Planning Commission, up to and including the adoption of the Rezoning Ordinance and of the Annexation Ordinance.

Exhibit I is an affidavit of Harry W. Moser, Jr., architect, to the effect that, pursuant to his employment by Mangum, he had prepared a site plan for the entire 85-acre tract. This plan was presented to the City Council on 11 November 1970 in support of Mangum's application to rezone the area from R-4 to R-6; and that, after passage of the ordinance rezoning only 39.89 acres of the 85-acre tract, he had prepared a site plan and architectural drawings for the reduced area.

Defendants' Exhibit J is a portion of the zoning map of the City of Raleigh on which the 39.89 acres rezoned and annexed are shown. It does not show (1) the boundaries of the 85-acre tract; (2) the location of plaintiffs' properties; (3) the corporate limits of Raleigh; or (4) the location of Crabtree Creek. Notations thereon purport to show when and how certain of the areas thereon were zoned or rezoned. There was no evidence purporting to explain Exhibit J.

By order dated 16 July 1973 Judge Hobgood denied plaintiffs' motion for summary judgment.

On 16 July 1973 defendant City of Raleigh filed a motion that summary judgment be entered for defendants on the ground that the undisputed facts entitle defendants to such judgment as a matter of law. When this motion came on for hearing on 1 August 1973, plaintiffs submitted their Exhibits 34 through 48, consisting of copies of the documents in the five condemnation proceedings and of the official minutes, beginning with minutes of a meeting of the City Council held 16 October 1972, preceding and relating to the institution of the five condemnation proceedings. The parties consented "to the court's reaching its decision and entering judgment out of term."

The judgment entered by Judge Hobgood on 13 August 1973 granted defendants' motion *for summary judgment.*

The judgment recites that the cause came on for hearing and was heard "upon the motions of *all* parties for summary judgment." (Our italics.) The judgment further recites that the court had before it the following documents: "The complaint and attached exhibits; the answer of the City of Raleigh, the Mayor, and the Members of the City Council of the City of Raleigh; the answer of W. E. Mangum; the affidavits of W. E. Mangum, Charles Aldridge, Mitchell Duke, Harry Moser, Jasper W. Dunn III, Richard R. Patty, Anne S. Taylor, Herbert J. Davis, and Hubert O. Whitaker; pertinent sections of the Raleigh City Code; and copies of the record of the City of Raleigh reflecting the deliberations of the Raleigh City Council and other administrative and legislative bodies which considered the ordinances in question and the proposed condemnation of a utility easement across the property of plaintiffs."

The judgment also recites: "It appearing to the Court, and the parties having agreed, that there is no genuine issue as to

any material fact and that the pleadings raise only questions of law." Immediately after the quoted recital, the following appears: "The Court, having considered these matters, makes the following FINDINGS OF FACT." Thereafter, in twenty-five (25) numbered paragraphs, appear what the court refers to as findings of fact. Based upon these "FINDINGS OF FACT," Judge Hobgood set forth in thirteen numbered paragraphs of his CONCLUSIONS OF LAW.

Based upon his FINDINGS OF FACT and CONCLUSIONS OF LAW, Judge Hobgood adjudged valid the Rezoning Ordinance and the Annexation Ordinance; denied the relief sought by plaintiffs; and taxed plaintiffs with the costs.

The record discloses that plaintiffs excepted to the judgment granting summary judgment in favor of defendants. Plaintiffs' exceptions Nos. 1, 2, and 3, addressed to the recitals in the judgment, are (1) to the making by the trial court of findings of fact and conclusions of law; (2) to the second quoted recital "on the grounds that plaintiffs have not agreed that there are no genuine issues as to any material fact in regard to the motions for summary judgment filed by the defendants"; and (3) "on the grounds that there are genuine issues as to material facts in regard to the motions for summary judgment filed by defendants." Plaintiffs' exceptions 4 through 21 are addressed to portions of the judgment denominated "FINDINGS OF FACT."

Plaintiffs appealed from the judgment, setting forth assignments of error based on exceptions referred to above.

Defendants also set forth assignments of error based on their exceptions to the trial court's failure to allow their motion to dismiss.

The Court of Appeals did not review Judge Hobgood's decision and judgment to the effect that the Rezoning and Annexation Ordinances were valid. Rather it based its decision upon defendants' assignments of error based on their exceptions to the order of Judge Hobgood entered 21 March 1973, in which he overruled *defendants' motions to dismiss.* It held plaintiffs' action for a judgment declaring the Rezoning Ordinance void was barred by laches. It further held that plaintiffs failed to show they had standing to attack the validity of the Annexation Ordinance. On these grounds the Court of Appeals found

"No Error." This Court allowed plaintiffs' petition for *certiorari.* 285 N.C. 669, 207 S.E. 2d 765 (1974).

Barringer and Howard by Thomas L. Barringer for plaintiff appellants.

Hatch, Little, Bunn, Jones, Few & Berry by David H. Permar for defendant W. E. Mangum, appellee.

Broxie J. Nelson, City Attorney, and Clyde Holt III, Associate City Attorney, for defendant City of Raleigh, appellee.

SHARP, Chief Justice.

Plaintiffs are the owners of land through which the City of Raleigh proposes to construct a sewer line from its primary corporate limits to the noncontiguous 39.89-acre Mangum "satellite" tract annexed in 1972. In this action for a declaratory judgment they seek to invalidate the ordinance annexing the property and the 1970 rezoning ordinance, which changed the property's classification from R-4 to R-6. This change authorized the construction of "Two (2) family dwellings, multi-family dwelling, townhouses, or apartment houses, each on its own lot, fronting on a public street, provided no dwelling shall contain more than eight (8) units on any one story, except as provided in section 24-42.1 [special exceptions]." The construction of an apartment house in the area, however, is impossible unless the City of Raleigh can extend its water and sewer system to the noncontiguous annexation.

Subsequent to the adoption of the two ordinances challenged by plaintiffs the City of Raleigh brought five separate condemnation proceedings against these plaintiffs seeking easements over their properties for the proposed sewer system. The relief which plaintiffs seek in this present action is a permanent injunction enjoining the City of Raleigh from condemning any of their property for the sewer system. The five condemnation proceedings, therefore, are germane in the present action only to the extent that the City's right to condemn may depend upon the validity of the annexation and rezoning ordinances. It is to a discussion of these ordinances and plaintiffs' standing to attack them that we now turn.

ANNEXATION ORDINANCE

The annexation ordinance, which became effective 26 June 1972, was enacted on 20 March 1972, under the authority con-

ferred by Ch. 989, N. C. Sess. Laws (1967) entitled, "AN ACT TO PROVIDE FOR VOLUNTARY ANNEXATION BY THE CITY OF RALEIGH OF AREAS, TERRITORIES OR SUBDIVISIONS NOT CONTIGUOUS TO THE MUNICIPAL BOUNDARIES OF THE CITY OF RALEIGH." The ordinance was adopted pursuant to petition of defendant Mangum, *the sole owner* of the annexed 39.89 acres.

Section 5 of Chapter 989 furnishes the only means of contesting the annexation of noncontiguous property authorized by that enactment. Section 5 provides that if, before the effective date of the annexation, a petition is filed by at least ten percent of the qualified voters of the City requesting a referendum on the question of annexing the area described in the petition, an election shall be conducted in accordance with the provisions of sections 6 and 7 of the Chapter. If a majority of the votes cast at such an election shall be "for extension," the area shall become a noncontiguous portion of the City.

At this point we note that by Ch. 1173, N. C. Sess. Laws (1973), effective 1 July 1974 and codified as G.S. 160A-58 through G.S. 160A-58.6 (Cum. Supp., 1975), the General Assembly empowered all municipalities (except those not qualified to receive gasoline tax allocations under G.S. 136-41.2) to annex satellite areas upon the petition of all the owners in the proposed satellite annexation. G.S. 160A-58.2 provides that those entitled to be heard "on the questions of the sufficiency of the petition and the desirability of the annexation" are "any person residing in or owning property in the area proposed for annexation and any resident of the annexing city." This enactment does not authorize any other persons to protest a proposed annexation of noncontiguous territory or to challenge the ordinance when it is passed.

Upon the institution of an action to challenge the validity of an annexation ordinance, one of the court's first concerns is whether the plaintiffs are authorized to maintain their action. In *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E. 2d 148 (1967), this Court recognized and applied the general rule that unless an annexation ordinance be absolutely void *(e.g.*, on the ground of lack of legislative authority for its enactment), in the absence of specific statutory authority to do so, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality. Such an action is to be prosecuted only by the State through its proper

officers. Annot., "Capacity to Attack the Fixing or Extension of Municipal Limits or Boundary," 13 A.L.R. 2d 1279 (1950); Annot., Proper Remedy or Procedure for Attacking Legality of Proceedings, Annexing Territory to Municipal Corporations," 18 A.L.R. 2d 1255, 1258-59 (1951); 56 Am. Jur. 2d *Municipal Corporations* §§ 36, 72 (1971). However, if the annexation is neither authorized by law nor made under the color of law it is void and is subject to attack by anyone having a sufficient personal interest in the litigation. Annot., 13 A.L.R. 2d at 1292.

[1] The legislature, of course, may authorize designated persons to contest the validity of annexation ordinances, but when "the courts are vested with jurisdiction to review annexation proceedings, the scope of judicial review is limited by statute." *In re Annexation Ordinance,* 284 N.C. 442, 452, 202 S.E. 2d 143, 149 (1974). Our legislature has authorized judicial review with reference to the annexation of "adjacent or contiguous" areas. G.S. 160A-38 and G.S. 160A-50 (Cum. Supp. 1975). As heretofore noted, however, neither in the local act of 1967 empowering the City of Raleigh to annex noncontiguous territory nor in the 1973 enactment which extended that right to all the State's municipalities did the legislature authorize private citizens to seek judicial review of the annexation. It is clear, therefore, that the plaintiffs in this action lack standing to contest the annexation ordinance. We also advert to the fact that plaintiffs own no property in the annexed noncontiguous area. Nor, so far as the record discloses, do they own any property within the primary corporate limits of Raleigh. Their properties and residences lie in between the two areas.

The Court of Appeals correctly held that plaintiffs have no standing to attack the annexation ordinance.

REZONING ORDINANCE

At the outset of our discussion of the rezoning ordinance it is appropriate to examine the statutory authority under which Raleigh exercises the right to zone and rezone. The General Assembly has delegated to "the legislative body" of cities and incorporated towns the power to adopt zoning regulations and from time to time, to amend or repeal such regulations. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189 (1956); *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880 (1953).

When Chapter 540 of the Session Laws of 1949 (hereafter called the 1949 Raleigh Act), was enacted, the statewide enabling legislation from which municipalities derive the general power to adopt zoning regulations made no provision for zoning beyond the municipal corporate limits. Article 14, Chapter 160, §§ 172 *et seq.*, N. C. Gen Stat., Volume 3 (1943); *State v. Owen,* 242 N.C. 525, 88 S.E. 2d 832 (1955). After enactment of the 1949 Raleigh Act, the statewide legislation was amended to enable municipalities to exercise zoning powers "not only within its corporate limits but also within the territory extending for a distance of one mile beyond such limits in all directions." N. C. Sess. Laws, Ch. 1204, Sec. 1 (1959), now codified as N.C.G.S. § 160A-360 (1972).

The 1949 Raleigh Act authorized the governing body of the City of Raleigh to adopt zoning ordinances "within the territory and community beyond and surrounding the corporate boundaries of the City of Raleigh, as now or hereafter fixed, for a distance of one mile of and beyond such corporate boundaries in all directions." Plaintiffs do not challenge the authority of the City Council to adopt zoning regulations and, from time to time, to amend or repeal such regulations, with reference to such property. Nor do they assert any failure to comply with prescribed procedures for the adoption of a valid rezoning ordinance. They attack the rezoning ordinance on the ground the decision of the City Council constituted an arbitrary and discriminatory exercise of its legislative power.

In considering whether plaintiffs (1) have standing to attack the rezoning ordinance, and (2) whether their action is barred by laches, as held by the Court of Appeals, a review of the documentary evidence submitted by plaintiffs is appropriate.

The copies of the records in the five condemnation proceedings show the addresses of plaintiffs to be as follows: (1) Taylor—4217 Laurel Ridge Drive; (2) Dunn—4505 Boxwood Drive; (3) Patty—4304 Azalea Drive; (4) Whitaker—4101 Balsam Drive; (5) Davis—4212 Azalea Drive. Laurel Ridge Road, Boxwood Drive, and Balsam Drive are shown as streets on the portion of the zoning map identified as defendants' Exhibit J. No street identified as Azalea Drive is shown thereon.

According to the scale of Exhibit J, the distance from the northern boundary of the rezoned 39.89 acres to Boxwood Drive is less than the distance from said northern boundary to any of

the other streets referred to above. By shortest direct line, the distance from said northern boundary to Boxwood Drive is 2800 feet; it is 2600 feet to the rear of lots on the south side of Boxwood Drive.

The affidavit of plaintiff Jasper W. Dunn III states that the house and lot at 4505 Boxwood Drive, owned by himself and his wife, "are located approximately one-half mile from the property of W. E. Mangum." It is unclear whether his reference is to the rezoned 39.89 acres or to the portion of the Mangum property closest to him, namely, the 45 acres still rezoned R-4.

[2] We first consider whether these plaintiffs have standing to attack the rezoning ordinance. Of course, the validity of a municipal zoning ordinance, when directly and necessarily involved, may be determined in a properly constituted action under our Declaratory Judgment Act. However, this may be done only when challenged by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby. 101 C.J.S. *Zoning* § 321 (1958); *Josephson v. Planning Board of Stamford,* 151 Conn. 489, 199 A. 2d 690 (1964). *Compare Greensboro v. Wall,* 247 N.C. 516, 519-20, 101 S.E. 2d 413, 416-17 (1958).

The undisputed evidence discloses that the impact of the rezoning ordinance on any of the plaintiffs was minimal. In this regard we note that none of the owners of property adjoining the 85-acre tract, or across Duraleigh and Edwards Mill Roads from it, protested Mangum's proposal for rezoning. The protest made in behalf of property owners in the Laurel Hills and other subdivisions was directed to the proposed rezoning of the entire 85-acre tract. The City Council, however, restricted the rezoning to 39.89 acres of the southern part, leaving a buffer zone of 45 acres in the R-4 classification between plaintiffs and the rezoned area. Thereafter, the minutes disclose no further protests. The property of plaintiffs Dunn on Boxwood Drive is one-half mile or more from the northern (closest) boundary of the rezoned 39.89 acres and the property of the other plaintiffs is farther from said northern boundary. Prior to the bringing of this action neither plantiffs nor any of those who protested the rezoning of the entire 85-acre tract had attacked, by protest or by lawsuit, the rezoning of the 39.89 acres farthest from them.

Furthermore we note that the portion of the Raleigh Code relating to zoning, Ch. 24, § 24-7 thereof, then provided that the following uses, among others, were permitted in a Residential 4 District: "(b) A dwelling, on its own lot, fronting on a public street, consisting of a single-family dwelling unit and one utility apartment; provided that the utility apartment shall have no more gross floor area than one-third (1/3) of the gross floor area of the single-family dwelling unit. *Townhouse developments and unit-ownership developments when approved as planned unit developments of fifty (50) acres or more under* Chapter 20 of this Code." (Our italics.) Thus, the 1970 amendment to the zoning ordinance did not, for the first time, authorize multi-family dwellings in the area; it merely increased the permissible types and units of dwellings.

[3] This action was instituted two years and twenty-two days after the rezoning ordinance was adopted. The persons who attack it now do so as a means of resisting the condemnation of easements over their properties for the installation of water and sewer lines. Plaintiffs' standing to attack the rezoning ordinance must be considered and determined with reference to whether the rezoning ordinance itself directly and adversely affects them.

On this record we would be unwilling to hold that plaintiffs have established that they are persons aggrieved by the rezoning ordinance. *See* 3 R. Anderson, American Law of Zoning § 21.10 (1968). However, in the circumstances here involved, we do not base decision solely on the ground plaintiffs are not sufficiently directly and adversely affected by the rezoning ordinance to entitle them to attack it. Rather, we treat plaintiffs' tenuous standing as a circumstance in considering whether plaintiffs' belated attack on the rezoning ordinance is barred by laches.

LACHES

In determining whether plaintiffs' suit is, at this stage of the proceeding, barred by the doctrine of laches, we face a threefold question: (1) Do the pleadings, affidavits and exhibits show any dispute as to the facts upon which defendants rely to show laches on the part of plaintiffs? (2) If not, do the undisputed facts, if true, establish plaintiffs' laches? (3) If so, is it appropriate that defendants' motion for summary judgment, made under G.S. 1A-1, Rule 56(b), be granted?

[4] The defense of laches is one "frequently raised by summary judgment motion." When it is so raised the plaintiff, of course, "is permitted to counter by showing a justification for the delay, and whenever this assertion raises triable issues, defendant's motion will not be granted." 10 C. Wright & A. Miller, Federal Practice and Procedure § 2734 (1973). *See also* 6 J. Moore, Federal Practice § 56.17[38] (1976). However, "an adverse party [plaintiffs here] may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule [Rule 56], 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." Rule 56(e).

[5] We are mindful that laches is an affirmative defense. It must be pleaded and the burden of proof is on the party who pleads it. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 22, 157 S.E. 2d 693, 698 (1967), and cases cited. "In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay." *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938).

[6] A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under G.S. 1-254 (1969) for a declaratory judgment. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971); *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E. 2d 670 (1965).

[7] "Since proceedings for declaratory relief have much in common with equitable proceedings, the equitable doctrine of laches has been applied in such proceedings. But the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay

must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it." 22 Am. Jur. 2d *Declaratory Judgments* § 78 (1965). *See also,* 101 C.J.S. *Zoning* § 354 (1958).

[8, 9] A petition to a city's governing body to reclassify an area zoned for single-family dwellings so as to permit the construction of multi-family dwellings or apartment houses is notice to all interested persons that the applicant, if his petition is allowed, has present plans to construct multi-family units in the rezoned area. Upon the passage of an ordinance reclassifying the property the next move is up to those who would challenge its legality. Thus, a delay in seeking a determination of the invalidity of a properly enacted zoning ordinance until after expenditures are incurred in reliance upon the ordinance, or an amendment thereto, may constitute laches or inequitable conduct barring judicial relief. 101 C.J.S. *Zoning* § 354 (1958). In *Richards v. Ferguson,* 252 Ark. 484, 479 S.W. 2d 852 (1972), a delay of twenty months after the amendment of the zoning ordinance, during which time the purchaser of the rezoned property incurred expense with respect to topographical survey, engineering studies, development plans, and architectural designs, was held to preclude "neighboring homeowners" from attacking the ordinance.

The defense of laches was not asserted or considered in our prior cases in which the validity of a zoning or rezoning ordinance was challenged by action for a declaratory judgment. *Allgood v. Town of Tarboro,* 281 N.C. 430, 189 S.E. 2d 255 (1972); *Blades v. City of Raleigh, supra; Allred v. City of Raleigh, supra; Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325 (1968); *Armstrong v. McInnis, supra; Walker v. Town of Elkin,* 254 N.C. 85, 118 S.E. 2d 1 (1960). It is noteworthy that in all of these cases the suits were instituted from within four days to three months of the passage of the ordinances.

In *Walker,* the rezoning ordinance was adopted 5 January 1960; the action was commenced 31 March 1960. In *Armstrong,* the rezoning ordinance was adopted 4 October 1963; the action was commenced 6 December 1963. In *Zopfi,* the rezoning ordinance was adopted 3 March 1967; the action was commenced 4 May 1967. In *Allred,* the rezoning ordinance was adopted 3 March 1969; the action was commenced 7 March 1969. In

Blades, the rezoning ordinance was adopted 1 December 1970; the action was commenced 21 December 1970. In *Allgood*, the rezoning ordinance was adopted 11 January 1971; the action was commenced 15 February 1971. In each case, the declaratory judgment action constituted a prompt challenge of the rezoning ordinance. We also note that in *Allred* and *Blades*, in which rezoning ordinances were successfully challenged, the action was instituted by a large number of nearby property owners.

In the present case plaintiffs, although not spokesmen before the City Council, were among the large number of persons who joined in protesting the rezoning of Mangum's *entire 85-acre tract* from R-4 to R-6. Notwithstanding notice of hearings to consider the annexation of the rezoned 39.89 acres was published, the minutes of the City Council do not show that any persons inside or outside the then corporate limits protested the proposed annexation. The minutes also disclose that at least two of the plaintiffs had full knowledge of Mangum's efforts; that their opposition was to the recommended location of the water and sewer lines; and that they suggested alternative locations.

[10] It is quite clear that plaintiffs, even now, would have no objection to the rezoning or the annexation ordinance had the City chosen another route for its sewer line. In refutation of defendants' plea of laches they state in their brief that they "were unaware at the time either the annexation or rezoning ordinance was enacted that an easement across their properties was going to be condemned by the City of Raleigh." Clearly this constitutes no reasonable excuse for plaintiffs' failure to assert their right, if any, to challenge the rezoning ordinance.

We must now consider whether plantiffs' long delay in bringing this action has prejudiced, disadvantaged, or injured the defendants. In this regard the minutes of the various meetings of the City Council disclose the continuing and extensive activity of Mangum and his attorneys to work out with the City plans for locating and financing a water and sewer system to service his proposed 200-unit apartment development on the rezoned 39.89 acres.

Furthermore, the map dated June 1972, which is attached to the petition in the condemnation proceeding against the Taylor plaintiffs, shows that it was based on an actual survey made by Rose, Pridgen and Freeman, Engineering Associates, Inc.

The minutes of the meeting of the City Council held 16 October 1972 disclose that Mangum's efforts to obtain by negotiation the necessary easements for water and sewer lines had failed and that he had to call for "city assistance." Most certainly all this activity was carried on in reliance upon the validity of the rezoning ordinance.

The affidavit of W. E. Mangum, filed 19 January 1973, states: "That in reliance upon Ordinance No. (1970) 33ZC91 and Ordinance No. (1972) 211, he has expended the following amounts of money: (1) $5,663.45 for architectural fees incurred in the design of a development compatible with the R-6 zoning on the land covered by the said ordinances; (2) $15,104.11 for engineering fees expended for the design of a sewer line to serve the land covered by the said Ordinances; (3) $2,500.00 for related attorney fees; for a total of $23,267.56.

"The above total figure includes only out of pocket expenses and his employees, which expense, if included, would greatly and does not include time and expenses incurred by the affiant increase the above total figure."

[11] Plaintiffs have not challenged the statements in Mangum's affidavit as required by G.S. 1A-1, Rule 56, sections (e) or (f). On the contrary, the documentary evidence (City Council minutes, etc.) submitted by plaintiffs, except in respect of the exact amounts of Mangum's out of pocket payments substantially support Mangum's statements. We further note that a finding in accordance with the facts stated in Mangum's affidavit is included among the "Findings of Fact" in Judge Hobgood's judgment of 13 August 1973. This discloses that Judge Hobgood had no misgiving as to the truth of Mangum's statements. Thus, as to the cedibility of Mangum's affidavit "there are only latent doubts, that is doubts which stem from the fact that [he] is an interested [party]." *Kidd v. Early,* 289 N.C. 343, 371, 222 S.E. 2d 392, 411 (1976).

In *Kidd v. Early, supra,* we held "that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when

summary judgment is otherwise appropriate." *Id.* at 370, 222 S.E. 2d at 410.

[12] Assuming *arguendo* that plaintiffs were sufficiently adversely affected by the rezoning ordinance to have standing to attack it, we hold that, under the undisputed facts, their delay of two years and twenty-two days from the adoption of the rezoning ordinance until the institution of this action constituted laches on their part; that on account thereof plaintiffs' action is barred; and that summary judgment to defendants is appropriate. Hence, defendants' motion for summary judgment on the grounds stated herein was proper.

Plaintiffs' exceptions to the judgment of 13 August 1973 indicate a misunderstanding or misapprehension of the nature of the hearing on 1 August 1973. They indicate plaintiffs considered it a hearing to consider solely whether defendants' motions for summary judgment should be granted. Upon such hearing, the questions for decision are: (1) whether there is a genuine issue of material fact, and, if not, (2) whether upon the undisputed facts the movant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The extensive "Findings of Fact" in the judgment of 13 August 1973 are consistent with a final hearing on the merits, when questions of fact are resolved by the court. *See Zopfi v. City of Wilmington, supra* at 438, 160 S.E. 2d at 333. We note that Judge Hobgood found the facts in accordance with defendants' contentions with reference to the subtantive features of the case. However, in view of plaintiffs' exceptions to the effect that these "Findings of Fact" were inappropriate, we have elected to affirm the judgment granting summary judgment for defendants on the grounds set forth herein rather than remand for a *de novo* hearing in the superior court.

The charter of the City of Raleigh, Ch. 1184, Secs. 89 and 90, N. C. Sess. Laws (1949) authorizes the City, *inter alia*, to construct and operate a sewerage system in order to furnish such service to residents of the City and, in its discretion, to persons and corporations desiring the same outside the corporate limits. The City is empowered to condemn easements within and without the City for the purpose of furnishing sewage disposal and treatment services for the City and its citizens. Under Ch. 989, Sec. 2, N. C. Sess. Laws (1967), when Mangum's 39.89

acres became a part of the City of Raleigh on 26 June 1972, that area became entitled to the same benefits and privileges of other parts of the City.

It is perhaps noteworthy (1) that the minutes of meetings of the Citiy Council prior to the authorization of the condemnation proceedings and the condemnation proceedings themselves disclose that the water and sewer lines approved and authorized by the City Council, in addition to the annexed 39.89 acres, would also serve a large populous area, very near but outside the primary limits of Raleigh, an area which includes all or a portion of the Laurel Hill Subdivision; and (2) that the City's proposed water and sewerage system is a more dependable method of sewage disposal than the septic tank treatment now relied on by the residents of the area lying between the City proper and the 39.89-acre satellite.

We affirm the decision of the Court of Appeals that plaintiffs are barred by laches from attacking the rezoning ordinance; that they have no standing to challenge the annexation ordinance; and that they cannot restrain the City from prosecuting the condemnation proceedings it has brought against them. In doing so we also note, as did the Court of Appeals, that if plaintiffs have any defenses *to the condemnation proceedings* they may be asserted in those actions.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

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

JOSEPH P. SHORE, CLERK OF THE SUPERIOR COURT OF GUILFORD COUNTY, NORTH CAROLINA v. RUFUS L. EDMISTEN, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; GUILFORD COUNTY; CITY OF GREENSBORO; CITY OF HIGH POINT; THE TRUSTEES OF GUILFORD TECHNICAL INSTITUTE; THE GUILFORD COUNTY BOARD OF EDUCATION; THE GREENSBORO CITY BOARD OF EDUCATION; THE HIGH POINT CITY BOARD OF EDUCATION; AND THE TOWN OF JAMESTOWN BOARD OF ALCOHOLIC CONTROL

No. 53

(Filed 1 September 1976)

1. **Criminal Law § 138— punishments permitted by N. C. Constitution — suspended sentence upon conditions — consent of defendant**

Though Article XI, § 1 of the N. C. Constitution enumerates the permissible punishments in this State, a constitutionally designated punishment may be suspended with the consent of defendant upon his performance of conditions which are otherwise constitutional, related to the purposes of punishment, and otherwise reasonable.

2. **Criminal Law § 142— suspended sentence — fines and restitution as conditions**

Fines and restitution are permissible conditions for suspension of sentences or for probationary judgments. G.S. 15-199(9), (10).

3. **Criminal Law § 142— suspended sentence — fines go to public schools — restitution goes to aggrieved party**

While fines and restitution are permissible conditions for suspension of sentence or probation, it is necessary for the trial judge to be precise as to which one he imposes, since a fine must go to the county for the use of the public schools, while restitution goes to the aggrieved party. N. C. Constitution, Article IX, § 7.

4. **Criminal Law § 142— suspended sentence — fine imposed — use by public schools only**

Any statute purporting to give what are in reality fines either to an individual or to another governmental agency violates Article IX, § 7 of the N. C. Constitution; likewise, any judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional.

5. **Criminal Law § 142— suspended sentence — fines and restitution — definitions**

Fines are pecuniary punishment exacted by the State and imposed in the discretion of the trial court for the purpose of punishing the defendant, while restitution is compensation to an aggrieved party.

6. **Criminal Law § 142— suspended sentence — restitution to state or local agency — propriety**

A state or local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs.

7. **Criminal Law § 142; Narcotics § 5— suspended sentence — money paid by officers for drugs — restitution proper**

In a prosecution for sale or possession of contraband, it is proper to order reimbursement to a state or local agency as a condition for suspension of sentence or probation for any sum paid by its agents to the defendant in order to obtain evidence of the crime. G.S. 90-95.3.

8. **Criminal Law § 142; Narcotics § 5— suspended sentence — money paid by officers for drugs — restitution proper**

Where a defendant was charged with possession of a controlled substance, a sentence of imprisonment was suspended on condition that defendant pay into court $60 for the money officers spent on the drugs, and the trial judge referred to the payment as "restitution" rather than a "fine," the amount to be disbursed in this case was not a fine but could be disbursed as restitution.

9. **Criminal Law § 142— suspended sentence — restitution ordered — aggrieved party not named — money treated as fine**

Where restitution is ordered it must be to a specific aggrieved party and this party must be named in the judgment; therefore, where a defendant was placed on probation on condition that he pay $40 as reparation or restitution but there was no indication whatsoever as to whom the restitution should be paid, the $40 was in effect a fine and the money should be paid to the county for the school fund.

10. **Criminal Law § 142; Narcotics § 5— suspended sentence — money required of defendant — fine and restitution required**

Where a defendant who pled guilty to possession of marijuana was ordered to pay $50 to the clerk of superior court to be paid to Guilford Technical Institute, the $50 was a fine, not restitution, and payable only to the school fund.

11. **Criminal Law § 142— suspended sentence — money required "for continued enforcement" by vice squad — money treated as fine**

Where a defendant pled guilty to possession and sale of non-tax-paid liquor, and the condition of the suspended sentence was that defendant pay to the clerk $500 for use of the vice squad of the High Point Police Department "for continued enforcement," the payment ordered was a "fine" payable under the N. C. Constitution only to the public schools.

ON petition for discretionary review prior to determination in the Court of Appeals, N. C. Gen. Stat. 7A-31, to review the judgment of *Walker, S.J.*, at the November 10, 1975 Special Non-Jury Civil Session of GUILFORD County Superior Court. This action was instituted by the plaintiff-appellee, the Clerk of the Superior Court of GUILFORD County [hereinafter clerk], pursuant to the North Carolina Uniform Declaratory Judgment

Act, N.C. Gen. Stat. 1-253 *et seq.* to determine the ownership of funds which he held in his official capacity.

In thirty-four criminal actions tried in the courts of Guilford County various judgments were entered which included provisions that each defendant pay money to the clerk for disbursement of the funds to various state and local agencies. Defendants are either those state and local agencies to which funds were ordered to be disbursed, including defendant-appellant City of Greensboro, or were various boards of education, including defendant-appellee Guilford County Board of Education, that claimed entitlement to the funds.

The clerk asked for a judgment advising and instructing him whether the funds which he held as a consequence of these judgments should be paid to the recipients designated in the jugdments or to the Guilford County Treasurer for the use of public schools as the clerk contended was required by the North Carolina Constitution, Article IX, § 7.

After answers were filed by all defendants and a pretrial order entered, Judge Walker entered his ruling based upon the pleadings, the stipulations of the parties and the judgments themselves as exhibits. He found that the monies ordered paid in the judgments in question were fines within the meaning of Article IX, § 7 of the North Carolina Constitution. He concluded and so decreed that these monies belonged to Guilford County for the use of the public schools; that provisions of the judgments insofar as they directed monies elsewhere were null and void; and that the clerk should disburse the monies to the Treasurer of Guilford County and in so doing would be exonerated from liability.

Only the defendant-appellant City of Greensboro appealed.

Jesse L. Warren, City Attorney, City of Greensboro, and Dale Shepherd, Attorneys for Appellant City of Greensboro.

Fred M. Upchurch, for Joseph P. Shore, Clerk of the Superior Court of Guilford County, Plaintiff Appellee.

John W. Hardy, for The Guilford County Board of Education, Defendant Appellee.

EXUM, Justice.

Judge Walker properly concluded that all fines must go to Guilford County for the use of the public schools and as to all

but one of the judgments properly concluded that the payments ordered were indeed fines. As to one judgment *(State v. Rogers,* Exhibit HH) he erred in holding that the payment in question was a "fine" in the constitutional sense. We conclude, for reasons hereinafter stated, that the money ordered to be paid in the Rogers judgment was restitution properly payable to the Greensboro Police Department. Judge Walker's judgment is to this extent modified and, as modified, affirmed.

[1] The starting point for discussion is Article XI, § 1 of the North Carolina Constitution which provides:

> "The following punishments only shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State."

This provision, in effect since 1868, was intended to stop the use of degrading punishments theretofore inflicted, but as a necessary consequence it also limited the creativity of trial judges in fashioning remedies for crime. *See* A. Coates, "Punishment for Crime in North Carolina," 17 N. C. L. Rev. 205 (1939).

Because of the desire for more diverse responses to criminal behavior the practice developed to suspend a constitutionally designated punishment with the consent of the defendant upon his performance of conditions. Although these conditions must be otherwise constitutional, related to the purposes of punishment, and otherwise reasonable they need not be limited to the type of punishment prescribed by Article XI, § 1 of our Constitution. A suspended sentence or probationary judgment can only be entered with the consent of the defendant. He can always choose to reject it and accept a punishment enumerated in the constitutional provision. Hence, no constitutional infirmity is seen. *State v. Simmington,* 235 N.C. 612, 70 S.E. 2d 842 (1952). *See generally* A. Coates, "Punishment for Crime in North Carolina," 17 N. C. L. Rev. 205 (1939); "Comment: Power of Court to Suspend Judgment," 2 N. C. L. Rev. 50 (1924); "Note: Separation of Powers—The Suspended Sentence," 51 N. C. L. Rev. 184 (1972); C. E. Hinsdale and R. Chaney, Conditions of Adult Probation—Legal and Illegal (Institute of Government, University of North Carolina at Chapel Hill 1976).

Generally courts have inherent authority to suspend sentences on the performance of conditions, *State v. Hilton,* 151

N.C. 687, 65 S.E. 1011 (1909). In the case of probation judgments the power to suspend on conditions is explicitly granted by General Statute 15-199 which provides in part:

> "The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, *or any other:* that the probationer shall:
>
> * * *
>
> (9) Pay a fine in one or several sums as directed by the court;
>
> (10) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court."

[2] As a condition for suspension a fine is obviously reasonable since the fine itself could have been imposed constitutionally as the only punishment. Fines are explicitly listed in General Statute 15-199(9) as a permissible condition for a probationary judgment. Where a fine is imposed the amount is subject to the constitutional provision that it not be excessive. N. C. Const. Art. I § 27. Restitution to an aggrieved party for damage, injury, or loss caused by criminal offense is also a reasonable condition for suspension of sentence, *State v. Simmington, supra,* or a probationary judgment, N. C. Gen. Stat. 15-199(10). Both fines and restitution are widely used. *See* C. E. Hinsdale and R. Chaney, *supra* at 3-6, 21.

[3] While fines and restitution are permissible conditions for suspension of sentence or probation it is necessary for the trial judge to be precise as to which one he imposes because the disposition of the money differs accordingly. Restitution goes to the aggrieved party. A fine must go, however, to the county for the use of the public schools. North Carolina Constitution, Article IX, § 7 provides:

> "All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

The purpose of this constitutional provision was stated in *Boney v. Kinston Graded School*, 229 N.C. 136, 48 S.E. 2d 56 (1948):

> "It is manifest that Article IX, Section [7], of the Constitution was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes."

[4] We have held that any statute purporting to give what are in reality fines either to an individual or to another governmental agency violates this constitutional provision. *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905); *School Directors v. Asheville (II)*, 137 N.C. 503, 50 S.E. 279 (1905); *School Directors v. Asheville (I)*, 128 N.C. 249, 38 S.E. 874 (1901); *Board of Education v. Henderson*, 126 N.C. 689, 36 S.E. 158 (1900). Likewise any judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional.

[5] In determining whether a given payment is a fine or restitution, the label given by the judge (or the legislature) is not determinative. *School Directors v. Asheville (I), supra; People v. Labarbera*, 89 Cal. App. 2d 639, 201 P. 2d 584 (1949); *People v. Barber*, 14 Mich. App. 395, 165 N.W. 2d 608 (1968) ("fine" labeled as "costs"). Fines are pecuniary punishment exacted by the state and imposed in the discretion of the trial court for the purpose of punishing the defendant. *State v. Maultsby, supra; School Directors v. Asheville (II), supra; Board of Education v. Henderson, supra; Common Council of Town of Indianapolis v. Fairchild*, 1 Ind. (1 Cart.) 315 (1848); *Southern Express Co. v. Walker*, 92 Va. 59, 22 S.E. 809 (1895), *aff'd*, 168 U.S. 705. Restitution is compensation to an aggrieved party. Ordinarily it could be recovered in a civil action but its collection as a condition of a suspended sentence is a reasonable ancillary remedy. *State v. Simmington, supra; cf. State v. Sullivan*, 24 Ore. App. 99, 544 P. 2d 616 (1976) (Chief Judge Schwab dissenting). *See also* John R. Gerber, "Joinder of Civil and Criminal Relief—A Comparative Analysis," 22 Syracuse L. Rev. 669 (1971).

[6] A state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss

to it over and above its normal operating costs. It would be reasonable, for example, to require a defendant to pay the State for expenses incurred to provide him with court appointed counsel should he ever become financially able to pay. *Fuller v. Oregon*, 417 U.S. 40 (1974). It would not however be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him. *People v. Baker*, 112 Cal. Rptr. 137 (Ct. App. 1974); *State v. Mulvaney*, 61 N.J. 202, 293 A. 2d 668 (1972); *cf. People v. Teasdale*, 335 Mich. 1, 55 N.W. 2d 149 (1952). In *People v. Baker, supra*, defendant, a licensed doctor, was convicted of prescribing narcotics to persons not under his treatment. A sentence was suspended and defendant placed on probation on condition he reimburse the county and state in the amount of $90,000 for the minimum estimated costs of prosecution. He was also fined $10,000 and assessed penalties. The California court held: (1) While the government may be reimbursed for "actual loss flowing from the charged offense" such "actual loss" does not include the usual costs of prosecuting and rehabilitating criminals. (2) Under a statute allowing, in addition, any "reasonable condition of probation" the costs of prosecution and probation cannot be judicially imposed upon defendant. It has been held that payments ordered by courts to reimburse the state for its general overhead attributable to prosecution costs violates the principle of separation of powers in that the judge is assuming the legislative function of allocating the resources of the state. *People v. Barber, supra;* Ex parte Coffelt, 93 Okla. Crim. 343, 228 P. 2d 199 (1951).

[7] In a prosecution for sale or possession of contraband we hold that it is proper to order the defendant to reimburse a state or local agency, as a condition for suspension of sentence or probation, any sum paid by its agents to the defendant in order to obtain evidence of the crime. Such a payment is not a fine. *Cf. State v. Bickford*, 28 N.D. 36, 147 N.W. 407 (1914). To allow the defendant to retain this money would result in unjust enrichment to him. Requiring him to return it to the agency which supplied it as restitution would be a reasonable condition for suspension of sentence or probation. General Statute 90-95.3 (1975 Cum. Supp.) now provides:

> "When any person is convicted of an offense under this Article, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made

in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction."

We see no constitutional infirmity in this statute so long as the order is a condition of suspension of sentence or probation to which defendant consents.

There remains one refinement of the law to be considered. The Constitution directs the disposition of the "clear proceeds of penalties and forfeitures and of all fines . . . . " Due to this unusual grammatical phrasing there were some early decisions that the concept of "clear proceeds" did not apply to "fines." *Board of Education v. Henderson, supra* (opinions by Furches and Faircloth); *School Directors v. Asheville (I), supra.* This was doubtless due to the influence of earlier decisions in regard to "penalties" to the effect that since an informant could get as much as 100 percent of a penalty in a *qui tam* action the penalty was not given to the State and there were no "clear proceeds" of the penalty to go to the schools. *Sutton v. Phillips,* 116 N.C. 502, 21 S.E. 968 (1895); *State ex rel. Hodge v. R. R.,* 108 N.C. 24, 12 S.E. 1041 (1891); *Katzenstein v. R. R.,* 84 N.C. 688 (1881). *Contra Dutton v. Fowler,* 27 Wis. 427 (1871). *Compare State v. De Lano,* 80 Wis. 259, 49 N.W. 808 (1891) *with State ex rel. Guenther v. Miles,* 52 Wis. 488, 9 N.W. 403 (1881).

Apparently this Court felt that the rationale of this line of decisions should not extend to the disposition of "fines" and, at first, held that 100 percent of a fine must go to the schools, *Board of Education v. Henderson, supra,* in effect reading "clear proceeds" out of the "fines" branch of the constitutional provision. In *School Directors v. Asheville (II), supra,* the Court intimated the "clear proceeds" language might apply to "fines" as well as to "penalties and forfeitures," but how much proceeds is "clear proceeds" would not necessarily rest solely in the hands of the legislature. The Court suggested that it could limit the words "clear proceeds" to mean that the legislature could dispose of only a part of the fine and the power of the legislature might be exhausted by giving to the clerk or sheriff a reasonable commission for collecting the fines before paying it over to the schools. The Court also suggested that a five percent commission as found in another statute or some other reasonable commission might exhaust the power of the legislature to demarcate "clear proceeds."

In *State v. Maultsby, supra,* this Court declared unconstitutional a statute under which a judge imposed a fine for selling whiskey insofar as it provided that an informant would receive one-half of the fine imposed. The Court noted that the amount ordered paid was quite clearly a fine since it was discretionary with the trial judge; therefore, the "clear proceeds" of the fine must go to the school fund. "Clear proceeds" meant the total sum less only the sheriff's fees for collection. The amount which the statute provided could be paid to an informant to induce enforcement was not constitutionally deductible from a "fine."

Cases from other states with similar constitutional provisions support the proposition that monies to be set aside for *future* enforcement of the law cannot be deducted from "fines" to arrive at "clear proceeds" of fines. *People v. Barber, supra; State ex rel. Rodes v. Warner,* 197 Mo. 650, 94 S.W. 962 (1906); *Ex parte McMahon,* 26 Nev. 243, 66 P. 294 (1901); *State ex rel. Comrs. of Public Lands v. Anderson,* 56 Wis. 2d 666, 203 N.W. 2d 84 (1973); *State ex rel. Johnson v. Maurer,* 159 Wis. 653, 150 N.W. 966 (1915); *State ex rel. Guenther v. Miles, supra; cf. State v. Parkins,* 63 W. Va. 385, 61 S.E. 337 (1908). In *Rodes* the Missouri legislature had attempted to give fines collected for the breach of game laws to the "Game Protection Fund" to pay salaries and expenses of wardens. The Court said, 197 Mo. at 664, 94 S.W. at 966:

> "But where fines and penalties are prescribed as a punishment for a violation of public wrongs, i.e., *crimes,* and such penalties or fines are to be recovered by public authority, the disposition of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned awry from the prescribed constitutional course."

In the case at bar Judge Walker considered thirty-four different judgments rendered in the various courts of Guilford County which the clerk claims run afoul of the Constitution in that monies properly payable only to the county for public schools were ordered paid to some other state or local agency. It would serve no useful purpose to consider each judgment individually. We discuss four representative judgments in detail.

[8] In *State v. Rogers* (Exhibit HH) defendant pled guilty to possession of a controlled substance. A sentence of imprison-

ment was suspended on condition "that he pay $60.00 into the office of the Clerk of Superior Court for the benefit of the Greensboro Police Department-Vice Division *for money they spent on these drugs.*" (Emphasis added.) In the accompanying probation judgment it was stated as a condition of probation that the defendant shall make "reparation or restitution . . . in an amount to be determined by the Court: $60.00." The amount on the probation judgment form for a "fine" was left blank. A special probation condition was that the "defendant pay into the office of the Clerk of Superior Court the costs and restitution . . . . Restitution to be disbursed to the GPD-Vice Division." In view of the nature of the offense, the judge's finding that the $60.00 was for "monies they spent on these drugs" and the judge's reference to the payment as "restitution" rather than a "fine," we hold that the amount to be disbursed in this case was not a fine and could be disbursed as restitution as ordered in the judgment. *Cf. State v. Bickford, supra.* The conclusion of Judge Walker to the contrary in this instance is erroneous.

None of the individual records giving rise to the thirty-four judgments in question are before us. We must presume that the restitution ordered in the Rogers judgment was supported by the record. The question of how much support there must be in the record is an important one. We note that the criminal trial itself may not be conducted to decide the question of how much damage or loss has been suffered. In *Shenah v. Henderson,* 106 Ariz. 399, 476 P. 2d 854 (1970) the fact that there had been a presentence report and a mitigation hearing was held to support the court's determination in its judgment of the amount of injury done. *Accord, State v. Sullivan, supra.* An instructive case is *State v. McClanahan,* 194 Neb. 261, 231 N.W. 2d 351 (1975). Defendant was convicted of larceny of a registered quarter-horse. The evidence at trial was that the horse was worth at least $500 and possibly $600 to $800. Defendant was placed on probation on condition that he make restitution of $600 to the owner of the horse. Defendant contended that the court abused its discretion in ordering restitution in any amount in excess of $500. The Nebraska Supreme Court disagreed and held that restitution is not limited to market value, the state is not required to establish the exact amount and the amount which may be ordered is a matter of the exercise of the trial court's discretion. Since evidence of the horse's value ranged from $500 to $800, a restitution order of $600 was not error. Nothing in

that opinion, however, would indicate that an award of $1,000 would have been permissible. *Cf. State v. Sullivan, supra.*

[9] In *State v. Tinsley* (Exhibit GG) defendant pled guilty to possession of marijuana. Entry of a judgment of guilt was continued and defendant was p'aced on probation for a period of one year (N. C. Gen. Stat. 90-96) on condition that he make "reparation or restitution . . . in an amount to be determined by the Court: $40.00." The amount for a fine was left blank. As a special condition of probation defendant was ordered to pay into the clerk's office "the court cost and restitution." This judgment differs from the Rogers judgment in that there is no indication whatsoever as to whom the restitution should be paid. This difference is crucial. Where restitution is ordered it must be to a specific aggrieved party and this party must be named in the judgment. Although the judge who signed this judgment may have intended this payment to be "restitution" to someone, we conclude that Judge Walker was correct in holding that it was in effect a fine and that the clerk should pay the money to the county for the school fund.

[10] In *State v. Dickerson* (Exhibit EE) defendant p'ed guilty to possession of marijuana. Entry of judgment of guilt was continued (N. C. Gen. Stat. 90-96) and defendant was ordered to pay costs and "the sum of $50.00 to the Clerk of Superior Court to be paid to [Guilford Technical Institute] . . . . " On the order the amount for "reparation or restitution to the aggrieved party" was left blank. Judge Walker properly concluded that this "sum of $50.00" was a fine which must go to the public schools. It was not labeled restitution. There is nothing in the judgment to indicate that it was so intended. It is highly unlikely that Guilford Technical Institute could be an "aggrieved party" for this type of offense. *Compare State v. Stalheim,* 542 P. 2d 913 (Ore. App. 1975) *with State v. Gunderson,* 74 Wash. 2d 226, 444 P. 2d 156 (1968), *overruled on another point, State v. Gosby,* 85 Wash. 2d 758, 539 P. 2d 680 (1975).

[11] In *State v. Welch* (Exhibit DD) defendant pled guilty to possession and sale of non-tax-paid liquor. The condition of the suspended sentence was that defendant pay to the clerk "the sum of $500.00 for the use and benefit of the Vice Squad of the High Point Police Department *for continued enforcement.*" (Emphasis added.) Nothing in the judgment indicates that restitution was intended or appropriate. Monies for *continued en-*

forcement are to be provided by the legislature, not the judiciary. *People v. Barber, supra; State ex rel. Rodes v. Warner, supra; Ex parte Coffelt, supra; State ex rel. Johnson v. Maurer, supra.* Judge Walker properly concluded that the payment ordered in the Welch judgment was a "fine" payable under our Constitution only to the schools.

Payments ordered to be paid in the other thirty judgments must be considered fines payable to the schools for one or more of the reasons we have noted with regard to the Tinsley, Dickerson and Welch judgments. Although in several of the cases restitution could have been intended and may have been proper Judge Walker properly concluded on the basis of the language of the judgments themselves and the legal principles we have discussed that each imposed a "fine" payable only to Guilford County for the use of the public schools. Each party will bear his own costs in this Court.

Modified and affirmed.

STATE OF NORTH CAROLINA v. ODELL C. CAWTHORNE

No. 5

(Filed 1 September 1976)

1. **Homicide § 21— murder in perpetration of robbery of cab driver — sufficiency of evidence**

In a prosecution for murder committed in the perpetration of an armed robbery, evidence was sufficient to be submitted to the jury where it tended to show that deceased picked up defendant and his companion in deceased's cab, halfway to his destination defendant decided to rob deceased cab driver, and in the process of executing the robbery with a .32 caliber revolver defendant shot and killed the driver; that defendant may not have intended to discharge the gun he was holding at the cab driver's head when he took his money was totally irrelevant.

2. **Criminal Law § 75; Homicide § 20— confession — pistol — admissibility**

The trial court did not err in allowing into evidence a confession made by defendant and a pistol found in defendant's house where the evidence on *voir dire* fully justified the court's findings that police officers observed all the procedural safeguards in conducting the interrogations which preceded defendant's consent to the search of his premises and his confession.

3. **Criminal Law § 73; Homicide § 15— murder of cab driver — statement by driver — testimony by dispatcher admissible**

In a prosecution of defendant for the first degree murder of a cab driver, the trial court did not err in allowing the cab dispatcher to testify concerning information as to destination and number of passengers given her by the deceased cab driver during the time defendant and his companion were being transported in his cab, since the radio transmission testified to by the dispatcher was made in the regular course of business, and the statement made by deceased cab driver was properly admitted under the *res gestae* concept and under the exception to the hearsay rule enunciated in *S. v. Vestal,* 278 N.C. 561.

4. **Criminal Law § 116— failure of defendant to testify — jury instruction proper**

The trial court's instruction on defendant's failure to testify, although not in the traditional language, made it clear that defendant had the right to testify or to refrain from testifying as he saw fit, and that his failure to testify created no presumption against him; however, since defendant requested no such instruction, it would have been better for the judge to make no reference to defendant's failure to testify.

5. **Criminal Law § 163— objections to jury charge — time for making**

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal.

6. **Constitutional Law § 36; Homicide § 31— first degree murder — death sentence vacated — life sentence substituted**

Sentence of death imposed upon defendant in a first degree murder prosecution is vacated and sentence of life imprisonment is substituted therefor.

APPEAL by defendant under G.S. 7A-27(a) from *Judge Perry Martin* at the 24 February 1975 Session, Superior Court of ONSLOW. *Certiorari* granted 14 November 1975.

Defendant was tried upon an indictment, drawn under G.S. 15-144, which charged him with the murder of Gordon Earl Peer (Peer) on 5 December 1974. From his conviction of murder in the first degree (felony murder), and the sentence of death imposed upon the verdict, he appealed to this Court.

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

On the night of 4 December 1974 Peer had been working for about 18 months as a taxi driver for the Yellow Cab Com-

pany in Jacksonville. On that night he was driving cab No. 85. At 1:52 a.m. on 5 December 1974 the Yellow Cab dispatcher, Phyliss Barnard, directed Peer by radio to go to the Red Carpet Inn. A short time thereafter he reported to her "who he had picked up." He also said, "Red Carpet to Richlands." She then inquired whether he meant the Town of Richlands or Richlands Avenue in Jacksonville, which is just off Highway No. 17 North. He told her it was the latter, and Miss Barnard noted this information and the amount of the fare ($3.75) on a "manifest card." Company rules required her to record on a card where a driver "is picking up and where he is going." At that time the card is put through a time clock and again when he discharges. The driver is also required to fill out a manifest card.

A few minutes after Peer had reported he was going to No. 17 North the dispatcher received a call for a cab at an address on No. 17 North, and she at once attempted to communicate with Peer. He was a driver who always answered "almost immediately"; so, when Miss Barnard's repeated efforts to contact him by radio were unsuccessful, she alerted the other drivers to look out for him and instructed cab driver Ernest S. Humphrey to "start checking 17 North, Richlands Avenue." She also called the Sheriff's Department, the Air Station PMO, Camp Geiger PMO, and Camp Lejeune Maingate.

Between 2:30 and 2:33 a.m., from Highway No. 17, Humphrey spotted Peer's cab stopped at 202 Roosevelt Road in the middle of the street. Its motor was running; all the lights were off except the blue top light. When he went up to the cab he found Peer "slumped down" on the driver's side in the front seat. There was blood all over his chest and he appeared to be unconscious. Humphrey immediately called the dispatcher and told her to send an ambulance. About 3:00 a.m. the rescue squad and C. D. Sisk, a detective with the Jacksonville Police Department, and several other police officers arrived at the scene.

When the rescue squad arrived Peer's body was still warm, but there were no vital signs. He was transported to the Onslow Memorial Hospital. There the doctor on duty pronounced him dead on arrival and sent his body to the morgue.

At 8:50 a.m. on 5 December 1974 Dr. Walter D. Gable, an expert in pathology, examined Peer's body in the morgue. He

testified that the cause of Peer's death was a gunshot wound in the right temple. There were powder burns around it, but it was "a close type wound"—not a contact wound. The bullet had fractured the skull and caused massive lacerations in the brain. Dr. Gable removed the bullet (Exhibit 5) and turned it over to Detective Brown of the Jacksonville Police Department, who immediately delivered it to SBI Agent Woodall.

At some time on 5 December 1974 defendant and one Charles Cook were arrested in connection with the murder by Jacksonville police. Detective Brown first saw and talked to defendant about 4:20 a.m. on December 6th at the Onslow County Jail. Brown testified that after identifying himself to defendant, he told him what he wanted to talk to him about.

Upon defendant's objection to the admission in evidence of any statement made by defendant to the investigating officers, the court conducted a *voir dire* to determine their admissibility. In the absence of the jury, Brown gave the testimony which is quoted and summarized below.

Before asking defendant any questions, Brown explained to him his constitutional rights and gave him the *Miranda* warnings in strict compliance with the requirements laid down in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Having done so, Brown asked defendant if he understood what he had just told him. Defendant said he did, and he made the statement that he did not think a lawyer was necessary; that he did not want one. At that time the officers had in their possession a statement from Charles Cook that defendant was the person who had shot the cab driver. Cook had made his statement about 3:00 a.m. Brown did not inform defendant of Cook's statement because he had told Cook he would not tell him.

At the time Brown talked with him defendant did not appear to be under the influence of alcohol, narcotics, or anything else. Indeed, Brown was certain that defendant's statements to him were made freely, understandingly and voluntarily. "I made sure of that. . . . I indicated to him two or three times that I didn't want him to tell me anything without thinking of the lawyer part . . . that I didn't want him to answer my questions without a lawyer if he felt like he needed one. He told me again that he didn't see it necessary to have a lawyer. . . . I told him that I wanted to ask him one question, that

is where the gun was at. And after I got through asking him that, I said, 'If you don't want to answer, you ain't got to answer. If you want to wait until you get your lawyer, you can wait and see him.' He said, 'No, I'll tell you where it's at.' . . . He told me it was inside the house, he's got a chimney. . . . [T]he chimney is built on the side of the wall and the flue goes into the chimney and he said it was back in the bottom of the chimney. . . . [H]e pushed it and it fell down. I asked him for permission to go out to his house to get this gun. Mr. Cawthorne was cooperative and he said he would give me permission to go out there and get it, and I asked him if he would give it to me and Detective Sisk too and he said he would. So . . . he told Detective Sisk where it was at and then he signed his name at the top and also at the bottom" of the following "permission sheet" (State's *voir dire* Exhibit 1): "I, Odell C. Cawthorne, give Detective Ed Brown and Detective C. D. Sisk permission to get a pistol out of my house at 313 Richlands Avenue, Jacksonville, on 12-6-74, 4:25 a.m."

After he had signed the permission sheet defendant said to Brown, "If you will come back tomorrow, I'm kind of sleepy today, but if you will come back tomorrow, I'll give you a written statement on what happened." Brown said he "didn't go down there to get a statement," and he was surprised by defendant's offer.

About 1:00 p.m. on December 6th Brown went back to the jail and talked to defendant a second time. He again warned defendant—just as he had done earlier—of all his constitutional rights, and he once more inquired if defendant wanted a lawyer present. Again defendant said he would talk to Brown without a lawyer. He then read and signed a waiver (Exhibit 8), the second paragraph of which is set out below:

"I have read the statement of my rights [Miranda warnings] as shown above. I thoroughly understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I thoroughly understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me."

As recounted by Brown, defendant then made the following statement to him: "He told me that himself and Cook were out to the Red Carpet Inn and that they caught a cab and he said it was about two o'clock in the morning. That on the way from

the Red Carpet Inn to Richlands Avenue, he decided to rob the cab driver. He had the cab driver pull off on Roosevelt Road, which is the road before you get to Richlands Avenue, and he said he drove down about halfway and had him to pull over. He said he pulled out a gun, stuck it to the cab driver's head and told him he wanted his money and he said that he pulled the hammer back on the gun to make the cab driver think he was serious and he said when he got the money, started to get out of the car, the gun went off and he said he didn't intend to shoot the cab driver . . . but when he started to get out of the car, the gun went off and he didn't know what happened. He just got scared and ran . . . to his house at 313 Richlands Avenue. He told me that Cook was not involved in it . . . didn't know nothing about it and he indicated that, at two different times, that Cook was no part of it."

After he had completed his oral statement Brown asked defendant if he "would write it out" just like it happened, and defendant "printed it out in his own handwriting." He put his name and social security number at the top and, at the end, he signed his name to it. This statement, introduced in evidence as State's Exhibit 7, is as follows:

"On the 5th day of December 1974, myself and Charles Cook caught a cab from the Red Carpet Inn and on the way home I decided to rob the cab driver. Charles Cook had no knowledge of what was going to take place at all, even I didn't know until I got halfway home. I had been drinking a lot that night and when I put the gun up to the driver's head, I pulled the handle back to make him think I was serious. I didn't pull the trigger but when I went to get out of the cab I let go of the handle to get away and that was when the gun went off. We both were shocked because I was not going to shoot no one intentionally but it happened so we both ran home. Quote: Charles Cook had nothing to do with it whatsoever. Odell C. Cawthorne."

When Brown took defendant back to the cell he said to him, "I would like to ask you one more question. How much money was taken." Defendant replied, "Twenty or twenty-five dollars." In answer to Brown's inquiry if he knew what happened to it, defendant said he did not know; that he didn't get any of it.

In concluding his *voir dire* testimony Brown said on cross-examination that the statement which Cook had given the officers "consisted of practically the same thing" that defendant had told them; that every time the officers talked to him defendant kept repeating that Cook had nothing to do with it. Brown also said defendant "was more than cooperative with him and that, in his opinion, defendant had been honest with him throughout the whole investigation."

Defendant neither testified nor offered any evidence on the *voir dire*. The court made detailed findings of fact in accordance with the testimony of Detective Brown. On the facts found he concluded as a matter of law that defendant, after being fully advised of his constitutional rights as contained in the *Miranda* warnings, had understandingly and voluntarily waived these rights, including the presence of an attorney at his interrogation; that thereafter defendant told Brown where to find the gun and subsequently made both oral and written statements with reference to the events surrounding the death of Peer; that all his statements to the police were "made understandingly, voluntarily, knowingly and under no promise, threat or any form of coercion." Whereupon he overruled defendant's objection to the admission in evidence of his statements to Detective Brown.

Before the jury Brown gave substantially the same testimony he had given before the judge on *voir dire*. His testimony before the jury, however, tended to show these additional facts: (1) The distance from 202 Rooseevelt Road, where Humphrey had found the abandoned cab, to defendant's residence at 313 Richlands Avenue was a little less than two-tenths of a mile by way of a driveway between the two streets. (2) After leaving the jail at about 4:30 a.m. on December 6th, Detectives Brown and Sisk procured a magnet and proceeded to 313 Richlands Avenue. There they disconnected the oil heater from the chimney and, using the magnet, they pulled up the .32 nickle plated pistol, which was introduced in evidence as Exhibit 6.

Alma Jones, who, in December 1974, resided with her boyfriend, Charles Cook, in defendant's home at 313 Richlands Avenue, gave tesetimony which is summarized as follows:

About 6:30 p.m. on 4 December 1974 Alma Jones, leaving Cook at the house, walked to her work as a barmaid "up town." At 2:00 a.m. (December 5th) she returned home with three

men. When she arrived neither defendant nor Cook was there, but within three minutes both came in. At defendant's request she "stepped into his bedroom" so that he could speak to her privately. He gave her a roll of dollar bills and told her "he had robbed some swine" and "had shot someone." He did not tell her whom he had robbed or shot, and she did not believe he would shoot anyone. He showed her a loaded .32-caliber pistol (Exhibit 6) from which she could see that a bullet had been fired. Cook, who seemed upset, also came into the room. However, when she tried to find out from him what had happened he wouldn't discuss it. She had seen Cook and defendant earlier that night, between 10:00 and 10:30 p.m., when they entered the place where she worked. Thereafter she did not see them again until they came home shortly after 2:00 a.m.

Mrs. Jones had seen the .32-caliber pistol, a silver or nickle plated revolver with the letters S & W on it, two days earlier when defendant showed it to her and Cook. At that time the gun was loaded and, fearing it would get defendant into trouble, she had taken the gun from him and hidden it. Thereafter defendant "got high on some wine" and demanded the gun; so she had to give it back to him.

Mrs. Jones first saw Detective Brown when he came to the house to search for the gun. She saw the officers retrieve the gun; it was Exhibit 6, the same gun she had seen two days earlier.

SBI Agent Woodall talked to Mrs. Jones at the Jacksonville Police Department on December 6th approximately 24 hours after "the alleged murder." She had been "picked up" because she was residing at 313 Richlands Avenue where defendant and Cook resided. Woodall testified she had then "stated basically" what she stated in court, except that she did not mention she had seen defendant with the gun on the morning of December 5th. Woodall also testified that Mrs. Jones told him she did not know how much money defendant had handed her in his bedroom between 2:15 and 2:30 a.m. December 5th; that she had returned it to him during their conversation; that she estimated the roll to contain between seven and ten dollars in one dollar bills; that when she got up on the morning of December 5th defendant was already gone; and that sometime during the early morning defendant had gone to the attic.

SBI Agent Frank Satterfield, a firearms identification expert to whom the bullet (Exhibit 5) and the .32-caliber S & W revolver (Exhibit 6) had been delivered, testified in substance as follows: The bullet was so mutilated and distorted that, although he fired about five "test rounds" from Exhibit 6, "a cheap revolver," he could not determine conclusively whether it had fired Exhibit 5. Satterfield did, however, note a number of similar characteristics between the test-fired rounds and the bullet.

Defendant rested without offering any evidence and moved for a judgment as of nonsuit. The motion was denied. After hearing the argument of counsel and the court's instructions, the jury found defendant guilty as charged.

Attorney General Rufus L. Edmisten; Assistant Attorney General George W. Boylan for the State.

Grady Mercer, Jr., for defendant appellant.

SHARP, Chief Justice.

Defendant's assignments of error numbered two through six assert that the trial judge erred (1) in overruling his motion for judgment as of nonsuit at the close of all the evidence; and (2) in making the findings of fact and conclusions of law upon which he admitted in evidence (a) defendant's confession that he shot the cab driver and (b) State's Exhibit C, the pistol which the officers retrieved from the chimney in defendant's home.

In lieu of stating his contentions in support of the foregoing assignments as required by App. R. 28(b)(3), defendant has "respectfully requested" that the Court (1) examine the evidence on *voir dire* to determine if it supports the judge's findings of fact and conclusions of law that "the purported confession was admissible as evidence against defendant," and (2) determine if there was sufficient evidence to withstand defendant's motion for nonsuit. The detailed preliminary statement of the evidence in this case manifests our careful examination of the record. It further reveals that any attempt by defendant to comply with App. R. 28(b)(3) would have been futile. The record contains no basis for any argument in support of assignments two through six.

[1] The uncontradicted evidence of the State, which included defendant's full confession, establishes beyond any reasonable

doubt that he shot and killed Peer in the course of an armed robbery. That defendant may not have intended to discharge the gun he was holding at the cab driver's head when he took his money is totally irrelevant. *State v. Shrader,* 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972). Defendant stands convicted by his own voluntary confession. It is to his credit that he neither attempted to repudiate nor to invalidate his statement admitting the facts which establish his guilt and absolve his companion Cook of any complicity in Peer's murder. Patently, the trial court was correct in overruling the motion for nonsuit. *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975).

[2] Nor did the trial judge err in his rulings upon the admission of evidence. The State's evidence on *voir dire,* uncontradicted by testimony from defendant himself or any other person, fully justified the court's findings that the police officers observed all the procedural safeguards in conducting the interrogations which preceded defendant's consent to the search of his premises and his confession. Defendant's objections to the admission of his confession and the pistol, which was the fruit of the search he voluntarily authorized, were properly overruled. *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169 (1974). *See State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968).

[3] Defendant's assignment No. 1 is that the court committed prejudicial error in permitting Miss Barnard, the Yellow Cab dispatcher, to testify that after she had directed Peer to go to the Red Carpet Inn he "called in his number," told her "who he had picked up," and that he was taking his passengers to Richlands Avenue just off Highway No. 17. We interpret Miss Barnard's testimony to mean that Peer told her he had "two fares" for Richlands Avenue just off No. 17. Nothing in the record suggests that he either knew or gave the dispatcher the names of his passengers. As dispatcher for the Cab Company, Miss Barnard was interested in knowing, and recording, only the number of the cabby's passengers and the distance he would transport them so that she could determine the fare for which the driver should account. The rules of Cab Company required Peer to give the dispatcher this information. Thus, his radio transmission to her was made in the regular course of business and during the trip involved here. The reasonable probability of its truthfulness is obvious.

Peer's challenged statement to the dispatcher was properly admitted under "the *res gestae* concept" and also under the exception to the hearsay rule enunciated in *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, *cert. denied* 414 U.S. 874 (1971). In *Vestal* a murder victim's declarations to his wife that he was going with the defendant on a business trip to Delaware, made while he was preparing to leave home, were held admissible to show his intention to leave town with the defendant. *See* 1 Stansbury, North Carolina Evidence § 162 (Brandis Rev. 1973). It is perfectly clear, however, that the admission of the radio transmission, even had it been erroneous, could not have been prejudicial error, for Peer's taxi and body were found in a driveway off Richlands Avenue less than two-tenths of a mile from defendant's residence. Further, substantially the same testimony was elicited from another witness without objection.

[4] Defendant's seventh assignment of error relates to the court's instructions on defendant's failure to testify. This instruction, although not in the traditional language, made it clear that defendant had the right to testify or to refrain from testifying as he saw fit, and that his failure to testify created no presumption against him. In this instruction we can perceive no prejudice to defendant. *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975). However, since defendant requested no such instruction, we are constrained to repeat once more that, in the absence of a request, it is better for the judge to make no reference to defendant's failure to testify. *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).

[5] Defendant's eighth assignment asserts that in reviewing certain evidence the judge misinterpreted it. We find no merit in this contention. We also note "[t]he general rule . . . is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires 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. Thomas,* 284 N.C. 212, 218, 200 S.E. 2d 3, 8 (1973).

In defendant's trial we find no error which, in our view, could have possibly influenced the verdict.

[6] Defendant's final assignment is that the judge erred in denying his motion in arrest of the judgment imposing upon

him the sentence of death. After we had heard the arguments in this case the Supreme Court of the United States, in *Woodson v. North Carolina*, ... U.S. ....., 96 S.Ct. 2978, 44 L.W. 5267 (1976), invalidated the death penalty provision of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendant was convicted of first degree murder and sentenced to death. We must, therefore, vacate the sentence of death imposed upon defendant and, under the authority of N. C. Sess. Laws, ch. 1201, § 7 (Session of 1974), substitute the sentence of life imprisonment.

Accordingly, it is hereby ordered that, upon remand of this cause to the Superior Court of Onslow County, the presiding judge, without requiring the presence of defendant, shall enter a judgment of life imprisonment in lieu of the sentence of death heretofore imposed upon him for the first degree murder of which he has been convicted. Further, in accordance with this judgment, the clerk of the superior court will issue a new commitment in substitution for the commitment heretofore issued. At the same time the clerk will furnish to defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

In the trial, insofar as it affects the verdict, we find

No error.

As to the judgment imposed upon the verdict, the death sentence is vacated and, in lieu thereof, a sentence of life imprisonment is substituted.

Crumpton v. Crumpton

RUTH HARRIS CRUMPTON; RUTH C. GREEN AND HUSBAND, EDWARD W. GREEN, JR.; REBECCA C. SAUNDERS AND HUSBAND, CLINTON L. SAUNDERS; DIANA C. TUCK AND HUSBAND, TONY M. TUCK AND MARIAN C. MONK AND HUSBAND, THOMAS A. MONK, SR. v. MALCOLM H. CRUMPTON AND WIFE, SANDRA H. CRUMPTON; EMMET GARRETT CRUMPTON AND WIFE, JUDY S. CRUMPTON; WILLIAM R. CRUMPTON III AND WIFE, KAREN L. CRUMPTON; HARRIS CRIGGER CRUMPTON AND WIFE, DEBBIE CRUMPTON; STEVE CRUMPTON AND WIFE, SHARON CRUMPTON; BROOKS CRUMPTON, SINGLE; KNOX MITCHELL, SINGLE; GEORGE EDWARD MITCHELL AND WIFE, MARY MITCHELL; ROSE C. GREGORY, WIDOW; SHARON LYNN CRUMPTON; TONIA ROBIN CRUMPTON; LISA ANN CRUMPTON; DOUGLAS JAY CRUMPTON; CHAD ALLEN CRUMPTON; MISHA CRUMPTON; SHANEL CRUMPTON; WILLIAM ROBERT CRUMPTON IV; SANDRA JOYCE CRUMPTON; RONDA LYNN CRUMPTON; AMY GARRETT GREEN; BRENDA GAIL SAUNDERS; CLINTON MARK SAUNDERS; WILLIAM MERRITT SAUNDERS; ANTHONY DARRON SAUNDERS; CHRISTOPHER JASON SAUNDERS; TONY MARTIN TUCK, JR.; THOMAS A. MONK, JR. AND WIFE, CAROLYN MONK; TAMMY MONK; CHRISTY MONK; CHARLES WILLIAM MONK; PAMELA GREGORY; MICHELLE MITCHELL; MRS. G. K. HARRIS, WIDOW; DOLIAN HARRIS AND WIFE, JANE KIRBY HARRIS; GEORGE E. HARRIS AND WIFE, KATHRINE HARRIS; JESSIE H. WADE, WIDOW; DOROTHY G. HARRIS, WIDOW; ROBERT EARL JAMES, SR., WIDOWER; BENJAMIN WILLIAM JAMES AND WIFE, JOYCE EVERETTE JAMES; ROBERT E. JAMES, JR. AND WIFE, GRACE F. JAMES; BETTY J. THOMPSON, WIDOW; KATIE HARRIS, SINGLE; CORINE H. GRANT, WIDOW; ELLA H. WINSTEAD AND HUSBAND, FRANK WINSTEAD, SR.; AND NETTIE LOU BULLOCK

No. 80

(Filed 1 September 1976)

1. **Estates § 7— land given to life tenant with remainder to issue — determination of remainder interest premature**

In a special proceeding pursuant to G.S. 41-11 for a private sale of land with the proceeds of the sale to be held in trust for the life tenant and at her death the proceeds remaining to be distributed to her issue then living, *per stirpes*, the Court of Appeals erred in determining prematurely an issue as to whether certain parties were contingent remaindermen in the subject land and therefore possibly entitled ultimately to the proceeds from the sale thereof.

2. **Estates § 7— vested interest in property — remaindermen not determined — statute providing for sale of land**

A close examination of G.S. 41-11 reveals that its purpose is not to obtain predictive declarations of future rights of the parties, *inter se*, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. The statute contemplates that the proceeds of the sale, less

expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate.

ON appeal pursuant to General Statute 7A-30(1) (substantial constitutional question) from a decision of the Court of Appeals reported at 28 N.C. App. 358, 221 S.E. 2d 390 (1976). Since no substantial constitutional question is presented, as will appear hereinafter, we dismiss the appeal and treat the papers as a petition for writ of certiorari pursuant to General Statute 7A-32(b).

The facts are not in dispute. On December 1, 1941, G. E. Harris and wife conveyed a tract of land in Person County to "Ruth Harris Crumpton for the term of her natural life, with remainder to her living issue *per stirpes* . . . . " The habendum clause of the deed provided that the grantee should hold the land "for and during the term of natural life, and at her death to her issue then living, *per stirpes;* Provided, however, that if she has no issue then living said land shall revert to the heirs at law of the grantor G. E. Harris." Ruth Harris Crumpton is still living. Two of her children are still living. A son, William Robert Crumpton, Jr., is deceased and left surviving him six children all of whom are now living. Another son, George Edward Crumpton, had five children before his death in 1962. Two of his children, George Edward Mitchell, born in 1943, and Edgar Knox Mitchell, born in 1945, were adopted from him on June 13, 1955. These two children were born to him by the wife of his first marriage; they are still living and are the appealing respondents in this action. George Edward Mitchell has a daughter, Michelle. By a second marriage, George Edward Crumpton had three children, Harris, Steve and Brooks, who are also now living and are respondent appellees here.

On December 9, 1974, petitioner Ruth Harris Crumpton *et al.* brought a special proceeding pursuant to General Statute 41-11 for a private sale of the land with the proceeds of the sale to be held in trust for the life tenant and at her death the proceeds remaining to be distributed "according to law and according to the terms of the said Deed."

The only issue purportedly presented is whether the two Mitchell children (or their issue) should ultimately share in the proceeds of the sale. The clerk entered an order directing a sale of the land and providing that George Edward Mitchell and Edgar Knox Mitchell would share in the proceeds of sale

if they survived Ruth Crumpton and if either or both should predecease her their children would take in the same manner as children of the other three children of George Edward Crumpton. To this conclusion of law the other three children of George Edward Crumpton, Harris, Steve, and Brooks, excepted and appealed to the superior court. After a hearing that court entered an order concluding as a matter of law that respondents, George Edward Mitchell and Edgar Knox Mitchell, "by virtue of the Final Order of Adoption dated June 13, 1955, were removed from the bloodline of Ruth Harris Crumpton and own no remainder interest, vested or contingent, in the subject lands or in the proceeds from the sale thereof . . . . " From this order Edgar Knox Mitchell and George Edward Mitchell appealed as did the guardian *ad litem* for Michelle Mitchell and other unborn or unknown issue. The Court of Appeals affirmed.

Ronnie P. King, for Respondent Appellants Edgar Knox Mitchell, George Edward Mitchell and wife, Mary Mitchell.

Alan S. Hicks, Guardian Ad Litem for Respondent Appellant Michelle Mitchell and any unknown or unborn persons being or being asserted to be the issue of Edgar Knox Mitchell or George Edward Mitchell.

Graham, Manning, Cheshire & Jackson, by Lucius M. Cheshire for Respondent Appellees Harris Crigger Crumpton, Steve Crumpton and Brooks Crumpton.

EXUM, Justice.

Appellants took their appeal to this Court claiming that the judgment of the superior court deprived them of property without Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution and in violation of the Law of the Land provision of Article I § 19 of the North Carolina Constitution. This appeal is dismissed. The interest of the appellants is still contingent, *Strickland v. Jackson*, 259 N.C. 81, 130 S.E. 2d 22 (1963). If appellants are ultimately denied an interest in this property by operation of the statutes relied upon by the Court of Appeals, e.g., General Statutes 48-6 (1941) and 48-23 (1966), it is now settled that such "statutes destroying or diminishing *contingent interests* in property do not, per se, deprive the holder thereof of property without due process of law . . . or violate any other constitutional limitation upon legislative power. *Stanback v. Citizens National Bank*, 197 N.C. 292, 148 S.E. 313 [1929]." *Peele v. Finch*, 284 N.C. 375,

200 S.E. 2d 635 (1973). (Emphasis added.) There was no substantial constitutional question upon which to predicate this appeal.

[1] However, because of error in the opinion of the Court of Appeals in deciding prematurely the issue purportedly presented, we treat the appeal as a petition for writ of certiorari, vacate the decision of the Court of Appeals and remand for further proceedings.

General Statute 41-11 under which this proceeding was brought provides:

> "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court . . . .
>
> "The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided . . . .
>
> "The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales . . . .

"The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina . . . but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section."

[2] A close examination of the statute reveals that its purpose is not to obtain predictive declarations of future rights of the parties, *inter se*, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. The statute contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate. As was stated in *Dawson v. Wood*, 177 N.C. 158, 163, 98 S.E. 459, 461 (1919), "[In 1905] this reinvestment in realty was required to be within two years, but such requirement was removed by the later [1907 act] leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered." *Cf. Pendleton v. Williams*, 175 N.C. 248, 255, 95 S.E. 500, 503 (1918). ("[T]he court may authorize the loaning of the money, subject to its approval, until such time as it can be reinvested in real estate.")

The statute specifically allows temporary reinvestment pending final investment in real estate. When new real estate is acquired or improved General Statute 41-11 requires that it "be held upon the same contingencies and in like manner as was the property ordered to be sold." Although this requirement is not stated in regard to the temporary fund held pending final reinvestment, it is obviously contemplated that the temporary fund be also "held upon the same contingencies . . . . "

General Statute 41-11.1 (1975 Cum. Supp.), a comparable statute, provides that:

> "In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided,
>
> (1) The trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until the occurrence of the event which will finally determine the identity of all members of the class . . . . "

Under General Statute 41-11 it is only for the purpose of determining who must be summoned and made a defendant that the clerk need decide who is presently "interested in the land." Here there is no question that all who might become interested have been properly summoned and made respondents. If appellants had opposed the sale it might have been necessary for the clerk to determine whether they were "interested in the land" so as to have standing to contest the sale. The respondent appellants did not, however, oppose the sale but rather joined in the prayer for the sale.

We conclude that the clerk erred as did the judge in determining the ultimate disposition of the fund. That action was premature and not authorized by the statute. Many events may obviate the need to determine the question answered by the clerk, judge, and Court of Appeals: (1) The life tenant is still living. Respondent appellants and those claiming through them may not survive her. (2) Before her death the General Assembly may speak more specifically to the precise situation here—the right of those adopted out of a family to take as "issue" of that family when a deed grants a remainder to "issue." (3) This lawsuit involves the sale of land worth $70,000. However, the amount contested is the remainder interest in only one-tenth of that amount. It is highly conceivable that appellants and appellees, half-brothers by birth, could reach an amicable settlement before their contingent interest vests at the death of the life tenant.

Our research reveals no similar case. An instructive case, albeit distinguishable, is *Reina v. Bracho*, 256 F. 834 (5th Cir. 1919). That case arising out of the Canal Zone was a bill in

equity praying for a partition in kind or a sale for division of the proceeds of lands in which the appellant had a one-eighteenth interest. The lands in question had been taken in possession by the United States for the use of the canal and appellants had filed a claim for compensation with a joint commission created by the Panama Canal treaty for the settlement of claims. That claim was pending. Partition was denied since the party in possession under a claim of right—the United States—was not made a party. As to the claim that appellant was entitled in this action to a division of the expected proceeds the Fifth Circuit held: "A judicial controversy is premature when it is started before the subject matter of it has come into existence and before it is known whether if it shall come into existence the claimant will need any relief in addition to that given by the tribunal the action of which brings it into existence. It is not yet known whether there will be any fund that could be dealt with by the orders of the court at the instance of the appellant, or that, if there shall be such a fund, there will be any occasion for granting relief to the appellant with reference to it." In this case the fund is in existence but it will not be known until the death of the life tenant whether there will be a controversy in respect to its distribution.

An analogous, though factually distinguishable, situation was dealt with by this Court in *Koob v. Koob*, 283 N.C. 129, 195 S.E. 2d 552 (1973). There in an action by the wife for alimony without divorce, the district court ordered the trustee in a deed of trust on real property held by the wife and husband as tenants by the entirety to pay into the clerk's office one-half of the net proceeds of any future foreclosure sale of the realty to secure certain obligations found to be due the wife by the husband. The trustee was further ordered to pay the other half of the net proceeds directly to the wife. Thereafter a foreclosure sale was conducted by the trustee who paid, with permission of the district court, the entire net proceeds thereof to the clerk. The clerk was then made a party defendant and ordered by the district court to disburse the proceeds in the same manner as the trustee had been earlier ordered to do. On the clerk's appeal to this Court, the district court's orders purporting "to adjudge the respective rights of plaintiff and defendant [in the alimony action] in the fund" were vacated as being premature. This Court saw the key legal question as whether the foreclosure sale dissolved the tenancy by entirety in the net proceeds. The Court was of the opinion that this question could not properly be an-

ticipated and determined in the alimony action brought *before* the foreclosure had taken place and therefore before the question had in fact arisen at least without more specific notice to the husband as to the plaintiff's claim against the net proceeds.

We express no opinion on the correctness of the decision of the Court of Appeals on the issue which it erroneously reached. The Court of Appeals erred in deciding this issue prematurely. Its decision is vacated. The case is remanded to the Court of Appeals with instructions to remand it to the superior court for such further proceedings as may be required by law.

Each party will pay his own costs in each court. *Cf. Utilities Commission v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976) and *Wikel v. Board of Commissioners*, 120 N.C. 451, 27 S.E. 117 (1897).

Decision of Court of Appeals vacated.

Error and remanded.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ASSOCIATES, INC. v. TAYLOR

No. 223 PC.

Case below: 29 N.C. App. 679.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

BANK v. CONSTRUCTION CO.

No. 247 PC.

Case below: 30 N.C. App. 220.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

BLOUNT v. TAFT

No. 231 PC.

Case below: 29 N.C. App. 626.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 September 1976.

BOWEN v. MOTOR CO.

No. 210 PC.

Case below: 29 N.C. App. 463.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 September 1976.

CLUB, INC. v. LAWRENCE

No. 218 PC.

Case below: 29 N.C. App. 547.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CONSTRUCTION CO. v. DEVELOPMENT CORP.

No. 222 PC.

Case below: 29 N.C. App. 731.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

CONTRACTING CO. v. ROWLAND

No. 229 PC.

Case below: 29 N.C. App. 722.

Petition by defendants Pearson and Northwestern Bank for discretionary review under G.S. 7A-31 denied 1 September 1976.

DILLON v. FUNDING CORP.

No. 219 PC.

Case below: 29 N.C. App. 513.

Motion of defendants to dismiss appeal for lack of substantial constitutional question denied 1 September 1976.

FOODS CORP. v. TUESDAY'S

No. 214 PC.

Case below: 29 N.C. App. 519.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

GOLDSTON v. CONCRETE WORKS

No. 234 PC.

Case below: 29 N.C. App. 717.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

HARDING v. HARDING

No. 232 PC.

Case below: 29 N.C. App. 633.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

HEMBY v. HEMBY

No. 208 PC.

Case below: 29 N.C. App. 596.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

IN RE BENFIELD

No. 153 PC.

Case below: 29 N.C. App. 185.

Petition by Ethel Benfield for discretionary review under G.S. 7A-31 denied 1 September 1976.

IN RE GREENE

No. 230 PC.

Case below: 29 N.C. App. 749.

Petition by Mr. and Mrs. J. C. Greene, Billy Cornejo and Buddy Wood for discretionary review under G.S. 7A-31 denied 1 September 1976.

IN RE MOORE

No. 221 PC.

Case below: 29 N.C. App. 589.

Petition by Robert A. McClary for discretionary review under G.S. 7A-31 allowed 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

LOWE'S v. HUNT

No. 236 PC.

Case below: 30 N.C. App. 84.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976.

MACON v. INSURANCE

No. 12 PC.

Case below: 30 N.C. App. 258.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

MANUFACTURING CO. v. MANUFACTURING CO.

No. 10 PC.

Case below: 30 N.C. App. 97.

Petition by Powell Manufacturing Co. for discretionary review under G.S. 7A-31 allowed for limited purpose. Motion of Harrington Manufacturing Co. to dismiss appeal for lack of substantial constitutional question allowed 1 September 1976.

NYBOR CORP. v. RESTAURANTS, INC.

No. 209 PC.

Case below: 29 N.C. App. 642.

Petition by third-party defendant Gem Oil Co. for discretionary review under G.S. 7A-31 denied 1 September 1976.

PATTERSON v. WEATHERSPOON

No. 206 PC.

Case below: 29 N.C. App. 711.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PINKSTON v. BALDWIN, LIMA, HAMILTON CO.

No. 220 PC.

Case below: 29 N.C. App. 604.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 1 September 1976.

PRICE v. HORN

No. 243 PC.

Case below: 30 N.C. App. 10.

Petition by defendants for discretionary review under G.S. 7A-31 denied 24 August 1976.

REEVES v. JURNEY

No. 233 PC.

Case below: 29 N.C. App. 739.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

REEVES v. MUSGROVE

No. 216 PC.

Case below: 29 N.C. App. 760.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. AARON

No. 203 PC.

Case below: 29 N.C. App. 582.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. ASHE

No. 9 PC.

Case below: 30 N.C. App. 74.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. BRYSON

No. 237 PC.

Case below: 30 N.C. App. 71.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. CARTER

No. 5 PC.

Case below: 30 N.C. App. 59.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 September 1976.

STATE v. DeWALT

No. 6 PC.

Case below: 30 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. EVERHART

No. 22 PC.

Case below: 30 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. GREEN

No. 215 PC.

Case below: 29 N.C. App. 574.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. JORDAN

No. 39 PC.

Case below: 30 N.C. App. 529.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. NEAGLE

No. 169 PC.

Case below: 29 N.C. App. 308.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. NORMAN

No. 213 PC.

Case below: 29 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. NORTON and NORTON

No. 4 PC.

Case below: 30 N.C. App. 258.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. SCOTT

No. 212 PC.

Case below: 29 N.C. App. 617.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. WATLINGTON

No. 70.

Case below: 30 N.C. App. 101.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 September 1976.

STATE v. WELBORN

No. 242 PC.

Case below: 30 N.C. App. 258.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 September 1976.

STATE v. WRAY and WOODS

No. 241 PC.

Case below: 30 N.C. App. 259.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976. Appeal of defendant Woods dismissed ex mero motu for lack of substantial constitutional question 1 September 1976.

SUBURBAN TRUST CO. v. EDWARDS

No. 192 PC.

Case below: 29 N.C. App. 422.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976. Appeal dismissed ex mero motu for lack of substantial constitutional question 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

SWEETEN v. KING

No. 227 PC.

Case below: 29 N.C. App. 672.

Petition by plaintiffs and petition by defendants for discretionary review under G.S. 7A-31 denied 1 September 1976.

TENT CO. v. WINSTON-SALEM

No. 188 PC.

Case below: 29 N.C. App. 297.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

UTILITIES COMM. v. EDMISTEN, ATTY. GENERAL

No. 47.

Case below: 29 N.C. App. 428.

Motion of plaintiff Carolina Power and Light Co. to dismiss appeal for lack of merit denied 1 September 1976.

WILLIAMS v. TRUST CO.

No. 228 PC.

Case below: 30 N.C. App. 18.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 September 1976.

WILLIAMS v. WILLIAMS

No. 207 PC.

Case below: 29 N.C. App. 509.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WRIGHT v. MEMORIAL HOSPITAL

No. 225 PC.

Case below: 30 N.C. App. 91.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

WYCHE v. WYCHE

No. 226 PC.

Case below: 29 N.C. App. 685.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 September 1976.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1976

ZAKIE G. BEALL v. LESTER T. BEALL

No. 122

(Filed 29 September 1976)

1. Divorce and Alimony §§ 17, 23— alimony and child support — fixing amount

In fixing the amount of alimony and child support which the husband is required to pay the wife the court must consider not only the needs of the wife and children but the estate and earnings of both the husband and wife. Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably; however, capacity to earn may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support of his wife and children.

2. Divorce and Alimony §§ 17, 23— permanent alimony and child support — award beyond defendant's ability to pay

In an action for divorce from bed and board, permanent alimony, child custody and support and attorney's fees, the trial court did not err in requiring defendant to pay $500 to plaintiff's attorney, approximately $2300 for family debts past due when defendant left the family residence, and the taxes and mortgage on the family home; however, the trial court's order requiring defendant to pay $10,800 annually for alimony and child support and at least $627 in property

taxes in addition to satisfying or refinancing the mortgage on the family home was unrealistic, beyond defendant's ability, and therefore must be modified.

3. **Appeal and Error § 16— motion that defendant be adjudged in contempt — no jurisdiction of trial court to entertain pending appeal**

Trial court was without jurisdiction to entertain a motion that defendant be adjudged in contempt for failure to obey an order of the trial court requiring him to pay taxes and pay or refinance the mortgage on the parties' home while defendant's appeal from that order was pending; but appeal does not authorize a violation of the order, which he violates at his peril.

4. **Appeal and Error § 16; Divorce and Alimony § 21— failure of defendant to pay for house — motion that defendant be adjudged in contempt**

Since the Supreme Court in a divorce, alimony and child support action upholds that portion of the trial court's order requiring defendant to pay taxes and pay or refinance the mortgage on the home occupied by plaintiff and the parties' children, the cause is remanded for disposition of plaintiff's motion made in the Supreme Court that defendant be adjudged in contempt of court for failure to obey the order.

ON *certiorari* to review the decision of the Court of Appeals (26 N.C. App. 752, 217 S.E. 2d 98 (1975)), which affirmed the judgment of *Fowler, J.*, entered 13 December 1974 in the District Court of GUILFORD, argued as case No. 1 at the Spring Term 1976.

Plaintiff wife brought this action against her husband seeking: (1) a divorce from bed and board under G.S. 50-7; (2) alimony *pendente lite* under G.S. 50-16.8(d)(1); (3) alimony under G.S. 50-16.8(b)(1) and G.S. 50-16.2; (4) custody of and support payments for the couple's four children under G.S. 50-13.5(b)(3); and (5) attorney's fees.

In her complaint plaintiff alleged that defendant had: (1) "willfully offered such indignities to [her], as to render [her] condition intolerable and her life burdensome. . . ." (G.S. 50-7(4) and G.S. 50-16.2(7)), and (2) "willfully failed and refused to provide [her] with the necessary support for herself and [their] children" (G.S. 50-16.2(10)). In his answer defendant denied these allegations and alleged a cross claim for a divorce from bed and board alleging that she "has generally acted in a contemptuous manner toward him, rendering his life burdensome and conditions intolerable."

Admissions in the pleadings, and stipulations at the trial, establish that the parties were married on 27 December 1955

in Danbury, Connecticut; that they have four daughters who, in July 1974, were respectively 6, 11, 16, and 17½ years old (the eldest was 18 on 4 January 1975); and that plaintiff is a fit and proper person to have custody of these children.

Judge Fowler heard the case without a jury. Both parties offered evidence with reference to their income, earning ability, financial requirements, and the misconduct of the other. Upon completion of the evidence Judge Fowler made findings of fact and conclusions of law. He concluded, *inter alia*, that plaintiff is the dependent spouse and defendant the supporting spouse; that defendant had wilfully failed to provide plaintiff with necessary subsistence and had offered such indignities to her person as to render her condition intolerable and her life burdensome; that defendant should be required to pay plaintiff reasonable alimony and child support and to contribute to the payment of reasonable fees for plaintiff's attorney; that plaintiff should have possession of the homeplace (which the parties own as tenants by the entirety) as a residence for herself and the children; that custody of the children should be committed to plaintiff subject to defendant's reasonable visitation rights; that at the time of the separation of the parties on 1 October 1974 there were outstanding "family debts" which defendant should pay. Further findings and evidence pertinent to this appeal will be set out in the opinion.

Upon the foregoing conclusions Judge Fowler awarded plaintiff permanent alimony, custody of the children and possession of the home with its furnishings (certain enumerated items excepted). Defendant was granted "reasonable visitation rights" with the children. Beginning 1 January 1975 defendant was ordered to pay to plaintiff, until her death or remarriage, alimony in the amount of $300.00 a month. As child support he was required to pay plaintiff $200.00 a month per child (except when he was paying a child's expenses at college) "until the month in which each child becomes 18 years of age." Defendant was also directed to pay the taxes on the home; the installments, due and to become due, on the mortgage upon the home; and the mortgage principal of $24,000.00 on or before its due date in August, 1975, unless he should arrange with the mortgagee to pay this obligation over a period of time. Finally, defendant was directed to pay within 30 days enumerated "family debts" in the sum of $2,291.22, and to pay

plaintiff's attorney the sum of $500.00 on or before 1 January 1975.

From this judgment defendant appealed to the Court of Appeals, which affirmed the judgment of the District Court. Upon defendant's petition we allowed certiorari.

Smith, Patterson, Follin, Curtis & James by Charles A. Lloyd and Norman B. Smith for plaintiff appellee.

Turner, Rollins & Rollins for defendant appellant.

SHARP, Chief Justice.

Upon conflicting allegations and evidence the trial judge found that "plaintiff was without substantial fault in her relationship with defendant"; that defendant had been guilty of specified marital misconduct which entitled plaintiff to permanent alimony; that during the marriage "plaintiff had been actually substantially dependent upon defendant for her support," and he has "customarily provided most of the funds" for the support of his wife and children. In accordance with defendant's admission in the answer, and his stipulation at trial, the judge found plaintiff to be a fit and proper person to have the custody of the children of the marriage. On plenary evidence he found that the children's best interests will be served by placing them in plaintiff's custody.

Twenty-two of defendant's thirty-four assignments of error challenge the foregoing findings and conclusions which they support on the ground that each finding is unsupported by the evidence and each conclusion is erroneous either because it is contrary to law or unsupported by the findings. As to these assignments we concur in the opinion of the Court of Appeals that they are without merit and that "recounting the sordid evidence adduced at the trial" would serve no useful purpose. We also share that court's view that defendant's statements in support of these assignments are an attempt to reargue the evidence in the hope that the appellate court will substitute itself for the trial court and accept defendant's version of the sad story. *See Beall v. Beall,* 26 N.C. App. 752, 753, 217 S.E. 2d 98, 99 (1975).

With reference to these twenty-two assignments it suffices to say that the district court's conclusions that plaintiff is entitled to permanent alimony and that the best interests of the

children require that their custody be awarded to plaintiff are fully supported by findings based upon competent evidence. When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings. *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1974); 7 Strong, N. C. Index 2d *Trial* § 58 (1968).

Defendant's remaining twelve assignments of error challenge the court's findings and the conclusions based thereon that defendant should be compelled to pay (1) alimony to plaintiff in the amount of $300.00 per month until her death or remarriage and child support of $200.00 per month until the month in which a child becomes 18 years of age; (2) specified "family debts" in the amount of $4,291.22; (3) $500.00 on attorney's fees to plaintiff's counsel; and (4) the taxes and mortgage on the parties' home, possession of which the court awarded to plaintiff and the children.

Defendant contends that all the evidence, as well as the court's findings, demonstrate his inability to pay the amounts ordered and that the court did not take into consideration the income of plaintiff in fixing his payments. These contentions require an examination of the evidence and the applicable statutes.

The proper amount of alimony is determined by G.S. 50-16.5(a) which provides: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

Child support payments are determined by G.S. 50-13.4(c) which provides: "Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

[1] In determining the amount of alimony and child support to be awarded the trial judge must follow the requirements of the applicable statutes. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a sound

judicial discretion from the evidence before him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. *Eudy v. Eudy,* 288 N.C. 71, 215 S.E. 2d 782 (1975). In fixing the amount of alimony and child support which the husband is required to pay the wife the court must consider not only the needs of the wife and children but the estate and earnings of both the husband and wife. It is a question of fairness and justice to all parties. *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966). Ordinarily the husband's ability to pay is determined by his income at the time the award is made "if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably." Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children. *Conrad v. Conrad,* 252 N.C. 412, 418, 113 S.E. 2d 912, 916 (1960); *Harris v. Harris,* 258 N.C. 121, 128 S.E. 2d 123 (1962).

We now attempt to apply the law to the facts of this case.

On 1 September 1974 plaintiff became employed at an annual salary of $9,500.00 as a teacher. The record does not disclose her take-home pay or her net income. However, deductions are made for income tax, social security, and health insurance. Other than her salary she has no income or source of revenue. At the time of the hearing she needed 22 hours of graduate study to complete the requirements for the Master of Arts degree, the completion of which would increase her salary. She was then "enrolled in the graduate program at UNC-G." She estimated that the expenditure of $1,288.00 would be necessary to complete required courses. Excluding the mortgage payments and taxes on the home, but including insurance and repairs, income taxes and life insurance, plaintiff estimated the annual living expenses of herself and children (60% for the children, 40% for herself) to be $21,123.20 annually or approximately $1,760.00 a month.

At the hearing plaintiff testified that family bills outstanding when defendant left the home on 1 October 1974, and still unpaid, totaled $6,216.38. These bills included the 1974 taxes on the home in the amount of $627.70, medical bills, automobile

payments, college payments, clothing bills, and household expenses.

Defendant, age 45, is a furniture designer. His testimony tended to show: In 1969 he used a $10,000.00 gift from his mother as the down payment on the house at 209 Hillcrest Drive in High Point in which he resided with his family prior to the separation. The purchase price was "about $48,500.00." The annual payments of principal and interest are $3,600.00 with the remaining principal being due on 1 August 1975. The 1974 taxes were $627.70. Plaintiff estimated the insurance on the home costs $200.00 annually; defendant estimated it at $180.00.

In 1973 his gross income was $43,511.00; his net income, $16,568.00. In 1972 his gross was $37,974.00; his net, $16,007.00. In 1971 his gross from the furniture design business was $30,244.00; his net $13,942.00. During four months of 1971 he was employed by Bassett Furniture Company as a senior designer at a salary rate of $25,000.00 annually. When his employment was terminated on 21 November 1971 he resumed business for himself. This business requires extensive travel in order to acquire customers. When a new design is created his customers require his presence at the factory to supervise the work. He is now designing furniture for manufacturers in Pennsylvania, Puerto Rico, Arkansas, Virginia, Tennessee, and Western North Carolina.

In 1973 defendant received $16,500.00 from the installment sale of Connecticut land which he had received from his parents and sold for $56,000.00. In 1974 he received an installment of $14,000.00. With this he made the $3,600.00 annual payment on the house and other bills. He also put $7,500.00 in a trust fund which he plans to use for the children's education.

Defendant, who is now living in an apartment in High Point, is "out of town on business up to three days a week." He has estimated his personal expenses, which include "Children's Education $300.00" and "Car Payments $204.00" on his $8,400.00 Oldsmobile Toronada, at $1,789.00.

Upon the foregoing evidence the trial judge found the following facts with reference to the parties' earnings and assets: (1) "In recent years" defendant has had a net income of $14,000.00 to $18,000.00 a year. A balance of $24,000.00 is owing

to him from the sale of land in Connecticut, and he has a $7,500.00 fund which he denominates as a "trust fund" for his children's education. (2) Plaintiff earns a salary of $9,500.00. (3) As tenants by the entirety plaintiff and defendant own the house and lot at 219 Hillcrest Street, High Point, the fair market value of which is presently estimated to be $64,000.00; that it is encumbered by a first mortgage on which the balance of $24,000.00 became due in August 1975.

With reference to the needs of the parties the judge found that "the reasonable monthly needs of plaintiff and the children of the marriage for support and maintenance are in the approximate amount of $1,900.00, which is in excess of defendant's present ability to pay." He made no findings with reference to defendant's reasonable living expenses.

The foregoing findings are supported by competent evidence. The question is, on these facts, are the payments which the court has ordered the defendant to make fair and just to the parties and children considering the respective needs?

[2] The sums defendant was ordered to pay fall into three categories: (1) nonrecurring, lump-sum payments for past due debts; (2) "annual mortgage payments and taxes which are now due and shall hereafter become due"; (3) recurring monthly payments of alimony and child support.

(1) The two nonrecurring, lump-sum payments of past due debts total $2,791.22. They are (a) $500.00 to plaintiff's attorney for services rendered and (b) $2,291.22 for utilities, clothing, household expenses, school and college tuition bills which were past due when defendant left the family residence on 1 October 1974. These bills, to be paid directly to the creditors, are included in plaintiff's itemization of unpaid family debts totaling $6,216.38. Because the trial judge made no order with reference to the payment of the balance of the bills past due on 1 October 1974, we must assume that plaintiff will have to pay them, an amount of $3,297.68 (if we exclude the $627.70 for 1974 taxes on the home).

Under all the circumstances, the two one-time, lump-sum payments appear to be entirely just and reasonable. The order that defendant pay them will not be disturbed.

(2) The annual expenditures absolutely necessary to retain the property at 219 Hillcrest Street as a home for plaintiff and

the children are those for taxes, approximately $600.00, and the payments specified in the mortgage. Prior to 1975, the mortgage payments were $3,600.00 annually. Prorated monthly, these two payments total $350.00. Of course, both prudence and, no doubt, the mortgage contract require the parties to carry insurance on the property. In defendant's estimated "family budget" ($1,224.27 a month), he listed "Real estate Ins." at $15.00 a month, or $180.00 annually. Obviously expenditures for repairs can also be anticipated. Under the judge's order, insurance and repairs, since they were not required of defendant, were left to plaintiff.

At the present time, the sum of $350.00 as a monthly proration of taxes and mortgage payments has little significance since, in August 1975, the balance on the mortgage became due and payable. The court's order required defendant to pay this balance at that time or to refinance it. Almost certainly he would be able to refinance an indebtedness of $24,000.00 on a dwelling having a fair market value of $64,000.00. If not, however, with a savings account of $7,500.00 and a secured debt of $24,000.00 due him from the sale of his land in Connecticut, he had the means with which to comply with the court's judgment. We have no way of knowing what the annual payments would be on the refinanced loan, but surely terms at least as favorable as the original loan could be obtained.

Defendant does not contend that plaintiff could pay the balance due on the mortgage or make the payments, and obviously she is not financially able to do so. We hold that the order requiring defendant to pay the taxes and the mortgage on the family home is reasonable. It merely requires defendant to do what he ought to do, and it will not be disturbed.

We next consider the court's requirement that defendant pay plaintiff alimony in the amount of $300.00 per month ($3,600.00 annually) and child support of $200.00 a month for the three children under 18 years of age ($7,200.00 annually) a total of $10,800.00 annually.

The trial judge found that plaintiff and the children need approximately $1,900.00 a month or $22,800.00 annually. Presumably, this finding was based upon plaintiff's estimated budget submitted as her Exhibit 1, which shows the family's needs as $24,757.34, a figure which included house payments of $3,000.00 and taxes in the amount of $634.14. Defendant's esti-

mated family budget shows that the family needs $1,174.27 monthly or $14,091.24 yearly. The major items of difference in the budgets are (1) plaintiff's budget projects $1,000.00 annually for vacation and travel while defendant projects only $300.00; (2) plaintiff's budget estimates clothing expense as $2,500.00 annually for which defendant only allows $1,800.00; (3) plaintiff projects $2,000.00 as necessary for domestic employees whereas defendant contends only $1,200.00 annually is required; (4) plaintiff estimates food and milk expenses as $3,500.00 annually or as $291.00 monthly, while defendant estimates these expenses as $2,640.00 annually or as $220.00 monthly; (5) plaintiff projects $2,250 annually or $188.00 monthly for automobile operating expenses; defendant projects no amount for this; (6) plaintiff projects $1,200.00 annually for house repair and maintenance while defendant projects $180.00; and (7) plaintiff also includes expenses of $868.00 for entertainment and beauty shops which defendant does not include. These expenses do not appear to have been consistent with the parties' accustomed standard of living prior to their separation. In our view they are now certainly unrealistic and must be reduced.

The only evidence of defendant's needs is his own testimony in explanation of his Exhibit 2. In that statement he estimated his monthly expenses at $1,789.00 as follows: rent, $190.00; utilities, $35.00; food, $100.00; laundry and dry cleaning, $35.00; insurance (life, health, house, auto, income loss), $210.00; medical expenses, $40.11; clothing, $60.00; recreation, $30.00; telephone, $45.00; property taxes, $60.00; contributions, $25.00; State income taxes, $40.00; interest, $200.00; children's education, $300.00; federal income taxes, $150.00; car payments, $204.00; children's incidentals, $65.00.

While some of these items appear to be extravagant, or overestimated, and several might be eliminated, others are essential. Thus, if only the projected monthly rent ($190.00); food ($100.00); utilities ($35.00) and car payments ($204.00) are counted, defendant would still need $529.00 monthly ($6,348.00 annually) to support himself. However, income taxes, automobile insurance, and laundry must be paid; most certainly he will have medical expenses and other unexpected demands for money from time to time. Even so, his projected monthly expenditures of $1,789.00 are beyond his means. We note that considered on an annual basis these expenses exceed defendant's total maximum income as found by the trial court.

In view of the needs, income and assets of the parties, the trial judge's order requiring defendant to make annual payments of $10,800.00 for alimony and child support and at least $627.00 in property taxes (a total of $11,427.00) in addition to satisfying or refinancing the $24,000.00 mortgage is unrealistic and beyond defendant's ability. According to the court's findings, defendant's income before taxes is from $14,000.00 to $18,000.00. Assuming the maximum of $18,000.00, after making the payments ordered by the court, defendant could not meet his own necessary expenses. The order requires that defendant not only exhaust his entire income but that he apply his accumulated capital to its satisfaction. The payments ordered, plus possession of the house, rent free and relieved of the mortgage payments, would enable plaintiff and the children to maintain a relatively high standard of living while reducing defendant to poverty.

As we said in *Sayland v. Sayland, supra,* the question of the correct amount of alimony and child support is a question of fairness to all parties. We hold that, under present conditions, the payments required of defendant impose too great a burden and are unfair to him. If defendant's income or estate increases, he should contribute proportionately to the needs of his wife and children. Until then more realistic payments must be ordered. The awards of alimony and child support are therefore vacated, and the district court is directed to reconsider and redetermine these amounts in light of this opinion and the parties' present circumstances.

Unfortunately, we cannot end this opinion here. An affidavit of plaintiff, filed by her counsel with this Court on 23 September 1976, asserts (1) that since October 1975 defendant had paid her no alimony and (2) that defendant has wilfully failed and refused either to pay the present outstanding mortgage on the homeplace of the parties or to arrange refinancing of the obligation; (3) that he has also refused to pay the 1975 ad valorem taxes on the property; (4) that she is informed, believes, and alleges that at all material times defendant has been able to meet these obligations; (5) that on 1 September 1976 the mortgagee of the homeplace filed a petition for an order of foreclosure with the Clerk of the Superior Court of Guilford County (File No. 76-SP-1153), in which it was alleged that the mortgage is in default; (6) that plaintiff has obtained a commitment from High Point Bank and Trust Company to

refinance the property in order to prevent its loss by foreclosure; that defendant has refused to sign the note and deed of trust and to cooperate in any respect; (7) that plaintiff is unable to make the necessary financial arrangements to save the property. Because the district court is without jurisdiction to entertain a motion for contempt of court during the pendency of the appeal, plaintiff prays that this Court order defendant to show cause why he should not be attached as for contempt of court.

[3] Plaintiff correctly asserts that the district court was divested of jurisdiction by the appeal. "The appeal stays contempt proceedings until the validity of the judgment is determined." *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962). However, as we also said in *Joyner*, "But taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the [trial] court." *Id.* at 591, 124 S.E. 2d at 727.

[4] We have now upheld the trial court's order that defendant pay the taxes and pay or refinance the mortgage on the home occupied by his wife and children as these obligations become due. It would seem that the natural feelings of a father for his children, as well as minimum fiscal responsibility, would have caused him to make every effort to prevent the loss of their home (worth approximately $64,000.00) by foreclosure. Instead, defendant seems to have deliberately invited foreclosure when, according to the record on appeal and plaintiff's affidavit of September 23rd, he was able to make the payments or arrangements which would prevent foreclosure. The information in plaintiff's affidavit that for one year defendant's resources have not been impaired by the payment of any alimony whatever makes his failure to pay the liens on the home even more incomprehensible.

Assuming the truth of plaintiff's affidavit, defendant is prima facie in contempt of court for failure to pay these liens, and he can purge himself only by paying the mortgage or by making arrangements which will stop the foreclosure and maintain the title to the property *in statu quo*. If perchance defendant's plan is to let the property be foreclosed so that he may acquire it freed of any claim by plaintiff as a tenant by the entirety, that will not do.

This cause, including plaintiff's motion that defendant be adjudged in contempt of court, is returned to the Court of Appeals with instructions that it be certified at once to the District Court of Guilford County to the end that the District Court may immediately inquire into the facts averred in the motion. The Clerk of the Supreme Court will forward copies of this opinion to counsel for the parties.

In accordance with this opinion the decision of the Court of Appeals is

Reversed in part; affirmed in part.

STATE OF NORTH CAROLINA v. WAYMON EDWARD HARRIS

No. 130

(Filed 5 October 1976)

1. **Criminal Law § 91— motion for continuance — appellate review**

Ordinarily a motion for a continuance is addressed to the trial judge's sound discretion and his ruling is not subject to review on appeal in the absence of gross abuse; 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 order of the court below is reviewable.

2. **Constitutional Law §§ 31, 32— right to counsel — right of confrontation**

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

3. **Criminal Law § 91; Constitutional Law §§ 31, 32— denial of continuance — right to effective counsel — right of confrontation**

Defendant's rights of confrontation of his accusers and to due process and effective assistance of counsel were not violated by the denial of his motion for continuance where: defendant was given a preliminary hearing; counsel was appointed for him seven weeks before trial; defendant was transferred to Central Prison but was returned to the county of his trial a week before the beginning of the trial; defendant's alleged accomplices were confined in the county jail; the State furnished defense counsel with copies of defendant's

statements to police officers; and defendant failed to show that he had been unable to confer with his counsel or that his counsel had been deterred from interviewing defendant's alleged accomplices.

4. **Jury § 7— juror tendered to defendant — reexamination and challenge by State**

The trial judge did not abuse his discretion in allowing the State to reexamine and challenge for cause a prospective juror who had been accepted by the State and tendered to defendant.

5. **Indictment and Warrant § 5— signature of grand jury foreman — presence of majority of grand jury**

The trial judge did not err in allowing the foreman of the grand jury to sign the bill of indictment for first degree murder without the presence of a majority of the grand jury in open court since G.S. 15-141 requires the *return* of the indictment in open court in the presence of the grand jury or a majority of them in capital cases, not that the foreman *sign* the indictment in the presence of the entire grand jury or a majority of them.

6. **Criminal Law § 162— necessity for objections, motions to strike**

When a specific question is asked, objection should be interposed immediately and before the witness has an opportunity to answer; however, when inadmissibility is not indicated before the witness answers, counsel should move to strike the answer or the objectionable part of it.

7. **Criminal Law § 85— testimony impugning defendant's character — absence of prejudice**

Defendant in this first degree murder prosecution was not prejudiced by a witness's testimony that defendant had demanded that she work as a prostitute since (1) the testimony might well have been admissible as evidence of prior acts to corroborate the witness's testimony that defendant had instructed her to make a "date" with deceased in order to rob him, and (2) the testimony was consistent with the sordid relationship between defendant and the witness as related in her other testimony.

8. **Searches and Seizures § 2; Criminal Law § 76— consent to search — voluntary statement to police**

The evidence on *voir dire* supported the trial court's findings that defendant consented to a search of his car and that defendant voluntarily stated to officers that a pistol found in the car belonged to him, and the court properly admitted into evidence the pistol, testimony relating to the finding of the pistol, and defendant's statement that the pistol was his.

9. **Criminal Law § 76— inculpatory statement — voluntariness — appellate review**

The trial judge's finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence.

10. Criminal Law § 75— transcript of in-custody statements — contention that portion erroneous

Defendant's contention that a transcript of statements he purportedly made to police contained some things that he did not say did not go to the admissibility of the transcript but presented a question to be resolved by the jury.

11. Criminal Law § 75— in-custody statements — failure to give copy to defendant

The fact that defendant did not receive a copy of his inculpatory statements until a week before trial did not affect their admissibility where defendant failed to show that this delay hindered him in preparing or presenting his defense.

12. Criminal Law § 87— leading questions

The trial judge did not abuse his discretion in permitting the district attorney to ask witnesses two leading questions where the evidence elicited by the questions was merely cumulative, and where there was ample evidence of similar import in the record to render the answers given non-prejudicial.

13. Criminal Law § 102— jury argument — erroneous statement of felony-murder law — absence of prejudice

Though the district attorney's jury argument that felony-murder is a death resulting from acts committed in the process of committing "a crime" and that defendant would be guilty even if he went to deceased's house to assist another in committing "a larceny" erroneously indicated that one could be convicted of felony-murder for a homicide occurring in the commission of an offense of lesser grade than felony, such argument was not prejudicial to defendant where trial judge gave a full and accurate instruction on felony-murder, the judge directed the jury to apply only the law given to them by the court, and the district attorney told the jury that the judge would tell them what the law was.

14. Criminal Law § 62— polygraph results — absence of objection

While testimony as to the results of a polygraph test is not admissible to show the guilt or innocence of an accused, such evidence admitted without objection may be considered by the jury.

15. Criminal Law §§ 62, 102— jury argument — lie detector results — supporting evidence

Although the trial court in this felony-murder prosecution struck testimony that a lie detector test showed that defendant "had knowledge of the robbery," the district attorney's jury argument that a lie detector test showed defendant "had guilty knowledge" was supported by inferences from testimony, admitted without objection, that defendant had "failed" his lie detector test and that the results "showed sensitivity that it [defendant's participation] was possible."

16. Criminal Law § 117— all evidence shows witness was accomplice — instruction on duty to scrutinize testimony

When all of the evidence shows a witness to be an accomplice, the trial judge should instruct that the witness's testimony should

be carefully scrutinized without requiring any finding by the jury that the witness was an accomplice.

17. **Criminal Law § 117— instruction on accomplice testimony — harmless error**

While it would have been appropriate in this murder case for the trial judge to have instructed the jury that testimony of a State's witness should have been carefully scrutinized without having required any finding by the jury, the judge's instruction which required the jury to determine whether the witness was an accomplice did not constitute prejudicial error.

18. **Homicide § 30— felony-murder — failure to submit lesser offenses**

In this prosecution for murder committed in the perpetration of a robbery, evidence that defendant told the police that he and a male companion entered deceased's home to get a female companion who was in the home, that upon their entry deceased ran to defendant and bit his finger, and that defendant thereupon hit him on the head with his fist and left the dwelling was insufficient to require the court to submit to the jury the lesser included offenses of second-degree murder and voluntary manslaughter.

19. **Constitutional Law § 36; Homicide § 31— sentence of death vacated — substitution of life imprisonment**

Since the U. S. Supreme Court has invalidated the death penalty provisions of G.S. 14-17, the statute under which defendant was indicted, convicted and sentenced to death for first degree murder, the sentence of death imposed upon defendant is vacated and a sentence of life imprisonment is substituted therefor.

APPEAL by defendant from *Lupton, J.*, 14 April 1975 Session of ROCKINGHAM Superior Court. This case was docketed and argued as No. 58 at the Fall Term 1975.

The State's evidence tended to show that on the night of 8 January 1975, in response to calls for help, neighbors of Mr. Harry Hopper went to his home. They found Mr. Hopper bleeding profusely. The house was spattered with blood and particles of broken glass were found about the floor. The local police were summoned and after their arrival Mr. Hopper became unconscious and was carried to the hospital in Eden. After a short examination, he was transferred to Cone Hospital in Greensboro, North Carolina, where he underwent immediate surgery. Mr. Hopper never regained consciousness and died six days later. There was medical testimony to the effect that there were five separate contused lacerations on Mr. Hopper's head and that a blood clot was removed from between his skull and brain. There was also evidence that prior to 8 January 1975, the deceased was in good health except for a mild diabetic condition.

On 10 February 1975 SBI Agent Johnson and Officer Martin went to Albany, Georgia, where they found defendant, who told the officers that he had nothing to do with the robbing and killing of Harry Hopper. On the same occasion, the officers took a pistol from defendant's automobile. The seizure of the pistol will be more fully considered in the opinion.

The State offered the testimony of Phyllis Brown who testified that she and defendant left Dothan, Alabama, on 6 January 1975 and drove to Eden, North Carolina. They arrived on the evening of 7 January 1975 and spent that night with Mr. and Mrs. Troy Harvey. The next day they went to the home of her parents where defendant and her brother, David Briggs, repaired defendant's car. Later in the afternoon Briggs brought up the subject of robbing Mr. Hopper. They drove to Mr. Hopper's house and Phyllis went inside. In response to his invitation, she agreed to meet Mr. Hopper at 10:00 p.m. that night. Defendant and Briggs told her to keep the date with Hopper and they would go in and rob him. They then stopped and bought two toboggans. After checking into a room at the Holiday Inn in Reidsville, defendant made masks of the toboggans. The three of them left the motel room at about 8:50 p.m. They stopped at the Hopper house at 9:55 p.m. and Phyllis went inside. When Mr. Hopper made advances towards her, she attempted to delay him by asking for and receiving a pack of Winston cigarettes. As she started out the door, defendant and Briggs rushed in and dived on Mr. Hopper. Defendant said, "Give us your money old man and we will not hurt you." As she fled, Phyllis heard glass breaking and Mr. Hopper screaming. The men then ran to the car and they all returned to their motel room. Defendant washed blood off the money taken from Hopper and divided the twenty-eight dollars with Briggs. He also washed hair and blood from his pistol. The men changed their bloody clothes and put them in a plastic trash can liner. The three of them then left the motel and drove towards Greensboro. When they came to the Reedy Fork Creek bridge, they stopped and defendant threw the bag containing the bloody clothes into the water. They then drove back to Georgia. Defendant threatened to kill anyone who told on him.

Agent Johnson retrieved two pairs of pants, a plastic trash can liner, and a man's shoe from Reedy Fork Creek. Phyllis Brown testified that one pair of pants and the trash

can liner looked like ones she had seen in the motel room on the night of the robbery.

Defendant was arrested on 13 February 1975 and on 14 February 1975, he made a statement to police officers which was offered into evidence. The circumstances surrounding this statement and its contents will be discussed hereafter.

There was also evidence to the effect that defendant came to North Carolina in a red Chevrolet automobile bearing Georgia license plates and that a red Chevrolet automobile bearing a Georgia license plate was seen parked near the Hopper house on the afternoon and night of 8 January 1975. The State offered other evidence which was cumulative and corroborative.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree. Defendant appealed from judgment imposing a sentence of death.

Attorney General Rufus L. Edmisten, by Isham B. Hudson, Jr., for the State.

Jesse S. Moore, Jr., and Leigh Rodenbough for the defendant appellant.

BRANCH, Justice.

Defendant first contends that the trial judge erred by denying his motion for a continuance. He takes the position that the denial of his motion violated his constitutional rights of due process, confrontation of his accusers and his right to effective assistance of counsel.

[1, 2] Ordinarily a motion for a continuance is addressed to the trial judge's sound discretion and his ruling is not subject to review on appeal in the absence of gross abuse. 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 order of the court below is reviewable. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112; *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; *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322. The rights to assistance of counsel and of confrontation of one's accusers and witnesses are guaranteed by

the Sixth Amendment to the Federal Constitution and by Article I, sections 19 and 23 of the North Carolina Constitution. *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321; *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55; *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296. It is implicit in these guarantees that an accused have a reasonable time to investigate, prepare and present his defense. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335, *cert. denied,* 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228; *State v. Hicks,* 282 N.C. 103, 191 S.E. 2d 593, *cert. denied,* 410 U.S. 967, 35 L.Ed. 2d 702, 93 S.Ct. 1445; *State v. Gibson, supra; State v. Utley,* 223 N.C. 39, 25 S.E. 2d 195; *State v. Whitfield,* 206 N.C. 696, 175 S.E. 93, *cert. denied,* 293 U.S. 556, 79 L.Ed. 658, 55 S.Ct. 114.

[3] The evidence in this case discloses that defendant was afforded a preliminary hearing and that counsel for defendant was appointed seven weeks before the case was called for trial. Defendant, who was a diabetic, was transferred to Central Prison in Raleigh and was returned to Rockingham County a week before the beginning of his trial. Defendant's alleged accomplices were confined in Rockingham County Jail during this period of time and the State had furnished defense counsel with copies of statements made by defendant to police officers. Defendant made his motion for continuance on the day the case was called for trial. He failed to support his motion with a showing that he had been unable to confer with counsel either in Central Prison or in Rockingham County. Neither was there any showing that he was deterred from interviewing defendant's alleged accomplices.

Defendant fails to show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. Thus, the trial judge correctly denied defendant's motion for a continuance.

[4] Defendant next assigns as error the action of the trial judge in permitting the State to reexamine and challenge prospective Juror Jones for cause after the State had accepted and tendered the juror to defendant.

Under examination by the State, prospective Juror Jones indicated that he was not opposed to the imposition of the death penalty in appropriate cases. However, in response to defense counsel's questioning, the prospective juror stated that he would not return a verdict of guilty in the case even if he were satisfied beyond a reasonable doubt that defendant was guilty of murder in the first degree. The trial judge thereupon allowed the State to reexamine the prospective juror and to challenge him for cause.

Defendant relies upon the provisions of G.S. 9-21(b) which provides in pertinent part that "[t]he State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant."

In the recent case of *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, we stated that "[n]othing in G.S. 9-21(b) prohibits the trial court, in the exercise of its discretion before the jury is empaneled, from allowing the State to challenge *peremptorily or for cause* a prospective juror previously accepted by the State and tendered to the defendant." Accord: *State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796, *cert. denied*, 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143.

We hold that the trial judge did not abuse his discretion in allowing the State to reexamine and challenge the prospective Juror Jones.

[5] Defendant's next assignment of error is that the trial judge erred by allowing the foreman of the grand jury to sign the bill of indictment without the presence of the full grand jury or a majority of them in open court.

G.S. 15-141, pertinent to this assignment of error, provides:

> Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body.

The statute requires the *return* of the indictment in open court in the presence of the entire grand jury or a majority of them. The statute does not require that the foreman *sign* the indictment in the presence of the entire grand jury or a majority of them. In fact, under G.S. 15-141, endorsement by

the foreman of the grand jury was not essential to the validity of an indictment otherwise duly returned into open court. *State v. Avant,* 202 N.C. 680, 163 S.E. 806.

G.S. 9-22 requires that the grand jury consist of eighteen jurors. This record discloses that the grand jury returned into open court, with sixteen members being present, the following indictment marked "a true bill": "75 CR 1577C—State v. Waymon Edward Harris—Murder." Thus, it is clear that this bill of indictment was returned in open court in a body by a majority of the grand jury.

This assignment of error is overruled.

Defendant contends that the trial judge erred in failing to instruct the jury to disregard irrelevant and immaterial evidence elicited by the State.

The testimony pertinent to this assignment of error is as follows:

> Q. What, if anything were you doing for the defendant during this time that you stayed together or what, if anything, was he doing for you?
>
> A. Well he had demanded that I work as a prostitute.
>
> Q. When was that demand first made on you?
>
> A. At — — —
>
> ATTORNEY MOORE: Objection Your Honor to any testimony on this.
>
> THE COURT: Just a minute, Sustained.

[6] It is well established that when a specific question is asked, objection should be interposed immediately and before the witness has the opportunity to answer. However, when inadmissibility is not indicated before the witness answers, counsel should move to strike the answer or the objectionable part of it. 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 27, p. 69. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17. However, in capital cases we will review assignments of error concerning admission of incompetent evidence even when there is no motion to strike when probable prejudice appears. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10.

[7] Even though the judge sustained defendant's objection to the admission of this evidence, it might well have been relevant and admissible as evidence of prior acts to corroborate the witness's direct testimony that defendant had instructed her to get a "date" with Mr. Hopper. *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728. The evidence objected to was consistent with the relationship between defendant and the witness as related in her other testimony.

In any event, the effect of the challenged evidence was to impugn defendant's character. The record shows that defendant had previously instructed the witness Phyllis Brown to "make a date" with deceased in order to rob him. The witness Brown testified that defendant had made threats on her life and that although she had previously slept with him on several occasions, defendant "forced" her to sleep with him on the night before the robbery. We do not believe that the admission of this further evidence of an already established sordid relationship between defendant and Phyllis Brown resulted in prejudicial error.

This assignment of error is overruled.

[8] We turn to defendant's contention that the search of his automobile was illegal and that the evidence relating to the finding of the pistol (State's Exhibit 8), the pistol itself, and the statement by defendant that the pistol belonged to him, were therefore all erroneously admitted into evidence. Upon defendant's objection to this evidence, the trial judge correctly excused the jury and conducted a *voir dire* hearing, found facts, entered conclusions of law and ruled on the admissibility of the evidence. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, *cert. denied,* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157.

On *voir dire,* police officers Ganelle, Martin and Johnson testified to the effect that they observed defendant in his red Chevrolet automobile in front of a liquor store in Albany, Georgia. They approached defendant and told him that they wanted to talk to him about his activities in North Carolina. Officer Ganelle also advised defendant that they would probably have to get a search warrant to search his automobile. At that time, defendant replied: "You won't need one. Go ahead and help yourself." The officers then asked defendant to accompany them to the police station for questioning and when he consented, Officer Martin drove defendant's car across the

street to the Cherokee Motel where they were advised defendant was staying. Upon entering the car Officer Martin discovered a .25 caliber pistol (State's Exhibit 8) in the console between the front seats. When he arrived at the Cherokee Motel, Officer Martin handed the pistol to Officer Ganelle and at that time defendant stated that it was his pistol. Officers Ganelle and Johnson also gave testimony which tended to show that defendant was not under arrest or in custody when the pistol was taken and the statement made. Neither was defendant subjected to any pressure or threats.

Defendant Harris testified, on *voir dire*, that he told the officers that they could look in the car and that there was nothing that he wanted to hide in the car. He admitted State's Exhibit 8 was his pistol.

The trial judge, after finding facts consistent with those above summarized, *inter alia*, concluded and ruled:

> . . . That the defendant freely and voluntarily and without any threats and promises consented to the search . . . that after being warned of his rights defendant waived his rights freely, voluntarily and without any promises or threats . . . and intelligently, freely and voluntarily stated to the officers . . . that the pistol, State's Exhibit 8, was his . . . that the search of the defendant's vehicle was legal and that the testimony of Officers Ganelle, Johnson, and Martin relating to the finding of the pistol and the statement made by the defendant that it was his pistol and that the pistol, itself, all are admissible into evidence and the objections of the defendant are overruled.

Where a person voluntarily consents to a search, he cannot complain that his constitutional and statutory rights were violated. *State v. Bishop* and *State v. Baskin* and *State v. Thompson* and *State v. McCain*, 272 N.C. 283, 158 S.E. 2d 511; *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741. It is also well settled in this jurisdiction that a statement voluntarily made is admissible into evidence. *State v. Keith*, 266 N.C. 263, 145 S.E. 2d 841.

In our opinion, the evidence supports the trial judge's findings and the findings in turn support the trial judge's conclusions and rulings. This Court is, therefore, bound by the findings, conclusions and rulings. *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222; *State v. Grant*, 279 N.C. 337, 182 S.E. 2d 400.

This assignment of error is overruled.

Defendant assigns as error the trial judge's ruling admitting into evidence State's Exhibit 19, a purported confession.

When the State offered its Exhibit 19, defendant objected and the trial judge excused the jury and held a *voir dire* hearing as to its admissibility.

SBI Agent Terry Johnson testified that the statement was made to him in the presence of Lt. Smart of the Eden Police Department at about 1:30 p.m. on 14 February 1975 in the District Courtroom in Eden, North Carolina. Agent Johnson stated that defendant indicated that he wished to make a statement but before the statement was taken, the officers called defendant's lawyer in Albany, Georgia, gave defendant the phone and left the room. About five minutes later, defendant emerged from the room and indicated that he was ready to make a statement. Johnson then fully advised defendant of his constitutional rights and defendant, without any promises or threats, signed a waiver in which he acknowledged his understanding of his constitutional rights and in which he specifically waived his right to have counsel present when he made the statement. Defendant then made a statement which he (Agent Johnson) wrote down. As the statement was written, he would occasionally read the statement back to defendant and inquire if defendant desired to make any changes or additions. Defendant made one or two minor corrections and when the statement was completed, it was handed to defendant to read. Defendant examined the statement for several minutes and then handed it to Agent Johnson with the remark that he trusted the officer. At defendant's request, SBI Agent Johnson left a copy of the statement with police officer Phillips. It was later shown that Officer Phillips did not deliver the copy of the statement to defendant.

The substance of defendant's statement was that defendant, Phyllis Brown and David Briggs planned to rob Mr. Harry Hopper on the afternoon of 8 January 1975 at about 3:00 p.m., Phyllis went to the Hopper home and made a date with Mr. Hopper for that evening. Defendant purchased two toboggans and after making some alterations so that they fitted defendant and David Briggs, the three returned to the Hopper home at about 9:00 p.m. Phyllis went into the house and defendant, with David Briggs, remained in the car for some period of time. Defendant and Briggs then put on the ski masks and

entered the Hopper dwelling. As they entered, Hopper came toward them and David hit him at least two times with a bottle. Defendant stated that he hit Mr. Hopper on his head with his fist after Mr. Hopper had bitten him. The three left the Hopper dwelling and went to a motel where they washed blood from the money taken from Mr. Hopper by David Briggs and twenty-eight dollars was divided between the two men. The men changed clothes and put their bloody clothes in a white trash can bag which was thrown from a bridge. The three of them returned to Albany, Georgia.

The State offered other evidence which corroborated the testimony of SBI Agent Johnson.

Defendant, testifying on *voir dire,* stated that on 14 February 1975, he was carried to a hospital for an insulin shot and when he returned, he was given lunch which he did not eat. At about 1:15 SBI Agent Johnson called defendant's lawyer in Albany, Georgia, and the police officers left the room so that defendant could talk with his lawyer privately. He stated that Johnson advised him of his rights one time but that no one told him that he had a right to an attorney. On cross-examination defendant stated that he was twenty-seven years old and had "about a tenth-grade education." He testified that he made the statement to the officers voluntarily but there was "a bunch of stuff in here that I did not say." He further stated that although he was told that he would be furnished a copy of the statement immediately, he did not see it until a week before the trial. Defendant said that the statement was incorrect in that he did not say that: (1) He bought the toboggans for any purpose except to protect his face and Briggs' face while they worked on his automobile, (2) that he planned to rob Mr. Hopper, and (3) that he shared in the division of any money taken from Mr. Hopper.

At the conclusion of the *voir dire* testimony, the trial judge made findings of fact consistent with the testimony of SBI Agent Johnson that defendant's statement was made freely and voluntarily. He thereupon overruled defendant's objection to the admission of this evidence.

[9] A trial judge's finding that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence. *State v. Haskins,* 278

N.C. 52, 178 S.E. 2d 610; *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37; *State v. Logner,* 266 N.C. 238, 145 S.E. 2d 867, *cert. denied,* 384 U.S. 1013, 16 L.Ed. 2d 1032, 86 S.Ct. 1983. Here there was ample evidence to support the trial judge's finding that defendant freely and voluntarily made the statement. However, defendant contends that Exhibit 19 contained some things that he did not say.

[10, 11] This contention does not go to the admissibility of the statement, but presents a question to be resolved by the jury. Defendant had ample opportunity by cross-examination or by direct testimony to present his contentions as to what he did or did not say in this statement. Defendant further complains that he did not receive a copy of his statement until a week before the trial. However, he fails to show that this delay hindered him in preparing or presenting his defense.

We hold that the trial judge correctly admitted State's Exhibit 19 into evidence.

[12] Defendant contends that the trial judge erred by permitting the District Attorney to propound leading questions.

A leading question is a question which suggests the answer desired and often may be answered by "yes" or "no." 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 31, p. 83. It is firmly established in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel may ask leading questions, and his ruling will not be disturbed on appeal in the absence of gross abuse. *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384. We conclude that of the questions challenged, only those hereinafter discussed may be classified as leading questions.

The Assistant District Attorney inquired of Jimmy Dillon and Hazel Belcher, neighbors of Mr. Hopper, if they had "seen a red automobile around there that night or day at any time?" They both answered in the affirmative. Prior to the posing of these questions, another witness had testified without objection that she had observed a red car in front of Mr. Hopper's house on the afternoon of 8 January 1975. Phyllis Brown had also testified, without objection, that she went to the Hopper residence on the same afternoon in defendant's red Chevrolet.

The other question which may be denominated a leading question was addressed to Officer Jerry Pulliam. He was asked

if he saw any ciragettes or matches in the Hopper house. The record discloses unchallenged testimony from Officer Mike Martin that he found cigarettes and matches in the Hopper house.

The admission of incompetent testimony over objection is cured when substantially the same evidence is theretofore or thereafter admitted without objection, or elicited by the objecting party during his later examinations. *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6; *State v. Bright,* 215 N.C. 537, 2 S.E. 2d 541.

The evidence elicited by these leading questions was merely cumulative. Further, there is ample evidence of similar import in the record to render the answers given non-prejudicial.

We find no abuse of discretion on the part of the trial judge in overruling defendant's objections to these questions.

Defendant contends that the closing arguments of the District Attorney and Assistant District Attorney had a misleading and prejudicial effect upon the jury.

[13] The Assistant District Attorney made minor misstatements of applicable law in two instances. He told the jury that felony-murder "is a death resulting from acts committed in the process of committing a *crime.*" (Emphasis added.) Also he argued to the jury that defendant would be guilty even if he went to the deceased's house "to assist Phyllis Brown in committing a *larceny.*" (Emphasis added.) The defect in both of these explanations of the felony-murder doctrine is that they indicate that one could be convicted of felony-murder for a homicide occurring in the commission of an offense of lesser grade than felony.

The district attorney, in his argument to the jury, may not make erroneous statements of law, *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203, nor may he argue principles of law not relevant to the case. *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283. However, if such arguments are made, a new trial is required only where defendant shows on appeal that this error was material and prejudicial. *State v. Cole, supra.* In the present case, the trial judge gave a full and accurate instruction on the doctrine of felony-murder. As is customary, the judge prefaced his charge to the jury with a direction to apply only the law given to them by the court. In addition, the Assistant

District Attorney told the jury that, "His Honor will tell you what the law is . . . . " Under these circumstances, we cannot say that the misstatements of law contained in the argument of the prosecutor are so material and prejudicial as to require a new trial.

On cross-examination of Officer Ray Ganelle, defendant inquired about the results of a lie detector test which he took in the Albany, Georgia police station. The witness initially responded that defendant had "failed" and that some "sensitivity" appeared. Upon further questioning, he stated that the results were inconclusive and that no definite answers resulted from the test. In response to the prosecutor's question on redirect, the witness stated that the test showed that defendant "had knowledge of the robbery . . . . " However, the prosecutor asked that the answer be stricken and the judge instructed the jury to disregard the answer. Later, in his closing argument, the Assistant District Attorney told the jury that the lie detector test showed that the defendant "had guilty knowledge." Defendant contends that because of the answer stricken from the record, there was no evidence to support this argument.

[14] While testimony as to the results of a polygraph test is not admissible to show the guilt or innocence of an accused, *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94, incompetent evidence admitted without objection may be considered by the jury. 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 27, p. 66.

[15] Counsel may not "go outside the record" and place before the jury facts without evidentiary support in the record. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *sentence imposing death panalty vacated,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873. However, control of counsel's argument is left largely in the discretion of the trial judge. *State v. Britt, supra; State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, *sentence imposing death penalty vacated,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290. Counsel may argue to the jury all reasonable inferences to be drawn from the facts in evidence. *State v. Britt, supra; State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750. In this case there was testimony, without objection, that defendant had "failed" his lie detector test. The police officer also testified, without objection, that the results of the test "showed sensitivity that it [defendant's participation] was possible." It is reasonable to

infer from that testimony that the polygraph test results indicated that defendant had knowledge of the robbery and killing. There was, then, some evidence in the record to support the prosecutor's argument, and therefore defendant's contention is without merit.

We have reviewed the entire argument of the District Attorney and the Assistant District Attorney and find nothing which exceeds the bounds of propriety so as to require a new trial.

Defendant contends that the trial court erred in excluding evidence which he attempted to elicit on cross-examination. His primary argument is that defendant's alleged accomplice, the State's chief witness, should have been allowed to answer the following question:

> Q. Is there any condition on your testimony on how this case comes out, anything about that as to how you are sentenced?

A defendant is entitled to cross-examine an accomplice who has testified against him as to whether he has been promised immunity or leniency in return for his testimony, and the denial of this right would constitute prejudicial error. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213; *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641; *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277. However, the scope and duration of cross-examination rest largely in the discretion of the trial judge, and he may limit cross-examination when it becomes merely repetitious. *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457; *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340.

Defendant strongly relies on the cases of *State v. Carey, supra,* and *State v. Roberson, supra,* to support his position.

In *Roberson* the defendant was awarded a new trial because the trial judge refused to allow defense counsel to show by cross-examination of the State's principal witness that a *nolle pros* had been entered in the case against him after he gave testimony against the defendant. In *Carey* the defendant attempted to show by cross-examination that the testimony of a coconspirator was influenced by the State's agreement to accept his plea of guilty to second-degree murder. The trial judge refused to allow any mention of the death penalty by the defendant in his attempts to impeach the testimony of the

coconspirator. In both *Carey* and *Roberson* the limitation on cross-examination was held to be reversible error. These cases are distinguishable from instant case in that in both *Carey* and *Roberson*, the trial judge's limitation on cross-examination *totally* precluded inquiry into the subject matter to which the respective defendant's cross-examination was directed. In the case before us, inquiry had been previously made on direct examination and on cross-examination concerning the possibility of favorable treatment to the witness in return for her testimony. On direct examination Phyllis Brown testified that she had voluntarily entered a plea of guilty to second degree murder for her participation in the crime. She said that no one representing the State had promised her anything in return for her testimony and that her testimony was given freely and willingly. On cross-examination she testified that she had been told that she would receive a prison sentence for a term of years up to and including life imprisonment. She stated that she had not been sentenced and that she did not know why her sentence had not been pronounced.

It seems clear that the trial judge was exercising his duty to control the course of the trial and to avoid repetitious questioning when he limited further cross-examination on the same subject matter. We hold that the trial judge did not abuse his discretion by excluding this repetitious cross-examination.

We do not think that the remaining questions presented by this assignment of error merit discussion. Each of them has been carefully examined without finding error prejudicial to defendant.

[17] Defendant contends that the trial judge incorrectly instructed concerning the credibility of the testimony of defendant's alleged accomplice, Phyllis Brown.

The challenged instruction, in pertinent part, was as follows:

> . . . Now, if you find that Phyllis Brown as an accomplice, you should 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 believeable evidence.

This instruction required the *jury* to determine whether or not Phyllis Brown as an accomplice. Defendant argues that the trial

judge should have instructed the jury that she *was* an accomplice and that the jury must carefully scrutinize her testimony.

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. *State v. White,* 288 N.C. 44, 215 S.E. 2d 557; *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165. Instruction to carefully scrutinize accomplice testimony is a subordinate feature of the trial and the trial judge is not required to so charge in the absence of a timely request for the instruction. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909. Nevertheless, once the judge undertakes to instruct the jury upon an applicable rule of law, it is his duty to correctly state that rule. *State v. Hale,* 231 N.C. 412, 57 S.E. 2d 322.

Defendant bases his argument primarily upon the case of *State v. Bailey, supra.* There the trial judge's failure to give an instruction on accomplice testimony, after a proper request, was held to be reversible error. In that case all the evidence, including his own admission, showed that codefendant Bailey participated in the crime. The Court approved the following instruction: "The court instructs you in passing upon the testimony of Bailey you should scrutinize it closely . . . . " The evidence also tended to show that two others who were present at the commission of the crime were accomplices. As to them the Court stated that the following instruction should have been given:

> . . . The court instructs you that if you merely find from the evidence that Gibson and Thomas are accomplices, or that either one of them is an accomplice . . . then you should scrutinize closely the testimony of such witness or witnesses as you find is an accomplice, or are accomplices . . . .

[16, 17] We interpret *Bailey* to say that when all of the evidence shows a witness to be an accomplice, then the trial judge should instruct that the witness's testimony should be carefully scrutinized, without requiring any finding by the jury. While this type of instruction would have been proper in the case before us, it must be borne in mind that every poorly stated instruction does not result in such prejudice as to require a new trial. In order to constitute reversible error, it must be made to appear that, in light of all the facts and circumstances,

the challenged instruction might reasonably have had a prejudicial effect on the result of the trial. *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683, *cert. denied,* 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293. We find no prejudicial error in the trial judge's instruction as to accomplice testimony.

[18] Defendant assigns as error the failure of the trial judge to charge on the lesser included offenses of second-degree murder and manslaughter. G.S. 14-17, in pertinent part, provides:

> A murder which shall be perpetrated by means of poison, lying in wait . . . or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery . . . shall be deemed to be murder in the first degree . . . .

This case was submitted to the jury by the trial judge on the felony-murder theory and in his final mandate to the jury he charged:

> . . . If the State has satisfied you from the evidence and beyond a reasonable doubt that on January 8, 1975, the defendant and John David Briggs entered into a conspiracy to rob Harry Hopper and that thereafter both the defendant and John David Briggs went into Harry Hopper's home and that both were present there acting in concert with each other or aiding and abetting each other in the pursuance of a common plan and purpose to rob Harry Hopper and thereby they did rob or attempt to rob Harry Hopper and while committing or attempting to commit the robbery of Harry Hopper, either the defendant or John David Briggs inflicted injuries on Harry Hopper that proximately caused his death, it would be your duty to find the defendant guilty of murder in the first degree. . . .

The law in this jurisdiction is that when all the evidence tends to show that an accused killed a deceased in the perpetration or attempted perpetration of a felony and there is no evidence of guilt of a lesser included offense, the court correctly refrains from submitting the question of accused's guilt of the lesser included offense. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671, *sentence imposing death penalty vacated,* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875.

In instant case, there was evidence tending to show that on the afternoon of 8 January 1975, Phyllis Brown's brother David Briggs inquired of her if the old man (Hopper) still had all that money. She replied that she did not know but that she would find out. Thereupon, they went to Mr. Hopper's dwelling and Phyllis went into the house. When she returned, she said she was going back to see the old man at about 10:00 that night. Thereupon they left and defendant purchased two wool-type toboggans and cut out eye holes and a nose hole so that they fitted his face and the face of David Briggs. They returned to the vicinity of Mr. Hopper's house at about 9:00 p.m. and Phyllis again entered the house. According to defendant's statement, he and David then entered the house for the purpose of getting Phyllis. Upon their entry, Mr. Hopper ran to defendant and bit his finger and defendant thereupon hit him on the head with his fist and left the dwelling. The evidence above summarized is the only possible evidence tending to support the defendant's contention that the trial judge should have submitted the lesser included offenses of second-degree murder and voluntary manslaughter. This portion of defendant's statement was entirely exculpatory and in our opinion was not sufficient to support a verdict of second-degree murder or voluntary manslaughter. We, therefore, hold that the trial judge correctly refrained from submitting these lesser included offenses to the jury.

Defendant does not argue or cite authority to support his Assignment of Error No. XIII which states that the trial judge erred in denying his motion for judgment as of nonsuit, for judgment notwithstanding the verdict and for a new trial. Thus this assignment appears to be formal and requires no discussion. We think it sufficient to say that there was plenary evidence to carry the case to the jury.

Further, in light of the holding in *Woodson v. North Carolina*, ... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978, we do not deem it necessary to consider Assignments of Error No. XIV and XV which attack the imposition of the death penalty in North Carolina.

[19] Our careful examination of this entire record does not disclose error which would justify disturbing the verdict reached. Accordingly, we find no error in the trial which affects the verdict returned by the jury. However, on 2 July 1976, the

Supreme Court of the United States, in *Woodson v. North Carolina, supra,* invalidated the death penalty provisions of G.S. 14-17 (Cum. Sup. 1975), the statute under which the defendant was indicted, convicted and sentenced to death. In compliance with that decision, the judgment imposing a sentence of death upon Waymon Edward Harris is vacated and by authority of the provisions of 1973 Sess. Laws c. 1201, § 7 (1974 Session), a sentence of life imprisonment is substituted in this case.

This case is remanded to the Superior Court of Rockingham County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing a sentence of life imprisonment for the first-degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court issue a commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish to defendant and his attorney a copy of the judgment and commitment as revised pursuant to this opinion.

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA v. BOBBY E. BOWDEN

No. 6

(Filed 5 October 1976)

1. **Jury § 7— juror already accepted by State — equivocation on death penalty — subsequent challenge by State permissible**

The trial court did not err in allowing the district attorney to challenge a juror peremptorily after he had passed her as a juror, since the juror, subsequent to her examination and tender by the district attorney, expressed doubts about her ability to follow the trial court's instructions if they conflicted with her personal beliefs on capital punishment.

2. **Jury § 7— juror already accepted by State — subsequent challenge by State permissible**

Nothing in G.S. 9-21(b) limits the trial court's discretion to allow the State, before the jury is impaneled, to challenge either pe-

remptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant.

3. Criminal Law § 80— documents concerning reward — motion for production properly denied

The trial court in a first degree murder case did not err in refusing to grant defendant's motion for the production of documents relating to the offer of a reward for information leading to the arrest and conviction of any individual involved in the murder and robbery in question, since defendant made no attempt to get the documents until after the jury selection process had commenced; if defense counsel wished to know whether any of the State's witnesses had been promised or received a reward, he could have elicited this information on cross-examinaiton; and the jury was in fact apprised of the existence of the reward offer.

4. Criminal Law § 66— codefendant having separate trial — in-court identification proper

In a first degree murder prosecution where the trial court at a prior term separated the cases of defendant and his codefendant, the trial court did not err in allowing the codefendant to appear in person in the courtroom during defendant's trial and be identified by two State's witnesses who saw him at the scene of the crime.

5. Homicide § 16— dying declarations — requirements for admissibility

Under G.S. 8-51.1 a dying declaration, to be admissible as an exception under the hearsay rule, must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. It is not necessary for the declarant to state that he perceives he is going to die; rather if all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied.

6. Homicide § 16— dying declarations — admissibility

The trial court in a first degree murder prosecution did not err in allowing a State's witness to testify as to a dying declaration made by a victim concerning his murderers, since there was evidence that the victim was in great pain, was bleeding from his head and stomach, was having difficulty breathing, and was aware of his substantial injury; moreover, the victim's statement to the State's witness implicating two "black dudes" was admissible as a spontaneous utterance, since only seconds elapsed between the time the killers left the victim and the State's witness discovered him.

7. Criminal Law § 66— in-court identification of defendant — admissibility

The trial court did not err in allowing a State's witness who observed defendant at the crime scene to make an in-court identification of defendant, since there was no illegal pretrial identification procedure which tainted the in-court identification; the witness's inability to select the defendant at a pretrial lineup did not render the lineup impermissibly suggestive and thus illegal, but instead went to the credibility of the witness.

8. **Criminal Law § 48— silence of defendant — admissibility as implied admission**

In a prosecution for two murders committed during the robbery of a Seven-Eleven store the trial court did not err in allowing into evidence testimony concerning statements made by a codefendant in defendant's presence which implicated defendant in the crimes charged, since there was evidence that defendant was in a position to hear and understand the statements, the statements were of such a nature as would require the defendant to deny them if they were false, and defendant made no such denial.

9. **Homicide § 21— felony-murder — store employee and customer — sufficiency of evidence**

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that two people were found fatally injured in the storeroom of a Seven-Eleven store; money had been taken from the store's floor safe; defendant was seen leaving the store just prior to the discovery of the injured people; one of the victims told two witnesses that two "black dudes" were responsible; defendant had been seen often in the past in the company of a person who owned a yellow Maverick automobile; two witnesses observed a yellow Maverick at the Seven-Eleven store at the time of the crime; defendant and his codefendant had possession of a gun during the time of the crime which later proved to be the murder weapon; the codefendant stated in defendant's presence that they were responsible for the robbery and killings, and defendant did not deny it; and defendant told his girl friend that he was responsible for the crime.

10. **Constitutional Law § 36; Homicide § 31— first degree murder — life imprisonment substituted for death penalty**

A sentence of life imprisonment is substituted for the death penalty which was imposed by the trial court in this first degree murder case.

11. **Homicide § 31— felony-murder — armed robbery charge merged into homicide charges**

The trial court properly did not enter judgment as to the charge of armed robbery against defendant, since the armed robbery charge was proved as an essential element in the capital offenses of murder in the first degree and therefore was merged into the murder charges.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgment of *McKinnon, J.*, entered at the 15 December 1975 Criminal Session, CUMBERLAND County Superior Court.

On indictments, proper in form, defendant was charged and found guilty of two counts of first degree murder and one of armed robbery and the death sentence was imposed. No judgment was entered for the armed robbery conviction.

The evidence for the State tended to show the following:

Deceased Larry Lovett left for work around 6:00 a.m. on 7 August 1975. He was employed by McArthur Road Seven-Eleven Store in Fayetteville and was familiar with the fact that $125.00 was always placed in the floor safe when the store closed at night. He had been instructed not to resist a robbery and did not own or carry a gun.

Just before 7:00 a.m. on the same morning, deceased Norma Ehrhart left her home to pick up a few groceries at the Seven-Eleven Store. About the same hour, Clarence Hilliard and Janice Whitten left for work together and planned to stop at the same store to pick up some cigarettes. They pulled up outside the store at 7:10 a.m. Both of them noticed a yellow Maverick automobile parked alongside their car, and shortly thereafter saw a light-complexioned black man come out of the store and get in the driver's side of the Maverick automobile. Clarence Hilliard waited in the car while Janice Whitten got out and headed for the double-door entrance-way. As she reached the doors, she observed a dark-complexioned black man come out of the store and head for the Maverick. Janice Whitten later identified the defendant as this man.

Janice Whitten walked into the store and noticed no clerks in sight and that it was very quiet. She waited a while and another customer came in. While she was talking to the other customer, they heard muffled, moaning sounds coming from the back storage room. They went to the storage room door and opened it. There Janice Whitten saw Larry Lovett, lying on his left side, bleeding from his head and stomach. Close by lay Norma Ehrhart, also bleeding. Both had been shot and were breathing faintly. Janice Whitten ran to the front of the store to call the police and summon Clarence Hilliard. When she came back to the storeroom, she bent over Larry Lovett to inquire about his condition. He responded "I've been shot, I've been shot in the gut . . . Didn't you see them?" By this time Clarence Hilliard was in the storeroom asking Larry Lovett what happened. Larry replied, "didn't you see them, the two Black dudes?"

Soon thereafter, officers from the Sheriff's department arrived. Norma Ehrhart appeared to be dead and Larry Lovett was still struggling. Ambulances took them to the hospital where both were pronounced dead on arrival. It was determined that

$124.89 had been taken from the floor safe. Janice Whitten and Clarence Hilliard told the officers what they had seen in the store but did not mention the two black males they had seen leaving in the yellow Maverick. Later the same day when they heard of the death of Larry Lovett, they went to the Law Enforcement Center and reported that they had seen two black men leaving the scene.

Four days later, they returned to the Center and each identified the defendant separately from photographs. As a result of this identification, defendant was arrested that night, as well as his co-defendant Gregory Cousin.

The next day, 12 August 1975, a lineup was held in which the defendant was one of six persons shown to Janice Whitten and Clarence Hilliard. They observed the lineup separately, but neither was able to positively identify the defendant, although Clarence Hilliard first identified the defendant and later changed his opinion. As a matter of fact, they each identified two other individuals.

Sometime before 7 August 1975, Martha Ann Mack and her boyfriend, Rodney Harris, had gone with the defendant and Gregory Cousin in Cousin's yellow Maverick to a bank in Fayetteville for business purposes. After Martha Ann Mack and Rodney Harris had gotten out of the vehicle, Martha noticed that Harris had her pistol in his pocket. She suggested that he not carry it into the bank so he returned with the gun to the car. The day before 7 August 1975, Martha Ann Mack went to the hospital to see her boyfriend, Rodney Harris. When she inquired about her pistol, he told her he had left it in the yellow Maverick.

On the evening of 7 August 1975, the defendant and Gregory Cousin went to Martha Ann Mack's trailer to return the gun. It was later determined that bullets from this gun killed Larry Lovett and Norma Ehrhart. While at the trailer, Cousin told Martha Ann Mack in the presence and hearing of the defendant that they were responsible for the Seven-Eleven robbery and murders. She questioned his statement and Cousin suggested that she listen to the 11:00 p.m. news which appeared on television shortly thereafter and this was done.

A short time after defendant visited Martha Ann Mack, he went to see his girlfriend, Geraldine Parker. He was nervous

and indicated that he had something to tell her. After a few hours he told her he had shot someone who held a gun on his partner. He suggested that she keep the yellow Maverick for a while in Vass, North Carolina and told her that he would leave the State. The next afternoon when Geraldine again saw the defendant, he gave her more details about the shooting and told her he was going to New Orleans to get rid of the car. He left her but was arrested before departing for New Orleans. The next morning Geraldine Parker called the Sheriff's Department and gave them the information she had received.

The defendant offered no evidence.

Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney Elizabeth C. Bunting for the State.

Charles H. Burgardt for defendant appellant.

COPELAND, Justice.

[1] During the jury selection process, defendant contends the court erred in allowing the district attorney to challenge peremptorily juror Christa E. Arnold after the district attorney had passed her as a juror.

On the first day of the trial, this juror was examined at length by counsel for the defendant and the district attorney.

From the outset, it should be noted that Miss Arnold was of German ancestry and had difficulty speaking and understanding the English language. When asked by the district attorney if she could vote to convict knowing that the penalty would be death, she responded affirmatively and thereupon was tendered by the prosecution. Under questioning by defense counsel, Miss Arnold indicated that she could not follow the judge's instructions if they conflicted with her personal beliefs on capital punishment but later replied that she would carry out the instructions of the court.

On the next day, when Miss Arnold was examined further by the court, out of the presence of the other jurors, she again equivocated on the question of her ability to follow the judge's instructions, reversing her position twice. She first stated that

she could not "pass a death sentence on anyone," but when the judge sought more details, replied that if she believed a person was guilty of murder beyond a reasonable doubt, she could vote for a verdict of guilty knowing that the law required a sentence of death. At the request of the district attorney before impanelment, the court permitted her to be challenged peremptorily.

[2] G.S. 9-21(b) provides in pertinent part that:

> "The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant."

Justice Huskins, speaking for our Court on the problem that here concerns us in *State v. McKenna,* 289 N.C. 668, 224 S.E. 2d 537 (1976), determined that G.S. 9-21(b) "does not deprive the trial judge of his power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury." *McKenna, supra* at 679, S.E. 2d at 545. Nothing in G.S. 9-21(b) limits the trial court's discretion to allow the State, before the jury is impaneled, to challenge either peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. *State v. McKenna, supra; see State v. Waddell,* 289 N.C. 19, 220 S.E. 2d 293 (1975).

When the district attorney passed the juror, she had made no inconsistent statements. It was only later under questioning by the defense attorney and the trial judge that contradictions became apparent. Certainly, under the circumstances, the trial judge did not abuse his discretion in allowing the district attorney's motion. The trial court has a duty to insure the continued as well as the initial competency of jurors. *See State v. McKenna, supra; State v. Waddell, supra.* This assignment of error is without merit and overruled.

[3] Under Assignment of Error No. 2 the defendant argues that the court erred in refusing to grant defendant's motion to produce documents relating to the offer of a reward.

G.S. 15A-802 of the Criminal Procedure Act governs motions of this type and provides that the subpoenas "must be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1."

Apparently while the jury was being selected, a subpoena was issued on 15 December 1975 by the Clerk of Superior Court

of Cumberland County, and served on the Southland Corporation, the owner of the Seven-Eleven, on 16 December 1975. At a *voir dire* examination of Mr. Khoeler, District Manager of Southland Corporation, conducted on 16 December 1975, Mr. Khoeler indicated that the Southland Corporation had offered a $10,000 reward for information leading to the arrest and conviction of any individual involved in the Seven-Eleven Store robbery on 7 August 1975. He disclosed that the reward was being handled by the Texas office of the Southland Corporation. Mr. Khoeler testified that two people, whose names he did not recall, had come to his office about the reward and that he advised each of them to talk to the Sheriff's Department and then submit a written claim for the reward to the Southland Corporation in Dallas, Texas. Incidentally, this subpoena does not appear to comply with Rule 45, *supra*, in that neither the caption of the case nor the name of the party who requested the subpoena appears on the subpoena.

Defendant sought these documents after the jury selection process had commenced. The defendant was indicted on 2 September 1975 and arraignment and jury selection took place on 15 and 16 December 1975, some three months later. In the interim period, defendant had ample time to request and serve a subpoena duces tecum which he failed to do. Certainly the trial judge was not required to delay the trial until documents or witnesses could come from Texas.

Assuming that counsel for the defendant had complied with Rule 45 and had served his subpoena *duces tecum* earlier, the denial of his motion did not prejudice his trial. Defense counsel contends that he desired these documents to assist him in cross-examining State's witnesses, Clarence Hilliard and Janice Whitten. Apparently, he seeks to show that these witnesses came forward with evidence merely because the reward was offered. The record is clear that Clarence Hilliard and Janice Whitten reported to the Law Enforcement Center on the day of the murders and robbery that they observed two black males leaving the Seven-Eleven Store. Nothing in the record indicates that they knew about the reward money at that time.

If defense counsel wished to know whether any of the State's witnesses had been promised or received a reward, he could have elicited this information on cross-examination. No such inquiry was directed to Clarence Hilliard or Janice Whitten.

Martha Ann Mack was asked about the reward money and stated that she had not made arrangements to collect a portion of the reward. Geraldine Parker on cross-examination indicated that she knew of the reward from the defendant before she went to the Police Station and that she had applied for the reward. The defendant had the benefit of cross-examination as to these witnesses and the jury was thus apprised of the existence of the reward offer. In Judge McKinnon's charge to the jury he instructed that the matter of a reward was "a circumstance that you may consider as it may tend to show any interest on the part of a witness in the outcome of the case. . . . " No prejudice to the defendant appears and the assignment of error is overruled.

[4] Next the defendant contends in Assignment of Errors Nos. 3, 4, and 6, that the court erred in allowing the co-defendant Gregory Cousin to appear in person in the courtroom and be identified by witnesses Clarence Hilliard and Janice Whitten.

The trial judge at a prior term separated the cases of Cousin and the defendant for the purpose of trial. On the morning of 19 December 1975, the district attorney had Gregory Cousin brought into the courtroom to which counsel for the defendant objected. Defendant takes the position that the appearance of co-defendant Gregory Cousin in the courtroom during the course of defendant's trial for the purpose of identification, violated his due process rights under the Fourteenth Amendment of the United States Constitution. For this proposition, he cites no other authority. Defendant argues that to permit co-defendant Cousin, without adequate notice, to be identified by eyewitnesses in defendant's separate trial places an unconstitutional burden upon the defendant to defend againt the validity of the in-court identification of the co-defendant. The defendant says that the identification of Cousin was harmful error because it tended to make defendant look guilty by association.

The argument is novel but we find no merit in it. As noted by Judge McKinnon in denying defendant's motion, "If this man [Cousin] were free in the community, he could be here by subpoena; if he were in prison, he could be here by appropriate court order, and for the purposes stated, . . . [his presence] is neither [a] legal surprise or impropriety. . . . "

In addition, the defendants could have been tried jointly in which case co-defendant Cousin would necessarily have been present and the in-court identification of him unquestionably permissible. To accept defendant's reasoning would be to conclude that joint trials were unconstitutional. This, of course, is not the case. *See State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

In the *voir dire* examinations of Clarence Hilliard and Janice Whitten no evidence was offered contradicting Hilliard's or Whitten's ability to identify Cousin and Judge McKinnon was fully justified in allowing the in-court identifications. The identification of Cousin by witnesses Hilliard and Whitten tended to corroborate their identification of the defendant, as the witnesses observed both defendants at substantially the same time and under similar circumstances.

We find no merit in these assignments of error and they are overruled.

[6] The defendant contends under Assignment of Error No. 5 that the court erred in permitting State's witness Clarence Hilliard to testify as to what the victim, Larry Lovett, said in the Seven-Eleven Store.

The defendant argues that for this testimony to be admissible it must fall within the dying declaration exception to the hearsay rule.

G.S. 8-51.1 (Cum. Supp. 1975) provides as follows:

> "The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:
>
> "(1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;
>
> "(2) Such declaration was voluntarily made."

The record discloses that Larry Lovett appeared to be in great pain, was bleeding from his head and stomach, and having

difficulty breathing. The record further reveals that Larry Lovett was aware of his substantial injury. When Janice Whitten saw Larry Lovett on the floor of the storeroom he told her "I've been shot, I've been shot in the gut . . . Didn't you see them?" This testimony was not objected to by the defendant. When Deputy Sheriff Roy Baker arrived and asked Larry Lovett who was responsible, Larry replied, "Two black dudes; oh, I can't breathe." This testimony also was entered without objection. Defendant objected to the admission of Larry Lovett's statement to Clarence Hilliard, "Didn't you see them, the two Black dudes?"

[5] The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration, his ruling is reviewable only to determine whether there is evidence tending to show facts essential to support it. *State v. Brown*, 263 N.C. 327, 139 S.E. 2d 609 (1965). Under the new statute, the declaration must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. It is the requirement that the declarant be aware of his impending death that has most often concerned the courts under the case law and now concerns us under the statute. We note, without deciding, that the words "no hope of recovery" in the statute may make the statutory exception to the hearsay rule more restrictive than existing case law. However, we believe that on the facts of this case, the declarant Larry Lovett must have believed there was no hope for recovery. It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied. *State v. Brown, supra.*

[6] The evidence shows that when Larry Lovett made the remark in question, he was on the storeroom floor "squirming and wiggling around and evidently in great pain," "yelling, 'Help me, please,' " experiencing difficulty breathing, and bleeding from multiple gunshot wounds of the head and stomach regions. These wounds were of such a nature that, taken with the fact that Larry Lovett died en route to the hospital, the trial judge could justifiably conclude that the declarant Larry Lovett realized his death was imminent and that there was no hope of recovery. See G.S. 8-51.1, *supra;* 1 Stansbury's N. C. Evidence, § 146 (Brandis Rev. Supp. 1976) at 151.

Moreover, Lovett's statement to Hilliard implicating two "black dudes" is admissible as a spontaneous utterance.

> "When a startling or unusual incident occurs, the exclamations of a participant or a bystander concerning the incident, made spontaneously and without time for reflection or fabrication, are admissible." 1 Stansbury's N. C. Evidence, § 164 (Brandis Rev. 1973) at 554; *see State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974).

Only seconds elapsed between the time the killers left the store and Janice Whitten and Clarence Hilliard's discovery of Larry Lovett. Over defendant's objection, Hilliard testified that Larry Lovett told him that "[t]wo Black dudes" had done it. Without objection, Deputy Sheriff Baker was permitted to testify to the same thing. *Ipso facto,* there can be no prejudicial error since the same evidence, received from Deputy Sheriff Baker, appears in the record without objection. *State v. Harris,* 290 N.C. 681, 228 S.E. 2d 437 (1976), decided this day; *State v. Creech,* 265 N.C. 730, 145 S.E. 2d 6 (1965). At any rate, we feel that the statement satisfies both the law as to a spontaneous utterance as well as a dying declaration, and this assignment of error is overruled. 1 Stansbury's N. C. Evidence, §§ 146, 164 (Brandis Rev. 1973, Supp. 1976).

[7] In Assignment of Error No. 7 defendant argues that it was error to permit the witness Janice Whitten to identify in court the defendant Bobby Bowden.

Upon objection to the in-court identification, Judge McKinnon conducted an extensive *voir dire* and made appropriate findings and conclusions. At a *voir dire* hearing, the trial judge must determine whether an illegal out-of-court identification took place. If he so finds, the judge must then decide whether the in-court identification is tainted by the illegal out-of-court procedure or whether it is based on the witness' independent observation at the crime scene. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

The trial court found, and this finding is supported by the evidence, that no illegal pretrial identification procedure had been conducted. Thus, it was not necessary to examine the witness on her opportunity to observe at the crime scene. Janice Whitten picked out the defendant's picture during a properly conducted photographic procedure. The following day at a lineup

she was unable to correctly identify the defendant. Janice Whitten's inability to select the defendant at the lineup did not render the lineup impermissibly suggestive and thus illegal; in fact, it tends to prove the contrary. As the trial court correctly observed, Miss Whitten's misidentification at the lineup goes to her credibility as a witness.

Although not required under the circumstances, Judge McKinnon heard evidence and made findings on Miss Whitten's opportunity to observe the defendant at the crime scene. The evidence revealed that Miss Whitten looked the defendant in the face for four or five seconds as she approached the door and, as she expressed it, was so close that she "could have kissed him." She described him as well as his clothes and recalled that his skin was very dark. She explained that the outside lights of the store were on and that she had described the defendant to the sheriff's deputies on the day of the crime.

Counsel for the defendant fully exploited in the presence of the jury Janice Whitten's failure to identify the defendant at the lineup. The jury could have chosen not to believe Janice Whitten but instead they accepted her identification. This was the jury's decision to make and cannot be attacked here. The assignment of error is overruled.

[8] As his Assignment of Error No. 8 defendant contends it was error to permit Martha Ann Mack to testify concerning statements made by co-defendant Gregory Cousin in the presence of the defendant. On the evening of the two murders and robbery, the defendant and his co-defendant, Gregory Cousin, went to the trailer home of their friend Martha Ann Mack to return her gun. When they arrived, they went directly to Martha's bedroom where defendant and Cousin were so close to Martha Ann Mack that she could have "reached out and touched both of them . . . "

Prior to receiving the ensuing conversations into evidence, Judge McKinnon excused the jury and held a *voir dire*. In the bedroom, Cousin stated that "they had robbed the Seven-Eleven Store." Martha Ann Mack indicated that she did not believe him and Gregory Cousin replied: "If you don't believe me, come on, it should be on televison." All three went to the front room and watched a news broadcast in which the Seven-Eleven robbery was described. They observed on the telecast a body being taken from the Seven-Eleven Store. The television news

indicated that two people were in custody, whereupon, Cousin remarked that: "[T]hey had the wrong people because they . . . did it." Cousin also said with regard to the woman who was killed in the Seven-Eleven Store: "[S]he was stupid if she thinks he would let her live and testify because he wasn't going back to jail again."

The defendant was present during these conversations and all the evidence indicated that he was in a position to hear and understand what was said, and that he said nothing.

There was some evidence that the defendant had been drinking. Martha Ann Mack said on cross-examination that the defendant "had a little to drink, but he wasn't drunk." Later in the *voir dire* the defendant called to the stand Linda Pratt, who was present in the trailer when the defendant and Cousin arrived and confirmed that the two defendants and Martha Ann Mack went to the bedroom. However, she denied hearing any news on television. Judge McKinnon overruled the objection to Martha Ann Mack's testimony, deciding it was for the jury's determination. The foregoing testimony of Martha Ann Mack was then related to the jury.

Co-defendant Cousin's statements, if admissible at all, are admissible as an admission by silence.

> "If a statement is made in a party's presence under such circumstances that a denial would naturally and properly be expected if the statement were untrue, silence or failure to deny is admissible against him as an implied admission.
>
> "The mere fact that the statement was made in the party's presence is not enough. It must be shown that he was in a position to hear and understand what was said . . . the circumstances . . . must have been such that a person in his position would be expected to deny it at the time if it were untrue." 2 Stansbury's N. C. Evidence, § 179 (Brandis Rev. 1973) at 50-53.

The statements made by co-defendant Cousin concerning the robbery in which he referred to "we" were of such a nature as would require the defendant to deny them if they were false. On all occasions defendant was present and in close proximity to Cousin and Martha Ann Mack. All the requirements for admissibility were met and Judge McKinnon correctly ruled

that these statements were for the jury to consider. This assignment of error is overruled.

The defendant says under Assignment of Error No. 9 that the trial court should have allowed his motion for nonsuit at the close of the State's evidence.

On a motion for nonsuit the evidence must be considered in the light most favorable to the State, giving such evidence the benefit of every reasonable inference to be drawn from it. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

[9] The evidence when considered in the light most favorable to the State shows the following: (1) On the early morning of 7 August 1975, Larry Lovett and Norma Ehrhart were found fatally injured in the storeroom of the McArthur Road Seven-Eleven Store; (2) A sum of money had been taken from the floor safe of the store; (3) Defendant was seen leaving the store just prior to the discovery of the injured persons; (4) Lovett told two witnesses that two "black dudes" were responsible; (5) Defendant had been seen often in the past in the company of a person who owned a yellow Maverick automobile; (6) This person (Cousin) and the defendant had possession of a gun during the time of the robbery which later proved to be the murder weapon; (7) Defendant's friend (Cousin) stated in defendant's presence that they were responsible for the robbery and killings and the defendant did not deny it, and (8) Defendant told his girl friend (Geraldine Parker) that he was responsible for the crime and that he was going to leave in order to get rid of the car. There was substantial circumstantial and direct evidence linking the defendant to the robbery and killing of Lovett and Ehrhart at the Seven-Eleven Store. The able trial judge was entirely correct in overruling the motion for nonsuit.

Judge McKinnon charged the jury on the felony-murder rule. The defendant assigns this as Error No. 10 because the evidence was insufficient.

The exception noted is broadside in that no specific portions of the charge are set out with which the defendant disagrees. The contentions of the defendant on this assignment of error are nothing more than a repetition of the argument advanced on his motion for nonsuit. The assignment is without merit and overruled.

[10] Defendant's last assignment of error attacks the imposition of the death penalty. In *Woodson v. North Carolina*, ... U.S. ..., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975) under which defendant was indicted, convicted, and sentenced to death. By authority of the provisions of 1973 Sess. Laws, c. 1201 § 7 (1974 Session), a sentence of life imprisonment is substituted for the death penalty in this case. We, therefore, deem it unnecessary to discuss further this assignment of error.

[11] The jury returned a verdict of guilty as to the charge of armed robbery. The trial judge properly did not enter judgment as to that charge since it conclusively appears that proof of the armed robbery was an essential element in the capital offense of murder in the first degree. The armed robbery charge, therefore, became a part of and was merged into the murder charges. *State v. Williams*, 290 N.C. 770, 228 S.E. 2d 241 (1976), decided this day; *State v. Lock*, 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972).

This case is remanded to the Superior Court of Cumberland County with directions (1) that the presiding judge, without requiring the presence of defendant, enter judgments imposing life imprisonment for the two first-degree murders of which defendant has been convicted; and (2) that, in accordance with these judgments, the clerk of superior court issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish to the defendant and his attorney a copy of the judgments and commitments as revised in accordance with this opinion.

This case was ably tried by Judge McKinnon. We have searched the record for errors other than those assigned by the defendant and have found none.

In the trial we find

No error.

Death sentence vacated and, in lieu thereof, life sentence imposed.

STATE OF NORTH CAROLINA v. JOE LOUIS HARRIS

No. 10

(Filed 5 October 1976)

1. **Criminal Law §§ 5, 112; Homicide § 7— insanity — affirmative defense**

The rule in this State that the defense of insanity is an affirmative defense which must be shown by the defendant to the satisfaction of the jury does not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684.

2. **Criminal Law §§ 5, 112; Homicide § 28— intent, premeditation and deliberation — insanity — burden of proof — instructions**

Where the court's instructions in a first degree murder case made it totally clear that the State had the burden of proving the elements of intent, premeditation and deliberation, and the court set the insanity defense apart as a separate issue for the jury's decision, the jury could not have been confused as to the State's burden on intent, premeditation and deliberation.

3. **Criminal Law § 5; Homicide §§ 7, 28— evidence of mental disease — effect on intent**

Evidence relating to mental disease and incapacity may not be considered by the jury in determining whether the State proves beyond a reasonable doubt the elements of specific intent to kill after premeditation and deliberation.

4. **Criminal Law § 5; Homicide § 7— insanity — effect of notice statute**

G.S. 15A-959(b) and the accompanying commentary on that statute do not establish the theory of "diminished responsibility" as law in North Carolina.

5. **Criminal Law § 5; Homicide § 7— presumption of sanity**

There is a presumption of sanity in all cases, and when there is evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity on a motion for nonsuit or for a directed verdict.

6. **Criminal Law § 5— test of insanity as defense to crime**

The test of insanity as a defense to a criminal charge is whether defendant is laboring under such a defect of reason from a disease of the mind as to be incapable of knowing the nature and quality of his acts or, if he does know this, he is incapable of distinguishing between right and wrong in relation to such acts.

7. **Criminal Law § 5; Homicide § 7— insanity as defense to murder — jury question**

The question of defendant's insanity as a defense to charges of first degree murder was a question for the jury when the testimony of several State's witnesses indicating defendant had a sane mind at the time of the crimes is considered with the presumption of sanity, particularly where defendant's expert witnesses testified only that

defendant's ability to understand the nature and quality of his acts was affected but that they did not know whether defendant was able to distinguish between right and wrong at the time of the killings.

8. **Homicide § 30— first degree murder — reliance on premeditation and deliberation — duty to instruct on second degree murder**

In all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree; in those cases in which the State proves a murder committed by one of the means stated in G.S. 14-17, or in the perpetration or attempted perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper, provided there is no evidence, or any inference deducible therefrom, tending to show a lesser degree.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Hobgood, J.*, at the 6 October 1975 Criminal Session of WAKE Superior Court.

On separate indictments, proper in form, defendant was charged with the murders of Bernice Clark Harrington, Azalle Jackson, Gertrude Clark Harmon and Haveleigh Monte Ravera White. The cases were consolidated for trial and defendant entered pleas of not guilty by reason of insanity. The jury returned verdicts of guilty of murder in the first degree upon each charge and a sentence of death was imposed.

A brief discussion of the facts leading up to the murders is necessary to better understand the issues raised on this appeal. On 23 September 1974, Gertrude Clark Harmon threw lye (or some other corrosive substance) upon the face and chest of the defendant. The reason for the assault is not known. However, defendant knew Gertrude well and had dated her in the past. As a result of the assault, defendant was hospitalized for several weeks, lost his vision in the left eye and suffered severe burns upon his face and chest.

Upon release from the hospital, defendant caused a warrant to be issued against Gertrude. On 31 October 1974, a preliminary hearing was held in the matter. At the hearing, the fact of the assault was not controverted. However, Gertrude introduced evidence of her good character through the testimony of Azalle Jackson (her sister) and Haveleigh White (a close friend). Although the record is not clear, it appears that these witnesses may have made some derogatory comments about defendant.

Subsequent to the preliminary hearing, it appeared that defendant's personality changed. Whereas he previously had been outgoing and talkative, he became withdrawn and quiet. Further, he did not return to his job which he had held for twelve to fifteen years.

It was against this background that the murders of Gertrude Harmon, Azalle Jackson, Bernice Harrington and Haveleigh White occurred. It should be noted at this point that Gertrude Harmon, Azalle Jackson and Bernice Harrington were sisters.

At approximately 8:00 p.m. on 9 January 1975, defendant came to the house of Robert and Azalle Jackson. He appeared to be in a friendly mood and asked the Jacksons to come to his house. Robert, Azalle and their child then went to defendant's house. Upon arrival, defendant, by the threatened use of a pistol, forced Robert into the trunk of defendant's car. As defendant closed the trunk lid, he said, "I don't want to hurt you or your wife or your kid." While locked in the trunk, Robert could hear his child crying and heard her say, "Leave my mother alone." He also heard his wife scream and call his name. Robert was unable to hear anything thereafter because a train was passing in the distance.

After a short time, defendant opened the trunk lid and gave Robert his child. Defendant then forced Robert back into the trunk and drove the car several blocks. The car stopped and Robert heard the car door close. He then heard two shots fired and several children began to cry. Defendant again opened the trunk and released Robert and his child. Robert noticed that defendant still had the pistol. Defendant then drove away, leaving Robert in front of the house of Gertrude Harmon. Robert went into the house and found Gertrude lying on a sofa with a bullet wound in her left temple. A spent .25-caliber shell casing was located adjacent to the body.

Robert then took the two children of Gertrude and his child to his house, located next door, and called the police. Upon their arrival, Robert led the officers to defendant's house. There, the body of Robert's wife, Azalle, was found with a bullet wound in the left temple. On the floor, in close proximity to the body, two .25-caliber shell casings were found.

Defendant's house was in a state of disarray. The furniture was overturned, papers were strewn about the floor and

pictures, once hanging on the walls, were on the floor. A Bible containing a folded piece of paper was found on a coffee table in the living room. The paper had a cross drawn on it with the following statement: "Joe Louis Harris. Born July 10, 1935. Murdered September 23, 1974. [The date of the alleged lye-throwing incident.] All responsible shall pay."

At approximately 10:00 p.m., in another part of town, Haveleigh White (one of the women who testified on behalf of Gertrude Harmon at the preliminary hearing) and her granddaughter, Mona Jervay, were returning from a meeting. They entered Mrs. White's driveway and Mona began to get out of the car. Mona saw a black man approach Mrs. White and fire several shots. She then saw Mrs. White fall to the ground. The man who fired the shots then got into his car and drove away. Two .25-caliber shell casings were found adjacent to the victim's body and a .25-caliber slug was found in the victim's chest.

Several hours later, the body of Bernice Harrington was found in the woods behind defendant's house. Bernice had been shot in the head. A trail of blood led from defendant's house to the spot where Bernice was found, indicating that the victim had been dragged from the house into the woods. A .25-caliber shell casing was found at the rear of the house close to a pool of blood.

The State further introduced evidence that defendant had stated to Gertrude during a telephone conversation on 28 December 1974, " . . . I am going to kill you and kill all the Clarks." The State also introduced expert ballistics testimony that all of the shell casings recovered adjacent to the victims' bodies were .25-caliber and fired from the same gun, and that all of the slugs recovered from the victims were .25-caliber and fired from the same gun. Medical testimony showed that each of the victims died as a result of these gunshot wounds. A neighbor of the defendant testified that defendant had a .25-caliber pistol and was an excellent marksman.

The defendant did not take the stand. He did, however, introduce evidence as to his insanity. Several of defendant's neighbors, friends, and co-workers testified concerning defendant's personality before and after the lye-throwing incident on 23 September 1974. This testimony tended to show that prior to 23 September 1974, defendant was an outgoing, civic-minded individual with a good work record. After the lye-

throwing incident and the preliminary hearing on 31 October 1974, the testimony was to the effect that defendant became a recluse who seldom ventured outside or wanted any contact with his friends.

Defendant also introduced expert medical testimony concerning his mental condition at the time of the murders. Dr. William Taylor of the Forensic Unit at Dorothea Dix Hospital testified that he interviewed defendant approximately a week after the murders and continued to do so during the next five months. He described defendant as extremely depressed and very self-conscious about his eye injury. Dr. Taylor also stated that defendant was unable to recall any of the events of the evening of 9 January 1975, and cried uncontrollably whenever the subject was raised. Dr. Taylor gave his opinion that defendant's injury had caused a psychological disorder and that this disorder affected defendant's ability to understand the nature and quality of his acts. However, Dr. Taylor was unable to give any opinion as to whether defendant understood the nature and quality of his acts on 9 January 1975, and he did not know whether defendant knew right from wrong at the time of the murders.

Frank Masur, an expert in clinical psychology at Dorothea Dix Hospital, then testified as to defendant's mental condition. Witness Masur stated, in substance, that defendant was very depressed and preoccupied with his eye injury. He testified that the psychological disorder caused by the injury impaired defendant's judgment to such an extent that defendant's ability to understand the nature and quality of his acts on 9 January 1975 was impaired. The witness further testified that he had no opinion as to whether defendant was able to distinguish right from wrong on 9 January 1975.

Additional facts necessary to the decision of these cases will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Elizabeth C. Bunting for the State.

W. Brian Howell for defendant appellant.

MOORE, Justice.

[1] Defendant first attacks the North Carolina rule that places upon defendant the burden of proof on the defense of insanity. Defendant concedes in his brief that North Carolina has long

adhered to the view that the defense of insanity is an affirmative defense which must be shown by the defendant to the satisfaction of the jury. *See State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975), and cases cited therein. He contends, however, that this is error because of the decision of the United States Supreme Court in *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

We have reexamined these cases in the light of *Mullaney* and have decided that *Mullaney* does not require, upon due process considerations, the reallocation of the burden of proof on the issue of insanity. *State v. Hammonds,* 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Shepherd,* 288 N.C. 346, 218 S.E. 2d 176 (1975). Other jurisdictions have reached the same conclusion. *See Rivera v. State,* 351 A. 2d 561 (Del. 1976); *Grace v. Hopper,* 234 Ga. 669, 217 S.E. 2d 267 (1975); *State v. Melvin,* 341 A. 2d 376 (Maine 1975); *accord, Hill v. Lockhart,* 516 F. 2d 910 (8th Cir. 1975). Defendant, in his brief, cites only one case holding to the contrary: *Commonwealth v. Williams,* 344 A. 2d 877 (Pa. 1975). An examination of these decisions convinces us that we should adhere to our holdings in *State v. Shepherd, supra,* and *State v. Hammonds, supra.*

Defendant contends, however, that the decision in *State v. Hammonds, supra,* on the defense of insanity is unsound in that it erroneously relied, in part, upon an excerpt from a concurring opinion to *Mullaney.* In this excerpt, Justice Rehnquist states:

> "I agree with the Court that *In re Winship,* 397 U.S. 358 [25 L.Ed. 2d 368, 90 S.Ct. 1068] (1970), does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against a defendant. I see no inconsistency between that holding and the holding of *Leland v. Oregon,* 343 U.S. 790 [96 L.Ed. 1302, 72 S.Ct. 1002] (1952). In the latter case this Court held that there was no constitutional requirement that the State shoulder the burden of proving the sanity of the defendant." 421 U.S. at 705, 44 L.Ed. 2d at 523, 95 S.Ct. at 1893.

The question apparently raised by defendant in the cases at bar is whether *Leland v. Oregon, supra,* cited within the above concurrence, is supportive of the decision in *Hammonds.*

In *Leland,* the petitioner raised the issue of whether an Oregon statute placing the burden upon a defendant to prove an insanity defense beyond a reasonable doubt was a deprivation of due process. The Court held that due process was not violated by the state's casting upon defendant the burden of proving insanity "beyond a reasonable doubt." The Court also stated that there was no due process violation caused by Oregon's adoption of the "right and wrong" (M'Naghten) test, rather than the "irresistible impulse" test of insanity.

It is true, as the defendant in the present cases points out, that the jury instructions given in *Leland* did allow the jurors to consider the issue of insanity on the elements of intent, premeditation and deliberation. The Court noted, however, that these instructions merely served to emphasize that the State had the burden of proof on these elements.

[2] In the cases at bar, the instructions given by the trial judge made it totally clear that the State had the burden in proving these elements. Furthermore, like the trial judge in *Leland,* the trial judge here set the insanity defense apart as a separate issue for the jury's decision. The jury in the present cases, therefore, could not have been confused as to the State's burden on intent, premeditation and deliberation. Thus, *Leland v. Oregon, supra,* does not command that we reach a different conclusion in this case, nor in *State v. Hammonds, supra.*

[3] Defendant urges the Court to adopt the viewpoint that evidence of abnormal mental condition should be considered on the issue of specific intent. He contends that evidence relating to mental disease and incapacity should be considered in determining whether the State proves beyond a reasonable doubt the elements of specific intent to kill after premeditation and deliberation. Suffice it to say, we have rejected this argument in *State v. Cooper, supra,* and in *State v. Hammonds, supra,* and again we do so in this case.

Defendant next argues that G.S. 15A-959 conflicts with this Court's decision in *State v. Hammonds, supra.* This section reads as follows:

> *"Notice of defense of insanity.*—(a) If a defendant intends to raise the defense of insanity, he must within the time provided for the filing of pretrial motions under G.S. 15A-952 file a notice of his intention to rely on the defense

of insanity. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders.

"(b) If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he must within the time provided for the filing of pretrial motions under G.S. 15A-952(b) file a notice of that intention. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make other appropriate orders."

Following this section, the commentary contains the following passage:

" . . . A defendant intending to raise the defense of insanity would almost always wish to come forward with his own expert; however, there may be a number of situations where the defense of insanity is not technically raised but expert testimony as to mental state will be introduced to negative the defendant's culpability with respect to some element of the offense. This section would require notice in either situation."

[4] It is contended by defendant that G.S. 15A-959(b) and the accompanying commentary establishes the theory of "diminished responsibility" as law in North Carolina and, as such, conflicts with *Hammonds*. We deem it implausible that the Criminal Code Commission, which drafted the statute and wrote the commentary, would implant a new and far-reaching theory on North Carolina law by implication or through the text of explanatory material. If the statute was intended to establish the principle of diminished responsibility, this would have been done in the body of a statutory section, not by implications in the commentary. Further, G.S. 15A-959 is a notice statute dealing with pretrial procedure and not with substantive law. We hold, therefore, that the statute does not conflict with *State v. Hammonds, supra,* and no reconsideration of that case is required.

It is next contended that the trial court erred in denying defendant's various motions for nonsuit, directed verdicts and new trial. Defendant urges quite strenuously that the motion for

directed verdicts on the specific charges of first degree murder should have been granted. The ground for this contention is that the State failed to adduce sufficient evidence bearing upon the defendant's sanity at the time of the murders.

[5] A motion for a directed verdict of not guilty has the same effect as a motion for judgment as of nonsuit. *State v. Cooper, supra; State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974). It is well settled that on such motion the court is to consider the evidence in the light most favorable to the State. Any conflicts and discrepancies in the evidence are to be resolved in the State's favor and the State is entitled to every reasonable inference which may be drawn therefrom. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). Further, in all cases there is a presumption of sanity, and when there is other evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity on a motion for nonsuit or for a directed verdict. *State v. Hammonds, supra.*

In the cases at bar, there was evidence from several State's witnesses which indicated a sane mind. Robert L. Jackson, Jr. testified that just prior to the crimes defendant acted in a friendly manner. On cross-examination, this witness testified that defendant had stated when he came to the Jackson's door, "Good Evening. How are you doing?" Shortly thereafter, according to Mr. Jackson, defendant stated that he did not want to hurt Mr. Jackson, his wife or his child. When the police arrested defendant, they questioned a group of people as to who was Joe Louis Harris. Defendant immediately said, "I am Joe Harris." The arresting officer testified that defendant gave the police no difficulty when apprehended. There was no evidence that defendant acted abnormally immediately after the crimes were committed. Although defense witnesses did indicate that defendant had not been acting normally prior to the crimes, such evidence need not be considered on a nonsuit motion under the holding of *State v. Hammonds, supra.*

The defendant also offered two expert psychiatric witnesses. Both witnesses stated flatly that they did not know whether defendant was able to distinguish between right and wrong at the time of the murders. Both of the witnesses stated that at the time of the murders defendant's ability to understand the nature and quality of his acts was affected.

[6] It is well established in this State that the test of insanity as a defense to a criminal charge is whether defendant

is laboring under such a defect of reason from a disease of the mind as to be incapable of knowing the nature and quality of his acts or, if he does know this, he is incapable of distinguishing between right and wrong in relation to such acts. *State v. Cooper, supra; State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973), *cert. den.*, 414 U.S. 1042, 38 L.Ed. 2d 334, 94 S.Ct. 546 (1973); *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1968).

[7] In the instant cases, the testimony of the two expert witnesses was not sufficient to support a motion for nonsuit. This is particularly true in the light of *State v. Shepherd, supra,* wherein two expert witnesses testified that defendant did *not* know the difference between right and wrong. In that case, there was also evidence tending to show that defendant was sane. The Court in *Shepherd* held that since some evidence of sanity was presented, the trial court's denial of the nonsuit motion was proper. In the cases at bar, based upon the above testimony and the presumption of sanity, there was even stronger reason for denying the proffered motions. Any conflicts in the evidence of sanity were properly an issue for the jury.

Finally, defendant assigns as error the refusal of the trial court to submit to the jury the question of defendant's guilt of second degree murder. He contends that inasmuch as the felony-murder rule was not applicable to the individual homicides charged herein, the trial court was required to submit to the jury the question of defendant's guilt of second degree murder as to each of the charges. He insists that considering the State's evidence, in the light most favorable to the State, the jurors could have concluded that the defendant committed each of the homicides. However, as to whether each homicide was committed with premeditation and deliberation, defendant contends that the evidence was wholly circumstantial and the jurors could have found that the State had failed to prove beyond a reasonable doubt that the defendant did premeditate and deliberate on each homicide. Defendant cites *State v. Perry,* 209 N.C. 604, 184 S.E. 545 (1936), in support of this position.

In *Perry,* the defendant was tried upon an indictment charging first degree murder. The State introduced sufficient evidence to support a conviction of first degree murder based upon

premeditation and deliberation. No evidence was introduced tending to show that the murder was committed by any of the statutory means stated in C.S. 4200 (now G.S. 14-17) or in the perpetration or attempted perpetration of a felony. The trial court instructed the jury to return a verdict of murder in the first degree or not guilty. This Court held that the failure to submit an issue of murder in the second degree was error. In reaching this conclusion, the Court stated:

> "It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. In those cases where the evidence establishes that the killing was with a deadly weapon the presumption goes no further than that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. Under such circumstances it is error for the trial judge to fail to submit to the jury the theory of murder in the second degree, since it is the province of the jury to determine if the homicide be murder in the first or in the second degree, that is, whether they, the jury, are satisfied beyond a reasonable doubt, from the evidence, that the homicide was committed with deliberation and premeditation. . . . " 209 N.C. at 605-06, 184 S.E. at 546.

The holding in *Perry* was based upon the cases of *State v. Spivey,* 151 N.C. 676, 65 S.E. 995 (1909), and *State v. Newsome,* 195 N.C. 552, 143 S.E. 187 (1928). In *Spivey,* the defendant was charged with first degree murder. The State introduced evidence that defendant killed the victim either by "lying in wait" or in the attempted perpetration of a felony (arson). The defendant introduced evidence of alibi. The trial court instructed the jury to return a verdict of guilty of murder in the first degree or not guilty. This Court held that there was no error in the trial judge's refusal to submit an issue of murder in the second degree. The Court stated:

> "After a careful review of the decisions of this Court, and a critical examination of the statute (Revisal, sections

3631 and 3271) [now G.S. 14-17], we deduce the following doctrine: Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' . . . " 151 N.C. at 685-86, 65 S.E. at 999.

The second case relied upon in *Perry* was *State v. Newsome, supra.* In *Newsome,* there was evidence tending to show that the defendant murdered the victim either during an attempted rape or with premeditation and deliberation. The trial judge instructed the jury that it could return a verdict of murder in the first degree or not guilty. The judge refused to submit an issue of second degree murder. This Court held that this refusal was error. The Court reaffirmed the rule enunciated in *State v. Spivey, supra.* The Court, however, enunciated a different rule for those cases in which the State bases its first degree murder charge upon premeditation and deliberation:

" . . . When, however, the State relies upon evidence tending to show . . . deliberation and premeditation, the jury should be instructed that if they fail to find from the evidence, beyond a reasonable doubt, that the murder . . . was committed after deliberation and premeditation, they should return a verdict of guilty of murder in the second degree, provided, of course, they shall find from the evidence, beyond a reasonable doubt, that the defendant committed the murder." 195 N.C. at 563-64, 143 S.E. at 193.

The Court then stated the reason for this rule:

" . . . Deliberation and premeditation, if relied upon by the State, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this Court, it is for the jury and not the judge to find the fact of deliberation and

premeditation, from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge." 195 N.C. at 564, 143 S.E. at 193.

This same reasoning was used by Justice Bobbitt (later Chief Justice) in *State v. Propst*, 274 N.C. 62, 71, 161 S.E. 2d 560, 567 (1968):

> " . . . The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, must be established beyond a reasonable doubt, and found by the jury, before the verdict of guilty of murder in the first degree can be returned; and the burden of so establishing these additional elements of premeditation and deliberation rests and remains on the State. [Citations omitted.]"

[8] We hold, therefore, that in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. Again, we reaffirm the rule originally stated in *State v. Spivey, supra*, that in those cases in which the State proves a murder committed by one of the means stated in G.S. 14-17, or in the perpetration or attempted perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper; provided, that there is no evidence, or any inference deducible therefrom, tending to show a lesser offense. *See State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Spivey, supra.*

In the present cases, the issue of premeditation and deliberation was for the jury. The refusal of the able trial judge to submit an issue of second degree murder, therefore, was error. This error entitles defendant to a new trial.

Other assignments of error present questions which probably will not recur at another trial. Discussion thereof is unnecessary and inappropriate at this time.

For the reasons stated above, defendant is entitled to a new trial and it is so ordered.

New trial.

DONALD P. BROCK; J. K. WARREN, JR.; W. B. HARGETT; H. C. BELL; MARY ELIZABETH BROCK McDANIEL; P. NELSON BANKS; HAROLD H. BATE; R. C. TYNDALL, JR.; G. B. FOY; C. C. JONES, JR.; W. W. BRAFFORD; ROBERT R. RIGGS; ERNEST B. RIGGS; HAROLD RIGGS; FRED D. RIGGS; RUSSELL J. RIGGS; DALTON EUBANKS; RALPH NOBLES; JERRY T. RIGGS; J. C. ARTHUR; E. N. RIGGS; W. H. RIGGS; ALTON ARTHUR; C. B. ARTHUR; BEN DILLAHUNT; THOMAS ARTHUR; C. FELIX HARVEY; JULIAN G. HOFMANN; CARLTON A. POLLOCK; MRS. ORA D. POLLOCK; SYLVANUS D. MALLARD; EDNA T. MALLARD; WILLIAM V. GRIFFIN; MRS. V. C. GRIFFIN; D. E. TAYLOR; HUGH B. OLIVER; W. DENFORD EUBANK; LINDY HARTSELL; CHRIS R. EUBANKS; HUBERT L. JENKINS; FELTON EUBANKS; CORENA ANDREWS; W. ARCHIE EUBANKS; MR. M. R. WILLIAMS; RALPH JONES; JOE MONETTE; RAY COLLINS; RAY HILL; MYRAL COLLINS; W. W. SIMPSON; RICHARD H. PARKER; RUDOLPH HUMPHREY; ERNEST W. HUMPHREY; JESSIE G. BYNUM; HAROLD MATTOCKS, JR.; WILLIAM F. MATTOCKS; J. J. CONWAY; R. E. PROVOST; CLINTON PHILLIPS; EUGENE SIMPSON; WAYNE SIMPSON; JOHNNY TOLER; JOHN H. TOLER; ROBERT H. TOLER; SAMUEL RIGGS; MELVIN E. HARRIS; MARY WOOTEN; EDWARD MEADOWS; CLEVE B. PROVOST, SR.; LELA S. EUBANK; HERBERT CONWAY; ELIJAH RIGGS; FURNEY COLLINS HEIRS; JAMES A. SIMPSON; JOE ED COLLINS; JOHN D. CARROWAY; MACK O. DANIELS; M. O. LaROQUE; NEIL RIGGS; AUGUSTA FRANKS; SPENCER HASKINS, JR.; MARTHA LOUISE AND GLENNIE HASKINS; PRESTON D. REYNOLDS; REX MILLS; WILLIAM E. KORNEGAY; C. V. MILLS; FRANK HOWARD; ALVA B. HOWARD; MARVIN BANKS; EARL F. GREENE; WILLIAM MILLS; NINA T. MILLS; HARVEY KING; J. E. TURNER, JR.; CONRAD JONES; LINWOOD F. COX; CARL KILLINGSWORTH; FRED HILL; ESSIE M. WHITE; B. B. STANLEY; HAZEL H. TURNAGE; PRESTON H. BANKS; LINWOOD B. SCOTT; NANNIE E. SCOTT; H. V. WILSON; RACHEL K. BANKS; ALPHEUS BANKS; BEN LANG; JOHN PARKS, AND HENRY FOSCUE, PETITIONERS v. NORTH CAROLINA PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW; N. D. McNAIRY, CHAIRMAN; WAYNE A. CORPENING, ROBERT C. BLACK, KYLE HARRINGTON AND MRS. E. B. HOWARD, MEMBERS OF THE NORTH CAROLINA PROPERTY TAX COMMISSION SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW, RESPONDENTS

No. 38

(Filed 5 October 1976)

1. Taxation § 25— valuation of property for tax purposes — schedule of values established — property individually appraised

The valuation for tax purposes placed upon property within a county by the county commissioners is arrived at through a two-step

process: (1) initially a schedule of values for property within the county is established and adopted; (2) then, pursuant to this schedule, particular properties are appraised on an individual basis. G.S. 105-317. Any protest of the valuations must be directed to the specific component part with which it is concerned—whether it be the schedule of values or the appraisal.

2. **Taxation § 25— finding that schedule of values attacked — insufficiency of evidence to support**

Evidence was insufficient to support the finding of the Property Tax Commission that a hearing before a county board of equalization and review and petitioners' appeal to the Property Tax Commission were attacks on the schedule of values established by the county commissioners for property in the county and not attacks on the appraisal of the property belonging to petitioners where the only direct evidence before the property Tax Commission bearing on the question was a letter from the county board of equalization and review to one petitioner which denied his request "for a percentage reduction of all farm property" in the county, but the letter was ambiguous with reference to the nature of the requested reduction; moreover, petitioners' notice of appeal to the Property Tax Commission which listed reasons for the appeal made it clear that petitioners were appealing the appraised value placed on their property and not the schedule of values.

3. **Appeal and Error § 7; Taxation § 25— appeal from order of county board of equalization and review — standing to appeal**

Ninety-nine petitioners who tried to join the appeal of twelve petitioners from a decision of the county board of equalization and review prior to a determination by the N. C. Property Tax Commission had no standing to pursue the appeal; the ninety-nine late petitioners should first request a hearing before the county board of equalization and review and then appeal to the Property Tax Commission within thirty days after the county board mails notice of its decision.

PETITIONERS appeal from decision of the Court of Appeals, 29 N.C. App. 324 (1976), upholding judgment of *Hall, J.*, 28 July 1975 Civil Session, WAKE Superior Court.

G.S. 105-286 required Jones County to make an octennial revaluation of real property within the County as of 1 January 1974. Southern Appraisal Company, a private appraisal firm, was employed by the County to assist with the reappraisal. The firm developed uniform schedules of values to be used in appraising the various kinds of property in Jones County and presented them to the Board of Commissioners for approval. The schedules were approved and adopted by the Board on 4 September 1973, and a notice of their adoption was published in the *Kinston Daily Free Press* and the New Bern *Sun-Journal*

on 10 September 1973 and in the Jacksonville *Daily News* on 12 September 1973. The published notice read as follows:

> "On Tuesday, the 4th day of September, the commissioners of the County of Jones approved and adopted schedules, standards and rules to be used in the next scheduled re-appraisal of real property. These schedules are open for examination by any property owner of the County at the office of the Tax Supervisor for a period of ten (10) days from the date of publication of this notice as required by Law (G.S. 105-317(C)).
>
> This 7th day of September 1973.
>
> Julian D. Waller
> Jones County Tax Supervisor"

Apparently no objections to the valuation schedules were received by the Jones County Tax Supervisor during the period they were open for inspection. Thereafter, Jones County proceeded with its revaluation so as to accomplish the task by 1 January 1974.

On 6 May 1974 Donald P. Brock and other unidentified property owners appeared before the Jones County Board of Equalization and Review protesting the values placed on their lands for tax purposes and requested "a percentage reduction of all farm property in Jones County" of at least 25 percent, contending that all farm property in Jones County had been valued in excess of its true market value by at least that amount. Following an informal hearing which was not recorded, this request was denied. On 3 June 1974 petitioners served notice of appeal to the North Carolina Property Tax Commission and on 29 July 1974 made application for a hearing.

On 14 August 1974 Jones County filed with the Property Tax Commission (1) motion to strike certain portions of petitioners' notice of appeal, (2) motion to dismiss appeal and (3) answer to the application for hearing and notice of appeal. On 22 August 1974 Jones County filed a motion to dismiss the appeal of the additional persons whose names were forwarded to the Property Tax Commission by Mr. Brock on 6 August 1974 to be listed as appellants.

A hearing was duly scheduled for 10:30 a.m. on 25 October 1974 in Room 671 of the Revenue Building in Raleigh, and all

interested parties were notified by the Property Tax Commission that "this hearing will be limited to arguments regarding the Motions filed by the County in the case. Each side is being allotted 45 minutes to make its presentation."

Following a plenary hearing on the various motions, the Property Tax Commission concluded that (1) "with the exception of # 2," the County's motion to strike designated portions of petitioners' "notice of appeal and application for hearing" should be allowed, (2) the County's motion to dismiss the appeal of the "additional" appellants should be allowed for that the persons named in that list "have no standing to appeal to the Property Tax Commission since they did not even appeal to the County Board of Equalization and Review," and (3) the County's motion to dismiss the appeal of *all* the appellants should be allowed. Accordingly, it was ordered, adjudged and decreed that "with the exception noted, the County's Motions are allowed and the appeals of all the appellants are dismissed." This final decision of the Property Tax Commission is dated 4 December 1974.

On 3 January 1975 appellants filed exceptions to the final decision of the Property Tax Commission and petitioned the superior court for judicial review. Judicial review was had before Judge Hall at the 28 July 1975 Civil Session, Wake Superior Court, and on 30 July 1975 he rendered judgment affirming the administrative decision of the Property Tax Commission. Petitioners appealed to the Court of Appeals. That court affirmed with Vaughn, J., dissenting. Thereupon petitioners appealed to the Supreme Court as of right, G.S. 7A-30(2).

Brock & Foy by Louis F. Foy, Jr., attorneys for petitioner appellants.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the Property Tax Commission, respondent appellee.

James R. Hood, attorney for Jones County Board of Commissioners and Jones County Board of Equalization and Review, respondent appellees.

HUSKINS, Justice.

Appellants contend the Property Tax Commission erred in dismissing their appeal from the Jones County Board of Equali-

zation and Review. This constitutes petitioners' first assignment of error.

[1] In view of sweeping changes implemented by the 1971 Machinery Act, it is essential to first examine the procedures developed by the Legislature to allow a taxpayer to contest the valuation placed upon his property by the county commissioners. This valuation is arrived at through a two-step process. Initially a schedule of values for property within the county is established and adopted. G.S. 105-317. Then, pursuant to this schedule, particular properties are appraised on an individual basis. G.S. 105-317.

Under separate procedures established by the Legislature, any protest of the valuations must be directed to the specific component part with which it is concerned—whether it be the schedule of values or the appraisal. The 1971 revision of the Machinery Act deliberately separated the two procedures to insure that appeals from the schedule of values would be taken *prior* to the use of those schedules in making appraisals of land. H. Lewis, The Annotated Machinery Act of 1971 (1971).

Appeal of Schedule of Values: After the schedule of values, standards and rules required by G.S. 105-317(b) have been approved and adopted by the board of county commissioners and notice thereof published as required by G.S. 105-317(c), any property owner of the county asserting that the adopted schedules, standards and rules fail to meet the appraisal standards established by G.S. 105-283 may except to the adoption order and appeal *directly* to the Property Tax Commission at any time within 30 days after the date of publication of the adoption order. Such appeal is perfected by filing a written notice thereof with the clerk of the board of county commissioners and with the Property Tax Commission, accompanied by the written statement of the grounds of appeal. G.S. 105-317(c)(1). The appeal procedure thus provided is the exclusive administrative means for challenging the order adopting schedules, standards and rules for the octennial reappraisal of real property for taxation. G.S. 105-317(c)(2).

Appeal of Appraisal: G.S. 105-322 establishes a county board of equalization and review and prescribes its powers and duties. Under that statute the board, upon request made prior to the board's adjournment, must hear any taxpayer who owns or controls taxable property in the county "with respect to the

listing or appraisal of his property or the property of others." G.S. 105-322(g) (2). At such hearing the county board of equalization and review "shall hear any evidence offered by the appellant, the tax supervisor, and other county officials that is pertinent to the decision of the appeal." G.S. 105-322(g) (2)c. On the basis of its decision after such hearing has been conducted, the board "shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal . . . " and shall notify the taxpayer by mail as to the action taken not later than 30 days after the board's adjournment. G.S. 105-322(g) (2)d.

Decisions of county boards of equalization and review and boards of county commissioners with respect to the listing and valuation of property for taxation are appealable to the Property Tax Commission. G.S. 105-324 governs such appeals. Any property owner in the county or member of the board of county commissioners or board of equalization and review may except to any order entered under the provisions of G.S. 105-322 (and other statutes not pertinent here) and appeal to the Property Tax Commission. G.S. 105-324(b). To perfect such an appeal the appellants, within 30 days after the board of equalization and review has mailed the notice of its decision, must file a written notice of appeal and a written statement of the grounds of appeal with the clerk of the board of county commissioners and with the Property Tax Commission. G.S. 105-324(b). If such appeal is timely perfected that Commission must proceed under the provisions of G.S. 105-290(b). G.S. 105-324(b).

When an appeal under this statute has been timely filed and the hearing is before the full Commission, the Property Tax Commission is required to fix a time and place at which the Commission shall hear the appeal after giving 10 days written notice to the appellants and to the clerk of the board of commissioners of the county from which the appeal is taken. "At the hearing the Commission shall hear all evidence and affidavits offered by the appellant and appellee county . . . " and make findings of fact and conclusions of law. G.S. 105-290(b) (2)b.

Any person aggrieved by a final decision of the Property Tax Commission, and who has exhausted all administrative remedies available to him, is entitled to judicial review. G.S. 143-307 (now G.S. 150A-43 et seq.).

We now turn to the task of applying these legal rules and procedures to the facts contained in the record before us.

[2] The Property Tax Commission dismissed the appeal in a final order containing both findings of fact and conclusions of law. The Commission found that both the hearing before the county board and the appeal to the Commission were attacks on the schedule of values and not on the appraisal of the property belonging to petitioners. Based on this finding the Commission concluded that appellants did not avail themselves of the proper procedure to attack the schedule of values and thus were without standing to pursue the appeal. This conclusion must necessarily stand or fall on the correctness of the Commission's finding as to the nature of the appeal. For the reasons which follow we hold this finding to be erroneous.

As to the hearing before the county board of equalization and review: The administrative decisions of the Property Tax Commission, whether with respect to the schedule of values or the appraisal of property, are always subject to judicial review after administrative procedures have been exhausted. *See In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728 (1968); *In re Freight Carriers, Inc.*, 263 N.C. 345, 139 S.E. 2d 633 (1965). When judicial review is sought in superior court on the record made before the Property Tax Commission, as here, the court is bound by the findings if they are supported by competent, material and substantial evidence in view of the entire record as submitted. G.S. 143-315(5) (now G.S. 150A-51(5)). Where the findings are not thus supported the case will be remanded for further proceedings. *See In re Appeal of Broadcasting Corp., supra; In re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E. 2d 855 (1963). A county board of equalization and review operates in a very informal manner. No record is kept and usually little hard evidence exists to indicate the procedures followed. Therefore, appeals to the Property Tax Commission should not be dimissed on technical grounds but only for clear noncompliance with statutory prerequisites.

The only direct evidence before the Property Tax Commission bearing on the question whether appellants in this case were attacking the *schedule of values* or the *appraisal* is the letter from the Jones County Board of Equalization and Review to Donald P. Brock dated 9 May 1974 informing Mr. Brock that the Board had denied his request "for a percentage reduction of all farm property in Jones County appraised in the recent

revaluation." This letter is ambiguous with reference to the nature of the requested reduction, and no record of the hearing before the county board exists to resolve this ambiguity. Other evidence before the Commission is similarly ambiguous on this point. We find no competent, material and substantial evidence in view of the entire record as submitted to support the finding of the Property Tax Commission that the original hearing before the Jones County Board of Equalization and Review was an attack on the schedule of values and nothing more.

As to the appeal before the Property Tax Commission: The notice of appeal by the original eleven petitioners, dated 31 May 1974 and served 3 June 1974, lists, *inter alia,* as reasons for appealing: "That said farm land and woodland has been valued in excess of its true value . . . That in placing said high and excessive values on said lands the appraisal firm either did not take into consideration or did not have information available to them as to the income producing potential, either past, present or future of said farm or woodland and did not visit and check all the lands valued as required by the Statute . . . That in valuing timber lands, if only timber-producing qualities of lands can be used as set out by the North Carolina Statutes, said lands are valued at two and three times its true value . . . That these appellants did not receive a full and adequate hearing before the County Board of Equalization and Review . . . That these appellants request a full and complete hearing before the State Board of Assessments [Property Tax Commission] with the evidence presented, documented and recorded, . . . and that these appellants will be in a position to furnish expert witnesses as to the productivity of the farm land and timber lands in Jones County and to show that the valuations placed by the appraisal firm were far in excess of their true and practical values." In our view the quoted portions of the notice of appeal constitute an appeal on the *appraised value* placed on the property of those eleven taxpayers.

We note that appellants did not offer proof of these allegations at the hearing before the Commission. That hearing, however, was "limited to arguments regarding the Motions [to strike and to dismiss] filed by the County in the case." At such a limited hearing appellants are not required to prove an attack on the appraisal of land; that kind of proof is required at the full hearing *de novo* on the merits as provided in G.S. 105-290(b). At a hearing on the motion to dismiss it is sufficient

to establish an attack on the appraisal of land where allegations are made which, if proven, entitle the taxpayers to relief. As seen from the quoted portions of the notice of appeal, appellants carried this burden.

For the reasons set out we hold that appellants sought to contest the appraisal of land before both the county board and the Property Tax Commission. It appears from the record as submitted, and the appea's procedure as established by the statutes, that appellants followed the correct procedure in perfecting their appeal on the appraisal. We hold therefore that they are entitled to a full hearing *de novo* before the Property Tax Commission on the merits.

[3] Among the petitioners listed in the caption, only the first eleven, to wit: Donald P. Brock; J. K. Warren, Jr.; W. B. Hargett; H. C. Bell; Mary Elizabeth Brock McDaniel; P. Nelson Banks; Harold H. Bate; R. C. Tyndall, Jr.; G. B. Foy; C. C. Jones, Jr., and W. W. Brafford, have standing to pursue this appeal. The ninety-nine landowners listed in the attachment to Mr. Brock's letter dated 6 August 1974 are not entitled to join the appeal en route, and the appeal was properly dismissed as to them. G.S. 105-324 provides that *any* property owner may except to an order of the county board of equalization and review and appeal to the Property Tax Commission. This statutory provision presupposes a ruling by the county board adverse to a taxpayer with respect to the listing or appraisal of his property or the property of others, *after a hearing requested by the taxpayer.* To perfect an appeal from the county board, an appellant must file a written notice of appeal with the clerk of the board of county commissioners and with the Property Tax Commission within 30 days after the county board has mailed notice of its decision pursuant to G.S. 105-322(g)(2)d. Here, the county board mailed its notice on 9 May 1974. Donald P. Brock and ten other landowners gave written notice of appeal dated 31 May 1974 and served 3 June 1974. The other ninety-nine landowners entered the picture on 6 August 1974, well beyond the statutory deadline, when Mr. Brock forwarded their names to the Property Tax Commission with a letter stating that they wished "to join the appeal taken by myself and others in connection with the property reevaluation in Jones County, North Carolina." The law does not permit them to board the train after it has left the station.

G.S. 105-322(g)(2) provides that the county board must, on request, "hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of his property *or the property of others.*" (Emphasis added.) Under this statute, appellants contend that, even should the ninety-nine additional appellants lack standing, the original eleven plaintiffs can and did raise an issue as to the appraisal of all property in Jones County, including that of the ninety-nine.

Appellants rely on several opinions of this Court for that proposition. *See In re Valuation,* 282 N.C. 71, 191 S.E. 2d 692 (1972); *In re King,* 281 N.C. 533, 189 S.E. 2d 158 (1972); *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970). In so relying, appellants misconstrue the thrust of those cases. When examined with respect to the statutes in effect at the time these cases were decided and with respect to the facts of each case, it is clear that the Court permits a property owner to contest the valuation on the "property of others" only where he is in some way aggrieved by that valuation.

On the record in this case, there has been no showing that the original eleven appellants have been aggrieved by the appraisal of the property of the ninety-nine taxpayers listed in the letter of 6 August 1974. Therefore as to that property this appeal is properly dismissed.

Other questions posed in appellants' brief need not be discussed. It suffices to say that the notice of the adoption of the schedules was published in newspapers having general circulation in Jones County, and the publication complied in all respects with G.S. 105-317(c). Questions raised regarding the adequacy of the notice are now moot since petitioners are not attacking the schedules.

Whether the order of the Property Tax Commission striking portions of the notice of appeal is correct or erroneous has no legal significance in relation to this appeal and need not be discussed.

For the reasons stated the decision of the Court of Appeals is reversed. This case is remanded to that court for entry of an appropriate order remanding the case to the Superior Court of Wake County with instructions for further remand to the Property Tax Commission. That Commission, in its capacity as

the State Board of Equalization and Review, shall hear and adjudicate on its merits the appeal of the eleven original petitioners as provided by G.S. 105-290(b).

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLES EARL DUNCAN

No. 11

(Filed 5 October 1976)

1. **Criminal Law § 34— defendant's guilt of other offenses — admissibility of testimony**

Generally, in a prosecution for a particular crime the State, prior to the defendant's taking the witness stand and thus placing his general character and credibility in issue, cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense; however, such evidence may be admissible to identify the defendant as a perpetrator of the crime with which he is presently charged, and it 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.

2. **Burglary and Unlawful Breakings § 4; Criminal Law § 34— defendant's participation in burglary ring — admissibility of testimony**

In a prosecution for burglary in the first degree and common law robbery, the trial court did not err in allowing evidence to the effect that defendant, two witnesses and others were members of a group which, over a period of time, had made it their business to burglarize houses previously identified by leaders of the group as likely to yield substantial loot to thieves.

3. **Criminal Law § 50— identity of diamond — opinion evidence properly admitted**

In a prosecution for first degree burglary and common law robbery, the trial court did not err in allowing the man whose house was burglarized to testify that a diamond shown to have been purchased from the defendant by a State's witness after the burglary was the same diamond taken from the man's wife in the course of the burglary in question, though the court did not determine that the man was qualified to testify as to the identity of the stone, since one need not be an expert in order to be competent to testify that an article seen by him in the courtroom is the same article seen by him on a prior occasion.

APPEAL by defendant from *Friday, J.*, at the 17 September 1975 Criminal Session of WATAUGA.

Upon indictments, proper in form, the appellant was tried and found guilty of burglary in the first degree and of common law robbery. He was sentenced to imprisonment for life in the Central Prison on the charge of burglary and to imprisonment for 10 years in the Watauga County jail on the charge of common law robbery. His defense was alibi.

According to the evidence for the State, Mr. and Mrs. Erwin Sherwin operated at Blowing Rock an art gallery in which they sold jewelry and other like merchandise. They operated a similar business in Florida. On 27 June 1974, they had just returned from Florida to Blowing Rock for the purpose of opening their business there for the summer season. They had brought with them from their Florida establishment a quantity of diamonds for sale in the Blowing Rock gallery in addition to Mrs. Sherwin's personal jewelry. Shortly after 9 p.m., at which time it was dark, Mrs. Sherwin was sitting in her residence alone, Mr. Sherwin having gone to the art gallery to make preparations for opening it for business. A man knocked at the front door of the residence and called to Mrs. Sherwin, saying that he had automobile trouble and desired to use her telephone. Before Mrs. Sherwin opened the door, it was pushed open from the outside and two or more men entered, seized Mrs. Sherwin, threw her to the floor, bound her hands behind her with adhesive tape and put tape over her mouth and eyes. They said they wanted her money and jewelry. Taking Mrs. Sherwin into the bedroom, they placed her on the bed, bound her feet with adhesive tape and covered her with a mattress cover up to her neck. She was able to see under the tape directly ahead of her. For some 20 minutes, the intruders ransacked the house and then departed with jewelry, diamonds and money of an estimated value of $100,000.

Jerry Glenn was also charged with these offenses and the cases against him and Duncan were consolidated for trial. On cross-examination by counsel for Glenn, without objection by Duncan, Mrs. Sherwin testified that at a preliminary hearing, at which Duncan was not present, she identified Glenn as one of the men who had so entered her home and robbed her and that she had also, prior to trial, identified Duncan as one of these men. On cross-examination by counsel for Duncan, she testified that before tape was placed over her eyes she saw the first intruder and, thereafter, she could see under the tape while lying down, as she was required by the intruders to do,

and that her original identification of Duncan was from photographs exhibited to her.

Gary Watkins, presently serving a life sentence for murder, testified for the State that he knew both Duncan and Glenn and had been engaged in stealing operations with them over a considerable period of time. According to him, Duncan and Glenn would get information on residences and pass it to Watkins and his associate, Billy Devine. Thereupon, Watkins and Devine would break into the houses and the four men and their other associates in these activities would divide the proceeds of their burglaries. These activities had extended over North Carolina, South Carolina, Virginia, Georgia and Florida. (For other activities of this group, see *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535, decided by this Court 1 September 1976.)

According to Watkins' testimony, Duncan and Glenn arranged for Watkins and another associate to break into the Sherwin residence, which they did in the manner described in the testimony of Mrs. Sherwin. After they broke and entered and bound Mrs. Sherwin, Duncan came into the house and participated in searching for and in taking the diamonds, jewelry and money. At the time of their arrival at the Sherwin residence, it was raining and dark. Glenn remained in their parked automobile. After leaving the Sherwin residence, the stolen articles were sold and the proceeds divided among the four men. Following the arrest of Watkins and Billy Devine, Duncan and Glenn visited them in jail and offered them $50,000 and assistance in making their escape if they would testify so as to absolve Duncan, Glenn and Hunter from all responsibility for this and other criminal activities carried on by the group. For fear that he would otherwise be killed, Watkins told the police officers that he had perpetrated the Sherwin robbery and did not bring the names of the other men into it.

Billy Devine, also serving a life sentence for second degree murder, testified to the effect that he was part of the group engaged in burglaries and robberies, that he was not involved in the Sherwin burglary but, after he and Watkins had been arrested, they were visited in jail by Glenn and Duncan who offered to pay them $50,000 and to help them escape from jail if they would testify that they had perpetrated the Sherwin robbery and that Glenn and Duncan were not involved in it.

The defendants Glenn and Duncan testified in their own behalf, each denying any participation in the Sherwin robbery and testifying that he was not in the Town of Blowing Rock when it occurred. Alfred and Edward Green, brothers, testified that, following the Sherwin robbery, they had a conversation with Mr. and Mrs. Sherwin in the Watauga County Sheriff's office at which time Mrs. Sherwin demanded to know what the Greens had done with her jewelry and said that they were the men who had been in her residence and she would not make charges against them if they would return the jewelry. Deputy Sheriffs Carroll and Morris also testified that at this conference Mrs. Sherwin so stated. Mrs. Sherwin and Mr. Sherwin testified that she made no such statements.

A diamond ring, found by investigating officers in the possession of Jerry Howell, was offered in evidence by the State. Howell testified that he purchased the diamond "in a white mounting" from Duncan and thereafter changed the diamond to a different setting. The diamond was identified by Mr. Sherwin, found by the court to be qualified "to give an opinion as to the weight of the stone," as one of the diamonds taken by the burglars from his residence. The diamond stolen from Mrs. Sherwin was in a white gold setting at the time it was so taken.

Rufus L. Edmisten, Attorney General, by John M. Silverstein, Special Deputy Attorney General, for the State.

Robert F. Rush for defendant.

LAKE, Justice.

The appellant's principal contention on this appeal is that the trial court erred in allowing the State's witnesses, Watkins and Devine, to testify, over objection, concerning their associations with the appellant in other criminal activities, specifically their collaboration with him in a series of unspecified breakings, enterings and stealings extending throughout North Carolina, South Carolina, Virginia, Georgia and Florida over a period of two years prior to the breaking and entering of the Sherwin home. There is no merit in this assignment of error.

[1] The general rule is that in a prosecution for a particular crime the State, prior to the defendant's taking the witness stand and thus placing his general character and credibility in issue, cannot offer evidence tending to show that the accused has

committed another distinct, independent, or separate offense. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). However, as there noted, numerous exceptions to this rule are also well established. One is that such evidence may be admissible to identify the defendant as a perpetrator of the crime with which he is presently charged. Another is that such 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.

[2] The evidence here in question was to the effect that the appellant, the two witnesses and others were members of a group, which, over a period of time, had made it their business to burglarize houses previously identified by leaders of the group as likely to yield substantial loot to thieves. In *State v. Grace,* 287 N.C. 243, 213 S.E. 2d 717 (1975), as here, the defendant's defense was alibi. We held that evidence of prior similar offenses committed in conjunction with the witness was competent as tending to establish a common plan or scheme and also was competent on the question of identity.

In *State v. Stancill,* 178 N.C. 683, 100 S.E. 241 (1919), the defendant was indicted for larceny of tobacco from the barn of one Little. A witness for the State was permitted to testify that the defendant had participated in a theft of tobacco from the barn of one Wilkinson. The Court, speaking through Justice Walker, said:

> "The testimony as to the theft of the Wilkinson tobacco was offered merely to show the intent with which the defendants stole this tobacco and not to prove the accusation substantively. It was sufficiently connected with the main charge to render it competent for this purpose. It was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. It was but a part of a series of transactions carried out in pursuance of the original design, and it was contemplated by them in the beginning, that they should plunder the tobacco barns in the neighborhood, and this was one of them. The jury might well have inferred this common purpose from the evidence. Robbing Wilkinson was part of the common design, and done in furtherance of it. Proof of the commission of other like offenses

to show the *scienter*, intent, or motive is generally competent when the crimes are so connected or associated that this evidence will throw light upon that question."

In *State v. Simons*, 178 N.C. 679, 100 S.E. 239 (1919), the Court, speaking through Chief Justice Clark, said:

> "There are offenses which are committed in sudden temper, or under violent provocation, or by the impulse of passion. As to these, the only competent evidence is what took place at the time. *S. v. Norton*, 82 N.C. 630. But the crime of illicit dealing in intoxicating liquor is in the same class with larceny, counterfeiting, forgery, obtaining money under false pretenses, and burglary, which are all committed with deliberation, in defiance of law, and for the ignoble motive of making a profit thereby. In all such cases it is competent to prove intent by showing matters of like nature, before or after the offense."

Evidence of prior offenses was likewise held competent in *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535, decided by this Court 1 September 1976. See also: *State v. Smoak*, 213 N.C. 79, 90, 195 S.E. 72 (1937); *State v. Flowers*, 211 N.C. 721, 192 S.E. 110 (1937); *State v. Batts*, 210 N.C. 659, 188 S.E. 99 (1936); *State v. Miller*, 189 N.C. 695, 128 S.E. 1 (1925).

[3] There was no error in permitting Mr. Sherwin to testify that the State's Exhibit No. 1, a diamond shown to have been purchased from the defendant by the State's witness Howell after the Sherwin burglary, was the same diamond taken from Mrs. Sherwin in the course of the burglary here in question. The contention of the defendant is that Mr. Sherwin, a dealer in diamonds for many years, was found by the court to be competent to testify as to "an opinion as to the weight of the stone," which qualification would not permit him to testify as to the identity of the stone. There is no merit in this contention.

One need not be an expert in order to be competent to testify that an article seen by him in the courtroom is the same article seen by him on a prior occasion. Difficulty of identification, inherent in the nature of the article, ordinarily would go only to the question of the weight to be given such evidence by the jury. In the present case, Mr. Sherwin's identification of the diamond introduced in evidence as State's Exhibit No. 1 was based in part upon its size, weight, color, and cut but pri-

marily upon his observing thereon a scratch which he had previously noted on the diamond in possession of his wife prior to the burglary. See: *State v. Bridgers*, 267 N.C. 121, 147 S.E. 2d 555 (1966); Stansbury, North Carolina Evidence, Brandis Revision, § 129.

A number of assignments of error made by the defendant are listed in his brief but no authority is cited and no argument made in support thereof. These assignments are deemed abandoned. Rule 28(a), Rules of Appellate Procedure, 287 N.C. 741.

The defendant assigns as error the action of the District Attorney in propounding certain questions to the State's witnesses Watkins and Devine and to the defendant himself on cross-examination. The record discloses that in each instance, save two, in which neither the question nor the answer elicited thereby was prejudicial, the court sustained the defendant's objection and, in one instance, instructed the jury to disregard the question and not consider it in the deliberations of the jury. No further ruling of the court with reference to these questions was requested by the defendant. We find no merit in this assignment of error.

There was no error in permitting the State's witness Watkins to testify on redirect examination that, after his arrest, he wrote certain letters, about which he was interrogated by the appellant's counsel on cross-examination, because he feared that otherwise it would be known that he intended to testify for the State and, to prevent him from doing so, he would be killed.

Our examination of the entire record shows no error prejudicial to the defendant. The evidence is ample, both as to the nature of the offense committed and as to the appellant's participation therein, to support the verdict.

No error.

STATE OF NORTH CAROLINA v. JAMES ALEXANDER PARKS

No. 27

(Filed 5 October 1976)

1. **Constitutional Law § 30; Habeas Corpus § 1— handwritten motion — request for habeas corpus**

Defendant's handwritten motion alleging that the charge against him was unsupported by any evidence and was the result of a partial police department and requesting a dismissal of the charge or a reduction of bail was not a motion for a speedy trial but was a request for habeas corpus relief.

2. **Habeas Corpus § 2— lack of hearing on motion — waiver of objection**

The issue of lack of hearing upon defendant's motion for habeas corpus to determine the legality of his restraint or to reduce his bail was waived where defendant made no objection at his trial to the lack of a hearing and made no request for a hearing, but the issue was raised for the first time in the Court of Appeals.

3. **Assault and Battery § 15— intent to kill — necessity for definition**

In the absence of a special request for instructions from the defendant, the presiding judge is not required to define "intent to kill"; however, when he does undertake to define the term, he must do so correctly.

4. **Assault and Battery § 15— intent to kill — erroneous instruction**

In this felonious assault prosecution, the trial court's instruction permitting the jury to find an intent to kill solely from the proof of defendant's commission of an unlawful act constituted prejudicial error.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 28 N.C. App. 703, 222 S.E. 2d 729 (1976), which found no error in the trial before *Snepp, J.*, at the 9 June 1975 Session of MECKLENBURG Superior Court.

On an indictment, proper in form, defendant was tried and convicted on a charge of an assault with a deadly weapon with intent to kill inflicting serious injury upon Barry W. Worley. Defendant was sentenced to twenty years in prison.

This case arises from an incident occurring in the parking lot of the Charlotte Memorial Stadium during a rock concert held on 13 July 1974. At approximately 5:00 p.m. on that day, Barry Worley, a Charlotte Parks and Recreation Department police officer, was on duty with Walter Dunn, a Charlotte police officer, and was supervising Gate 5 leading into the stadium.

Mr. Worley testified that while he was patrolling the area of Gate 5, he observed three black males walking around outside the stadium. As these men passed Worley and Dunn, one of them, later identified as defendant, cursed and stated that he should cut the officers' "pig . . . guts out." The two officers decided that these men should be "checked out."

The three men had entered a tunnel under Independence Boulevard which led to the stadium parking lot. Mr. Dunn followed the males into the tunnel. Mr. Worley ran across Independence Boulevard and met two of the men as they were exiting the tunnel. As he began to question these two, Mr. Worley was struck by a bullet in the right lower chest. He spun around and saw a black male who then shot him four more times. As a result of the wounds inflicted, Mr. Worley is paralyzed from the waist down.

Officer Dunn testified that as he reached the end of the tunnel opening into the parking lot, he observed Mr. Worley speaking with two of the three black males. He heard a loud report and saw defendant firing a pistol at Mr. Worley. Defendant then ran through the parking lot. Mr. Dunn was unable to apprehend him.

Mr. Charles Edward Twilley was in the parking lot at the time of the shooting and testified that as he was going from his car to the tunnel, he observed Mr. Worley speaking to a black male. Mr. Twilley stated that he heard a gunshot, turned and saw defendant fire four or five more shots at Mr. Worley. After the shots were fired, defendant ran through the parking lot. Shortly thereafter, defendant was apprehended in an alley several blocks from the scene of the shooting.

Defendant testified in his own behalf. He stated that an officer told him to get away from the fence around Memorial Stadium, and he then went into the tunnel to go to the parking lot. As he exited the tunnel, a police officer struck him very hard with a billy stick. After being struck, he began running from the parking lot. As he was running, he heard several gunshots. Defendant further stated that he fired no shots and that he did not own a gun.

Further facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Acie L. Ward for the State.

John H. Hasty for defendant appellant.

MOORE, Justice.

Defendant contends in his first assignment of error that the lower court committed reversible error in failing to hold a hearing upon a motion filed by defendant on 9 May 1975. This motion, drafted by defendant while in jail awaiting trial, stated (in his own words and spelling):

"To the Honorable Cliffton Johnson. Judge in Superior Court of Mecklenburg County.

Your Applican respectfully shows unto your Honor,

I. Your Applican is at present imprisoned and restrained of his liberty in the Mecklenburg County Jail in the County of Mecklenburg in the State of North Carolina by the Responden Sheriff Donald Stahl by virtue of orders imposed by the Respondent and by the Superior Courts of Mecklenburg County pursuant to the Constitutional Amendment violation of 6th, 8th and 14th.

II. Your Applican motion for a Dismissal on the grounds that this charge brought against him are unwarranted without proper evidence and witness applicant is innocent of the unfounded charged and warrant alleged against him by a partial Police Department that is over anxious to solve cases and to apprehend individual regardless of their innocences. Your Applicant complaines that he have been incarcerated since 7-13-74 to his belief and knowledge for A.D.W.I.K.

III. Right were never read to Applicant and counsel was not given benefit of being present at questioning upon arrest or at investigation.

Your Applicant request that the Courts take his Bond in consideration and kindly give him a reduction. Bond now is very much to expensive.

Your Applicant prays unto the Courts, that this dismissal or bond reduction be granted on some or all the following remedies presented by your Applicant.

Respectfully submitted
This 9 day of May, 1975
s/ JAMES A. PARKS"

The motion was forwarded by Judge Johnson, a district court judge, to Judge Snepp in the superior court.

On 16 May 1975, Judge Snepp entered an order stating "that petition presents grounds for determination upon review under habeas corpus." The order also commanded the sheriff to bring defendant before the Superior Court of Mecklenburg County on 21 May 1975 or as soon thereafter as possible. A copy of the order was to be sent to defendant, his privately retained attorney, the district attorney and the judge presiding over the 21 May session of court. There is no indication in the record of a hearing being held in the matter nor of any further action being taken by defendant.

[1] On appeal to the Court of Appeals, and in this Court upon discretionary review, defendant contends that his motion is a request for a speedy trial. We are unable to ascertain any ground upon which this motion could be construed as requesting a speedy trial. There is no request to be brought to trial contained anywhere in the motion. Rather, defendant alleges in his motion that the charge against him is unsupported by any evidence and is the result of a partial police department. Defendant then requests a dismissal of the charge or, in the alternative, a reduction in the amount of bail.

We feel that Judge Snepp's characterization of defendant's motion as a request for habeas corpus relief was correct. Habeas corpus is the proper method by which a prisoner may challenge his incarceration as being unlawful. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962). Further, a prisoner may be admitted to bail in a habeas corpus proceeding if the trial judge determines that the prisoner is so entitled. G.S. 17-35. *See also State v. Herndon*, 107 N.C. 934, 12 S.E. 268 (1890). In instant case, defendant alleged that he was being unlawfully restrained of his liberty and requested a dismissal of the charge against him or a reduction in bail. Under the principles stated above, defendant's allegations constituted a request for habeas corpus relief.

We are, therefore, confronted with the issue of whether the lack of a hearing upon defendant's request for habeas corpus constitutes reversible error. In *State v. Gaiten,* 277 N.C. 236, 239, 176 S.E. 2d 778, 781 (1970), we held:

> " . . . [A] defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. [Citations omitted.]"

A corollary to this rule is that, generally, in order for an appellant to assert a constitutional or statutory right in the appellate courts, the right must have been asserted and the issue raised before the trial court. Further, it must affirmatively appear on the record that the issue was passed upon by the trial court. *City of Durham v. Manson,* 285 N.C. 741, 208 S.E. 2d 662 (1974); *State v. Braswell,* 283 N.C. 332, 196 S.E. 2d 185 (1973); *State v. Cumber,* 280 N.C. 127, 185 S.E. 2d 141 (1971); *accord, Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953).

[2] In the case at bar, there is no indication that the issue of the lack of a hearing on defendant's motion was raised or passed upon by the trial court. Defendant was personally present in court on the first day of trial and did not mention the lack of a hearing on his motion. Defendant's retained counsel at trial made no objection to the lack of a hearing nor did he request one at any time. The first instance of the issue being raised was in the Court of Appeals. This is too late. We hold that the issue of the lack of a hearing upon defendant's motion for habeas corpus was waived.

The defendant further contends that the trial judge committed reversible error in defining "intent to kill" in his instructions to the jury. In his charge, the trial judge instructed the jury that they could return one of the following verdicts: guilty of assault with a deadly weapon with intent to kill inflicting serious injury; guilty of assault with a deadly weapon inflicting serious injury; guilty of assault with a deadly weapon with intent to kill; or not guilty. The trial judge then instructed the jury that in order to find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove beyond a reasonable doubt: (a) that defendant acted intentionally; (b) that he used a deadly weapon; (c) that defendant had the specific intent to kill; and,

(d) that defendant inflicted serious bodily injury upon his victim.

[4] In defining intent to kill, under part (c) above, the trial judge stated:

> "By intent to kill, it means that no special intent is required beyond the intent to commit an unlawful act which may be inferred from the nature of the assault and the attending circumstances."

Later in the charge, the trial judge instructed the jury that if they found from the evidence beyond a reasonable doubt that on 13 July 1974 defendant intentionally shot Mr. Worley intending to kill him and did seriously injure him, that it would be the duty of the jury to return a verdict of assault with a deadly weapon with intent to kill inflicting serious injury. Here, however, the trial judge did not attempt to define "intent to kill."

[3] In *State v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10 (1949), the trial court did not define the term "with intent to kill." Defendant there assigned this as error. In overruling this assignment, Chief Justice Stacy said: "The jury could hardly have failed to understand what was meant by the expression 'with intent to kill.' It is self-explanatory. There is no point in elaborating the obvious." Thus, the rule has developed that in the absence of a special request for instructions from the defendant, the presiding judge is not required to define "intent to kill." The meaning is obvious and no explanation is necessary. *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970). However, when a trial judge undertakes to define a term, he must do so correctly. *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322 (1950); *State v. Hale,* 231 N.C. 412, 57 S.E. 2d 322 (1949).

In *State v. Allison,* 256 N.C. 240, 243, 123 S.E. 2d 465, 467 (1961), this Court stated:

> " . . . We have consistently held that conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury. *S. v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143; *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. Isley,* 221 N.C. 213, 19

S.E. 2d 875; *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; Strong's N. C. Index, Vol. IV, Trial, p. 334."

The quoted portion of the charge in the present case is clearly erroneous. The instruction that a person is presumed to intend the natural consequences of his act is proper only in those cases wherein a specific intent is not an element of the crime. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93 (1950). However, where a specific intent to do an act is an element of a crime, the State has the burden of proving the specific intent beyond a reasonable doubt. *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972). Ordinarily, a specific intent to do an act is shown by the proof of facts and circumstances from which such an intent may be inferred. *State v. Thacker, supra; State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956).

[4] In the case at bar, a specific intent to kill was a necessary element in the proof of two of the assaults charged upon by the trial judge. Further, it was the distinguishing characteristic between two of the assaults and the lesser offense of assault with a deadly weapon. The quoted portion of the charge permitted the jury to find the requisite intent to kill solely from the proof of defendant's commission of an unlawful act. This is prejudicial error and entitles defendant to a new trial.

In justice to the learned and experienced trial judge, we deem it proper to say that we believe the error in the charge may have been an error in taking and transcribing the charge, or "one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit." *State v. Simpson,* 232 N.C. 438, 442, 64 S.E. 2d 568, 571 (1951). However, the error appears in the record and also in the original transcript of the trial, and we are bound by it. *State v. Gause,* 227 N.C. 26, 40 S.E. 2d 463 (1946).

Other assignments of error may not recur in the next trial, and we deem it unnecessary and inappropriate to discuss them at this time.

For the reasons stated above, the case is remanded to the North Carolina Court of Appeals with direction that it remand the case to the Superior Court of Mecklenburg County for a new trial in accordance with this opinion.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM ALPHONSO FINNEY

No. 33

(Filed 5 October 1976)

Narcotics § 4— marijuana in apartment — constructive possession — insufficiency of evidence

The evidence was insufficient to support a jury finding that defendant was in constructive possession of marijuana found during the search of an apartment where: the State's evidence tended to show that defendant had leased the apartment, that letters and bills in the apartment indicated defendant had not been present there for the previous 44 days, that on the night of the search another person appeared on the scene with a key to the apartment on his person, and that one of the two bedrooms of the apartment did not appear to have been lived in for some time; defendant testified he had sublet the apartment to the person who appeared with the key; and such person testified that all of the marijuana found in the apartment belonged to him and not to defendant.

APPEAL by defendant as a matter of right under G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 29 N. C. App. 378, 224 S.E. 2d 263 (1976) (Vaughn, J. dissenting), finding no error in judgment of conviction by *Long, J.*, entered 16 October 1975, FORSYTH County Superior Court.

Defendant was tried under an indictment charging him with felonious possession of a controlled substance, to-wit, marijuana.

The evidence for the State tended to show that on 28 July 1974, at about 1:00 a.m., Winston-Salem Police Officers, pursuant to a valid search warrant, searched Apartment C, 820 W. Seventh Street, Winston-Salem. In the search, the officers discovered a bag of marijuana, two pipes, a set of scales, three hundred brown envelopes used for packaging marijuana, several hand-rolled cigarettes which contained a green vegetable material, and a driver's license registered to Vernard Rapley, all of these being found in the north bedroom of the apartment. In the bedroom on the south side of the apartment were found seven brown bags containing marijuana (in a closet), a number of bills, receipts, letters, and other papers bearing defendant's name, a large box filled with dirt, a chair, some old clothes piled in a corner, and a small work bench on which the papers were

located, but no bed. None of the papers or letters with the defendant's name thereon were dated later than 14 June 1974.

The lease of Apartment C had been in the defendant's name since 1967. Defendant was arrested on 15 September 1974 at Apartment A of the same address. Defendant was not present at the time Apartment C was searched and no evidence was offered as to when the defendant had last been in the apartment other than that which could be infered from the letters and bills found in the south bedroom on which defendant's name appeared.

While the search was in progress, Vernard Rapley came in the back door of the residence, after unlocking the door with a key. He was searched and a key to the apartment found in his possession. Upon being advised that he was under arrest, Rapley went to the bedroom on the north side and got some cigarettes, a pair of shoes, and some small papers he wanted to take with him to the police station. Subsequently, Rapley was convicted of felonious possession of marijuana resulting from this search.

Some bags of marijuana, weighing approximately seven pounds were delivered to Mr. Garland Nelson, Assistant Toxicologist, North Carolina Baptist Hospital. An expert in the field of chemical drug analysis, including marijuana, Mr. Nelson determined that the bags contained marijuana. Each of the bags containing the marijuana delivered to the toxicologist was marked "Rapley's bedroom" when received. No other markings were on the bags.

The defendant's evidence tended to show that he had not lived in Apartment C since 14 June 1974 when he went to Florida. He testified that he had paid the rent in full up to that date and had turned the key to the apartment over to Vernard Rapley. Rapley testified all the marijuana found in the apartment belonged to him. Defendant also offered the testimony of a witness who had seen him in Florida and evidence that he had deposited money in a bank in Chicago and later withdrawn it on 27 July 1974. In short, defendant's evidence is to the effect that he sublet the apartment to Vernard Rapley and sold the remaining household furnishings to him on 14 June 1974. In rebuttal, the State offered evidence tending to show that Vernard Rapley had made a prior inconsistent statement concerning ownership of the marijuana in the apartment.

Defendant's motion for a nonsuit at the end of the State's evidence and at the close of all the evidence was overruled.

The jury found the defendant guilty as charged and sentence was duly imposed by the trial judge.

Attorney General Rufus L. Edmisten by Associate Attorney Joan H. Byers, for the State.

Richard C. Erwin, for the defendant.

COPELAND, Justice.

The only error assigned by the defendant is the trial court's denial of his motion for judgment of nonsuit made at the close of the State's evidence and at the close of all the evidence. We believe the motion made at the close of all of the evidence should have been allowed.

Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. When there is sufficient evidence, direct or circumstantial, by which the jury could find that the defendant had committed the offense charged, then the motion should be denied. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 2 Strong, N. C. Index 2d, Criminal Law, § 106 at 654.

In this case the State relied completely upon circumstantial evidence. In order to withstand a motion for nonsuit, there must be substantial evidence of all the essential elements of the offense charged "[b]ut evidence which raises no more than a surmise or conjecture of guilt is insufficient to overrule nonsuit. . . " 2 Strong, N. C. Index 2d, Criminal Law, § 106 at 655. *See also State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976).

This Court has considered several controlled substance cases in recent years. In each of these cases possession of the controlled substance was an essential element of the offense charged. Justice Branch spoke for our Court in *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); and *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971).

In *Harvey, supra,* he said:

"An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion . . . for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' " [Citations omitted.] *State v. Harvey, supra* at 12-13, 187 S.E. 2d at 714.

In *Harvey, supra,* the facts indicated that the defendant was found alone in a room in his home some three or four feet from the marijuana. Our Court held that this evidence supported the reasonable inference that the marijuana was in defendant's possession.

In *Allen, supra,* the facts disclosed that the defendant had been present at the premises on which the heroin was found and from which it had been sold one day prior to the search, that the utilities were listed in the defendant's name, and that an Army identification card and other personal papers bearing the defendant's name were found in the master bedroom. In addition, there was testimony that the heroin discovered in the master bedroom belonged to the defendant and was being sold by a minor child as defendant's agent and at his direction during the defendant's absence. The Court concluded that the heroin which was seized and purchased at the place where these personal papers were found was subject to the defendant's dominion and control and that it was proper to deny a nonsuit motion.

In *Spencer, supra,* this Court held that evidence that the defendant had been seen on numerous occasions in and around a pig shed where marijuana was found, this shed being located some 20 yards from the defendant's residence, together with evidence that some marijuana seeds were found in defendant's bedroom, led to a reasonable inference that defendant exercised custody and control over the pig shed and the marijuana found therein.

In a recent case before our Court, *State v. Minor,* 290 N.C. 68, 224 S.E. 2d 180 (1976), the evidence revealed that the property on which marijuana was growing had been leased by a co-defendant and that the defendant had been a visitor at an abandoned house on the property leased by the co-defendant. The marijuana field was located 100 feet away from the house, obscured by a wooded area and accessible by three different routes. At the time of arrest, the defendant was a passenger in the front seat of an automobile owned and operated by the co-defendant which was stopped by police officers a short distance from the house and marijuana field. Marijuana leaves were found on the left rear floorboard and in the trunk of this automobile. Our Court held that under a charge of possession of marijuana for the purpose of distribution, and manufacturing and growing marijuana, nonsuit should have been allowed.

The facts of our case are substantially weaker than and distinguishable from those of *Harvey, supra; Allen, supra;* and *Spencer, supra.* About all the evidence shows is: (1) The lease to the defendant had been in existence for about seven years. Defendant testified that he had paid the rent through 14 June 1974 and vacated the apartment. (2) When the search was made on 28 July 1974, records in the apartment disclosed that the defendant had not been present there for the previous 44 days. (3) On the night of the search Vernard Rapley appeared on the scene with a key to the apartment on his person. Defendant's evidence tended to show the apartment was sublet to Rapley and a key to the apartment delivered to him on 14 June 1974 before the defendant departed for Florida. (4) The bedroom on the south side did not appear to have been lived in for some time. (5) The toxicologist who identified the vegetable material delivered to him as marijuana, testified that the bags containing the contraband each had an identifying symbol, "Rapley's bedroom" and that there were no other identifying marks on the bags. (6) At the time of the trial, Rapley was serving a sentence for the felonious possession of marijuana in the same apartment and testified that all the marijuana therein belonged to him.

The Court of Appeals relied heavily on an earlier opinion of that Court, *State v. Wells,* 27 N.C. App. 144, 218 S.E. 2d 225 (1975), in affirming the instant case. The facts in that case disclosed that the officers searched the premises on 11 August 1974 and found a controlled substance, commonly called

MDA, in a bedroom of a two bedroom apartment. No one was present at the time the search was conducted. The defendant had rented and paid the rent on the apartment for the months of July and August 1974. He and his two brothers had been seen in the apartment on several occasions prior to the search, and the defendant had been seen there three days before. A letter from Duke Power Company to the defendant was found in the apartment dated 26 July 1974. The contraband was found within one foot of this letter. The facts in *Wells* are distinguishable from those in our case.

In *Wells,* the defendant had been seen on the premises many times, most recently three days before the search; defendant Finney had not been seen at Apartment C for 44 days prior to the search. There was no evidence of subletting in *Wells.* Not only was there testimony in the instant case that defendant had sublet his apartment, his bedroom appeared to have been abandoned. In *Wells* there was a letter addressed to the defendant lying within one foot of the controlled substance. The marijuana in this case was discovered in a closet across the room from where the papers bearing defendant's name (all dated prior to defendant's departure) were found. Finally, Rapley, who was in actual possession of Apartment C at the time of the search, testified that he owned all the marijuana discovered in the apartment. In *Wells* there was no similar testimony on the part of anyone in possession of the apartment. The differing facts prevent *Wells* from being determinative. Judge Vaughn was a panelist in both cases. Significantly, he voted with the majority in *Wells* and dissented in this case.

The case of this Court which appears to be closest on its facts to the case at bar is *State v. Hunt,* 253 N.C. 811, 117 S.E. 2d 752 (1961). In that case involving non-taxpaid liquor the defendant had not been at his residence for 2 days. At the time of the search defendant's brother-in-law was intoxicated on the porch. Defendant's wife and brother-in-law testified that they bought the liquor and that the defendant had no knowledge of it. In that case we held the evidence was insufficient to show either actual or constructive possession of the illegal liquor by the defendant and a nonsuit should have been granted.

All the State has shown is that defendant Finney was in the apartment some 44 days before the search and that his name appeared on the lease at the time of the search. If the

marijuana had been present 44 days earlier, defendant was at a place where he could have committed the crime charged. "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor, supra* at 75, 224 S.E. 2d at 185. The trial judge should have allowed the motion for judgment as of nonsuit at the close of all the evidence. The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. BOBBY W. GRESHAM

No. 26

(Filed 5 October 1976)

1. **Criminal Law § 122— instructions urging jury to agree**

It is not error for the trial judge to instruct the jury additionally that the trial of a case involves heavy expense to the county and that it is the duty of the jury to continue its deliberations and to attempt to reach an agreement; nor is it error for the trial judge to instruct that so far as he knows all available evidence is before them for their consideration.

2. **Criminal Law § 122— second instruction urging jury to agree — failure to instruct not to surrender convictions**

While it is the better practice for a trial judge on each occasion that he urges the jury to agree on a verdict to emphasize in clear and understandable language that no member of the jury should surrender his conscientious convictions in order to reach a verdict, failure of the trial judge to do so when he gave the jury additional instructions for a second time did not constitute prejudicial error where approximately one hour before the second additional instructions were given, the judge had twice told members of the jury that they should reconcile their differences only if they could do so without surrender of their individual conscientious convictions.

DISCRETIONARY review of the decision of the Court of Appeals, 28 N.C. App. 730, 223 S.E. 2d 410, finding no error in the trial before *Judge Perry Martin* at the 26 May 1975 Session, ONSLOW Superior Court.

Defendant was charged with felonious breaking and entering and larceny. The State relied primarily on the testimony of Michael Glass, an alleged accomplice. Glass testified that at about 8:30 p.m. on 22 March 1975, he and several others were

at defendant's residence. Glass, John Harris, and defendant drove to the town of Hubert in defendant's car. Upon finding an apparently unoccupied house, Glass broke a window and obtained entry into the house. The three entered the house and defendant took a 12-gauge shotgun and the others took clothes, jewelry, a camera and a television set. As they left the house, a car pulled into the driveway. Glass and Harris ran around the house and hitchhiked back to defendant's house. They there found defendant with the stolen shotgun. Defendant sawed the barrel off the shotgun on the following day and a police officer later found the barrel of the shotgun in defendant's house.

Defendant testified that he had nothing to do with the theft. He stated that on the night of 22 March 1975, there were several people in his home. He loaned his car to John Harris but at no time did he (defendant) leave the house. Defendant offered several witnesses who corroborated his statement that he had not left the house on the night of 22 March 1975.

The jury returned verdicts of guilty as to each charge. Defendant appealed from judgment imposing a sentence of ten years "as a committed youthful offender."

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Edward G. Bailey for defendant appellant.

BRANCH, Justice.

The single question presented by this appeal is whether the trial judge's additional instructions coerced the verdict of the jury.

The jurors returned to the courtroom about one hour after the case had been submitted to them and through their foreman indicated that they had been unable to reach a unanimous verdict and that the numerical division among the jurors was ten to two. At that time, the trial judge charged:

> COURT: Be seated, please. Ladies and gentlemen of the jury, I presume that the twelve of you realize what a disagreement means. In the Court's opinion you have not been deliberating for an unreasonable length of time for this case, not over an hour and fifteen minutes at the most. Stating that you have been unable to arrive at a verdict

means, of course, that if this case is not tried, it will be another week of court that will have to be consumed for the trial of this case again. I'm not making an effort to force your or to coerce you in any way to reach a verdict, but it is my duty to tell you that it is the duty of the jurors to try to reconcile their differences and reach a verdict if they can do so without surrender of their conscientious convictions. And, as I originally told you, it is not well for a juror to take an adamant position at the commencement of the deliberations for which they say they will not recede under any circumstances after consulting with the other members of the jury. A jury is a deliberative body.

You have heard the evidence in this case. You have had the benefit of all the evidence and you have heard the arguments and contentions of the attorneys. If this Court is required to declare a mistrial, it will mean that another jury will have to be selected to hear this case and this evidence again and to ultimately decide the very thing that it is your responsibility to decide at this time, if you can do so.

I recognize, of course, that there are times when individual jurors cannot agree. I want to emphasize the fact that it is the duty of the jurors to do whatever they can to resolve their differences as reasonable men and women and to reconcile them to the end that they arrive at the truth as a composite body and to reach a verdict, if you can possibly do so without violence to your individual judgment and conscience.

I remind you again, ladies and gentlemen of the jury, that your decision in this case is not to be based on sympathy, bias or prejudice, but is to be based upon the evidence that you have heard under oath which you believe and the Court's charge as to the law.

You may retire and continue your deliberations.

At 6:30 p.m., approximately one hour later, the court asked that the jury be returned to the courtroom. The jury returned and in response to the court's inquiry the jury foreman indicated that no progress had been made toward reaching a unanimous verdict. After stating to the jurors that so far as he knew they had the benefit of all available evidence and that failure to

reach a verdict would require another trial at added expense to the County, Judge Martin stated:

> I am asking you as a jury of twelve to consider the views of all the members of the jury. I might say to you, ladies and gentlemen of the jury, there is no reason to hurry in this case. Today is only Thursday. You can take as much time as you desire in this matter and deliberate and discuss the case as long as you desire. If you become hungry, we will sit down for food. If you become sleepy, we will rest. I want to emphasize the fact that it is the duty of the jurors to do whatever they can reason the matter all together as reasonable men and women and to reconcile their differences.
>
> Ladies and gentlemen of the jury, I will let you retire and resume your deliberations.

The jury retired and on the same evening returned its verdicts. The record does not reveal the hour at which the verdicts were returned.

[1] This Court has held that it is not error for the trial judge to additionally instruct a jury that the trial of a case involved heavy expense to the County and that it was the duty of the jury to continue its deliberations and to attempt to reach an agreement. *State v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552. Nor is it error for the trial judge to instruct the jury that so far as he knows all available evidence is before them for their consideration. *State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85, *cert. denied,* 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198. Our Court has also ruled that a statement contained in an additional instruction that "we have until Friday night for you to work on this case and no reason to hurry the matter" was not coercive but was merely an assurance that the jury had ample time to deliberate. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652. The essence of both of Judge Martin's additional instructions was that it was the duty of the jury to reach a verdict and their failure to do so would result in a retrial of the same cause at heavy expense to the County. In his charge, he assured the jury that they had ample time to deliberate. We see nothing in the additional instructions which intimates what verdict the judge thought was proper or deprived the jurors of "that freedom of thought and of action so very essential to a calm, fair and impartial consideration of the case." *State v. Windley,* 178 N.C.

670, 100 S.E. 116. However, defendant contends that the vice in the additional instructions is that Judge Martin in his second additional instruction to the jury failed to instruct that no member of the jury should surrender his conscientious convictions in order to reach a verdict.

We deem it necessary to review authorities which have considered this narrow question.

The landmark case of *Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154, in pertinent part states:

> The seventeenth and eighteenth assignments were taken to instructions given to the jury after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions. These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. . . .
>
> * * *
>
> . . . There was no error in these instructions.

Defendant, in part, relies upon the case of *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767, as support for his contention that the verdict of the jury was coerced by the trial judge's instructions. In *McKissick*, the trial judge recalled the

jury after it had deliberated for several hours and thereafter instructed as follows:

> "Well, members of the jury, a Judge cannot discharge a jury lightly. You must consider this case until we have exhausted every possibility of an agreement.
>
> "I presume you realize what a disagreement means. It means that this case will have to be retried at further expense.
>
> "I do not want to force or coerce you into agreement and could not if I wished to so do. But still it is your duty as intelligent men and women to consider the evidence, reason the matter over among yourselves and come to an agreement.
>
> "A mistrial is always a misfortune in any case or to any County.
>
> "Jurors, if they cannot render a verdict, are entirely useless.
>
> "It is the duty of jurors, if possible, to render a verdict and I hope you can retire and consider the matter further, reason with each other as intelligent men and women and come to an agreement. You may retire."

The Court, emphasizing the language of the second sentence in the above-quoted instruction, held that the instruction might reasonably be construed by the minority members of the jury as a coercive instruction which suggested that they surrender their conscientious convictions in deference to the views of the majority. In granting a new trial, the Court quoted with approval from 89 C.J.S., Trial, § 481, p. 128, as follows:

> "What amounts to improper coercion of a verdict by a trial court necessarily depends to a great extent on the facts and circumstances of the particular case and cannot be determined by any general or definite rule. . . . In urging the jury to agree on a verdict, the court should emphasize that it is not endeavoring to inject its ideas into the minds of the jurors and that by such instruction the court does not intend that any juror should surrender his own free will and judgment, and these ideas should be couched in language readily understood by the ordinary lay juror." . . .

[2] We have consistently followed the rule set forth in *Allen* and *McKissick*. *State v. Accor* and *State v. Moore*, 281 N.C. 287, 188 S.E. 2d 332; *State v. Roberts*, 270 N.C. 449, 154 S.E. 2d 536; *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44. Certainly it is the better practice for a trial judge on each occasion that he urges the jury to agree on a verdict to emphasize in clear and understandable language that no member of the jury should surrender his conscientious convictions in order to reach a verdict. However, whether prejudicial error results from the language of additional instructions urging the jury to agree on a verdict depends largely on the facts and circumstances of each case. *State v. McKissick, supra.*

In instant case, approximately one hour before the challenged second additional instructions were given, the trial judge had *twice* told the members of the jury that they should reconcile their differences only if they could do so without surrender of their conscientious individual convictions. Neither of the additonal charges contained language which was misleading or which was of a *per se* coercive nature. We think that the lack of a coercive atmosphere in the courtroom is clearly shown in the exchange between the judge and jury when the jury returned to the courtroom to request refreshments. The trial judge immediately granted this request and spontaneously exhibited a concern for the jurors' needs and comfort.

Under these circumstances, it is our opinion that the jury verdict was not coerced by the trial judge's additional charges.

No error.

STATE OF NORTH CAROLINA v. JIMMIE WILLIAM HICKS

No. 30

(Filed 5 October 1976)

Criminal Law § 75— admission of in-custody statement — waiver of objection

Defendant's failure to object at trial to the admission of testimony as to his in-custody statement made as a result of interrogation after he had demanded a lawyer waived his right to complain about such testimony on appeal where the statement tended to assist defendant in his defense of insanity, and it is probable that defendant desired that his statement be heard by the jury.

State v. Hicks

ON defendant's appeal under General Statute 7A-27(a) from *Wood, J.*, presiding at the December 8, 1975 Criminal Session of ROCKINGHAM Superior Court.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Walker & Melvin, by R. Martin Melvin, Attorneys for the defendant.

EXUM, Justice.

Defendant was placed on trial for and convicted of murder in the second degree of his wife. He was sentenced to life imprisonment.

The only objection or exception which appears in the record is to the judgment of the trial court. There are no assignments of error. In defendant's brief his counsel simply states that he "has carefully reviewed the record on appeal and has been unable to find prejudicial error." Nothing, therefore, is properly presented for review. *State v. McMorris*, 290 N.C. 286, 291, 225 S.E. 2d 553, 556 (1976). Defendant's counsel asks that we review the record for error and give defendant the benefit of any that we find.

While we are not required to do so, we have nonetheless complied with counsel's request and reviewed the proceedings and the evidence leading to defendant's conviction and the judgment against him. All of the evidence in the case, both that for the State and defendant, tended to show that defendant on October 22, 1974, bludgeoned his pregnant wife to death in their home. When defendant testified in his own behalf he admitted killing his wife. He said he first hit her with a pop bottle, then stuck her with a knife, and then hit her with a block seven times. A bloody cinder block weighing nearly 24 pounds was found lying near her dead body at the scene. Her skull was crushed.

The only issue in the case raised by the evidence was whether defendant was insane at the time of the killing. Defendant's evidence tended rather persuasively to show that he suffered from mental and emotional abnormalities which had existed for some time before the killing. Dr. Bob Rollins, Director of Forensic Services for the Division of Mental Health Services of the North Carolina Department of Human Resources

and Director of the Forensic Unit at Dorothea Dix Hospital, a psychiatrist who had observed and examined the defendant over a period of several months at Dorothea Dix, testified that defendant was psychotic and suffered from schizophrenia, paranoid type. His opinion was that defendant at the time of the killing was unable to distinguish between right and wrong and in fact believed that to kill his wife was the right thing to do. Other lay witnesses for defendant, including defendant himself, tended to corroborate this assessment. Lay witnesses, however, for the State, who testified in rebuttal and who had observed defendant shortly after the killing, gave their opinion that defendant did know right from wrong and knew that he had committed a wrongful act. The jury upon proper instructions from the trial judge answered the issue of defendant's sanity in favor of the State.

One aspect of the proceedings against defendant deserves discussion. After defendant was incarcerated he was interrogated by the police. He was advised of his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). He stated that he knew his rights. He then said, "I want a lawyer or I will raise hell, I know my rights, I know my rights, if I can just get my head together, my brains are about half eat out." At this point, defendant having demanded a lawyer, the questioning should have ceased. It continued however and defendant went on to rave about how he had killed his wife. He said, in part:

> "I know that Jesus will give me life, I know I will live forever, it is the only way I could give her everlasting life, you all can't understand . . . . [I]t don't make any difference because I know that my wife isn't dead, she is waiting for me, she don't have a scratch on her and she is waiting for me, I would rather kill myself than hurt her, I loved her . . . . Why should I go to Wentworth jail when my wife is outside waiting for me, she is not hurt, she is outside waiting for me and I know that. I want to go home with my wife."

No objection was made to the introduction of this statement. It is entirely probable that defendant desired this statement to be heard by the jury. His own testimony at trial was in a similar vein. While one of the witnesses for the State in rebuttal apparently based his opinion that defendant was legally sane on this pre-trial statement which the witness heard, it is arguable that the statement tends more to assist defendant on

the question of his sanity and corroborates defendant's other evidence on this issue. Under these circumstances defendant's failure to object to this testimony at trial waives his right to complain about it on appeal. *State v. Barker*, 8 N.C. App. 311, 174 S.E. 2d 88 (1970), *cert. denied*, 277 N.C. 113; *see also State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946 (1970); *State v. Mitchell*, 276 N.C. 404, 172 S.E. 2d 527 (1970); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Pressley*, 266 N.C. 663, 147 S.E. 2d 33 (1966); 1 Stansbury's North Carolina Evidence § 27 at 66 (Brandis Rev. 1973); 2 Stansbury's North Carolina Evidence § 187 at 83 (Brandis Rev. 1973). *But see State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966).

The jury has spoken. We find

No error.

STATE OF NORTH CAROLINA v. WILLIE LEE WILLIAMS a/k/a BUBBA WILLIAMS

No. 19

(Filed 5 October 1976)

1. **Criminal Law § 113— jury instructions — necessity for applying law to evidence**

Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under the rule of G.S. 1-180; however, where the evidence is simple, direct, and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with the statute.

2. **Homicide § 25— felony-murder — instructions on parties' contentions, felony-murder, possible verdicts — sufficiency**

In a felony-murder prosecution where there was eyewitness testimony that defendant shot and killed his victim, there was abundant corroborative evidence, and defendant offered no evidence in his own behalf, the trial court's instructions which set forth contentions of the parties, fully and accurately explained the felony-murder doctrine, and properly instructed the jury as to the permissible verdicts it could return sufficiently complied with G.S. 1-180.

3. **Constitutional Law § 36; Homicide § 31— first degree murder — life sentence substituted for death penalty**

A sentence of life imprisonment is substituted for the death penalty which was imposed by the trial court in this first degree murder case.

4. **Homicide § 31— felony-murder — armed robbery charge merged into homicide charge**

The trial court properly did not enter judgment as to the charge of armed robbery against defendant, since the armed robbery charge was proved as an essential element in the capital offense of murder in the first degree and therefore was merged into the murder charge.

APPEAL by defendant from *Martin, J.*, at 18 November 1975 Criminal Session, NEW HANOVER Superior Court.

Defendant was charged in separate bills of indictment with first-degree murder and armed robbery.

The State offered evidence which tended to show that on 10 September 1975, two black males entered a convenience food store known as KB's Limited which was owned and operated by Mr. and Mrs. A. E. Lewis. At the time only Mr. and Mrs. Lewis and two customers were present in the store. The two black males went to the meat cooler where they were assisted by Mr. Lewis. One of the men, later identified as defendant Willie Lee Williams, walked to the check-out counter, placed a gun on the ice cream box, and covered it with a newspaper. When Mrs. Lewis saw this, she walked out the door and went to Smith Shoe Repair. She told Mr. Thurston Smith that her husband was in trouble. Mr. Smith then went to KB's. Meanwhile, defendant had displayed a gun and ordered the two customers to the back room of the store. Defendant forced Mr. Lewis to open the cash register from which the other black male took about two hundred dollars. At that time Mr. Smith entered the store. The two black males then shot Mr. Smith and fled from the store. Mr. Smith was dead when the police arrived shortly thereafter.

The two customers who were present in the store testified that after being ordered into the back room of the store, they heard three shots. When they were let out of the room, they observed Mr. Smith lying on the floor.

On 14 September 1975 police officers used bloodhounds to track down defendant and another black male in a wooded area of Pender County. Defendant was found lying on the ground

and was immediately taken into custody. On the morning of 15 September 1975 police officers returned to the location of defendant's apprehension and found a .38 caliber pistol under pine straw at the location where defendant had been found the prior evening. The pistol contained three empty chambers and three chambers loaded with live bullets. A firearms identification expert testified that a bullet taken from the spinal column of Mr. Smith was fired from the .38 caliber pistol found at the scene of defendant's arrest.

There was expert medical testimony that Mr. Smith died as a result of a bullet which perforated his heart and aorta and lodged in his spinal column.

Defendant offered no evidence.

The jury was instructed on the felony-murder doctrine and returned verdicts of guilty of first-degree murder and armed robbery. Defendant appealed from judgment imposing the death penalty on the verdict of guilty of first-degree murder.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for the State.

John Richard Newton, attorney for defendant appellant.

BRANCH, Justice.

[2] Defendant assigns as error the trial judge's failure to state the evidence and apply the law thereto as required by G.S. 1-180. He argues that the judge did nothing more than to state the contentions of the parties. The portion of the charge to which defendant excepts is as follows:

> Now, ladies and gentlemen of the jury, the law imposes upon me the responsibility of reviewing the evidence sufficiently for you to understand my charge as to law. . . .
>
> The State contends that some of the evidence favorable to the State is as follows: That on the 10th day of September, 1975, about 1:30 p.m. the defendant and another male went to the KB's Store in this City. That while there and while in the process of robbing Mr. and Mrs. Lewis with a firearm of about $200.00, they being the owners, that Mr. Smith, who was summoned by Mrs. Lewis from a neighboring business, came into the front of the store to render aid. That witnesses for the State have given

a positive identification of the defendant at the scene of the crime. That the defendant and another male shot and killed Mr. Smith. That they then fled the scene and were later apprehended in Pender County. That the weapon, wounds, and bullets causing death have been properly identified and have been made available to you in the evidence. That the cause of death has been stated clearly by the pathologist. That your verdict should be guilty as charged.

That is what some of the evidence for the State tends to show. What it does show is for you to say, ladies and gentlemen of the Jury.

The defendant contends that he is not guilty and that he has pled not guilty and that you should not be satisfied of his guilt beyond a reasonable doubt. He further contends that evidence mostly on cross-examination favorable to him tends to show that Mr. and Mrs. Lewis and another or others that have identified him were frightened and unsure of their identification. That his appearance is different today from their testimony. That there are many stocky black males in this area and that he was not known by the identifying witnesses before the time. He further contends that he was apprehended afar off while peaceably sleeping in the nighttime and that the .38 caliber was not found for several hours later, and that your verdict in this case should be not guilty.

That is what some of the contentions of the defendant are. What the evidence shows in that regard is for you to say, ladies and gentlemen of the jury.

Following this portion of the charge, the judge fully and accurately explained the felony-murder doctrine and properly instructed the jury as to the permissible verdicts it could return.

[1] Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under the rule of G.S. 1-180. *State v. Coggin,* 263 N.C. 457, 139 S.E. 2d 701; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196. However, where the evidence is simple, direct, and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with the statute. *State v. Best,* 265 N.C.

477, 144 S.E. 2d 416; *State v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823.

[2] In instant case there was eyewitness testimony that defendant shot and killed Mr. Smith. There was abundant corroborative evidence. Defendant offered no evidence in his own behalf. We believe that, in light of the direct, unequivocal nature of the evidence in this case, the challenged instruction sufficiently complied with G.S. 1-180. We therefore overrule this assignment of error.

[3] Defendant's next assignment of error attacks the imposition of the death penalty in North Carolina. In *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978, the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Sup. 1975), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, by authority of the provisions of 1973 Sess. Laws, c. 1201, § 7 (1974 Session), a sentence of life imprisonment is substituted in lieu of the death penalty in this case. We, therefore, do not deem it necessary to discuss this assignment of error.

[4] The jury returned a verdict of guilty as to the charge of armed robbery. The trial judge did not enter judgment as to that charge and properly so since it conclusively appears that the armed robbery charge was proved as an essential element in the capital offense of murder in the first degree. The armed robbery charge, therefore, became a part of and was merged into the murder charge. *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49; *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326.

This case is remanded to the Superior Court of New Hanover County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for the first-degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court issue a commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish to the defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the verdict.

Death sentence vacated.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BARNES v. BARNES

No. 40 PC.

Case below: 30 N.C. App. 196.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

BLACK v. BLACK

No. 45 PC.

Case below: 30 N.C. App. 403.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976. Appeal dismissed ex mero motu for lack of substantial constitutional question 5 October 1976.

CANNADY v. WILDLIFE RESOURCES COMM.

No. 33 PC.

Case below: 30 N.C. App. 247.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976. Appeal dismissed ex mero motu for lack of substantial constitutional question 5 October 1976.

CHANCE v. JACKSON

No. 46 PC.

Case below: 30 N.C. App. 405.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

CROSS v. BECKWITH

No. 38 PC.

Case below: 30 N.C. App. 259.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

DARNELL v. DEPT. OF TRANSPORTATION

No. 41 PC.

Case below: 30 N.C. App. 328.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

FOWLER v. McLEAN

No. 51 PC.

Case below: 30 N.C. App. 393.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

HADDOCK v. SMITHSON

No. 31 PC.

Case below: 30 N.C. App. 228.

Petition by defendants Smithson and Moore-King-Sullivan for discretionary review under G.S. 7A-31 denied 5 October 1976.

HILL v. PARRISH

No. 50 PC.

Case below: 30 N.C. App. 405.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

HOUSE OF CHEESE v. BD. OF TRADE

No. 37 PC.

Case below: 30 N.C. App. 259.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

INSCOE v. INDUSTRIES, INC.

No. 14 PC.

Case below: 30 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 5 October 1976.

LENTZ v. GARDIN

No. 54 PC.

Case below: 30 N.C. App. 379.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 October 1976.

MENDENHALL v. MENDENHALL

No. 49 PC.

Case below: 30 N.C. App. 597.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

POORE v. RAILWAY

No. 15 PC.

Case below: 30 N.C. App. 104.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 October 1976.

REALTY CORP. v. COBLE, SEC. OF REVENUE

No. 44 PC.

Case below: 30 N.C. App. 261.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

REDEVELOPMENT COMM. v. HOLMAN

No. 36 PC.

Case below: 30 N.C. App. 395.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

STANBACK v. STANBACK

No. 43 PC.

Case below: 30 N.C. App. 322.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976. Justice Exum took no part in the consideration or decision of this petition.

STATE v. BRYANT

No. 23 PC.

Case below: 30 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. CHAVIS

No. 240 PC.

Case below: 30 N.C. App. 75.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. DALLAS

No. 17 PC.

Case below: 30 N.C. App. 258.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. DODD

No. 35 PC.

Case below: 30 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. DUNCAN

No. 246 PC.

Case below: 30 N.C. App. 112.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. DURDEN

No. 25 PC.

Case below: 30 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 September 1976 for lack of merit.

STATE v. EPPLEY

No. 32 PC.

Case below: 30 N.C. App. 217.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1976.

STATE v. FREEDLE

No. 11 PC.

Case below: 30 N.C. App. 118.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. HAMRICK

No. 34 PC.

Case below: 30 N.C. App. 143.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. HILL

No. 24 PC.

Case below: 30 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. LOCKLEAR

No. 19 PC.

Case below: 29 N.C. App. 186.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 October 1976 without prejudice to petitioner's right to petition for new trial in Superior Court.

STATE v. PEVIA

No. 245 PC.

Case below: 30 N.C. App. 79.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1976.

STATE v. RAINES

No. 29 PC.

Case below: 30 N.C. App. 176.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. ROGERS (RODGERS)

No. 21 PC.

Case below: 30 N.C. App. 298.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. RUSS

No. 53 PC.

Case below: 29 N.C. App. 186.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. WHITE

No. 244 PC.

Case below: 30 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

STATE v. WRIGHT

No. 30 PC.

Case below: 30 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1976.

WHITTEN v. AMC/JEEP, INC.

No. 18 PC.

Case below: 30 N.C. App. 161.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 October 1976. Petition by Defendant King for discretionary review under G.S. 7A-31 denied 5 October 1976.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WILLIAMSON v. SALTER

No. 42 PC.

Case below: 30 N.C. App. 405.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1976.

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.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 4. Hearing Before Administrative Board

The right of protection against self-incrimination is inapplicable in an administrative hearing before the State Personnel Board. *Nantz v. Employment Security Comm.*, 473.

§ 5. Appeal and Review as to Administrative Orders

Since the State Personnel Board had power only to make advisory recommendations and not direct reinstatement of the dismissed employee, its determination was not subject to judicial review. *Nantz v. Employment Security Comm.*, 473.

AGRICULTURE

§ 9.5. Seed Dealers

G.S. 25-2-316 providing for exclusion or modification of warranties is not in conflict with the N. C. Seed Law. *Billings v. Harris Co.*, 502.

Defendant's disclaimer and limitation clause on a cabbage seed purchase order and package was effective to avoid liability of defendant for disease bearing seed sold to plaintiff. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

In an action arising out of a two-car collision, the Court of Appeals was without authority to order new trials of passengers' claims against one driver upon appeal taken only by the other driver. *Henderson v. Matthews*, 87.

Where defendant failed to appeal from an adverse determination of his claim in the first trial, appeals by plaintiff and the third party defendant did not give the Court of Appeals jurisdiction to consider or grant a new trial on defendant's claim. *Kaczala v. Richardson*, 91.

§ 5. Supervisory Jurisdiction of Supreme Court

The function of protecting infants and incompetents has been entrusted by statute to the clerk of superior court in the first instance, and the Supreme Court may exercise ultimate supervisory power over this function. *In re Lancaster*, 410.

§ 6. Judgments and Orders Appealable

Requirement that the trial judge make a finding that there is "no just reason for delay" in order for a party to appeal from an order adjudicating fewer than all the rights and claims of the parties does not restrict the right of an immediate appeal from a judicial order affecting a "substantial right" as provided by G.S. 1-277 and G.S. 7A-27(d). *Oestreicher v. Stores*, 118.

Plaintiff had the right to an immediate appeal from an order granting summary judgment for defendant on claims for punitive damages and anticipatory breach of contract, leaving only the issue of compensatory damages for trial. *Ibid.*

APPEAL AND ERROR — Continued

§ 16. Jurisdiction of Lower Court after Appeal

Since the Supreme Court upholds that portion of the trial court's order requiring defendant to pay taxes and pay or refinance the mortgage on the parties' home, the cause is remanded for disposition of plaintiff's motion made in the Supreme Court that defendant be adjudged in contempt for failure to obey the order. *Beall v. Beall*, 669.

§ 22. Certiorari to Preserve Right to Review

Where it was asserted that a proper case on appeal had been tendered to the clerk of superior court but that the clerk refused to file it, the proper action by the Court of Appeals was not dismissal of the purported appeal, but rather issuance of the writ of certiorari to the end that the trial judge settle the case. *In re Lancaster*, 410.

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill by placing a plastic bag over the victim's head. *S. v. Strickland*, 169.

§ 15. Instructions

Trial court did not err in use of the words "intentionally used a firearm" in instructing on discharging a firearm into an occupied dwelling. *S. v. Swift*, 383.

Instruction permitting the jury to find intent to kill solely from proof of defendant's commission of an unlawful act was prejudicial error. *S. v. Parks*, 748.

ATTACHMENT

§ 7. Bonds in Attachment

Trial judge had discretionary right to reduce bond substituted for attached property. *Oestreicher v. Stores*, 118.

ATTORNEY AND CLIENT

§ 7. Fees

G.S. 50-13.6 providing for payment of attorney's fees in an action for child support applies to a proceeding to compel the future support of the child, not to compel reimbursement for past payments made by a person secondarily liable for such child's support. *Tidwell v. Booker*, 98.

AUTOMOBILES

§ 3. Driving After Suspension of License

For purpose of a conviction for driving while license is suspended, mailing of the notice under G.S. 20-48 raises only a prima facie presumption that defendant received the notice and thereby acquired notice of the suspension. *S. v. Atwood*, 266.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 6. Instructions

Where defendant was charged with first degree burglary, the crime he allegedly intended to commit being rape, it was not error for the trial court to fail to instruct on lesser included offenses of rape. *S. v. Wells*, 486.

The trial court properly charged that the moving and raising of a window would be a breaking within the meaning of the law. *Ibid.*

Trial court's error in a first degree burglary prosecution in instructing that the prosecuting witness's apartment was a "sleeping apartment" was harmless. *Ibid.*

§ 8. Sentence and Punishment

Defendant in a first degree burglary case is entitled to a new trial where the court denied defense counsel's motion to be allowed to inform the jury that conviction would necessarily result in the imposition of a life sentence. *S. v. McMorris*, 286.

CLERKS OF COURT

§ 5. Jurisdiction in Regard to Insane Persons and Their Estates

The function of protecting infants and incompetents has been entrusted by statute to the clerk of superior court in the first instance, and the Supreme Court may exercise ultimate supervisory power over this function. *In re Lancaster*, 410.

CONSPIRACY

§ 5. Relevancy and Competency of Evidence

Statement made by one defendant just before he stabbed deceased was admissible against other defendants as a statement made in furtherance of a conspiracy. *S. v. Covington*, 313.

CONSTITUTIONAL LAW

§ 13. Police Power in Regard to Health

The Health Care Liability Reinsurance Exchange Act is unconstitutional. *Indemnity Co. v. Ingram, Comr. of Insurance*, 457.

§ 29. Right to Trial by Duly Constituted Jury

Trial court did not err in summarily denying defendant's motion to dismiss the jury array "for the reason that there are no blacks" without requiring the State to show affirmatively the absence of systematic exclusion. *S. v. Wright*, 45.

Defendants' constitutional rights were not violated by the exclusion of jurors because of their capital punishment views since sentences of death imposed on defendants have been invalidated. *S. v. Covington*, 313; *S. v. Swift*, 383.

§ 30. Due Process in Trial

Defendant was not denied his constitutional right to a speedy trial by a delay of 19 months between the date the warrant was served and the date of defendant's trial. *S. v. Wright*, 45.

CONSTITUTIONAL LAW — Continued

Where discord developed between defendant and his court-appointed counsel because of counsel's refusal to be a party to the introduction of what he believed to be perjured testimony by defendant and his witness, defendant was deprived of a fair trial when the court left such counsel in charge of a portion of the trial while relieving him of the responsibility for questioning defendant's only witness or defendant, himself, if he elected to testify. *S. v. Robinson*, 56.

§ 33. Self-incrimination

The right of protection against self-incrimination is inapplicable in an administrative hearing before the State Personnel Board. *Nantz v. Employment Security Comm.*, 473.

§ 36. Cruel and Unusual Punishment

Cases, no longer authoritative, holding death penalty for first degree murder to be constitutional. *S. v. Hammonds*, 1; *S. v. Smith*, 148; *S. v. Strickland*, 169; for felony-murder, *S. v Phifer*, 203; *S. v. Shrader*, 263; *S. v. Jones*, 292; *S. v. Peplinski*, 236.

Sentences for death for first degree murder are vacated and sentences of life imprisonment are substituted therefor. *S. v. Covington*, 313; *S. v. Swift*, 383; *S. v. Davis*, 511; *S. v. Cawthorne*, 639; *S. v. Harris*, 681; *S. v. Bowden*, 702; *S. v. Williams*, 770.

Sentence of death for rape is invalidated and sentence of life imprisonment substituted therefor. *S. v. Thompson*, 431.

CRIMINAL LAW

§ 5. Mental Capacity in General

The question of defendant's insanity as a defense to a murder charge was for the jury based on lay testimony although defendant presented testimony of two psychiatrists that he was unable to distinguish right from wrong at the time of the crime. *S. v. Hammonds*, 1.

The question of defendant's insanity as a defense to charges of first degree murder was a question for the jury when the testimony of State's witnesses indicating defendant had a sane mind is considered with the presumption of sanity. *S. v. Harris*, 718.

Trial court's instruction placing the burden of defense of insanity on defendant did not contravene the Mullaney decision. *S. v. Hammonds*, 1; *S. v. Taylor*, 220; *S. v. Harris*, 718.

A defendant who interposes a defense of insanity to a criminal charge is entitled, upon request, to an instruction setting out the commitment procedures applicable to acquittal by reason of insanity. *S. v. Hammonds*, 1; *S. v. Taylor*, 220.

Trial court in a first degree murder case did not err in refusing to give requested instruction that evidence of defendant's mental debilities could be considered on the question of defendant's ability to form a specific intent. *S. v. Hammonds*, 1.

G.S. 15A-959(b) and the accompanying commentary do not establish the theory of "diminished responsibility" as law in N. C. *S. v. Harris*, 718.

CRIMINAL LAW — Continued

§ 21. Preliminary Proceedings

In a hearing before a judge on a preliminary motion to determine the admissibility of evidence, the ordinary rules as to the competency of evidence applied in a trial before the jury are to some extent relaxed. *S. v. Davis*, 511.

§ 23. Plea of Guilty

In a prosecution for murder committed in perpetration of a kidnapping, acceptance of defendant's plea of guilty of kidnapping at the close of all the evidence was not tantamount to acceptance of a plea of first degree murder in violation of public policy precluding acceptance of a plea of guilty to a capital crime. *S. v. Shrader*, 253.

§ 26. Plea of Former Jeopardy

The criminal offense of wilful nonsupport of an illegitimate child may be repeated and, if it is, prosecution for the subsequent offense is not barred by prosecution for the former offense on the theory of double jeopardy. *Tidwell v. Booker*, 98.

Defendants who were convicted of a murder committed in the perpetration of a robbery may not be separately punished for the robbery. *S. v. Davis*, 511.

§ 29. Suggestion of Mental Incapacity to Plead

Evidence was sufficient to support trial court's determination that defendant had the mental capacity to stand trial for first degree murder. *S. v. Taylor*, 220.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Where the nature of defendant's cross-examination of a witness in a kidnapping and murder trial was such as to suggest that the witness, independent of defendant, had been involved in other kidnappings and murders, the State was entitled, for the purpose of rebutting this impeaching evidence, to show on redirect examination that defendant was the kidnapper and murderer on the other occasion. *S. v. Shrader*, 253.

Testimony in a rape case identifying defendant as one of two men who attempted to rape another woman some thirty minutes before the prosecutrix was abducted was competent to establish that he was one of the men who raped the prosecutrix. *S. v. Thompson*, 431.

Evidence of defendant's participation in other crimes was admissible to establish a common plan or scheme. *S. v. Hunter*, 556.

Trial court in a prosecution for first degree burglary and common law robbery did not err in allowing evidence that defendant was a participant in a burglary ring. *S. v. Duncan*, 741.

§ 43. Photographs

Photographs were properly used for illustrative purposes when a witness placed an "X" on a photograph to locate defendant's position, and when witnesses testified as to blood shown on the photographs. *S. v. Swift*, 383.

Trial court did not err in allowing the jury to view slides of the wounds of a murder victim. *S. v. Hunter*, 556.

CRIMINAL LAW — Continued

§ 46. Flight of Defendant as Implied Admission

Officer's testimony relating to his unsuccessful search for defendant for three days after the crime and his description of defendant's furtive acts when he was finally located were properly admitted into evidence. *S. v. Covington*, 313.

§ 48. Silence of Defendant as Implied Admission

Statement made by one defendant in the presence of two other defendants who remained silent was admissible against the silent defendants as an implied admission, and therefore it was not required that the statement be struck or that defendant be tried separately. *S. v. Phifer*, 203.

Trial court in a first degree murder prosecution did not err in allowing into evidence testimony concerning statements made by a codefendant in defendant's presence which implicated defendant in the crimes charged. *S. v. Bowden*, 702.

§ 50. Expert and Opinion Testimony

Trial court properly allowed person in charge of a mobile crime laboratory to give an opinion as to whether washing the hands would destroy any possibility of a valid gun residue test. *S. v. Phifer*, 203.

Trial court in a first degree burglary case did not err in allowing opinion evidence as to identity of a diamond. *S. v. Duncan*, 741.

§ 52. Examination of Experts; Hypothetical Question

Portion of a hypothetical question asked a psychiatrist could be inferred from the evidence, and an erroneous assumption in the question was not of such vital nature as to require a new trial. *S. v. Taylor*, 220.

The omission of any reference to defendant's history of mental illness in a hypothetical question asked a psychiatrist as to defendant's ability to distinguish right from wrong at the time of the crime did not constitute reversible error. *Ibid.*

§ 57. Evidence in Regard to Firearms

Officer's testimony as to how a rifle functioned was competent to show the rifle could not have discharged accidentally in the manner contended by defendant. *S. v. Swift*, 383.

§ 60. Fingerprint Evidence

An SBI employee who was not a fingerprint expert was properly allowed to explain the difference between a latent lift and a fingerprint. *S. v. Phifer*, 203.

§ 62. Lie Detector Tests

While testimony as to the results of a polygraph test is not admissible to show the guilt or innocence of an accused, such evidence admitted without objection may be considered by the jury. *S. v. Harris*, 681.

§ 66. Evidence of Identity By Sight

In-court identification was not tainted by impermissible suggestion by anyone or by photographs exhibited to the witness by the police. *S. v. Shrader*, 253.

CRIMINAL LAW — Continued

The viewing of defendant in the courtroom during various stages of a criminal proceeding did not taint in-court identification testimony. *S. v. Covington*, 313.

Trial court did not commit prejudicial error in failing to make findings of fact when he denied defendants' motion to suppress in-court identification testimony. *Ibid.*

There was no impermissible suggestiveness in a robbery victim's photographic identification of defendants. *S. v. Davis*, 511.

Where the trial court at a prior term separated the cases of defendant and his codefendant, the trial court did not err in allowing the codefendant to appear in the courtroom during defendant's trial and be identified by witnesses. *S. v. Bowden*, 702.

§ 73. Hearsay Testimony

Even if testimony by the murder victim's wife amounted to hearsay, defendant was not prejudiced by its admission. *S. v. Peplinski*, 236.

Testimony by a cab dispatcher as to a statement made by deceased cab driver was admissible as part of the res gestae. *S. v. Cawthorne*, 639.

Statements made by murder victim were competent as part of the res gestae. *S. v. Covington*, 313.

Evidence of declarations made to defendant were competent to show defendant's knowledge and state of mind. *S. v. Swift*, 383.

Reference to a doctor's report in a rape prosecution was not prejudicial although the doctor's report had been excluded as hearsay. *S. v. Tolley*, 349.

§ 75. Tests of Voluntariness of Confession; Admissibility

Evidence on voir dire supported trial court's determination that defendant was not in custody when he was questioned by an officer at a hospital and that Miranda warnings were not necessary. *S. v. Strickland*, 169.

The record as a whole in a murder prosecution showed that defendant possessed sufficient mental capacity to make in-custody statements voluntarily and understandingly. *S. v. Taylor*, 220.

Defendant's confession was properly admitted in a homicide prosecution. *S. v. Cawthorne*, 639.

Defendant's contention that a transcript of statements he purportedly made to police contained some things he did not say did not go to the admissibility of the transcript but presented a question for the jury. *S. v. Harris*, 681.

Defendant's failure to object at trial to admission of testimony as to his in-custody statement made as a result of interrogation after he had demanded a lawyer waived his right to complain about such testimony on appeal. *State v. Hicks*, 767.

§ 76. Determination and Effect of Admissibility of Confession

Although the court found defendant gave no specific answer when asked whether he desired to answer a certain question, the court's determination that defendant waived his right to remain silent was supported by the evidence and findings. *S. v. Swift*, 383.

CRIMINAL LAW — Continued

§ 79. Acts and Declarations of Companions, Codefendants and Coconspirators

Statement made by one defendant just before he stabbed deceased was admissible against other defendants as a statement made in furtherance of a conspiracy. *S. v. Covington*, 313.

§ 80. Books, Records and Private Writings

A defendant is not entitled to the granting of a motion for a fishing expedition nor to receive the work product of police or State investigators. *S. v. Davis*, 511.

Trial court in a first degree murder case did not err in refusing to grant defendant's motion for production of documents relating to the offer of a reward. *S. v. Bowden*, 702.

§ 83. Competency of Wife to Testify For or Against Spouse

Trial court erred in failing to instruct the jury to disregard the district attorney's argument relating to failure of defendant's wife to testify in his behalf. *S. v. Thompson*, 431.

§ 85. Character Evidence Relating to Defendant

Defendant in a first degree murder prosecution was not prejudiced by a witness's testimony that defendant had demanded that she work as a prostitute. *S. v. Harris*, 681.

§ 87. Direct Examination of Witnesses

Trial court in a felony-murder prosecution did not err in allowing the State to ask the victim's wife leading questions concerning her husband's habit of carrying large amounts of cash. *S. v. Peplinski*, 236.

Guidelines for allowing leading questions. *S. v. Smith*, 148.

Witness was not incompetent on the ground she had been promised, in exchange for her testimony for the State, that she would be charged only with kidnapping and not with murder of the victim. *S. v. Shrader*, 253.

Testimony that the witness lived in the small town of Laurinburg and had known defendant for twenty years gave a reasonable foundation for and credence to the witness's testimony that a car in which he saw the defendant riding was owned by defendant's sister. *S. v. Covington*, 313.

Trial court properly denied motion of defendant for a bill of particulars seeking a detailed statement of the testimony of each of the State's witnesses. *S. v. Covington*, 313.

The allowance of testimony by witnesses not on a list furnished to defendants was discretionary. *S. v. Davis*, 511.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Where the nature of defendant's cross-examination of a witness in a kidnapping and murder trial was such as to suggest that the witness, independent of defendant, had been involved in other kidnappings and murders, the State was entitled, for the purpose of rebutting this impeaching evidence, to show on redirect-examination that defendant was the kidnapper and murderer on the other occasion. *S. v. Shrader*, 253.

Erroneous admission of noncorroborative evidence was cured by trial court's instructions. *S. v. Covington*, 313.

CRIMINAL LAW — Continued

Trial court's instructions on a prior inconsistent statement were proper. *S. v. Tolley*, 349.

§ 90. Rule That Party is Bound by and May Not Discredit His Own Witness

District attorney's attempt to discredit his own witness was not prejudicial to defendant where the trial court gave immediate curative instructions. *S. v. Peplinski*, 236.

§ 91. Time of Trial and Continuance

The statute relating to mandatory disposition of detainer charges upon request by a prisoner was inapplicable to this case. *S. v. Wright*, 45.

Denial of defendant's motion for continuance was reviewable on appeal since a question of law rather than discretion was raised. *S. v. Tolley*, 349.

Trial court did not err in denying defendant's motion for continuance to obtain the presence of family members to testify for him. *Ibid.*

Defendant's rights of confrontation of his accusers and to due process and effective assistance of counsel were not violated by the denial of his motion for continuance. *S. v. Harris*, 681.

§ 92. Consolidation of Counts

Consolidation was proper where defendants were charged with the same crime. *S. v. Davis*, 511.

§ 93. Order of Proof

Trial judge did not err in admitting defendant's in-custody statements as part of the State's rebuttal evidence. *S. v. Taylor*, 220.

§ 97. Introduction of Additional Evidence

Trial court properly allowed the court reporter, at the jury's request, to read back the testimony of two witnesses. *S. v. Covington*, 313.

§ 98. Presence and Custody of Defendant

Trial court did not err in allowing defendant charged with rape to be tried in shackles where defendant had earlier tried to escape, the sheriff had recommended such restraints, and defendant's counsel made no objection. *S. v. Tolley*, 349.

Defendant charged with a capital felony is not required to be present at the hearing of a pretrial motion for discovery. *S. v. Davis*, 511.

§ 99. Conduct of Court and Expression of Opinion

Trial court in an incest case erred in extensively warning the witness, out of the jury's presence, that he was "not impressed with her truthfulness" and that he was "not going to tolerate any perjury in this case." *S. v. Rhodes*, 16.

The handcuffing of defendants while the jury was out deliberating on the verdict did not constitute an impermissible expression of opinion on the part of the trial judge. *S. v. Phifer*, 203.

§ 101. Custody of Jury

Trial court in a kidnapping and murder case did not err in allowing the jury access to television and other news sources. *S. v. Shrader*, 253.

CRIMINAL LAW — Continued

Trial court's charge as a whole made it clear to the jury that each element of the crime charged had to be proved by evidence establishing the same beyond a reasonable doubt. *S. v. Hunter*, 556.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's instructions made it clear that in order to convict defendant as an aider and abettor of a murder committed during a robbery, the State had to prove he shared with his codefendants the criminal purpose to commit the crime of robbery. *S. v. Covington*, 313.

Trial court did not err in failing to define "corroboration." *Ibid.*

Ordinarily a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under G.S. 1-180. *S. v. Williams*, 770.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court did not express an opinion when he stated that statements made by two witnesses to a deputy sheriff were consistent with the testimony given by the witnesses in the courtroom. *S. v. Covington*, 313.

Trial court did not express an opinion when it instructed that the clerk would first take the verdict as to a codefendant and "following that and any motions his attorney might like to make" the clerk would take the verdict as to defendant. *Ibid.*

§ 116. Charge on Failure of Defendant to Testify

Trial court's instructions on the failure of defendant to testify were proper. *S. v. Covington*, 313; *S. v. Davis*, 511.

Trial court's instruction on defendant's failure to testify was not error but it would have been better to give no instruction in the absence of a request therefor. *S. v. Cawthorne*, 639.

§ 117. Charge on Credibility of Witness

When all of the evidence shows a witness to be an accomplice, the trial judge should instruct that the witness's testimony should be carefully scrutinized without requiring any finding by the jury that the witness was an accomplice. *S. v. Harris*, 681.

§ 122. Additional Instructions after Initial Retirement of Jury

Failure of the trial judge to instruct that no member of the jury should surrender his conscientious convictions in order to reach a verdict when he gave the jury additional instructions for the second time did not constitute prejudicial error. *S. v. Gresham*, 761.

§ 126. Unanimity of Verdict; Polling the Jury

Trial court's instructions on unanimity of the verdict that "there must be a meeting of the minds" did not coerce a verdict. *S. v. Swift*, 383.

Polling the jury is a ministerial act which may be performed by the deputy clerk. *S. v. Davis*, 511.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Trial court did not err in failing to declare a mistrial when a juror notified the court her supervisor had told her some man had been arrested

CRIMINAL LAW — Continued

in the courtroom during the trial for carrying a loaded weapon. *S. v. Swift*, 383.

§ 135. Judgment and Sentence in Capital Case

Sentences of death for first degree murder are vacated and sentences of life imprisonment are substituted therefor. *S. v. Covington*, 313; *S. v. Swift*, 383; *S. v. Davis*, 511.

Sentence of death for rape is invalidated and life imprisonment substituted therefor. *S. v. Thompson*, 431.

§ 140. Concurrent and Cumulative Sentences

Where defendant was convicted of two offenses of second degree rape involving separate victims, imposition of consecutive life sentences was not unlawful. *S. v. Tolley*, 349.

§ 142. Suspended Sentences

Fines and restitution are permissible conditions for suspension of sentence or probation, but the trial judge must be precise as to which one he imposes and must name the aggrieved party to whom restitution is made. *Shore v. Edmisten*, 628.

In a prosecution for sale or possession of contraband, it is proper to order reimbursement to a state or local agency as a condition for suspension of sentence or probation for any sum paid by its agents to the defendant in order to obtain evidence of the crime. *Ibid.*

Where defendant's sentence was suspended upon payment of money for the use of the vice squad for continued enforcement, payment was a fine payable to the public schools. *Ibid.*

§ 158. Conclusiveness of Record and Presumptions as to Matters Omitted

Where the record disclosed that 57 jurors were excluded for cause as a result of their answers to questions concerning their death penalty views, it is assumed the trial court excused only those jurors who indicated they could not vote for conviction which would result in imposition of the death penalty. *S. v. Phifer*, 203.

Defendant's motion to amplify the record on appeal was properly denied. *S. v. Tolley*, 349.

§ 161. Form and Requisites of Exceptions and Assignments of Error

In a first degree burglary and second degree rape case where defendant assigned as error the signing of the judgment in each case but no argument was presented in defendant's brief on this point, neither the assignment of error nor the appeal itself presented anything for review. *S. v. McMorris*, 286.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

In a criminal case on appeal the court reviews the sufficiency of all the evidence to sustain the verdict, notwithstanding defendant failed to move for nonsuit at the conclusion of all the evidence. *S. v. Atwood*, 266.

DAMAGES

§ 11. Punitive Damages

Plaintiff's complaint was sufficient to state a claim for relief for punitive damages based upon fraud and deceit by defendant in the breach of a lease agreement by intentionally understating its net sales. *Oestreicher v. Stores*, 118.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy

A property owner having standing to attack a zoning ordinance may do so in a declaratory judgment action. *Taylor v. City of Raleigh*, 608.

The doctrine of laches is applicable in an action for a declaratory judgment. *Ibid.*

DIVORCE AND ALIMONY

§ 17. Alimony Upon Divorce From Bed and Board

Trial court's order requiring defendant to pay a lump sum for alimony and child support and property taxes and to satisfy or refinance the mortgage on the family home was unrealistic and beyond defendant's ability. *Beall v. Beall*, 669.

§ 21. Enforcing Payment of Alimony

Since the Supreme Court upholds that portion of the trial court's order requiring defendant to pay taxes and pay or refinance the mortgage on the parties' home, the cause is remanded for disposition of plaintiff's motion made in the Supreme Court that defendant be adjudged in contempt for failure to obey the order. *Beall v. Beall*, 669.

EQUITY

§ 2. Laches

The defense of laches is frequently raised by summary judgment motion; when it is so raised the plaintiff is permitted to counter by showing a justification for the delay, and whenever this assertion raises triable issues, defendant's motion will not be granted. *Taylor v. City of Raleigh*, 608.

Plaintiffs were barred by laches from attacking a rezoning ordinance where their action to invalidate the ordinance was not brought until two years and 22 days after the ordinance was adopted. *Ibid.*

ESTATES

§ 7. Sale of Estate for Division or Reinvestment

In a proceeding for private sale of land, the Court of Appeals erred in determining prematurely the remainder interest of adopted grandchildren of the life tenant. *Crumpton v. Crumpton*, 651.

EVIDENCE

§ 27. Telephone Conversations

In an action for alimony and child support, trial court properly excluded conversations intercepted when defendant had plaintiff's telephone tapped. *Rickenbaker v. Rickenbaker*, 373.

EVIDENCE — Continued

§ 34. Admissions and Declarations Against Interest by Parties to the Action

Plaintiff could not recover damages upon the testimony of other witnesses where she repudiated the allegations in her complaint and testified to objective facts which destroyed her case and exonerated defendant of any liability to her. *Cogdill v. Scates*, 31.

FRAUD

§ 12. Sufficiency of Evidence and Nonsuit

Evidence did not entitle plaintiffs to have submitted to the jury an issue of fraudulent nondisclosure by defendant real estate agent of the cause of water accumulated in the crawl space of a house. *Griffin v. Wheeler-Leonard & Co.*, 185.

GUARDIAN AND WARD

§ 4. Sale of Ward's Lands

In a proceeding for sale of an incompetent's lands, the clerk erred in striking allegations by a friend and former attorney of the incompetent raising issues as to whether a sale of the incompetent's lands was necessary or desirable. *In re Lancaster*, 410.

Confirmation of the sale of an incompetent's lands is set aside where the record shows that scant attention was paid to the factual basis for the proposed sale presented in the guardian's petition and that facially valid objections to the sale thereafter raised were never addressed, investigated or answered. *Ibid.*

§ 7. Actions By or Against Guardian

Where the complaint is that the guardian is acting improperly, the concept of "standing" to act for the incompetent must give way to the primary duty of the court as the ultimate guardian to protect the incompetent's interest, and in the performance of its duty the court must receive any pertinent information or assistance from any source. *In re Lancaster*, 410.

HABEAS CORPUS

§ 1. Nature of Writ

Defendant's handwritten motion alleging the charge against him was unsupported by evidence and requesting dismissal or bail was not a motion for a speedy trial but was a request for habeas corpus relief. *S. v. Parks*, 748.

§ 2. Determination of Legality of Restraint

The issue or lack of hearing of defendant's motion for habeas corpus to determine the legality of his restraint or to reduce his bail was waived where defendant made no objection at his trial to the lack of a hearing. *S. v. Parks*, 748.

HOMICIDE

§ 4. Murder in the First Degree

It is not necessary to support a conviction of felony-murder that defendant actually inflicted the fatal shot. *S. v. Peplinski,* 236.

The offense of discharging a firearm into an occupied dwelling is an unspecified felony within the purview of G.S. 14-17 and can result in conviction for first degree murder under the felony-murder rule. *S. v. Swift,* 383.

§ 7. Defense of Insanity

The question of defendant's insanity as a defense to a murder charge was for the jury based on lay testimony although defendant presented testimony of two psychiatrists that he was unable to distinguish right from wrong at the time of the crime. *S. v. Hammonds,* 1.

The question of defendant's insanity as a defense to charges of first degree murder was a question for the jury when the testimony of State's witnesses indicating defendant had a sane mind is considered with the presumption of sanity. *S. v. Harris,* 718.

Rule that insanity is an affirmative defense does not contravene the Mullaney decision. *S. v. Hammonds,* 1; *S. v. Taylor,* 718.

Evidence relating to mental disease and incapacity may not be considered by the jury in determining whether the State proves elements of specific intent to kill. *S. v. Hammonds,* 1; *S. v. Harris,* 718.

G.S. 15A-959(b) and the accompanying commentary do not establish the theory of "diminished responsibility" as law in N. C. *S. v. Harris,* 718.

§ 12. Indictment

Indictment for murder in the form prescribed by G.S. 15-144 was sufficient to support a verdict of guilty of murder upon a finding that defendant killed deceased with malice and after premeditation and deliberation or that he killed deceased in the perpetration of a robbery or kidnapping. *S. v. Shrader,* 253.

Trial court properly denied defendant's motion for a bill of particulars stating whether the State would proceed under the felony-murder rule or on the basis of premeditation and deliberation. *S. v. Swift,* 383.

§ 13. Pleas

In a prosecution for murder committed in perpetration of a kidnapping, acceptance of defendant's plea of guilty of kidnapping at the close of all the evidence was not tantamount to acceptance of a plea of guilty of first degree murder in violation of public policy precluding acceptance of a plea of guilty to a capital crime. *S. v. Shrader,* 253.

§ 14. Presumptions

The felony-murder rules does not establish a presumption of premeditation and deliberation in violation of due process. *S. v. Swift,* 383.

§ 15. Relevancy and Competency of Evidence

Testimony by decedent's wife that he was in good health was competent to show decedent died from wounds he received during a robbery. *S. v. Covington,* 313.

HOMICIDE — Continued

Evidence was sufficient for the jury in a prosecution for defendants' murder of a store operator during a robbery of a store employee. *S. v. Davis*, 511.

Evidence was sufficient for the jury in a prosecution for accessory before the fact to murder. *S. v. Hunter*, 556.

Evidence was sufficient for the jury in a prosecution for murder committed in the perpetration of a robbery of a cab driver. *S. v. Cawthorne*, 639.

Evidence was sufficient for the jury in a prosecution for first degree murder of an employee and customer of a Seven-Eleven store. *S. v. Bowden*, 702.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court's instruction on presumptions of malice and unlawfulness arising from proof of intentional killing with a deadly weapon did not relieve the State of its burden of proof. *S. v. Hammonds*, 1.

§ 25. Instructions on First Degree Murder

Trial court did not err in failing to instruct the jury that in order to find defendant guilty it must find that the robbery was the proximate cause of the victim's death. *S. v. Covington*, 313.

Trial court's instruction in a first degree murder case on the defendants acting together was proper. *S. v. Davis*, 511.

Though the trial court should have spelled out the essential elements of the underlying felony of attempted armed robbery in its instructions as to what the State must prove to convict defendant of being an accessory before the fact to felony-murder, failure to do so was not prejudicial error. *S. v. Hunter*, 556.

Trial court's instructions in a felony-murder case which set forth the contentions of the parties, explained the felony-murder doctrine and instructed as to the permissible verdicts complied with G.S. 1-180. *S. v. Williams*, 770.

§ 28. Instructions on Defenses

Trial court's instruction placing the burden of proving defense of insanity on defendant did not contravene the Mullaney decision. *S. v. Hammonds*, 1; *S. v. Taylor*, 220; *S. v. Harris*, 718.

Trial court did not err in charging that defendant contended he did not "actually" fire the rifle into the victim's dwelling rather than stating that defendant did not "intentionally" fire the rifle into the dwelling. *S. v. Swift*, 383.

§ 30. Submission of Question of Guilt of Lesser Degree of the Crime

Trial court in a first degree murder prosecution did not err in failing to instruct on accessory before the fact. *S. v. Phifer*, 203.

Trial court was not required to submit lesser included offenses of first degree murder where all the evidence tended to show murder perpetrated during armed robbery. *S. v. Covington*, 313.

In a prosecution for murder committed in the perpetration of a robbery, evidence of a statement made by defendant to the police did not

JURY — Continued

Defendant's constitutional rights were not violated by the exclusion of jurors because of their capital punishment views since sentences of death imposed on defendants have been invalidated. *S. v. Covington*, 313; *S. v. Swift*, 383; *S. v. Davis*, 511.

The trial judge did not err in allowing the State to reexamine and challenge for cause a prospective juror who had been accepted by the State and tendered to defendant. *S. v. Harris*, 681; *S. v. Bowden*, 702.

LANDLORD AND TENANT

§ 6. Use and Occupation

Although a lease agreement obligated the lessee to pay a percentage of net sales as rent, there was no implied covenant by the lessee to use or occupy the premises during the term of the lease. *Oestreicher v. Stores*, 118.

MASTER AND SERVANT

§ 10. Duration of Employment and Wrongful Discharge

Employment by the State of N. C. does not *ipso facto* confer tenure or a property right in the position. *Nantz v. Employment Security Comm.*, 473.

A contract of employment which contains no provision concerning its duration is terminable at the will of either party. *Ibid.*

An employee of the Employment Security Commission who was dismissed because of her refusal to aid the agency in its investigation of anonymous letters alleging mismanagement and sexual misconduct by employees in the office in which the petitioner worked was not deprived of liberty without a hearing and therefore without due process of law. *Ibid.*

§ 56. Workmen's Compensation—Causal Relation Between Employment and Injury

Plaintiff fireman's act in assisting the cleaning of the oil breather cap from a fellow employee's car during the lunch period was a reasonable activity, and injuries received by plaintiff when gasoline poured on the breather cap caught fire arose out of and in the course of his employment as a fireman. *Watkins v. City of Wilmington*, 276.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Private citizens had no standing to seek judicial review of a municipal ordinance annexing a noncontiguous area. *Taylor v. City of Raleigh*, 608.

§ 30. Zoning Ordinances

Plaintiffs were barred by laches from attacking a rezoning ordinance where their action to invalidate the ordinance was not brought until two years and 22 days after the ordinance was adopted. *Taylor v. City of Raleigh*, 608.

NARCOTICS

§ 4. Sufficiency of Evidence

State's evidence was insufficient to support a finding that defendant was in constructive possession of marijuana found growing in a field which had been leased by another. *S. v. Minor*, 68.

Evidence was insufficient to support a jury finding that defendant was in constructive possession of marijuana found in the search of an apartment he had sublet to another. *S. v. Finney*, 755.

§ 5. Verdict and Punishment

In a prosecution for sale or possession of contraband it is proper to order reimbursement to a state or local agency as a condition for suspension of sentence or probation for any sum paid by its agents to the defendant in order to obtain evidence of the crime. *Shore v. Edmisten*, 628.

PARENT AND CHILD

§ 7. Duty to Support Child

If it is determined in a civil action for child support that defendant is the father of plaintiff's illegitimate child, plaintiff and defendant owe the child the same support as if she were their legitimate child. *Tidwell v. Booker*, 98.

The father is primarily liable for the support of a child and the mother is secondarily liable. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Malpractice

The Health Care Liability Reinsurance Exchange Act is unconstitutional. *Indemnity Co. v. Ingram, Comr. of Insurance*, 457.

RAPE

§ 5. Sufficiency of Evidence

State's evidence in a rape case was sufficient to permit inference that defendant procured the victim's submission through use of a deadly weapon where the weapon was actually held by a codefendant. *S. v. Thompson*, 431.

§ 7. Verdict and Judgment

Where defendant was convicted of two offenses of second degree rape involving separate victims, imposition of consecutive life sentences was not unlawful. *S. v. Tolley*, 349.

Sentence of death for rape is invalidated and sentence of life imprisonment substituted therefor. *S. v. Thompson*, 431.

RULES OF CIVIL PROCEDURE

§ 45. Subpoenas

Procedure for issuance of a subpoena for obtaining testimony of a witness. *S. v. Wells*, 486.

WORD AND PHRASE INDEX

PRINTED BY
COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA