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SUPREME COURT OF NORTH CAROLINA

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[1] Appointed Chief Judge 12 April 1977 to succeed J. Phil Carlton who resigned 31 March 1977.

[2] Appointed 2 May 1977 to succeed Benjamin Beach who retired 30 March 1977.

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LICENSED ATTORNEYS

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the additional named person below duly passed the examinations of the Board of Law Examiners, and said person has been issued a license certificate by the Board:

WALTER OLIVER MELVIN.....Fayetteville

Given under my hand and the Seal of the Board of Law Examiners, this the 24th day of March, 1977.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1976

STATE OF NORTH CAROLINA v. CLIFFORD DELANE DAVIS

No. 44

(Filed 4 November 1976)

1. **Constitutional Law § 30— two years between indictment and trial— delay caused by defendant — right to speedy trial not denied**

Defendant was not denied his right to a speedy trial, though more than two years elapsed between the time of indictment and trial, since the delay, as determined by the trial court, was the result of a studied effort to avoid trial on the part of the defendant.

2. **Criminal Law § 89— corroborating evidence — minor discrepancies — evidence properly allowed**

The trial court in a second degree rape case did not err in allowing a physician who examined the victim to relate the history he obtained from her at the time he examined her, since his testimony was in essence in harmony with that of the prosecuting witness, and discrepancy in minor details would not warrant a new trial.

3. **Criminal Law § 86— prior offenses by defendant — cross-examination proper**

The trial court in a second degree rape prosecution did not err in allowing the district attorney to cross-examine defendant with respect to prior convictions for forcible trespass and assault with intent to commit rape, particularly since defendant first informed the judge and jury in his own direct examination of the convictions.

4. **Criminal Law § 102— district attorney's argument — characterizations of defendant**

Argument of the district attorney in a second degree rape prosecution was supported by the evidence, and his characterizations of defendant were fully supported by defendant's own testimony.

5. **Criminal Law § 102— district attorney's jury argument — comment on defendant's credibility**

The district attorney's statement to the jury that "the State would argue and contend to you that his [defendant's] testimony was nothing but the testimony of a pathological liar" did not amount to an expression of opinion that defendant was a liar but instead submitted defendant's credibility to the jury; moreover, defendant's failure to object to the argument at the time it was made constituted a waiver of his objection.

6. **Rape § 6— consent only issue — submission of lesser degrees of crime to jury improper**

In a prosecution for rape when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was with the prosecuting witness's consent or by force and against her will, it is not proper to submit to the jury the lesser offenses included within a charge of rape.

7. **Criminal Law §§ 114, 119— request for instructions — expression of opinion by court**

The trial court in a second degree rape case properly refused to give the jury an instruction requested by defendant that "it is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished; but it must be remembered that it is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, even though completely innocent," since such an instruction would have amounted to an expression of opinion in violation of G.S. 1-180.

8. **Criminal Law § 119— requested instruction not given verbatim — no error**

In a prosecution for second degree rape, the trial court did not err in failing to use the exact language of defendant's requested special instructions on the presumption of innocence and reasonable doubt, and on the function and duties of the jurors, since the court gave the requested instruction in substance.

9. **Criminal Law § 119— motive for rape — requested instruction properly denied**

The trial court in a second degree rape case properly refused to give defendant's requested instruction that "the jury is instructed that in its deliberations upon the question of the defendant's guilt or innocence, it may consider his lack of motive to commit the crime charged," since motive was not an element of the crime charged and was utterly immaterial in this case.

10. **Criminal Law § 117— evidence of rape victim's reputation — consideration for credibility**

The trial court's instruction in a second degree rape case that the jury should consider the evidence with reference to the reputa-

tion of the rape victim for one purpose only, that of the victim's credibility, did not, as defendant contended, withdraw a defense witness's testimony with reference to the victim's reputation from the jury's consideration on the question whether she had consented to have intercourse with defendant, since there was no real distinction between the issue of the victim's credibility and the issue of her consent.

11. Criminal Law § 168— misstatement of evidence by judge — no correction before verdict by defendant —no prejudice

In a second degree rape prosecution, the trial court's misstatement of defendant's testimony as he recapitulated it for the jury was not prejudicial to defendant, particularly in light of the fact that defendant did not object to the misstatement before the verdict, and the judge instructed the jury to take their own recollection as to what the witnesses had said.

12. Criminal Law § 119— indictment not evidence — request for instruction required

In the absence of a request, defendant was not entitled to an instruction that an indictment is not evidence.

13. Rape § 3— indictment for common law rape — trial for second degree rape proper

The indictment upon which defendant was tried charged common law rape, and its language was clearly sufficient to embrace second degree rape as defined by G.S. 14-21. Though G.S. 14-21, the statute dividing rape into degrees, was enacted subsequent to the date of the offense alleged in this case, it was nevertheless applicable to defendant's trial since Chapter 749 of the Session Laws of 1975 (ratified on 24 June 1976—prior to defendant's trial) provided that G.S. 14-21 should apply in all trials for rape committed after 18 January 1973 and prior to the effective date of G.S. 14-21, the period during which the rape for which defendant was on trial allegedly occurred.

APPEAL by defendant under G.S. 7A-27(a) from *Thornburg, J.*, 5 January 1976 Session of MECKLENBURG.

Defendant was tried upon a bill of indictment which charged that on 26 August 1973 he "did, unlawfully, wilfully and feloniously ravish and carnally know Susan E'aine Kilmer, a female, by force and against her will." The solicitor prosecuted defendant for second-degree rape under G.S. 14-21 (1973) and ch. 749, § 1 (1975), N. C. Sess. Laws. Upon defendant's conviction of that crime the judgment of the court was that he be imprisoned in the State's prison for "the remainder of his natural life." From this sentence he appealed as a matter of right to the Supreme Court.

Prior to 1 October 1975 defendant was represented by privately employed counsel, Mr. William L. Stagg. Disagree-

ments, which they were unable to resolve, developed. "For reasons sufficient to the court," Judge Snepp permitted Mr. Stagg to withdraw and, upon defendant's affidavit of indigency, he appointed Public Defender Michael S. Scofield as his counsel.

On 9 December 1975 the public defender filed a motion to dismiss the indictment upon allegations that defendant had been denied his Sixth Amendment rights to a speedy trial. The case was calendared for trial at the 17 December 1975 Session, but it was necessarily continued because of the illnss of both the public defender and the assistant district attorney assigned to the case. The motion to dismiss, however, was heard. At the hearing Mr. Scofield advised Judge Snepp that he had filed the motion without talking to defendant "in any depth"; and that after consulting with him and Mr. Stagg, he had learned that the trial had been delayed because of defendant's requests for postponement. Whereupon, Mr. Scofield withdrew the motion to dismiss and requested that defendant be allowed bail in "a nominal amount." The judge expressed the opinion that this case could have been disposed of long ago except for defendant's "maneuvering" and "studied effort to avoid trial" and fixed his bond at $30,000.00. Thereafter the trial was held at the first term in January.

Evidence for the State, summarized except when quoted, tended to show:

On 27 July 1973 Susan Elaine Kilmer, a physical therapist, moved to Charlotte from Atlanta, Georgia, where she had lived with her parents for 24 years. On 26 August 1973 she had been employed by Huntersville Hospital for about four weeks and was living alone in Apartment 27-A in Fountain Square Apartments on Eastway Drive. Her next door neighbor, in Apartment 27-B, was Mary Jamison Johnson.

On the night of August 25th, after ascertaining that both the front door and the sliding glass door in the back were locked, Miss Kilmer went to bed and to sleep about 10:30 p.m. During the early morning hours, while it was still dark, a noise awakened her. The only light in her bedoom came from a street light. Miss Kilmer saw a man standing just inside the open door, which she had closed before retiring. When he said something to her, which she did not understand, she inquired who he was and what he was doing there. He said he was the maintenance man and asked her what *she* was doing there. She replied,

"I live here. What do you want?" He said, "Have you got any money?" She said, "Yes, do you want it?" He answered, "No, I want you."

At this point Miss Kilmer started screaming. The man crossed the room, put his hand across her face, pushed her back on the bed and told her to shut up. He then said he was not going to hurt her, rolled her over on her stomach and held her, face down, on the bed while he asked her a number of questions, all of which she answered. *Inter alia,* he inquired as to her name (she told him it was Susan), where she worked, her marital status, and if she had ever been raped before. During his entire time his hand was on her back, and she was unable to see his face. He asked her if she would consider it rape if he had intercourse with her and she said "Yes." He then rolled her over on her back, put a pillow over her face and had intercourse with her.

Miss Kilmer testified: "I did not physically resist this man in any way. I was scared. I believed if I struggled, he would kill me. He said something while he was on top of me. I couldn't hear what he said. He then moved the pillow a little bit and I could hear somebody ringing the doorbell. . . . He said that I had better stay where I was because he had a gun. . . .

"I could hear people downstairs by then. I heard them identify themselves as police officers. They said, 'Police officers. Is there anybody there?' I was still in my bed at this time. The man was halfway between the bed and the door. He got up and closed the door and left it cracked about four inches. He said, 'You tell them I'm with you.' I didn't say anything. Then I heard people coming up the stairs and they called out, 'This is the police. Is there anybody there'; and he said 'you're going to protect me, aren't you?' I said, 'No, I won't.' I started yelling for the police then. He opened the door and went out and there were police officers on the landing. The lights were turned on after that. That man is in the court room. His name is Clifford Davis.

"I did not know Clifford Davis at that time. I had not seen him before that night."

The police had come to Miss Kilmer's apartment in response to a call from Miss Johnson who had been awakened

sometime after 1:00 a.m. by Miss Kilmer's voice next door. Miss Johnson testified:

"Her voice was very loud and clear. It was very distinct, and I could tell that she was alarmed. She said, 'Who are you?' There was a pause and then I heard her say, 'What are you doing here?'; another pause, and then I heard her say, 'Well, I live here'; and after that, I heard three screams, just really blood-curdling screams. I was really scared at this point. After I heard the screams, I decided to call the police. I have a phone by my bed but I did not know if the person in Susan's apartment had heard me or would hear me, so I went into the hall to use my phone, closing my door so that the light in the hall could not be seen. I then called the operator and requested the police. She got the police department and I identified myself and where I lived; I told them that I had heard my neighbor. I said 'She lives alone and I just heard her scream, three screams.' I said, 'I'm really afraid something bad has happened to her and I wish you would come out here and check on her.' . . . The police arrived between two and five minutes after I called them. I pointed to the next door so they would know where the trouble was. I saw one of them knock on the door and they knocked again. One went around the back of the apartment. I heard a voice in Susan's apartment say 'Put your hands up against the wall.' I saw Clifford Davis as they brought him from Susan's apartment. I had not seen him before."

The testimony of Charlotte police officers, C. H. Parker and J. C. Stanton tended to show that they were directed to Miss Kilmer's apartment by Miss Johnson, who had been waiting for them; that they entered the apartment from the rear through the sliding glass door, which was open far enough for them to enter sideways. Finding no one downstairs they called several times, "Police officers, is anybody home?" Getting no response they went upstairs. As they approached the landing Officer Parker again announced the presence of police officers and inquired, "Is anybody here?" This time he "heard a voice, Miss Kilmer's voice say 'He's up here.'" At this point defendant stepped out of the bedroom and one of the officers informed him that "he was under arrest for suspected possible rape." Upon hearing this defendant stated, "Susan, tell them who I am." Officer Parker immediately asked Miss Kilmer if she knew defendant, and she replied that she had never seen him before. After telling defendant to turn around and place

his hands on the wall, Officer Parker handcuffed him and took him to the patrol car. Defendant had the odor of alcohol about his person.

At the patrol car Officer Parker reached into defendant's right front pocket, where he found change, keys and apparatus used with an acetylene torch. While he was examining these items, defendant attempted to escape by running away from the police car. The officers apprehended him in a very short distance, and he was taken to the police station. There defendant told Officer Thompson that he had met Miss Kilmer two years earlier at a party in the same apartment complex.

Thereafter, Miss Kilmer called her father in Atlanta. Officer Stanton then took her to the Charlotte Memorial Hospital, where she was examined by the chief resident gynecologist, Dr. Larry Craddock, at 6:30 a.m. on 26 August 1973. He testified to the presence of sperm in her vaginal canal and her statement to him that she had been raped.

Early in the evening of August 26th Miss Kilmer went to Miss Johnson's apartment and told her she "couldn't bear to stay by herself that night." Miss Johnson spent the night with her. Two or three weeks later Miss Kilmer moved from the Fountain Square Apartments. Miss Johnson also moved.

Defendant's testimony in his own behalf, summarized except when quoted, tended to show:

In 1965, in Johnston County, he was convicted of an assault with intent to commit rape, which occurred on 28 December 1964 *(see State v. Clifford Delane Davis,* 265 N.C. 720, 145 S.E. 2d 7 (1965)). After serving three years of the twelve to fifteen-year sentence imposed for this felony, defendant was paroled. In July 1969 he moved with his family to Charlotte. There, on 28 November 1971, he made a "forcible entry" into the Fountain Square Apartment occupied by Miss Paula Crotwell. This was in the same apartment complex in which Miss Kilmer was living in 1971. Defendant was familiar with these apartments and knew they had patio doors. Upon his conviction of this forcible entry in 1971 defendant received an active prison sentence of two years (G.S. 14-126), and he was returned to prison.

According to defendant, during the latter part of July or early August 1973, he was on work release. During the daytime

he was working on the renovation of the Playmate Club in Charlotte and spending the night back at the prison unit. However, every week he had a weekend pass. While working at the Club he was introduced to Miss Kilmer (whom he consistently referred to as Susan) by one Joe Johnson (now deceased), who was at the Club "quite a bit." Defendant and Joe were discussing sex, and Joe commented that he had had sexual intercourse with Susan on several occasions. Defendant "made a statement that he might like to go out with her." Thereafter in mid-August he saw her at a party and talked to her for about five minutes. The next time he saw her was during the early morning hours of 26 August 1973.

About 12:00 p.m. on August 25th, having procured her telephone number from Directory Assistance, defendant called Miss Kilmer and told her he'd like to come over. She said it was too late but, when he insisted, she gave him her address. He instructed her to leave the back door open and he'd be over in a few minutes. Upon arrival he found the back door unlocked, entered and went upstairs, where he found Miss Kilmer lying in bed nude. After he had been with her about thirty minutes they had intercourse by mutual consent, after which he slept until about 5:00 a.m. As he prepared to leave, Miss Kilmer went downstairs and discovered that he had let her cat out when he came in. She shouted up to him to "go down and look for her." He went out and searched unsuccessfully for the cat for about five to ten minutes. He then returned to tell her he could not find the cat.

When he came upstairs she had gone back to bed and loudly demanded, "Well, what are you doing back up here?" He rep'ied, "Well, it's your cat. Why don't you go look for him yourself or help me look for him." When Miss Kilmer asked him to go back downstairs he told her he had to go home; that it was late and he'd been out too long; that her back door would not close but she would have to get the apartment complex maintenance man to fix it because he did not have time.

At this juncture the police arrived, came up the stairs and ordered defendant Davis to put his hands on the wall. When Officer Parker asked him if he lived there he said, "No," and turned to Miss Kilmer to say, "Susan, tell them who I am and what I'm doing here." After he had asked her several times to tell them who he was and she had said nothing, Officer Parker took him downstairs to the police car. Once outside he panicked

at the thought that he was on work release and it would probably come out that he was running around on his wife; so he "took off, trying to run from what [he] did not know."

After defendant was apprehended Officer Larson, who had remained with the police vehicle, asked him if he "knew this girl." When he replied that her name was "Susan," the officer inquired what her full name was. To this query he answered, "Didn't Susan tell you what her name was?" The officer said, "I'm asking you." At this point defendant said he "began to think that maybe Susan didn't want them to know her name."

He denied that Miss Kilmer ever screamed while he was in her apartment; that he asked her if she had ever been raped before or if she would consider it rape if he had intercourse with her. He also denied telling Officer Thompson he had met Miss Kilmer two years earlier.

On redirect examination Miss Kilmer denied that she had ever attended a party in Charlotte prior to the night of 25 August 1973.

Attorney General Rufus L. Edmisten and Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Michael S. Scofield, Public Defender and James Fitzgerald, Assistant Public Defender for defendant appellant.

SHARP, Chief Justice.

In the record on appeal defendant sets out 11 assignments of error, which we will examine in the order the matters complained of occurred at the trial.

[1] We consider first the assignment that defendant was denied his constitutional right to a speedy trial in that "the delay of time from indictment to trial was excessive . . . and that the delay was the studied choice of the State." This assignment, which is based on no exceptions taken at the trial, is totally without merit.

Initially, defendant was represented by his privately employed counsel, Mr. William L. Stagg. Sometime (date not disclosed) after defendant was indicted for the rape of Miss Kilmer, he severely injured himself in an unsuccessful attempt to escape from the Statesville prison unit over a 15-foot wall. *Inter alia,* he broke both ankles. In consequence he was removed to the

State's prison in Raleigh where he underwent surgery. Thereafter defendant continuously requested Mr. Stagg to have his trial postponed. In August 1975 he was brought to Charlotte for trial. At that time he told the assistant district attorney that he wanted to have a foot operation at the prison hospital before his trial, and he represented to the prosecutor that he would plead guilty to "two reduced pleas" if the prosecutor would postpone his trial. Upon these representations defendant's case was again continued.

On 29 September 1975 defendant was again brought to Charlotte for trial. This time he requested a continuance in order to have a "post-operative examination from surgery in August" and until after his "prison system expires the 22nd." He also denied any intention of ever pleading guilty to any offense and told Judge Snepp that his "greatest fear right now is having to appear with Mr. Stagg." After listening to defendant, Judge Snepp said to him: "Don't worry, Mr. Stagg is not going to appear for you . . . Mr. Davis, you apparently have used every method possible to put off the fateful day of trial. . . . All right. I'm going to give you a lawyer." Thereupon, Judge Snepp ordered that the public defender, Mr. Scofield, be appointed to represent defendant and, over defendant's protest and renewed request for a continuance, directed that defendant be arraigned the following day. The order permitting Mr. Stagg to withdraw as defendant's counsel was signed on 1 October 1975.

On 9 December 1975, without prior consultation with defendant as to the motion and "solely on the basis of the indictment being two and a half years old," Mr. Scofield filed a motion to dismiss the action. As pointed out in the preliminary statement, the case was scheduled to be tried before Judge Snepp on 17 December 1975. However, on that day, Mr. Buckhalt, the assistant district attorney, was absent on account of illness, and Mr. Scofield—although present—was barely able to speak. He did, however, advise Judge Snepp, in open court and in the presence of defendant, that he was withdrawing his motion to dismiss for lack of a speedy trial because he had learned that defendant himself had requested the postponements of his trial. Judge Snepp responded, "I have seen, and from what I know about this case, what I believe to be a studied effort to avoid trial on the part of the defendant." Mr. Scofield informed the court that after being appointed counsel for defendant he required four to six weeks to prepare, but thereafter he had

informed the district attorney (whom he knew had scheduling problems) that "as soon as [the district attorney] was ready to go they wanted to go." The case was tried during the week of 5 January 1976.

On the foregoing facts we find incomprehensible and unsupportable the contention that the judge, *ex mero motu*, should have dismissed the action. *State v. Harrell*, 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

[2] Two of defendant's assignments of error relate to the admission of evidence. The first charges that the court erred in permitting Dr. Craddock to relate the history he obtained from Miss Kilmer at the time he examined her on 26 August 1974 in that the history "did not corroborate but conflicted with the prosecuting witness's testimony." This assignment is not sustained. We find in the record no conflict between Miss Kilmer's testimony and Dr. Craddock's account of what she told him at the time of his examination. His brief summary of the history she gave him was not, of course, in the words of her testimony. However, "in essence there was harmony. . . . Discrepancy in minor details does not warrant a new trial." *State v. Cox*, 272 N.C. 140, 141, 157 S.E. 2d 717, 718 (1967).

[3] The next assignment is that the court permitted the district attorney to improperly cross-examine defendant concerning his prior criminal record. Specfically the district attorney's question was: "After you were paroled [from the 12-15-year sentence for assault with intent to commit rape] you . . . broke into Paula Crotwell's apartment and attempted to have sexual relations with her at that time without her permission?" Mr. Scofield objected to the question but, before the court could rule, defendant had answered, "I did not." The judge then overruled the objection and thereafter, upon repeated questioning, defendant admitted that he had been "convicted of a misdemeanor, breaking into Paula Crotwell's apartment . . . a forcible entry" and that he had received a sentence for it. In the challenged cross-examination we perceive no error prejudicial to defendant. *See State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). Indeed, defendant first informed the judge and jury in his own direct examination that he had previously been convicted of an assault with intent to commit rape and of forcible trespass. The State was within its rights in cross-examining him with respect

to these two convictions. *See* 1 Stansbury's North Carolina Evidence § 35 at 103 (Brandis rev. 1973).

[4] Defendant's third assignment of error is that the district attorney made irrelevant and inflammatory remarks in his argument to the jury which were not supported by the evidence. The arguments of the public defender and the district attorney are in the record, and we have read both with care. We find nothing in the solicitor's remarks which exceeded the bounds of legitimate argument. At no time did he "travel outside of the record" or inject into his argument facts of his own knowledge or other facts not included in the evidence. His characterizations of the defendant are fully supported by defendant's own testimony. *See State v. Wortham,* 287 N.C. 541, 215 S.E. 2d 131 (1975). Considering the character of defense counsel's argument and his attack upon the character and credibility of the prosecuting witness the district attorney's response should have come as no surprise to him. The response he received was justified. *See State v. McCall,* 289 N.C. 512, 223 S.E. 2d 303 (1976).

[5] Defendant has inserted in the record on appeal an exception to the district attorney's statement to the jury, "The State would argue and contend to you that his [defendant's] testimony was nothing but the testimony of a pathological liar." Defendant made no objection to this argument at the time it was made. The general rule is that if an objection to argument of counsel is not made at the time of the argument, so as to give the court an opportunity to correct the transgression, it is waived. *State v. Coffey,* 289 N.C. 431, 222 S.E. 2d 217 (1976); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974). The circumstances of this case suggest no reason for making an exception.

This Court held in *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967) that, while it is improper for a lawyer to assert his opinion that a witness is lying, a lawyer may argue to the jury that they should not believe a witness. In *State v. Noell, supra,* we held that it was not improper for the solicitor, in discussing the testimony of the defendant's witness, to say to the jury, "I submit to you, that they have lied to you." The solicitor did not call the defense witnesses liars. In this case the district attorney also submitted defendant's credibility to the jury. Defendant's third assignment of error is overruled.

[6] Defendant's assignments of error 4, 5, 6, 7, 10, and 11 relate to the judge's charge. The fourth assignment is that the

judge failed to include in the list of permissible verdicts guilty of an assault with intent to commit rape and guilty of an assault on a female. The judge instructed the jury that it could return only one of two verdicts, guilty of second degree rape or not guilty. Since this Court's decision in *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972), the rule has been in prosecutions for rape that when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was with the prosecuting witness's consent or by force and against her will, it is not proper to submit to the jury lesser offenses included within a charge of rape. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Bynum* and *State v. Coley,* 282 N.C. 552, 193 S.E. 2d 725 (1973). Assignment No. 4 is overruled.

[7] Assignment No. 5 is to the court's denial of the defendant's request that he give the jury the following special instruction:

"It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished; but it must be remembered that it is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, even though completely innocent." U. S. Gov't, *Manual for Courts-Martial* ¶ 199a (Rev. ed. 1969).

Such expressions are sometimes found in the opinions of an appellate court. *See State v. Williams,* 185 N.C. 685, 693, 116 S.E. 736, 740 (1923). However, it was never intended that a trial judge should use them in instructing the jurors, who would undoubtedly interpret such an instruction as an expression of the judge's opinion as to the particular case. *See State v. Oakes,* 249 N.C. 282, 285, 106 S.E. 2d 206, 208 (1958). Judge Thornburg correctly refused to give the requested instruction. To have done so would have been to violate G.S. 1-180, which prohibits the trial judge from expressing an opinion as to "whether a fact is fully or sufficiently proven." This proscription applies to the State's case as well as the defendant's.

[8] The substance of defendant's assignment No. 6 is that the trial judge failed to use the exact language of defendant's requested special instructions on the presumption of innocence and reasonable doubt, and on the function and duties of the jurors. The well established rule with us is that if a request

is made for a specific instruction "which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions 'or to become a mere judicial phonograph for recording the exact and identical words of counsel,' must charge the jury in substantial conformity to the prayer." *State v. Bailey,* 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961); *State v. Henderson,* 206 N.C. 830, 175 S.E. 201 (1934).

Insofar as the requested instructions are correct statements of legal principles and applicable to this case, the record discloses that the court instructed the jury in substantial conformity therewith. He was not required to give them verbatim. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). We surmise that the learned judge declined to give the instructions as tendered because he thought defense counsel did "protest too much" and that in the repetitive statements of elementary legal principles, he perceived an overemphasis calculated to convey to the jury the impression that the court was trying to tell them to acquit defendant. He committed no error when he marked the request, "Tendered in apt time and rejected except as included in instructions given."

[9] The trial judge correctly rejected the following requested instruction in its entirety: "The jury is instructed that in its deliberations upon the question of the defendant's guilt or innocence, it may consider his lack of motive to commit the crime charged." Motive, of course, is not an element of a crime, *State v. Burno,* 200 N.C. 267, 156 S.E. 781 (1931). When a man rapes a woman it is utterly immaterial whether his motive was to satisfy his passion, savor a sensation of power, or to debase and humiliate his victim. In some cases, the presence or absence of a motive may be of great probative value in determining whether the accused is guilty of the crime charged. *See State v. Wilcox,* 132 N.C. 1120, 44 S.E. 625 (1903); 22 C.J.S. *Criminal Law* § 31(1) (1961). In this case, however, there is no question as to the identity of the man who entered Miss Kilmer's home in the early morning hours of 26 August 1973. He admits he had sexual intercourse with her. The only issue was whether the act was with Miss Kilmer's consent. The requested instruction was entirely inappropriate and could have served only to confuse the jury. Assignment of error No. 6 is overruled.

[10] Assignment No. 7 relates to the court's charge that the jury should consider the evidence with reference to the reputa-

tion of Miss Kilmer "for one purpose only"; that if they believed all or any part of this evidence and found it to bear upon Miss Kilmer's credibility, they could consider it, together with all the other facts and circumstances bearing upon her truthfulness in deciding whether to believe or disbelieve her testimony during the course of the trial.

The testimony to which the judge had reference was that of defense witness Marjorie Campbell and State's witness Carolyn DePuy. Ms. DePuy, head of the physical therapy department at Huntersville Hospital, testified: Miss Kilmer was "hired from Atlanta" in the summer of 1973 and "that was her first job." In August Ms. DePuy asked Miss Kilmer where she was spending her weekends and ascertained that she had gone home for the first three. Ms. DePuy said, "Susan was a very diligent worker. She was of good character."

Ms. Campbell, who was a nurse at Huntersville Hospital, testified that she knew Miss Kilmer "on sight" but was not acquainted with her personally; that she had met defendant several times while visiting a friend at the Huntersville Prison unit; and that defendant had always conducted himself as a gentleman in her presence. Ms. Campbell further testified that she knew defendant's reputation to be good but based on her conversations with Miss Kilmer's boyfriend and two patients, she has an opinion about Miss Kilmer's reputation and "that opinion" is bad.

Defendant contends that the instruction he challenges in Assignment No. 7 withdrew Ms. Campbell's testimony with reference to Miss Kilmer's reputation from the jury's consideration on the question whether she had consented to have intercourse with defendant. He argues that since consent was the crucial issue in his trial, this instruction was prejudicial error. He cites the rule which is stated in 1 Stansbury's North Carolina Evidence § 105 (Brandis rev. 1973) and *State v. Stegmann*, 286 N.C. 638, 647, 213 S.E. 2d 262, 270 (1975): "[T]he character of the complainant in rape may, it seems, be shown as bearing upon the question of consent."

Character and reputation are, of course, two different things. As pointed out in Stansbury's North Carolina Evidence, *supra*, § 110, when character is offered as evidence of a person's conduct on a particular occasion, it may not be proven by the opinion of those who know him. "[T]he standard method,

and usually the only permissible method, of proving character is by *reputation.* By this is meant *community* reputation, *i. e.,* general reputation in the community in which the person in question resides. Mere rumor and gossip, or a divided opinion, or the opinion of a part of the community, or reputation among a particular group, is not admissible." Thus, whether Ms. Campbell had a good opinion or a bad opinion about Miss Kilmer's reputation, her opinion was not evidence tending to prove Miss Kilmer's character.

Further, as the attorney general points out in the State's brief, "In this case, where the credibility of the victim's testimony that she did not consent was the key to the State's case, there is no real distinction between the issue of the victim's credibility and the issue of her consent." On that issue of consent, the testimony of defendant and Miss Kilmer was in irreconcilable conflict. There was no middle ground; the jury had to believe one and disbelieve the other. The credibility of the two was the key. If the jury found Miss Kilmer to be a creditable witness and believed her testimony, they would necessarily find that she did not consent.

On the evidence the charge which defendant challenges in assignment No. 7 was neither erroneous nor prejudicial as applied to defendant. This assignment is overruled.

[11] In assignment No. 10 defendant asserts that the judge misstated defendant's testimony as he recapitulated it for the jury. The judge told the jury that defendant had offered evidence tending to show that shortly after he awoke in Miss Kilmer's bedroom on the morning of 26 August 1973 "the police came in, and that Susan Elaine Kilmer told them that he had raped her." This statement by the judge was an inadvertence. It was not the defendant who testified that when the officers entered Miss Kilmer told them defendant had raped her. It was Officer C. H. Parker who testified that as he approached the landing and announced the presence of police officers, the first thing Miss Kilmer said, after telling them to come up, was that she had been raped.

Defendant concedes that he did not object to the misstatement before the verdict. He now contends, however, that it was "a statement of a material fact not shown in evidence" and so prejudicial as to entitle him to a new trial. We do not so hold. We have repeatedly held that an inadvertence in recapitulating

the evidence must be called to the attention of the court in time for correction and that an objection after verdict comes too late. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Cornelius*, 265 N.C. 452, 144 S.E. 2d 203 (1965); *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608 (1950). Further, the judge specifically instructed the jury "to take your own recollection as to what a witness has said or as to what any of the evidence in the case was. At this point I will give you my recollection of what a part of the evidence offered by the parties tends to show . . ."

Under the circumstances of this case we are convinced beyond a reasonable doubt that the judge's inadvertent misstatement did not influence the verdict. Assignment No. 10 is overruled.

[12] In assignment No. 11 defendant asserts that "the court erred when it failed to instruct that an indictment is not evidence" and this "failure to so instruct allowed the jury to give undue weight to the grand jury's finding of an indictment." Defendant made no request for such an instruction; and, in the absence of a request, the judge was under no obligation to give it. The presumption is that the jurors were intelligent people, that they understood the charge on the presumption of innocence and that they were not under the misapprehension that the bill of indictment was evidence tending to show that defendant was guilty of the crime it charged. Defendant has cited no authority for the proposition for which he contends. This assignment is without merit and is overruled.

Finally, defendant contends "that the court erred in accepting the verdict of second degree rape because appellant had not been indicted for second degree rape." We treat this assignment of error as a motion in arrest of judgment and overrule it.

[13] Defendant argues that the rape for which he was indicted on 5 November 1973 allegedly occurred on 26 August 1973; that Ch. 1201, N. C. Sess. Laws (1973), codified as G.S. 14-21 (Cum. Supp. 1975), which divided rape into first and second degree offenses did not become effective until 8 April 1974; and that therefore the crime for which he stands convicted did not exist on 26 August 1973.

The indictment upon which defendant was tried charged common law rape, and its language is clearly sufficient to em-

brace second degree rape as defined by G.S. 14-21. This statute did not redefine or reconstitute the crime of rape. It remains carnal knowledge of a woman forcibly and against her will. The General Assembly's only purpose in dividing rape into degrees was to reduce the mandatory sentence of death theretofore imposed upon all defendants convicted of rape to a term of years or life imprisonment in those cases in which the rape was not accompanied by serious injury or accomplished by the use or threatened use of a deadly weapon and the victim was 12 years of age or over. In *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), this Court held that for all rapes committed prior to 18 April 1974 the punishment remained death. However, on 24 June 1975 the General Assembly ratified Chapter 749 of the Session Laws of 1975, Section 1 of which provides:

"The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973."

Obviously the enactment of Chapter 749 of the Session Laws of 1975 prior to the time of defendant's trial inured to his benefit. The United States Supreme Court long ago declared the power of State legislatures to reduce the penalties imposed for previously defined crimes. *Rooney v. North Dakota*, 196 U.S. 319 (1905). *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

We have examined the entire record in this case with care commensurate with the gravity of the sentence from which defendant appeals. It shows that defendant has had a fair trial before a patient and painstaking judge.

No error.

GERALD P. WILLIS, ADMINISTRATOR OF THE ESTATE OF DAVID S. WILLIS, DECEASED v. DUKE POWER COMPANY, A CORPORATION

No. 133

(Filed 4 November 1976)

1. **Contempt of Court § 8; Appeal and Error § 6— failure to comply with discovery order — contempt of court — immediate appeal**

When a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature, and the order is immediately appealable for the purpose of testing the validity both of the original order and the contempt order itself, notwithstanding the contemnor was not immediately punished, where the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains. G.S. 5-1(4); G.S. 5-2; G.S. 5-8; G.S. 1-277; G.S. 7A-27(d)(1).

2. **Rules of Civil Procedure § 34— production of documents — showing required**

Rule 34 requires that as a prerequisite of production, documents must be (1) "designated," (2) "within the scope" of Rule 26(b), and (3) in the "possession, custody, or control" of a party from whom they are sought.

3. **Rules of Civil Procedure §§ 33, 34— interrogatories asking party to "identify" documents — production of such documents**

Since a proper function of interrogatories is to obtain the information necessary to make a showing that the prerequisites for the production of the documents have been established, plaintiff's interrogatories properly asked defendant to "identify" certain documents; however, it was error for the trial court to order production of any documents before the documents had been (1) further "identified" by defendant, or (2) further "designated" by plaintiff.

4. **Rules of Civil Procedure § 34— production of documents — showing of good cause**

An order for the production of documents under former Rule 34 was erroneous where it was not based upon either a showing or finding of good cause.

5. **Rules of Civil Procedure § 37— failure to make discovery — contempt of court — erroneous order**

An order holding defendant in contempt for (1) failure to comply with an order to produce documents and (2) failure to answer a specified interrogatory was erroneous where the order for the production of documents was unlawful and the record shows a good faith effort on the part of defendant to answer the interrogatory.

6. **Rules of Civil Procedure § 26— discovery — information in claim files relating to shocks or burns**

Information in all of defendant's claims files relating to shocks or burns wherever and whenever they may have occurred would be

neither relevant to plaintiff's claim against defendant nor likely to lead to relevant information and would fall outside the scope of discovery provided by Rule 26(b)(1).

7. **Rules of Civil Procedure § 26— response to interrogatories — identification of documents**

In responding to interrogatories requesting defendant to identify certain documents, defendant should have identified those documents which met the relevancy requirements of Rule 26(b)(1) even if the documents themselves may not be discoverable because they are privileged or fall within the trial preparation immunity of Rule 26(b)(3) since the question of the discoverability of the documents cannot be properly determined until they have been appropriately identified and designated.

8. **Rules of Civil Procedure § 26— discovery — test of relevancy**

The test of relevancy under Rule 26 is not the stringent test required at trial, the rule being designed to allow discovery of any information "reasonably calculated to lead to the discovery of admissible evidence."

9. **Rules of Civil Procedure § 26— discovery — relevant material — protective order**

While the relevancy requirements of Rule 26 are mandatory, a discretionary protective order may be granted under Rule 26(c) even as to relevant material.

10. **Rules of Civil Procedure § 34— production of documents — new rule — good cause need not be shown — protections to responding party**

The new procedure for obtaining production and inspection of documents has eliminated the requirement of a court order based upon motion and good cause, since new Rule 34 simply requires serving the request for production upon the other party; however, the party from whom discovery is sought is afforded protections by the designation, scope, and possession requirements of Rule 34, the exemption of privileged matter in the scope provision of Rule 26, the allowance of protective orders, and the extended "work product," or trial preparation, immunity of Rule 26(b)(3).

11. **Rules of Civil Procedure § 34— production of documents — "designation" requirement**

The "designation" requirement of Rule 34 does not necessarily mean that documents must be separately described, since designation by categories may be sufficient depending upon the categories utilized.

12. **Rules of Civil Procedure § 37— failure to make discovery — sanctions — order compelling discovery**

If a party files answers or objections to interrogatories, or serves a written response to a request for inspection, no sanctions under Rule 37(d) may be obtained and the proper procedure for the party seeking discovery is to obtain an order compelling discovery under Rule 37(a).

13. Rules of Civil Procedure § 26— discovery — attorney-client privilege

The protection of the attorney-client privilege under Rule 26 is absolute and is identical in scope to the traditional privilege.

14. Rules of Civil Procedure § 26— work product or trial preparation immunity

The "work product," or trial preparation, exception of new Rule 26(b)(3) goes considerably beyond the protection accorded under the old rule and, although not a privilege, the exception is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent."

15. Rules of Civil Procedure § 26— trial preparation immunity — materials prepared in anticipation of litigation

The trial preparation immunity of Rule 26(b)(3) applies not only to materials prepared after the other party has secured an attorney, but to those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation; however, the protection does not extend to materials prepared in the ordinary course of business or to facts known by any party.

16. Rules of Civil Procedure § 26— trial preparation immunity — materials prepared in other litigation

The trial preparation immunity of Rule 26(b) protects any materials prepared in anticipation for any litigation by the party from whom discovery is sought, including materials prepared for litigation between different parties which was terminated prior to the pending case.

17. Rules of Civil Procedure § 26— materials subject to trial preparation immunity — discovery — showing of substantial need and undue hardship

A plaintiff may be allowed discovery of materials subject to the trial preparation immunity upon a showing of "substantial need" and "undue hardship" involved in otherwise obtaining the substantial equivalent thereof, and in the interests of justice the trial judge may require an *in camera* inspection and may allow discovery of only parts of some documents; however, no discovery whatsoever may be obtained of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" concerning the case at bar or of the work product of attorneys in the case at bar.

ON petition by defendant for discretionary review of the decision of the Court of Appeals, 26 N.C. App. 598, 216 S.E. 2d 732 (1975), dismissing defendant's appeal of the order of *Falls, J.*, 6 January Session of MECKLENBURG Superior Court. Docketed and argued as No. 103 at the Fall Term 1975.

William E. Poe, William F. Farthing, Jr., William I. Ward, Jr., William E. Poe, Jr., and Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, Attorneys for defendant appellant.

Cansler, Lockhart, Parker & Young, P.A., by Thomas Ashe Lockhart, Joe C. Young and John M. B. Burtis, Attorneys for plaintiff appellee.

EXUM, Justice.

This case presents questions involving a contempt order imposed in part under General Statute 1A-1, Rule 37(b), as a sanction for defendant's alleged noncompliance with an earlier order compelling certain discovery. The first is whether the contempt order which imposes no punishment pending the expiration of a period in which defendant may purge itself by complying with a modified version of the earlier order is immediately appealable. We hold that it is. We are then presented with whether the earlier order and the contempt order are in error. To decide this we must consider important questions involving our rules regulating discovery in civil actions, particularly Rules 26 (scope), 33 (interrogatories), and 34 (production of documents)—their interrelationship and their use and abuse.

In this wrongful death action plaintiff alleges that the negligence and gross negligence of Duke Power Company caused the death by electrocution of plaintiff's intestate on October 4, 1973. Death allegedy resulted from the contact of an aluminum ladder, being used by decedent to paint the gable of a house, with defendant's 7200-volt electrical power line. Plaintiff alleges that defendant was negligent in the creation, maintenance, location and condition "of its uninsulated high-tension wires, and the failure and refusal by Duke Power to remedy the condition . . . of which it had full notice and knowledge." Plaintiff further alleges that a similar accident occurred about one year previously causing the death of Nelson Hale, the former owner of the house, "from the same uninsulated wires at the same place, under the same or substantially similar circumstances as those alleged in this complaint." Plaintiff seeks compensatory damages in the sum of $1,250,000 and punitive damages in the sum of $6,250,000.

Defendant's answer denies negligence and asserts the defense of contributory negligence.

On July 29, 1974, plaintiff served on defendant a single document entitled "Plaintiff's Interrogatories and Request for Documents to Defendant, Set No. 1," comprising 37 interrogatories most of which contained a number of subdivisions and a request that defendant produce all documents identified in the interrogatories. In summary the pertinent interrogatories asked defendant (1) to identify persons who had investigated the equipment in question, the Nelson Hale accident, and who had been contacted by defendant or given defendant any information relative to the accident in suit; (2) to furnish various kinds of information regarding all claims for electric shock or burns *ever made* against defendant; (3) "identify" each document containing any information "gained by" or "relating to the contacts" made by any of the persons identified and "relating" to any other claims inquired about; (4) identify each document it did not intend to produce and which was not in its possession or control; and (5) "requested" defendant to produce and permit plaintiff to inspect "all documents identified."

On August 10, 1974, defendant filed objections to those interrogatories asking it to "identify" certain documents as well as to other interrogatories not involved in this appeal. Defendant also moved for a protective order on the grounds that to answer the interrogatories and produce the documents requested would cause it unreasonable annoyance, expense and oppression and on the further ground that since no documents had yet been designated it need not respond to plaintiff's request for them and need not respond, in any event, until its objections were ruled on by the court.

Defendant's objections and its motion were apparently calendared for hearing on November 25, 1974. When called for hearing defendant's counsel was not present in court. Judge Falls heard from plaintiff's counsel and entered the following order before the noon recess on November 25, 1974:

> "THIS CAUSE . . . being heard on the pleadings and argument of counsel for plaintiff, and appearing to the court that said Motions and Objections should be denied in their entirety;
>
> "NOW, THEREFORE, IT IS ORDERED, AJUDGED AND DECREED THAT defendant's Motion for Protective Order, and Objections to Plaintiff's Interrogatories and Motion be, and same hereby are, denied and that defendant be, and it

hereby is, ordered to answer plaintiff's Interrogatories heretofore filed July 30, 1974, and produce and permit plaintiff to inspect and copy the documents therein designated within ten (10) days from the entry of this order."

That afternoon defendant's attorneys appeared and requested a hearing. A hearing was afforded them on the morning of November 26. The upshot of this hearing was that the November 25 order was allowed to stand without modification. Defendant excepted to the order.

On December 5, 1974, defendant served its answers and produced certain documents. No question was left unanswered by defendant. Interrogatory 1(b), which reads:

"Identify each and every person who has, in the course of his employment with you or, if not an employee, at your request:

(b) conducted any study or investigation or measurement of any of the Relevant Equipment,

(i) on or after October 4, 1973;

(ii) between October 28, 1972 inclusive and October 4, 1973."

(iii) for a period of 2 years prior to October 28, 1972."

was responded to by defendant as follows:

"Olin Brooks, Charles Ray Hardin, John McGee, Wesley Thompson, and L. D. Weeks, Jr., measured the line on the east side of 112 Tranquil Avenue after October 28, 1972, and again after October 4, 1973. The names of any other employees who did any measuring or investigation are not known except members of the Claim Department who did some investigation under the direction of the defendant's attorney."

Plaintiff's Interrogatory No. 12 in summary asked defendant to identify any person who had made any kind of investigation of the Nelson Hale accident. Interrogatory No. 13(c) asked defendant to "Identify each document which relates or refers or contains any information relating to action taken by" any

person identified in Interrogatory No. 12. To Interrogatories 12 and 13 defendant answered:

> "R. P. Bailey and D. M. Alexander conducted an investigation under the direction of the defendant's attorney, W. I. Ward, Jr.; and they performed such investigation immediately after the Hale accident. Olin Brooks, Wesley Thompson, John McGee, and C. R. Hardin took measurements and prepared a report pertaining to the measurements. The actions were taken because of the Nelson Hale accident."

Plaintiff's Interrogatories 16 and 17 asked defendant to identify every person contacted by defendant or who had given any information to defendant relating to the David Willis accident. For each person so identified five different categories of information were requested. Defendant was also requested to "identify each document which relates or refers to or contains information relating to the contact of said person." In answer to these interrogatories the defendant listed the names of some 32 persons and gave with regard to each person the information asked for by the interrogatories. No documents however were identified. Plaintiff's Interrogatory No. 33 in summary asked defendant to give various kinds of information regarding each occurrence in which a person had received an electrical shock or burn from any of defendant's equipment carrying more than 300 volts which resulted in the death or hospitalization of the person and to "identify each document relating to said occurrence." To this interrogatory defendant responded by providing the name, date, location, and a one sentence description of the accident, type of equipment involved, and nature of injuries received for some 55 claims filed against it dating from 1937.

To its answers defendant attached documents as follows: (1) correspondence from William I. Ward (defendant's chief trial counsel) to the North Carolina Utilities Commission relative to the accident in suit; (2) photographs of the scene; (3) certain provisions of the National Electrical Code; (4) a completed accident report form relating to the accident in suit; (5) a measurement reporting form apparently completed by defendant's employees Hardin and Brooks relating to the accident scene; (6) a schematic drawing of the accident scene; (7) correspondence from the Utilities Commission to the plaintiff; (8) a right-of-way agreement; (9) other schematic drawings the import of which is not clear in the record.

Under Section "IV. Request for Documents" plaintiff requested defendant to produce and permit plaintiff to inspect all of the documents identified in Interrogatories 1 through 37. In Interrogatory 37 plaintiff requested defendant to identify each document "designated in Section IV, *infra*," but which defendant did not intend to produce in response to a claim of privilege or other ground for nonproduction or any document which was not in defendant's possession, custody or control. Defendant answered Interrogatory No. 37 by stating that it had designated no documents in "Section IV, *infra*," and further that it did not "intend to produce under CLAIM OF PRIVILEGE all of the documents contained in its claims files, all of which were prepared and/or drafted at the direction of the defendant's attorney for use in the defense of actions against the defendant or were communications between defendant and defendant's attorney." To plaintiff's request for documents defendant answered as follows: "The defendant cannot produce documents which are not specified; however, the defendant claims as privileged all of the documents in its claims files which were prepared by or at its attorney's direction and/or which were communications between the defendant and its attorneys. Those documents which it does not claim as privileged are attached hereto." At the conclusion of the November 26 hearing, defendant's counsel had entered into the record an affidavit, the substance of which is that defendant's claims agents are supervised by defendant's attorneys, that their files are under the attorneys' control and contain their work product.

On December 12, 1974, plaintiff moved the trial court for an order to show cause why defendant should not be held in contempt for failing to comply with the court's November 25, 1974, order. Plaintiff suggested specifically that defendant had failed to answer Interrogatories Nos. 1(b), 13, 16, 17, 33, and 37. The motion was heard on January 6, 1975, after which the court entered its order on January 9, 1975, from which defendant has appealed. This order, in summary, found that defendant had not produced or permitted plaintiff to inspect defendant's investigations files on the accident in suit or on the Nelson Hale accident, and that defendant had wilfully failed to comply with the November 25, 1974, order in that it had not answered Interrogatory 1(b) in full and had not produced the documents designated in Interrogatories 13, 16, 17 and 33. The order concluded that defendant's described omissions constituted contempt of

the court and tended to defeat and prejudice the rights of the plaintiff. The order further then adjudged defendant to "be in contempt of this court under Rule 37(b) and as for contempt of this court under the laws of North Carolina . . . . " The order provided, however, that defendant could purge itself of contempt if within 30 days it provided the plaintiff with the names of all of its Claims Department members who investigated the Hale and Willis accidents and produced and permitted plaintiff to copy "defendant's entire files on its investigation of the Nelson Hale and David Willis deaths . . . and all other deaths and injuries referred to in Interrogatory 33 which occurred within three years prior to January 1, 1975, provided that defendant shall not be required to produce or submit for plaintiff's inspection any part of a writing which part reflects an attorney's mental impressions, conclusions, opinions, or legal theories, and as to such parts, if any, defendant shall submit them to this court for such determination."

I

We think the Court of Appeals erred in concluding that this order adjudging the defendant to be in contempt was not appealable. Whether we characterize the contempt proceeding as criminal or civil, or both, it is clear that unless the fact that defendant was permitted to purge itself in lieu of being immediately punished requires a different result, the order adjudging defendant to be "in contempt . . . under Rule 37(b), and as for contempt . . . for failure to comply with the November 25, 1974, order . . . " and characterizing defendant's conduct as tending to "defeat, impair, impede, and prejudice the rights of plaintiff . . . " was immediately appealable. Insofar as the contempt order was based upon defendant's wilful disobedience of a prior lawful order of the trial court it was appealable under General Statutes 5-1(4) and 5-2. Insofar as the contempt order was based upon defendant's defeating, impairing, impeding or prejudicing the rights of the plaintiff, see G.S. 5-8, it was appealable under the rule announced in *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345 (1951) and cases cited therein. *See generally, Rose's Stores v. Tarrytown Center,* 270 N.C. 206, 154 S.E. 2d 313 (1967); *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822 (1954); Snepp, The Law of Contempt in North Carolina, 7 Wake Forest L. Rev. 1 (1970).

The Court of Appeals, however, determined that since defendant was not punished but was permitted to purge itself

of the contempt in lieu of being punished, the contempt order was not appealable. It relied on our language in *Luther v. Luther, supra* at 432, 67 S.E. 2d at 347, that "no legal impediment bars a person, who is penalized as for contempt, from obtaining a review of the judgment entered against him in the Superior Court by a direct appeal to the Supreme Court." We made a similar statement in *Rose's Stores v. Tarrytown Center, supra* at 214, 154 S.E. 2d at 318, that "a person who is penalized *as for contempt* may obtain a review of the judgment entered against him by a direct appeal to the Supreme Court." The Court of Appeals also relied on secondary authorities including an annotation, "Contempt Adjudication — Appealability," 33 A.L.R. 3d 448, 564 (1970); and it relied on *Alexander v. United States*, 201 U.S. 117, 121 (1960).

The language in *Luther* and *Rose's Stores* was, first of all, directed only toward proceedings as for contempt, i.e., civil proceedings under General Statute 5-8. The language had no application to a criminal contempt proceeding bottomed on the contemnor's violation of General Statute 5-1(4), i.e., the "wilful disobedience of any process or order lawfully issued by the court." Insofar as the contempt order here is bottomed upon a violation of this statute, its appealability is governed by General Statute 5-2 which provides, "Any person *adjudged* guilty of contempt under the preceding section [§ 5-1] has the right to appeal to the Appellate Division in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subdivisions (1), (2), (3), and (6). Nor shall the right of appeal lie under subdivisions (4) and (5) if such contempt is committed in the presence of the Court." (Emphasis added.) This statute thus provides for an appeal upon a contemnor's being *adjudged* guilty of contempt notwithstanding the lack of imposition of punishment. The language relied on by plaintiff in *Luther* and *Rose's Stores* was, moreover, not used in the sense that punishment was a prerequisite for appealability of an "as for contempt" order although in those cases the contemnor had in fact been punished.

Alexander v. United States, supra, relied on by the Court of Appeals, is clearly distinguishable on its facts. That case involved naked discovery orders directing the appellants to appear before a special examiner to answer certain questions and to produce certain documents. There had been no initiation at the time of the appeal of contempt proceedings.

Rule 37, furthermore, establishes certain sanctions for failure of a party to comply with discovery processes. Subsection (b)(2)d of this rule provides that a court may treat "as *a contempt* of court the failure to obey any orders [to provide or permit discovery] except an order to submit to a physical or mental examination . . . . " (Emphasis added.) The A.L.R. annotation relied on by the Court of Appeals was preceded by the case of *Southern Railway Co. v. Lanham,* 403 F. 2d 119, 33 A.L.R. 3d 427 (5th Cir. 1968). In that case the appealing party had been found by the trial court to be in "civil contempt" and fined unconditionally $2,000 for failure to comply with an order to produce documents during discovery proceedings. The Fifth Circuit, finding the contempt criminal in nature notwithstanding the recitation of the trial judge held that the order was immediately appealable. It said, 403 F. 2d at 125, 33 A.L.R. 3d at 436:

> "Appeal from an adjudication of criminal contempt is a recognized means of obtaining immediate review to test discovery orders. See *Garland v. Torre,* 2d Cir., 259 F. 2d 545, cert. denied, 1958, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed. 2d 231; *Hickman v. Taylor,* 3d Cir. 1945, 153 F. 2d 212, aff'd, 1947, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451; Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 996 (1961). 'Appellate review of the final judgment of contempt involves power to review the civil element as well as the criminal and to grant relief affecting both.' *Hickman v. Taylor, supra,* 153 F. 2d at 214, n. 1. If the order of production was improper, the contemnor's refusal to comply was justified and the contempt conviction must be reversed. Thus the dispute on appeal is between the private parties to the original suit. The character of the contempt as civil or criminal, however, is fixed by the nature and purpose of the punishment and is not affected by the nature of the parties to the appeal. Cf. *McCrone v. United States, supra,* 307 U.S. at 64, 59 S.Ct. at 686, 83 L.Ed. 1108.
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> * * *
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> "Finally, a citation for criminal contempt pursuant to a refusal to obey an order of production is within the authority conferred on the district courts by Rule 37 of the Federal Rules of Civil Procedure. *Hickman v. Taylor,* 3d Cir. 1945, 153 F. 2d 212, 214, n. 1, aff'd, 1947, 329 U.S. 495, 67 S.Ct. 385. Rule 37(b)(2) authorizes the district

court to impose such sanctions as are 'just' when any party 'refuses to obey . . . an order made under Rule 34 to produce any document . . . . ' Accordingly, since the conviction for criminal contempt was final and appealable, and since appellant has filed a timely notice of appeal, we proceed to the merits of this controversy."

Not to entertain this appeal would force defendant either (1) to risk being punished by fine or imprisonment or (2) to comply with an order which it contends and which we believe to be erroneously entered. Should defendant comply with the purging conditions to avoid punishment, the important legal questions it seeks to raise on this appeal and tried to raise in the trial court would be rendered moot. Under these circumstances the contempt order "affects a substantial right" and is appealable under General Statutes 1-277 and 7A-27(d)(1).

[1] We hold, then, that when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains. It has long been recognized that one act may be punishable both "as for contempt," i.e., as civil contempt, and "for contempt," i.e., criminal contempt. *Rose's Stores v. Tarrytown Center, supra; Galyon v. Stutts, supra.* This kind of duality particularly inheres in a party litigant's wilful failure to comply with a discovery order. Punishment is not, therefore, limited to the criminal sanctions provided by General Statute 5-4.

II

We now proceed to examine the lawfulness of the contempt order and the November 25, 1974, order upon which it is based.

The heart of this dispute is whether and to what extent plaintiff should be permitted to inspect defendant's claims files not only on the accident in question but on all other accidents involving electrical shocks or burns. Plaintiff wants *all* of the information contained in *all* of these files for the life of the company and defendant apparently refuses to give up any of it which is documentary in form. The lawsuit is stymied until this threshold discovery issue can be properly settled.

First we note that, substantively, the question at issue is not easily solved even when all of the facts relating to it have been properly developed. In *Southern Railway Co. v. Lanham, supra,* plaintiff sought to discover certain documents in defendant's claims files. The Fifth Circuit in a thoughtful opinion held that while some of these documents might be discoverable, certainly not all of them were and on grounds other than attorney-client privilege or attorney work product. The Fifth Circuit held:

> "(1) That the statements of the train crew [made to defendant's claims agents] were properly discoverable; (2) that while the factual elements of the accident investigation reports were discoverable, those portions of the reports reflecting the opinions and evaluations of appellant's [claims] agents were not discoverable; and (3) that the trial court must clarify the order as it relates to the attorney-client correspondence, deleting privileged communications, if any, encompassed by the order to produce."

We, of course, cannot now address the question of what might or might not be discoverable from defendant's claims files. Neither could the trial court have properly done so until the items contained therein were more specifically delineated and placed in bolder relief than they have been so far. Failure to do this lies at the core of these litigants' misuse of the discovery processes which, in turn, undoubtedly led the able trial judge into legal error.

[2, 3] The November 25, 1974, order requires the defendant to answer the plaintiff's interrogatories and to produce "the documents therein designated . . . . " The question is which documents and where designated. At the time of this order no documents had been identified or designated by either party. Rule 34 requires that as a prerequisite of production, documents must be (1) "designated," (2) "within the scope" of Rule 26(b), and (3) in the "possession, custody, or control" of a party from whom they are sought. The party seeking production must show that these prerequisites are satisfied. A proper function of interrogatories is to obtain the information necessary to make such a showing. Plaintiff's interrogatories properly, therefore, asked the defendant to "identify" certain documents. It was error, however, for the trial court to order production of any documents before the documents had been

(1) further "identified" by defendant, or (2) further "designated" by plaintiff. Whether and to what extent defendant should have been required to identify documents in answer to plaintiff's interrogatories was a threshold question pending before the court on November 25, 1974, but which the court never addressed.

[4] The order for production, moreover, was in error since it was not based upon either a showing or finding of good cause. Under Rule 34 as then in effect, orders for production of documents could be obtained, if not by mutual consent of the parties, only by a motion demonstrating and a finding of good cause. Under older North Carolina discovery rules, production and inspection of documents required a court order supported by affidavits showing the necessity for inspection and materiality of the documents sought. If the affidavit was insufficient, an order based upon it was invalid. *Vaughan v. Broadfoot,* 267 N.C. 691, 149 S.E. 2d 37 (1966). While the adoption of Rule 34 formally dispensed with the requirement of an affidavit, the practice of utilizing an affidavit continued in the federal courts unless it was manifestly clear that verification of the good cause could be otherwise supplied, 4A J. Moore, Federal Practice, ¶ 34.07 at 34-47 n. 5 (2d ed. 1975), and in our own state courts. *Stanback v. Stanback,* 287 N.C. 448, 215 S.E. 2d 30 (1975). In any case the good cause requirement of Rule 34, before it was amended, was an essential and material requirement and "not a mere formality which may be overlooked." *Stanback v. Stanback, supra* at 459, 215 S.E. 2d at 38.

It is difficult to know how good cause could have been shown by the plaintiff in this case until the documents sought were somehow identified and more adequately described.

[5] Turning now to the contempt order itself, it is clear that defendant has been found in contempt "for failure to produce all of the documents in its claims files on the accident in issue, the Hale accident, and all other 'incidents of injury or death from electric shock or burn' and for failure to answer Interrogatory 1(b) 'in full' and 'to produce the documents designated in Interrogatories 13, 16, 17 and 33.'" Insofar as the contempt order addresses the defendant's failure to produce documents, it is based upon an unlawful order for production and is therefore erroneous. With regard to defendant's failure to answer Interrogatory 1(b) the record demonstrates a good faith effort

on the part of defendant to answer this interrogatory. The interrogatory, as defendant contends, seems to require identification of those who made *engineering* investigations as opposed to investigations of the accidents generally. Information concerning investigations of the accidents generally rather than the equipment itself is arguably not requested. The interrogatory is ambiguous in this regard. Moreover, defendant's good faith is amply demonstrated by the inclusion of the names of its claims agents in its answers to Interrogatories 12 through 17. Therefore the contempt order, insofar as it addresses the failure of the defendant to answer Interrogatory 1(b), is in error because there is no competent evidence in the record to support a finding that defendant wilfully refused to answer this interrogatory. *See Galyon v. Stutts, supra.*

[6, 7] Plaintiff has sought too much; defendant would give up too little. Certainly information in all of defendant's claims files relating to shocks or burns wherever and whenever they may have occurred would be neither relevant nor likely to lead to relevant information and would fall outside the scope of Rule 26(b)(1). The trial court obviously recognized this in the purging provisions of its contempt order where, *for the first time,* it limited the discoverable material to the files on Hale, the accident in suit, and other similar accidents occurring *within three years.* This limitation should have been addressed early on in the proceeding by the parties and, if necessary, the court. Defendant on the other hand should have identified some of the documents requested by plaintiff. Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . . . " Thus defendant should have identified those documents which met the relevancy requirements of Rule 26(b)(1) even if the documents themselves may not be discoverable because they are privileged or fall within the trial preparation immunity of Rule 26(b)(3). Obviously the question of the discoverability of the documents cannot be properly determined until they have been appropriately identified and designated.

III

[8, 9] On remand the parties and, if necessary, the trial court, should be aware of substantial changes in the rules regarding discovery, effective January 1, 1976, and applicable to pending litigation. Again we note that it will probably be appropriate for the discovery to be limited in terms of time and perhaps other factors to conform to the relevancy requirements of Rule 26(b)(1). Although the rule should be construed liberally neither party should be allowed to roam at will in the closets of the other. The test of relevancy under Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information *"reasonably calculated* to lead to the discovery of admissible evidence . . . . " While the relevancy requirements of Rule 26 are mandatory, a discretionary protective order may be granted under Rule 26(c) even as to relevant material. One party's need for information must be balanced against the likelihood of an undue burden imposed upon the other. Emphasis in the new rules is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized.

[10, 11] The new procedure for obtaining production and inspection of documents has eliminated the requirement of a court order based upon motion and good cause. New Rule 34 simply requires serving the request for production upon the other party. Protections are afforded by the designation, scope, and possession requirements of Rule 34, the exemption of privileged matter in the scope provision of Rule 26, the allowance of protective orders, and the extended "work product," or trial preparation, immunity of Rule 26(b)(3). "Designation" does not necessarily mean that documents must be separately described. Designation by categories may be sufficient depending upon the categories utilized. *See Kirkpatrick v. Industrial Commission,* 10 Ariz. App. 564, 460 P. 2d 670 (1969). "Claims files" is, of course, not a permissible category.

[12] The new rules contemplate that "in most instances, details of production and inspection can be worked out among the lawyers without recourse to the court." 4A J. Moore, Federal Practice ¶ 34.05[3] at 34-37 (2d ed. 1975). The provision

in Rule 37(d) for a mandatory allowance of expenses against a party which fails to respond to a discovery request, unless other sanctions are imposed under Rule 37 or unless the failure "was substantially justified or . . . other circumstances make an award of expenses unjust," is designed to discourage dilatory practices and frivolous refusals to comply with discovery procedures. Rule 37(d) does not, however, come into operation if the responding party meets the requirements of Rule 33 as to interrogatories and those of Rule 34 as to requests for production. Thus, if a party files answers *or* objections to interrogatories, or serves a written response to a request for inspection, no sanctions under Rule 37(d) may be obtained and the proper procedure for the party seeking discovery is to obtain an order compelling discovery under Rule 37(a).

[13] The trial court should take care in its supervision of further discovery to protect fully defendant's attorney-client privilege. This protection is absolute under Rule 26, and the privilege under that rule is identical in scope to the traditional privilege. Wright and Miller, Federal Practice and Procedure: Civil § 2017 at 132-33 (1970).

[14-16] Finally, it should be recognized that the "work product," or trial preparation, exception of new Rule 26(b)(3) goes considerably beyond the protection accorded under the old rule and under *Hickman v. Taylor*, 329 U.S. 495 (1947). Although not a *privilege*, the exception is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, *or agent.*" (Emphasis added.) The protection is allowed not only materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party. Wright and Miller, Federal Practice and Procedure: Civil § 2024 at 197 (1970). Although some cases have held that the trial preparation immunity should not extend to materials prepared for litigation terminated prior to the pending case if the earlier litigation was between different parties, *see, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962); *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 534 (D. Del. 1954), we believe

the better rule is that any materials prepared in anticipation for any litigation by the party from whom discovery is sought are protected under Rule 26(b) (3). *Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 487 F. 2d 480 (4th Cir. 1973). The latter rule seems most compatible with the rationale of *Hickman v. Taylor, supra,* and with the spirit of the discovery rules. "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman v. Taylor, supra,* 329 U.S. at 516.

[17] Thus a large portion of the materials in defendant's claims files may be subject to the trial preparation immunity. The record is insufficient for us to determine the extent to which this may be the case. However, even such material is not irrevocably barred from plaintiff's sight. Upon a showing of "substantial need" and "undue hardship" involved in obtaining the substantial equivalent otherwise, plaintiff may be allowed discovery. In the interests of justice, the trial judge may require *in camera* inspection and may allow discovery of only parts of some documents. Of course no discovery whatsoever of the "mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative* of a party" concerning the litigation at bar, nor any discovery whatsoever of the work product of attorneys in the case at bar is permitted under the new rule. Rule 26(b) (3).

The decision of the Court of Appeals dismissing defendant's appeal is, therefore, reversed. The orders of the Mecklenburg Superior Court dated November 25, 1974, and January 9, 1975, are likewise reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court of Mecklenburg County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ISAAC S. MONK

No. 28

(Filed 4 November 1976)

1. **Jury § 7— jurors opposed to death penalty — challenges for cause properly allowed**

The trial court in a first degree murder prosecution properly allowed the State's challenges for cause of three jurors who stated that they would not return a verdict under any circumstances knowing that the death penalty would be imposed and that it would be impossible to return a verdict of first degree murder even though the State proved the defendant guilty beyond a reasonable doubt.

2. **Criminal Law § 53— medical expert — abrasions and lacerations on deceased — opinion testimony admissible**

In a first degree murder prosecution, a witness for the State who was found by the court to be a medical doctor and an expert in the field of pathology was qualified to testify that in his opinion abrasions and lacerations on the face of deceased were due to contact with some form of rough surface or object.

3. **Criminal Law § 57— ballistics expert — no express finding of expertise — testimony properly allowed**

Though the trial court in a first degree murder prosecution did not expressly find a witness to be an expert in ballistics, the court presumably found him an expert, since it admitted the witness's testimony as to the caliber of the bullet taken from the body of deceased.

4. **Criminal Law § 169— evidence erroneously admitted — similar evidence already before jury — no prejudice**

Though the trial court in a murder prosecution erred in allowing a witness to testify as to what he had told a third person, such error was not prejudicial to defendant, since practically the same testimony was already before the jury by virtue of the testimony of a witness who had shared a jail cell with defendant and to whom defendant had made an admission.

5. **Criminal Law § 77— statements by defendant to fellow prisoners — findings of fact as to voluntariness not required**

On a *voir dire* hearing on defendant's motion to suppress the testimony of two witnesses concerning incriminating statements made by defendant to them while all three were prisoners, the trial court was not required to make findings of fact as to the voluntariness of the admissions or as to whether the witnesses were not agents of the sheriff's department at the time the statements were made to them by defendant, since defendant confided to the witnesses under no pressure and since there was no conflict in the evidence as to whether the witnesses were sheriff's agents.

6. Criminal Law § 99— court's interruption of cross-examination — no expression of opinion

The trial court did not express an opinion regarding the testimony of a State's witness when he stopped defendant's cross-examination with respect to prior offenses to inquire as to the basis for his questions, nor did the court express an opinion when he thereafter instructed the jury that defendant was bound by the witness's answers and that the questions regarding the prior crimes were not to be considered.

7. Criminal Law § 99— court's questioning of witness — no expression of opinion

The trial court did not express an opinion by questioning a State's witness regarding certain liquor which had been given to the witness while in protective custody.

8. Criminal Law § 99— court's effort to expedite trial — no expression of opinion

The trial court did not express an opinion and defendant was not prejudiced where the court offered defense counsel the opportunity to examine a witness's notes during a recess and expressed the hope that a stipulation could be made or that cross-examination could be expedited.

9. Constitutional Law § 21; Searches and Seizures § 1— defendant's car in garage — exterior searched — standing of defendant to assert unlawfulness

Defendant in a first degree murder prosecution did not have standing to assert an unlawful search and seizure and was not entitled to a *voir dire* where defendant was not present at the garage where his car was located at the time it was searched; he was not charged with a crime dealing with possession of the seized evidence; he had no proprietary or possessory interest in the garage which was searched; and defendant had no protected interest in the outside portions of the car from which the soil samples were taken, particularly in light of the evidence tending to show that he had abandoned or sold the car.

10. Criminal Law § 61— expert opinion testimony as to tire tracks — admissibility

Evidence that a witness had over ten years of experience in latent identification procedures, including tire print, fingerprint and footprint identification and analysis was sufficient to support the trial court's finding that the witness was an expert, and the court did did not err in allowing the witness to testify that he compared a plaster cast of a tire print made adjacent to the scene of the crime with the tire taken from defendant's automobile and that, in his opinion, the tire was the same one that made the imprint from which the plaster cast was taken.

11. Criminal Law § 50— soil samples — expert testimony admissible

Evidence was sufficient to support the finding of the trial court that a witness was an expert in the field of soil analysis where it

tended to show that he held a doctorate in soil science and chemistry, had been active in his field for over 12 years and during this time received both laboratory and field experience; and he was the author of approximately a dozen published articles and held several patents in the field. The court properly allowed the witness to give his opinion that soil samples taken from defendant's car and those taken from the dirt road adjacent to the scene of the crime were from the same source.

12. Criminal Law § 102— prosecutor's jury argument — comments on veracity of witness — no prejudice

Statements by the district attorney in his jury argument that he had known an expert witness for the State for 15 years, had heard him on prior occasions, and that the witness was telling the truth and statement by the assistant attorney general that the witness was "one of the best men in the State of North Carolina," though disapproved by the Supreme Court, were not so prejudicial to defendant as to warrant a new trial.

13. Criminal Law § 163— misstatements of evidence in jury charge — necessity for calling court's attention to

Any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial so that he may have an opportunity to correct any misstatements in order to avoid the expense of a retrial, and a defendant may not avoid the operation of this rule by contending that the trial judge's misstatements were impermissible expressions of opinion.

14. Criminal Law § 114— jury charge — no expression of opinion by court

Trial judge's statement to the jury in his closing remarks that he had "done everything humanly possible for you [the jury] to be unaware of the opinion that I have . . . " did not constitute an expression of opinion in violation of G.S. 1-180.

15. Criminal Law § 119— requested instructions — exact language of request need not be used

The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance.

16. Constitutional Law § 36; Homicide § 31— first degree murder — life imprisonment substituted for death sentence

A sentence of life imprisonment is substituted for the sentence of death imposed upon defendant in a first degree murder prosecution.

17. Criminal Law §§ 145, 166— lengthy statement of facts in brief — cost of printing part of record taxed to attorney

The cost of mimeographing 25 pages of the record on appeal is taxed against counsel for defendant where he failed to comply with Rule 28 of the Rules of Appellate Procedure requiring that a summary of the facts if contained in the brief should be short.

State v. Monk

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Martin (Perry), J.*, at the 8 December 1975 Session of NEW HANOVER Superior Court.

Defendant was charged in separate bills of indictment, proper in form, with the armed robbery and the murder of Donnie P. Christian on 5 April 1973. The cases were consolidated for trial and defendant was convicted of murder in the first degree. A sentence of death was imposed.

This is the second appeal in this case. In the first, we granted defendant a new trial on the ground of improper arguments to the jury by the district attorney. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

The evidence for the State tended to show the following: On the evening of 5 April 1973, Donnie P. Christian, the victim, was working in the office of his father's poultry plant in Wilmington. At approximately 8:45 or 9:00 p.m., Christian picked up the cashbox containing the day's receipts of the plant (about $2,400 in cash, $1,700 in checks) and went to his car. As was his routine each evening, Christian drove to the plant gate and unleashed the watchdog inside the fence surrounding the plant. He then closed the gate behind him.

The body of Donnie Christian was found by his father a few minutes after 9:00 p.m. on the night of 5 April 1973. Mr. Christian testified that his son's body was lying next to his car. There was a pool of blood near a road adjacent to the gate and there were several streaks of blood leading from the pool of blood to the location of the body. Donnie Christian was taken to the hospital and an autopsy was performed. It was determined that he died from loss of blood caused by a wound inflicted by a .22-caliber gun.

A Pall Mall cigarette butt was found at the scene of the crime. Later, while in custody, defendant was seen smoking a Pall Mall cigarette and was seen throwing away an empty Pall Mall cigarette pack. A plaster cast of a tire track found upon a dirt road adjacent to the scene of the crime was made and soil samples from the dirt road were taken. At trial, evidence was adduced tending to show that the tire print taken from the dirt road matched that made from the tire of the automobile which the evidence tended to show defendant was driving at the time of the murder. The soil samples taken from the dirt road

matched those samples taken from defendant's automobile. The cashbox containing the plant's daily receipts was missing, together with deceased's wallet and a money clip containing two one-hundred dollar bills. These items were never located.

The State further introduced statements which defendant made to two cell mates while in jail. Mr. Charles Edward Pennington testified that he shared a cell with defendant for several days. During this time, defendant stated that he and a friend had planned to rob the person who carried the daily cash receipts from Christian Poultry Company. Defendant further said that he and his friend approached Donnie Christian, who was carrying the receipts, and demanded the money. When Christian refused, defendant stated that he "capped him" or "blew him away." Mr. Victor Jerome McClain was also in a cell with defendant for several days and testified at trial. During the period in which they shared a cell, defendant made statements to McClain quite similar to those statements made to Pennington.

The defendant did not take the stand and did not offer any evidence.

Other evidence pertinent to the decision of this case will be set out in the opinion.

Attorney General Rufus L. Edmisten, Assistant Attorney General Lester V. Chalmers, Jr., and Associate Attorney Lawrence Pollard for the State.

Charles E. Rice III for defendant appellant.

MOORE, Justice.

By his first two assignments of error defendant challenges the district attorney's decision to place him on trial for a capital crime, and the validity of the bill of indictment charging him with that offense. These assignments require little discussion in view of the holding of the Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. ____, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), invalidating the death penalty provisions of G.S. 14-17. This decision did not affect the verdict however; only the imposition of a sentence of death. Hence, capital punishment is no longer an issue in this case. *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976).

Next, defendant assigns as error the denial of his motion to sequester jurors on *voir dire.* This motion was directed to

the sound discretion of the trial judge. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970). We are unable to find any abuse of discretion in its denial.

Defendant further contends that the trial judge erred in denying his motion to sequester the jury and the State's witnesses during the trial. G.S. 9-17 provides, in part: "The presiding judge, *in his discretion,* may direct any jury to be sequestered while it has a case or issue under consideration." (Emphasis added.) The motion of the defendant for the sequestration of witnesses was addressed to the discretion of the court. *State v. Davis, supra; State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965). Defendant has shown no abuse of discretion. These assignments are overruled.

Defendant makes numerous assignments of error relating to the selection of the jury. The thrust of these assignments is that the trial judge erred in allowing prospective jurors to be questioned concerning their beliefs as to capital punishment, and in excusing certain jurors because of their opinions as to capital punishment. The questions propounded to the jurors were those authorized by *Witherspoon v. Illinois,* 391 U.S. 150, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), and *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974).

[1] In present case, defendant did not exhaust his peremptory challenges and the jury as empaneled was acceptable to defendant and did not contain any juror to which he had objected. Three jurors were challenged by the State for cause and the challenges were allowed. Each of these jurors stated that he or she would not return a verdict under any circumstances, knowing that the death penalty would be imposed. Further, each juror excused for cause stated that it would be impossible to return a verdict of first degree murder even though the State proved the defendant guilty beyond a reasonable doubt. These jurors were properly excused. *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974). *See also Witherspoon v. Illinois, supra.* As stated by Justice Branch in *State v. Honeycutt, supra,* at 178, 203 S.E. 2d at 847:

" . . . It is now well established that in a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. [Citations omitted.]" *See also State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972).

These assignments are overruled.

[2] Dr. Leach, a witness for the State, was found by the trial court to be a medical doctor and an expert in the field of pathology. He testified that in his opinion abrasions and lacerations on the face of the deceased were due to contact with some form of rough surface or object. Defendant contends this was hearsay. Obviously, this contention is without merit. The doctor was only expressing an opinion based upon facts within his own knowledge. This he was qualified to do. *See* 1 Stansbury, N.C. Evidence § 135 (Brandis Rev. 1973), and cases cited therein.

[3] By his next assignment, defendant argues that the court erred in allowing Deputy Sheriff Blanton to identify a bullet, taken from the body of deceased, as a .22-caliber bullet. Blanton had been a deputy sheriff for fourteen and one-half years and during that time had fired a .22-caliber pistol and other weapons on many occasions. The .22-caliber bullet, identified as State's Exhibit No. 21, was introduced into evidence without objection. While the trial court did not expressly find this witness to be an expert in ballistics, the court did allow him to give his opinion as to the caliber of the bullet. By admitting the testimony as to the caliber of the bullet, the court presumably found him to be an expert. There was ample evidence to support such finding. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507 (1963); *State v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218 (1947). This assignment is overruled.

Bertie Brailford testified for the State that he had worked at Christian Poultry Company for about nine months preceding 5 April 1973. He stated that some three or four weeks prior

to 5 April 1973 he had a conversation with one Sam Taylor concerning this employment. The following then transpired:

"MR. CARRIKER: What did you tell Sam Taylor at that time?

"MR. BRAILFORD: I told him he came to my house to borrow some money.

"MR. RICE: Objection, Your Honor—He is talking about Sam Taylor coming to his house for some reason—it is not material at this time.

"MR. CHALMERS: Sam Taylor will be offered by the State, if Your Honor please. We can't put on all of our evidence at one time.

"THE COURT: If your objection is based solely on the fact that it is not material it is overruled—is that the basis of your objection?

"MR. RICE: Yes, sir.

"THE COURT: Overruled."

Without further objection and without any motion thereafter to strike, Brailford then testified:

"I told Sam where I worked, where it was located. I told him that it was possible for him to get two, or three thousand dollars there. I told him that it was dark. That it would be dark at the place where I worked. That the bossman came out usually alone at night. That he wouldn't have a weapon of any kind. That he would drive his car to the gate, get out of the car, release the dog, lock the gate behind him and get into the car.

"Donnie Christian was my bossman back on April 5, 1973.

"After I had told this to Sam Taylor, Chris Spicer came to my home. Chris Spicer came to my home while Sam Taylor was still there. I had a conversation with Chris Spicer in Sam Taylor's presence, this being about three or four weeks prior to April 5, 1973.

"MR. CARRIKER: What, if anything, did you tell Chris Spicer at that time?"

On objection, the court held a *voir dire* and in the absence of the jury Brailford testified:

"At this time, Sam Taylor and Christopher Spicer were in my home. While Chris Spicer was in my home on that date, I related to him the same story that I had repeated to Sam. I told Chris Spicer where I worked, where it was located. I told him how my bossman came out with the cashbox at night, that he would be alone, that he wouldn't have any weapon of any kind, and that there was a road across the street from the plant where a car could be concealed.

"After I told this to Chris Spicer, he and I walked out of my house to a car that was parked on Taylor Street. It was a white '68 Chevy, two-door hardtop, green vinyl top. We continued to talk about Christian Poultry on the way out to the automobile.

"When we got to the automobile I observed Isaac Monk, the defendant in this case, behind the [steering] wheel of the automobile.

"MR. CARRIKER: Did you continue to discuss Christian Poultry after you reached the automobile?

"MR. BRAILFORD: Most of the same thing over again."

The court then ruled that the conversation Brailford had with Spicer when defendant was not present was inadmissible. The witness Brailford then testified before the jury without objection:

"Three or four weeks prior to April 5, 1973 I had a conversation with Chris Spicer in my home.

"After we had this conversation Chris Spicer and I left my home and we walked to a car that was parked on Taylor Street in the project. The vehicle was a white '68 Chevy Impala Custom with a green vinyl top, two-door hardtop.

"I observed Isaac Monk, the defendant in this case, behind the wheel of that vehicle.

"MR. CARRIKER: Did you continue to talk with Mr. Spicer once you arrived at the automobile?

"MR. BRAILFORD: Once we reached the car there wasn't too much said about it. We talked about it on the way to the car but once we reached the car there wasn't too much said.

"Q. Did you speak to Mr. Monk once you reached the car?

"A. I looked into the car at him.

"Q. Did you say anything while you were at the car in Mr. Monk's presence?

"A. No.

"Christopher Spicer got into the car with Monk and they drove off.

"On approximately the Monday or Tuesday prior to April 5, 1973, I again saw Chris Spicer. He came to my house. We had a conversation at that time on the front porch of my house.

"After the conversation, I did not leave my home. Chris Spicer left and I saw him go to a car that was parked on the west side of Fourth Street. I could see that from my porch. I observed someone else in that vehicle. That vehicle was a white '68 Chevy Impala Custom, green vinyl top."

Brailford further testified that this was the same vehicle in which he had observed defendant some three or four weeks prior to 5 April 1973.

Immediately prior to the testimony of Brailford, the witness McClain testified that while he and defendant were sharing a cell in the Wilmington jail defendant told him that he and Spicer had talked to Brailford about:

" . . . what would be a good place to hit, make some money, stuff like that, and Bradford [Brailford] told them about the place where he was working at, how much the guy would be handling, you know. When he would come out he wouldn't have no weapon and what time and everything like that, and he said him and Spicer, they didn't do it right away, but about two or three weeks later they went to the place in his car and he said he parked across the street in a driveway. Monk said they were driving his car.

"He said they waited for the man to come out and the man came out the gate. He said he went across the street where he was. He said the man came out in a little small car, and when he got out of the car, he drew the gun on him. He said the man put up a scuffle. He was by himself. He said he had to shoot the man and he got the money. Him and Spicer left. He said somebody started running their mouth too much and they got picked up.

"Monk said that he and Spicer drove up in Monk's car to the place they were going to hit and that Monk got out of the car and went across the street to where the place was. He said that the dude came out, I think to lock the gate or something like that. He said he drew the gun on the guy and the guy put up a scuffle. He said he couldn't scuffle him down by himself, so he shot him.

"Monk said they got the money and didn't say how much money."

[4] Thus, before Brailford testified, practically the same testimony was already before the jury through defendant's admission to McClain. Hence, admitting that the court erred in allowing Brailford's testimony as to what he hold Sam Taylor, under the circumstances in this case we believe it to be harmless error and not prejudicial. *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). This assignment is overruled.

[5] When the witnesses McClain and Pennington were called to testify for the State, defendant renewed his motion to suppress their testimony. The trial judge conducted a *voir dire* as to each witness. It appeared that both of these witnesses were cell mates of defendant while in the Wilmington jail awaiting trial. The evidence showed that defendant volunteered the statements to which they testified concerning his participation in the robbery and shooting of Donnie Christian. Defendant first contends that the trial court should have made findings of fact upon which the admissibility of this evidence depended. As Justice Higgins said in *State v. Perry*, 276 N.C. 339, 345-46, 172 S.E. 2d 541, 546 (1970):

"The defendant misinterprets the necessity for the voir dire examination to determine the voluntariness of his admissions to his jailmate Pierce. As a general rule, volun-

tary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States,* 385 U.S. 293, 17 L.Ed. 2d 374: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . . "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." . . . . '"

Defendant further contends, however, that the trial court should have made findings of fact and included therein a finding that the witnesses McClain and Pennington were not agents of the sheriff's department at the time the statements were made to them by defendant. The trial judge on *voir dire* allowed defendant's counsel to cross-examine these witnesses as to whether they were acting as such agents at the time. Both denied it. Defendant offered no evidence to the contrary. Where there is no conflict on the evidence heard by the court, it is not error to admit the statements without making specific findings. *State v. Biggs,* 289 N.C. 522, 223 S.E. 2d 371 (1976) ; *State v. Whitley,* 288 N.C. 106, 215 S.E. 2d 568 (1975). The trial court did not commit error in permitting the witnesses McClain and Pennington to repeat the incriminating admissions defendant voluntarily made to them while all of them were prisoners.

Defendant next contends that his right of cross-examination was improperly limited. In numerous cases we have held that cross-examination should be searching and wide latitude should be allowed in the questions propounded. *See, e.g., State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969), and cases cited therein. However, the trial court is given a great amount of discretion in the control of cross-examination. Further, its rulings will not be disturbed except for an abuse of discretion or when prejudicial error is disclosed. *State v. Ross, supra.*

As was stated by Justice Huskins in *State v. Miller,* 288 N.C. 582, 594, 220 S.E. 2d 326, 335 (1975) : " . . . Exclusion of evidence which could not have affected the result may not be

held prejudicial. . . . " In instant case, none of the excluded evidence could have affected the result of the case. The questions dealt largely with collateral matters and could have had little bearing upon the jury's verdict. Further, many of the questions were repetitive and argumentative and properly excluded. Accordingly, we find no abuse of discretion nor prejudicial error in the trial judge's rulings.

Defendant also contends that the trial judge expressed an opinion regarding the testimony of the State's witnesses Charles Edward Pennington and Dr. Otis Philen, in violation of G.S. 1-180.

[6] During the cross-examination of witness Pennington, defendant attempted to impeach the witness by showing that he had committed certain crimes. After defendant had asked whether the witness had been convicted of several crimes, which the witness denied having committed, the trial judge requested that defense counsel approach the bench. After a conference at the bench, the trial judge instructed the jury that defendant was bound by the witness's answers and that the questions regarding the prior crimes were not to be considered. Later, during cross-examination, the trial judge asked the witness several questions regarding certain liquor which had been given to the witness while in protective custody. Evidence of the gifts of the liquor had been brought out by defendant on cross-examination.

The conduct of a trial is in the discretion of the trial judge and he is charged with ensuring that a defendant has his cause presided over by the "cold neutrality of the impartial trial judge." *State v. McEachern*, 283 N.C. 57, 59, 194 S.E. 2d 787, 789 (1973). However, the trial judge must exercise his power to control the course of a trial in order to ensure justice for all the parties. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). To the end that justice is received by all the parties, the trial judge may ask questions of a witness and instruct the jury on the proper use of evidence. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968).

In instant case, the trial judge properly stopped the cross-examination by defendant to inquire as to the basis for his questions. His instruction to the jury, while not perfect, certainly did not express any opinion and did not deprive defendant of the fair trial to which he was entitled. *See, e.g., State v.*

Branch, 288 N.C. 514, 220 S.E. 2d 495 (1975); *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953).

[7] The questioning of the witness by the trial judge comes within the well established rule that:

> "[O]n occasion, it is the duty of the trial judge to ask questions in order to clarify testimony or to elicit overlooked, pertinent facts. [Citations omitted.]" *State v. McEachern, supra*, at 59, 194 S.E. 2d at 789.

Thus, we find no reversible error in the trial judge's actions with respect to the questioning of the witness Pennington.

[8] Likewise, we find no error in the trial judge's comments during the testimony of Dr. Philen. The trial judge offered defense counsel the opportunity to examine Dr. Philen's notes during a recess and expressed the hope that a stipulation could be made or that cross-examination could be expedited. We fail to see how this statement prejudiced defendant. If anything, the trial judge's order was beneficial to defendant since it gave him full access to Dr. Philen and his notes.

[9] Defendant next contends that the trial court failed to hold a *voir dire* hearing upon a motion to suppress a tire seized by the State and certain soil samples taken from an automobile. The evidence discloses that sometime after the date of the robbery-murder, defendant had an automobile accident. His car was towed to a garage on 12 April 1973. On that date defendant took some articles from the vehicle and then left. He never returned. The owner of the garage gave police officers permission to take certain soil samples from the underside of the car and permission to take a tire which defendant had removed from the car and left in the garage. On these facts, defendant contends that he was entitled to a *voir dire* on his purported motion to suppress, and that the tire and soil samples should not have been allowed into evidence. We find no merit in this contention.

Rights against unreasonable searches and seizures under the Fourth Amendment are personal and, unlike some constitutional rights, may not be asserted by another. *Brown v. United States*, 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565 (1973). "[T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were

not charged with an offense that includes, as an essential element of the offense charged, possession of seized evidence at the time of the contested search and seizure. . . . " *Brown v. United States, supra,* at 229, 36 L.Ed. 2d at 214, 93 S.Ct. at 1569; *State v. Gordon,* 287 N.C. 118, 213 S.E. 2d 708 (1975); *State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975).

In the case at bar, defendant was not present at the garage at the time of the search and was not charged with a crime dealing with possession of the seized evidence. Defendant clearly had no proprietary or possessory interest in the garage which was searched. Further, defendant had no protected interest in the outside portions of the car from which the soil samples were taken. This is particularly true in light of the evidence tending to show that he had abandoned or sold the car. We hold, therefore, that defendant did not have standing to assert an unlawful search and seizure and was not entitled to a *voir dire.*

At trial, two witnesses were permitted to testify as experts. Dr. Otis Philen was tendered and accepted as an expert in the field of soil analysis and Steven Jones was accepted as an expert in the field of latent identification. Defendant contends that the testimony of both experts should have been excluded.

[10] Steven Jones testified that he had over ten years of experience in latent identification procedures, including tire print, fingerprint and footprint identification and analysis. Jones was allowed to testify, over objection, that he had compared a plaster cast of a tire print made adjacent to the scene of the crime with the tire taken from defendant's automobile. In his opinion, the tire was the same one that made the imprint from which the plaster cast was taken.

The finding by the trial judge that Mr. Jones was an expert in his field is supported by competent evidence and is conclusive. *See State v. Carey,* 288 N.C. 254, 218 S.E. 2d 387 (1975). We have also approved the use of plaster casts of tire imprints in prior cases, and we here do so again. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Brown,* 263 N.C. 327, 139 S.E. 2d 609 (1965); *State v. Young,* 187 N.C. 698, 122 S.E. 667 (1924).

[11] Dr. Otis Philen testified at trial as an expert in the field of soil analysis. Suffice it to say, he was well qualified. The record shows that Dr. Philen holds a doctorate degree in soil

science and chemistry from North Carolina State University. He had been active in his field for over twelve years and during this time he received both laboratory and field experience. Further, he was the author of approximately a dozen published articles and is the holder of several patents in the field. The finding of the trial judge that Dr. Philen was an expert in his field was clearly proper and was supported by the evidence. *State v. Carey, supra.*

At trial, Dr. Philen testified regarding the results he obtained when soil samples taken from a dirt road adjacent to the scene of the crime were compared with soil samples taken from beneath defendant's automobile. Dr. Philen testified in detail as to the procedures he employed in analyzing these samples. The objective of this analysis was to determine whether the minerals contained in each sample came from the same source. Dr. Philen stated, over objection, that in his opinion the samples taken from defendant's car and those taken from the dirt road adjacent to the scene of the crime were from the same source.

We find no error in the admission of this opinion testimony. As was held in *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973), the opinion of an expert witness is admissible when it is shown that the witness, through study or experience, has acquired such skill and expertise that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies. We feel that the evidence in the present case clearly indicates that the witness Philen, through study and experience, possessed the requisite knowledge to give opinion testimony. *See also State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972). Therefore, his testimony was correctly allowed.

[12] Defendant next contends that he is entitled to a new trial because of improper arguments to the jury made by the district attorney and the assistant attorney general. During his argument, the district attorney stated that he had known Steven Jones for fifteen years and had heard him testify on prior occasions. The district attorney further stated, in substance, that Jones was telling the truth. The assistant attorney general stated that witness Jones "is one of the best men in the State of North Carolina." Defendant objected to both statements and his objections were overruled. The arguments to the jury are not

included in the record. We do not know in what context the statements were made, what might have induced them, or what defense counsel might have said. *State v. Taylor,* 289 N.C. 223, 221 S.E. 2d 359 (1976).

It is a well established rule that the prosecuting attorney may not argue to the jury facts not in evidence nor travel outside the record by injecting his personal views and beliefs. *State v. Taylor, supra.* However, the scope of the arguments to the jury is in the sound discretion of the trial judge and his rulings will not be disturbed except upon a finding of prejudicial error. *State v. McKenna,* 289 N.C. 668, 224 S.E. 2d 537 (1976). While we do not approve of the arguments stated above, we do not find prejudice sufficient to warrant a new trial.

[13] Defendant further contends, in numerous assignments of error, that the trial judge expressed an opinion upon the evidence, in violation of G.S. 1-180, during his statements of contentions and facts. We have held in many cases that any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial. *See State v. Bush,* 289 N.C. 159, 221 S.E. 2d 333 (1976), and cases cited therein; *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536 (1966). The reason for this rule is that the trial judge should be given an opportunity to correct any misstatements in order to avoid the expense of a retrial. We have further held that a defendant may not avoid the operation of this rule by contending that the trial judge's misstatements were impermissible expressions of opinion. *State v. Bush, supra.*

In instant case, defendant failed to object or bring to the attention of the trial judge any of the statements which he now contends constitute error. In light of the fact that he failed to object and the fact that the misstatements are all relatively minor, we find no merit in this contention.

[14] In his closing remarks to the jury, the trial judge stated, in substance, that he had attempted to be fair and impartial in all of his actions at trial. He further stated that if he had expressed any opinion upon any matter, the jury should disregard it. He then stated that he had "done everything humanly possible for you [the jury] to be unaware of the opinion that I have. . . . " Standing alone, this statement would appear to imply that the trial judge had an opinion about the case. How-

ever, there is no indication in the record, and defendant fails to point out any, as to what the trial judge's opinion may have been. Further, we feel that the judge's statement, construed as a whole, was sufficient to indicate that he did not have any opinion.

[15] In his final assignment of error, defendant contends that the trial court committed reversible error in denying certain instructions which he requested. As we held in *State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973), the trial court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968).

Defendant requested instructions upon interested witnesses, impeachment of witnesses and expert testimony. The trial court gave the requested instructions in substance. The portions of defendant's requested instructions which were not given were either not supported by the law in this jurisdiction or not supported by the facts in this case. Thus, we find no merit in this contention.

[16] We have carefully considered the entire record in this case as well as each of defendant's assignments of error. Having done so, we find no prejudicial error. We therefore affirm the verdict. However, in view of the decision in *Woodson v. North Carolina, supra,* we hold that the punishment in this case is life imprisonment. Therefore, the judgment imposing a sentence of death upon defendant Monk is vacated and a sentence of life imprisonment substituted in lieu thereof. *State v. Davis, supra.* Accordingly, it is hereby ordered that this case be remanded to the Superior Court of New Hanover County with directions (1) that the presiding judge, without requiring the presence of defendant, enter as to defendant a judgment imposing life imprisonment for the first degree murder of which he has been convicted, and (2) that in accordance with this judgment the clerk of superior court issue commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish the defendant and his attorney a copy of the judgment and commitment, as revised, in accordance with this opinion.

[17] Defendant's counsel in this case, by failing to comply with Rule 28 of the Rules of Appellate Procedure, 287 N.C. 671, 741, has incurred considerable unnecessary expense. In case of an indigent, such as we have here, this expense is borne by the taxpayers of this State. Rule 28 of the Rules of Appellate Procedure provides that the brief shall contain a short summary of the essential facts when these will be helpful to an understanding of the questions presented for review. Instead of such summary, defendant's counsel devotes 27 pages of his brief to stating the case and summarizing the testimony of each witness. He then devotes over 200 pages of his brief to presenting his 43 assignments of error, together with arguments and authorities supporting these assignments. While we respect counsel for his zeal, we feel that he could have better presented his case without such a lengthy review of the evidence and without so much repetition and overlapping in his arguments. His failure to do so has added unwarranted expenses which the State should not be required to bear on behalf of this indigent defendant. Pursuant to Rule 9(b) (5) of the Rules of Appellate Procedure, the cost of mimeographing 25 pages of the record on appeal is hereby taxed against counsel for defendant.

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA FIRE INSURANCE RATING BUREAU

No. 35

(Filed 4 November 1976)

1. Insurance § 116— changes in extended coverage insurance — two methods

The two methods by which changes in premium rates for extended coverage insurance may be put into effect are: (1) the Rating Bureau may file with the Commissioner of Insurance, for approval by him, a proposal for such change, either an increase or a decrease; and (2) the Commissioner, on his own initiative, may, after investigation, order a reduction or an increase in the premium rate when necessary to enable the operating companies to earn upon policies written in N. C. a fair and reasonable profit. G.S. 58-131.1; G.S. 58-131.2.

2. **Insurance § 116— withdrawal of rate filing**

The Fire Insurance Rating Bureau acted within its rights in withdrawing an extended coverage rate filing before the Commissioner of Insurance took any action upon the filing and before the filing could go into effect pursuant to the "deemer" provision of G.S. 58-131.1.

3. **Insurance § 116— extended coverage insurance — withdrawal of rate filing — authority of Insurance Commissioner**

When the Fire Insurance Rating Bureau withdrew its extended coverage rate filing, the matter was then as if no filing had ever been made so far as the Insurance Commissioner's authority to order a change in the premium rate was concerned, and the only method available to the Commissioner for bringing about a change in the premium rate was an independent investigation and action pursuant to G.S. 58-131.2.

4. **Insurance § 116— withdrawn rate filing — competency in subsequent hearing**

A rate filing which had been withdrawn by the Rating Bureau, together with the statistical data attached thereto, would be competent in evidence at a properly convened hearing before the Commissioner of Insurance, pursuant to G.S. 58-131.2, as an admission by the Bureau that, as of the date of the filing, the therein proposed rates would be sufficient to yield to the companies (considered as one) a fair and reasonable profit upon their N. C. extended coverage business; however, at such hearing it would be subject to correction, clarification or modification by evidence of inconsistent or more recent information.

5. **Insurance § 116— extended coverage rates — failure of Rating Bureau to request hearing**

Failure of the Rating Bureau to request a hearing on the merits of extended coverage rates pursuant to G.S. 58-131.5 did not obviate the necessity of a public hearing where the Rating Bureau had withdrawn its filing and had no notice that the Commissioner of Insurance contemplated a change in the premium rate pursuant to an independent investigation as authorized by G.S. 58-131.2.

6. **Insurance § 116— hearing on extended coverage rates — absence of notice — arbitrary and capricious order**

Where the Commissioner of Insurance gave no notice to the Fire Insurance Rating Bureau of his intent to convert a contemplated hearing on the Rating Bureau's motion to vacate a "letter order" entered by the Commissioner into an independent investigation of the reasonableness of existing premium rates for extended coverage insurance pursuant to G.S. 58-131.2, the resulting order reducing extended coverage rates must be deemed arbitrary and capricious and may be reversed by the reviewing court pursuant to G.S. 58-9.6(b).

7. **Insurance § 116— extended coverage rates — decrease of 19% — material change — necessity for public hearing**

A decrease of 19% in extended coverage rates is a material change in the rate level within the meaning of the Insurance Advisory

Board rule requiring a public hearing when such a change is involved, and the Commissioner of Insurance may not deny a hearing when he decides to embark upon an independent investigation, designed to produce a rate reduction of 19%, by finding that this is not a material change in the rate level.

8. **Insurance § 116— extended coverage rates — applicability of "deemer" provision**

The "deemer" provision of G.S. 58-131.1 has application only when there is before the Commissioner of Insurance for his approval a filing by the Rating Bureau.

9. **Insurance § 116— extended coverage rates — independent investigation by Insurance Commissioner — necessity for notice and hearing**

G.S. 58-27.1(c) and the rules of the Insurance Advisory Board adopted pursuant thereto forbid the Commissioner of Insurance, acting on his own motion pursuant to G.S. 58-131.2, to order a material reduction in premium rates for extended coverage insurance without notice and without a hearing upon the merits of such rate change.

APPEAL by the Commissioner of Insurance from the decision of the Court of Appeals, reported in 29 N.C. App. 237, 224 S.E. 2d 223 (1976), from which *Martin, J.*, dissented. The Court of Appeals vacated orders issued by the Commissioner of Insurance in April 1975 concerning premiums to be charged for extended coverage and windstorm insurance.

On 6 January 1975, the North Carolina Fire Insurance Rating Bureau, hereinafter called the Bureau, filed for approval by the Commissioner of Insurance, hereinafter called the Commissioner, revisions in rates to be charged for extended coverage and windstorm insurance, the effect of the proposed rates being a reduction of 19% in such charges.

G.S. 58-131.1 provided, and now provides:

> "No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the Rating Bureau until it shall have been first submitted to and approved by the Commissioner. * * * Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within 60 days after submission."

The last sentence of this statute is known in the insurance industry and in the Department of Insurance and is referred to herein as the "deemer" provision.

On 5 March 1975, the Commissioner dispatched a letter to the Bureau stating, "It is not possible to schedule a public hearing on this filing at this time and you are requested to waive the deemer provisions of General Statute 58-131.1." This letter stated no reason for the inability of the Commissioner to schedule a public hearing at that time.

By letter dated 6 March 1975, one day before the deemer provision would take effect, the Bureau advised the Commissioner, "The captioned filing [the filing of 6 January 1975] is hereby withdrawn." The letter stated that this action was taken on advice of the General Counsel of the Bureau for the purpose of avoiding possible controversy as to the effect of the operation of the deemer provision and as to the effect of a waiver thereof by the Bureau. The record does not show when or if this letter was received by the Commissioner but nothing in the record, briefs or arguments on appeal indicates that it was not received in the usual course of the post; i.e., on 7 March 1975.

On 7 March 1975, instead of agreeing to waive the deemer provision, the Bureau dispatched a letter to the Commissioner acknowledging receipt of his request for such waiver and referring him to its letter withdrawing the filing.

On 11 April 1975, nothing else appearing in the record to have transpired, the Commissioner dispatched a letter, referred to in this proceeding by the parties as the "letter order." This stated:

> "Pursuant to authority conferred under General Statute 58-131.2 the reduction of 19% set forth in your filing is hereby approved. An additional decrease of 3.4% as determined by the attached rate development exhibit is also hereby approved.
>
> "You are directed to implement these reductions effective May 1, 1975."

On 22 April 1975, the Bureau filed with the Commissioner its motion to set aside the said "letter order" for the following reasons (summarized):

(1) The filing of 6 January 1975 with the statistical exhibits attached thereto was not before the Commissioner for his consideration or action at the time of the "letter order" or thereafter, having been withdrawn by the Bureau.

(2) The Commissioner gave to the Bureau no notice of his proposal to issue the said order and no opportunity was afforded the Bureau or any other person to be heard with respect thereto, this failure being alleged to be a violation of statutory provisions, of the constitutional right of the Bureau and its members to due process of law and of long established custom.

(3) The "letter order" was not supported by findings of fact or conclusions of law.

(4) No public hearing in North Carolina has been held on the subject of fair rates for extended coverage insurance for more than two years and the public interest would be served best by a full public hearing on "a revised and updated filing on extended coverage rates which filing is now being prepared for the North Carolina Fire Insurance Rating Bureau and is expected to be filed within the next thirty days."

The Bureau requested a hearing "on this motion" and determination thereof prior to 1 May 1975, the date upon which the "letter order" stated it would take effect. Attached to the motion was an exhibit showing "the history of consecutive and connected extended coverage filings of the years 1973, 1974 and 1975."

This exhibit attached to the motion of the Bureau showed:

On 8 January 1973, almost immediately after the Commissioner took office pursuant to his election by the people, the Bureau filed for his approval revisions in extended coverage and windstorm insurance rates, rules and forms. On 7 March 1973, the Commissioner wrote a letter to the Bureau with reference to that filing, which stated:

> "It is not possible to schedule a public hearing at this time due to my very busy schedule. Therefore, I am requesting that you waive the deemer provisions of General Statute 58-131.1.
>
> "A public hearing will be set as soon as my schedule permits."

On 9 March 1973, the Bureau wrote to the Commissioner advising him that, in accordance with his request, the Bureau waived the deemer provision but requested that the public hearing be set as soon as practicable. No such hearing having been set, the Bureau, on 22 June 1973, wrote a further letter to the

Commissioner advising him that its filing was "hereby withdrawn" for the reason that more recent experience data had become available for review, upon the completion of which review the Bureau would make a new filing.

The filing of 8 January 1973, so withdrawn on 22 June 1973, proposed a 23.3% reduction in premium rates.

On 21 September 1973, the Bureau made another filing with the Commissioner of proposed revisions in premium rates for extended coverage and windstorm insurance, this filing proposing a premium reduction of 22.6%, the approval of the Commissioner thereof being requested.

On 20 November 1973, the Commissioner wrote to the Bureau a letter which, except as to caption and date, was an exact duplicate of the above quoted letter of 7 March 1973, again requesting a waiver by the Bureau of the deemer provision. On 27 November 1973, the Bureau wrote the Commissioner that, in accordance with his request, it waived the deemer provision but requested that the public hearing be set as soon as practicable.

On 31 May 1974, no such hearing having been set, the Bureau again wrote the Commissioner withdrawing its filing dated 21 September 1973 for the reason that "more recent experience data are now available for review," and stating that upon the completion of such review a new filing would be made.

Nothing else transpired until the filing here in question on 6 January 1975.

The Commissioner notified the Bureau that "the hearing requested in your motion to set aside" the "letter order" would be held on 28 April 1975 and such hearing was held. At that hearing the filing of 6 January 1975 was introduced in evidence. Also introduced in evidence at the hearing were: The "letter order" of 11 April 1975, together with the statistical data attached thereto; the motion of the Bureau to set aside such order, together with the above mentioned attachments thereto; testimony of an actuary for the Bureau to the effect that in the filing the Bureau was saying that the proposed 19% reduction would provide an adequate premium rate through 1 December 1975, based upon the then available cost index; the letter of the Bureau withdrawing the filing, which letter, un-

like the letters of withdrawal of previous filings, did not state that a subsequent filing, based on more recent data, would be made; and a copy of the rules and regulations of the North Carolina Insurance Advisory Board adopted pursuant to G.S. 58-27.1.

The above mentioned rules and regulations adopted by the North Carolina Insurance Advisory Board contained the following provisions:

> "1. Any rate adjustment or proposal involving a general revision of an existing rating schedule which the Commissioner or the Advisory Board finds upon investigation involves a material change in the rate level, or the setting up of a new rating schedule of a material nature for a kind of insurance or for a separately rated major subdivision thereof, shall be subject to a public hearing prior to action thereon by the Insurance Commissioner. Any proposal involving only a change or changes in specific items of an existing rating schedule shall not be subject to a public hearing unless the Insurance Commissioner, upon review, decides that a public hearing is justified and required by the nature and importance of the proposed change or changes and is in the public interest.
>
> * * *
>
> "3. Public hearings herein provided for shall be conducted by the Commissioner of Insurance or, in his discretion, by any responsible person employed and duly authorized to act in his stead. * * * "

At the conclusion of the hearing, the Commissioner announced orally that his decision was that the 19% reduction stated in the "letter order" would continue in effect but the additional 3.4% reduction would be set for a hearing on 12 May 1975. To this the Bureau excepted and gave notice of appeal to the Court of Appeals.

Thereafter, on 30 April 1975, the Commissioner issued a more formal written order affirming the "letter order" as to the 19% reduction and staying, pending a hearing on 12 May 1975, the further reduction of 3.4%. This written order of 30 April 1975 set forth findings of fact and conclusions of law. The findings of fact were:

> "1. That by a filing dated January 6, 1975 (which filing is a part of the record in this matter) the Fire

Bureau proposed a reduction in Extended Coverage premium rates of 19%, *without requesting a hearing on said proposal.* (Emphasis added.)

"2. That the Fire Bureau purported to withdraw said filing by letter dated March 6, 1975, which made no mention of statistics more recent than that contained in said filing being available.

"3. The statistics contained in said filing, including North Carolina non-catastrophe loss experience for the six year period 1968 through 1973 and countrywide catastrophe loss experience for the 26 year period 1947 through 1972, are the latest available Extended Coverage statistics before the undersigned Commissioner.

"4. That all the factors, allowances, and adjustments contained in said filing are reasonable, proper and correct, with the exception of the trended cost factor of 10.8%, which trended cost factor said filing used to trend to December 1, 1975.

"5. That a reasonable, proper and correct trended cost factor for trending the statistics contained in said filing should be based on trending to no later than December 1, 1975, and is no greater than 10.8%, which is appropriate for use at this time to determine the rate level decrease of 19% until a further hearing can be held to afford the Fire Bureau an opportunity to be heard on the additional 3.4% rate level decrease.

"6. That the loss ratio for the five year period 1968 through 1973 in North Carolina for Extended Coverage insurance; after adjustment by the filing current cost factor, the aforesaid 10.8% trended cost factor, the filing loss adjustment expense factor, and the filing allowance for the loss portion of the catastrophe element; is 46.6%.

"7. That a proper and correct balance point loss ratio (permissible loss ratio), reflecting a fair and reasonable profit, is 57.5%.

"8. That therefore current Extended Coverage premium rates are producing a profit in excess of what is fair and reasonable.

"9. That therefore a reduction of at least 19% is necessary to produce a fair and reasonable profit for Extended Coverage insurance.

"10. That the investigation by the undersigned Commissioner pursuant to G.S. 58-131.2, which investigation supports the letter order of April 11, 1975 determined the foregoing Findings of Fact based on the latest statistics available to the undersigned Commissioner, to wit, the filing dated January 6, 1975 * * * and that the Fire Bureau by its filing dated January 6, 1975, admits that there should be a rate decrease of at least 19% for Extended Coverage insurance."

The significant conclusions of law in the Commissioner's formal written order of 30 April 1975 were these:

"4. * * * [I]t is concluded that at least 19% reduction in Extended Coverage premium rates is necessary to produce a fair and reasonable profit in compliance with said provision of said Article.

"5. That the Fire Bureau by its filing of a proposed rate reduction admits that there should be a rate reduction of at least the amount set forth in such filing and is estopped from denying the validity and necessity for such rate reduction."

To the formal written order of the Commissioner, the Bureau gave notice of appeal to the Court of Appeals, specifying therein the grounds upon which it deemed such order to be "unlawful, unjust, unreasonable and unwarranted" and specifying the errors of law alleged to have been committed by the Commissioner.

Specifically, the Bureau asserted in such notice of appeal that the hearing before the Commissioner was "solely and exclusively on the appellant's Motion to Set Aside and rescind the Order and Decision of the Commissioner of April 11, 1975, and was not an investigation of the adequacy of the existing Extended Coverage rates"; that no notice was given that the Commissioner would attempt to convert such hearing into an investigation of rates by the Commissioner; and that no attempt was made by the Commissioner to develop accurate and precise data bearing on the "enlargement of the eroding effect of in-

flation of the very substantial period from January 5, 1975 until May or June or July, 1975."

The Court of Appeals concluded that G.S. 58-27.2(a) and the rules and regulations adopted by the North Carolina Insurance Advisory Board required the Commissioner, before acting upon the proposal for the 19% reduction, to hold a public hearing after due notice to the public. It concluded that, insofar as this statutory requirement for a public hearing may be repugnant to the "deemer provisions" of G.S. 58-131.1, the provisions of G.S. 58-27.2(a) requiring a public hearing, that being the later enacted statute must prevail. The Court of Appeals further concluded: The "busy schedule" of the Commissioner does not justify a failure by him to comply with this statutory requirement; the only hearing held by the Commissioner was solely to consider the Bureau's motion to set aside the "letter order"; by entering the orders from which this appeal is taken without conducting a public hearing as required by the statute, the Commissioner exceeded his authority; the Bureau had the right to withdraw the filing which it made on 6 January prior to the setting of a public hearing thereon. For these reasons, the Court of Appeals held the orders of the Commissioner should be reversed.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, for Commissioner of Insurance.

Joyner & Howison by William T. Joyner, Henry S. Manning, Jr., and James E. Tucker for North Carolina Fire Insurance Rating Bureau.

LAKE, Justice.

The North Carolina Fire Insurance Rating Bureau is a statutory agency created by the State "for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance." G.S. 58-125, 127. "For rate making purposes, the Bureau is to be regarded as if it were the only insurance company operating in North Carolina and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation." *In Re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 32, 165 S.E. 2d 207 (1968). Every company engaged in the writing of fire insurance policies, including

extended coverage endorsements attached thereto, is required to be a member of the Bureau. G.S. 58-127.

[1] There are two methods by which changes in premium rates for extended coverage insurance may be put into effect. First, the Bureau may file with the Commissioner of Insurance, for approval by him, a proposal for such change, either an increase or a decrease. G.S. 58-131.1. Second, the Commissioner, on his own initiative, may, after investigation, order a reduction or an increase in the premium rate when necessary to enable the operating companies (considered for this purpose as if they were a single company) to earn upon policies written in North Carolina a fair and reasonable profit. G.S. 58-131.2. The two methods overlap in the sense that in passing upon a proposal submitted by the Bureau the Commissioner need not approve or disapprove such proposal in its entirety but "upon proper findings of fact supported by substantial evidence, may fix premium rates at a level such as to allow part but not all of the increase [or decrease] proposed by the Bureau." *In Re Filing by Fire Insurance Rating Bureau, supra,* at p. 40. The two methods for changing premium rates are, however, separate and independent and the procedures prescribed by the statute in pursuing the one or the other method must be followed.

In the present instance, the Bureau filed a proposal that the premium rates for extended coverage insurance be reduced by 19% for the reason that premium rates then in effect were producing excessive profits and, with such reduction in effect, the profits of the companies (considered as if they were one company) would be fair and reasonable. The proposal, known to the Insurance Department and to the insurance industry as the "filing," carried attachments containing statistical data in support of the proposal. Nothing in the record before us indicates that these data were not sufficient to show, *prima facie,* that the proposed reduction in premium rates was proper and that, with such proposed rates in effect, the insurance companies would earn upon their North Carolina extended coverage business a fair and reasonable profit. The actuary and statistician for the Bureau, testifying at the hearing before the Commissioner on the motion of the Bureau to vacate the Commissioner's "letter order," testified that data available to the Bureau at the time of the filing so indicated.

[2] Before the Commissioner took any action upon this filing and before the filing could go into effect pursuant to the "deemer" provision of G.S. 58-131.1, the Bureau notified the Commissioner that it was withdrawing the filing. We have heretofore said that when the Bureau makes a filing in which it proposes an increase in the premium rates, "unquestionably, the Bureau may amend its filing so as to propose a smaller increase in premium rates than that proposed in the original filing." *In Re Filing by Fire Insurance Rating Bureau, supra,* at p. 40. We find no merit in the contention of the Commissioner that once a filing is made the Bureau cannot withdraw it, but it remains before the Commissioner for his approval, disapproval or modification.

If a filing, once made, could never be withdrawn, it would follow that if the Bureau made a filing proposing a substantial increase in the premium rates which the Commissioner, with or without justification, failed to disapprove within 60 days after its submission, such increase would go into effect, at least temporarily, pursuant to the "deemer" provision of G.S. 58-131.1, even though the Bureau were to find that its calculations were in error and no increase was justified and were to advise the Commissioner of such error and of its desire to withdraw the proposal. It can hardly be supposed that the Legislature, by the enactment of Article 13 of Chapter 58 of the General Statutes, creating the Bureau, so intended. Nothing in the statute relating to filings by the Bureau supports the contention that a filing, once made, cannot be withdrawn for any reason satisfactory to the Bureau. In this respect, there is no basis for making a distinction between a filing which proposes an increase in the premium rate and a filing which proposes a decrease in such rate. We, therefore, hold that the Court of Appeals was correct in its determination that the Bureau was acting within its rights in withdrawing this filing. It is not necessary for us to determine, and we do not pass upon, the question of whether a filing may be withdrawn by the Bureau after the "deemer" provision puts it into effect or the Commissioner sets it for a public hearing. The filing in question was never set for hearing and was withdrawn within 60 days from its submission.

[3] The Bureau having withdrawn its filing, that matter was at an end and there was, thereafter, no proposal before the Commissioner for a change in the premium rate for extended

coverage insurance. The matter was then as if no filing had ever been made, so far as the Commissioner's authority to order a change in the premium rate was concerned. The second method for bringing about a change in the premium rate, namely an independent investigation and action by the Commissioner pursuant to G.S. 58-131.2, was available to the Commissioner, just as it would have been had the Bureau made no filing at all. However, to pursue that method, the Commissioner must follow the procedure prescribed therefor. "Obviously, the Commissioner of Insurance has no authority to prescribe or regulate premium rates, except insofar as that authority has been conferred upon him by the above mentioned statutes. In exercising that authority, he must comply with the statutory procedures and standards." *In Re Filing by Fire Insurance Rating Bureau, supra,* at p. 33.

[4] This is not to say that the withdrawn filing is, by the withdrawal, obliterated from the records of the Insurance Department or that, in a proceeding initiated by the Commissioner, it cannot be considered by him. Such filing, together with the statistical data attached thereto, would be competent in evidence at a properly convened hearing before the Commissioner, pursuant to G.S. 58-131.2, as an admission by the Bureau that, as of the date of the filing, the therein proposed rates would be sufficient to yield to the companies (considered as one) a fair and reasonable profit upon their North Carolina extended coverage business. However, at such hearing, like any other extra-judicial admission, it would be subject to correction, clarification or modification by evidence of inconsistent or more recent information. Stansbury, North Carolina Evidence (Brandis Rev.), § 166, at p. 4 of Vol. 2, § 167.

The Commissioner, having no filing before him, issued his "letter order" directing a reduction in the premium rate for extended coverage insurance without notice to the Bureau or to the public, without conducting a hearing and without receiving any evidence or making any finding of fact. The subsequent orders of the Commissioner (one oral, the other a formal, written order) followed a hearing upon the motion by the Bureau to set aside the earlier "letter order." This hearing was necessarily limited to the determination of the Bureau's motion to vacate the earlier order. No notice thereof was given to the public and the notice thereof to the Bureau contained no information that the purpose of the hearing was to receive

evidence, make findings of fact and determine the premium level which would yield to the companies (considered as one) a fair and reasonable profit on their extended coverage business in North Carolina. Thus, the two orders, oral and written, made by the Commissioner following the hearing on the motion to vacate, must be deemed made without any notice or hearing as to the merits; i.e., the reasonableness of the then existing premium rates.

G.S. 58-131.5 provides:

> "*Hearing.*—The Commissioner shall not make any rule, regulation or order under the provisions of this Article without giving the Rating Bureau and insurers who may be affected thereby reasonable notice and a hearing if *hearing is requested.* All hearings provided for in this Article shall be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the Rating Bureau * * * at least 30 days before the date designated therein. The notice shall state the subject of the inquiry.
>
> "At the conclusion of such hearing, or within 30 days thereafter, the Commissioner shall make such order or orders as he may deem necessary *in accordance with his finding* * * *." (Emphasis added.)

[5] The Commissioner contends that this statute has no application and no hearing upon the merits was necessary in this instance because there was no request for such hearing by the Bureau. To acquiesce in this contention would be for us to shut our eyes to the obvious fact that the Bureau had no notice that the Commissioner contemplated a change in the premium rate pursuant to an independent investigation into the merits of the existing rates as authorized by G.S. 58-131.2. Having no notice that such action was in contemplation by the Commissioner and having withdrawn its filing, the Bureau had no reason to request a hearing on the merits of the existing premium rate level. Under the circumstances, the phrase "if hearing is requested" cannot be deemed to shield arbitrary rate fixing by the fiat of the Commissioner.

[6] G.S. 58-9.2 provides that all hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice given by the Commissioner, which

notice "shall state the subject of the inquiry." No notice whatever was given by the Commissioner to the Rating Bureau of his intent to convert the contemplated hearing on the Bureau's motion to vacate the "letter order" into an independent investigation of the reasonableness of existing premium rates for extended coverage insurance pursuant to G.S. 58-131.2. To so proceed without such notice and an adequate opportunity to the Bureau to present evidence as to the merits of the existing premium rate level must be deemed arbitrary and capricious. Thus, the resulting order may be reversed by the reviewing court pursuant to G.S. 58-9.6(b) and, in so adjudging, the Court of Appeals committed no error.

G.S. 58-27.1 establishes within the Insurance Department an Insurance Advisory Board and authorizes that board to promulgate rules and regulations to provide for the holding of public hearings before the Commissioner (or any person employed by the Insurance Department and authorized by the Commissioner to act in his stead) on such proposals to revise an existing rating schedule so as to increase or decrease the charge for insurance or to set up a new rating schedule, if such proposals are subject to the approval of the Commissioner and, in the judgment of the board, are of such nature and importance as to justify and require such public hearing. This statute also authorizes the board to determine by its rules and regulations the circumstances under which such public hearing shall be held and requires the Commissioner of Insurance to hold public hearings in accordance with such rules and regulations.

The Insurance Advisory Board adopted rules pursuant to this statutory authority. Rule 1, so adopted, provides:

> "Any rate adjustment or proposal involving a general revision of an existing rating schedu'e, which the Commissioner or the Advisory Board finds upon investigation involves a material change in the rate level, or the setting up of a new rating schedule of a material nature for a kind of insurance or for a separately re'ated major subdivision thereof, *shall* be subject to a public hearing prior to action thereon by the Insurance Commissioner. * * *" (Emphasis added.)

[7] Obviously, a rate decrease of 19% (not to mention the additional 3.4% decrease ordered by the Commissioner in his "letter order") is a material change in the rate level. If Rule 1

were to be interpreted to permit the Commissioner to deny a hearing when he decides to embark upon an independent investigation, designed to produce a rate reduction of at least 19%, by the simple expedient of finding that this is not a material change in the rate level, it would raise serious doubt as to the constitutionality of the rule. When reasonably possible, a statute, or an administrative rule, should be construed so as to avoid serious doubt as to its constitutionality. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352 (1937); 16 Am. Jur. 2d, Constitutional Law, § 146. We decline to construe this rule of the Insurance Advisory Board as giving such authority to the Commissioner. Clearly, G.S. 58-27.1(c) contemplated the holding of a public hearing before an order can be entered making such a material change in insurance premium rates. There was no error in the decision of the Court of Appeals that the statute and the rule require the Commissioner to hold a public hearing, after due notice, before entering the orders here in question.

The Court of Appeals stated that to the extent that there may be a conflict between this requirement of G.S. 58-27.2 and the "deemer" provision of G.S. 58-131.1, the provisions of G.S. 58-27.2 must prevail since that statute was enacted later than G.S. 58-131.1. The principle of statutory construction relied upon by the Court of Appeals is entirely sound. However, we do not consider it pertinent to this decision for the reason that the "deemer" provision has no application to this appeal. That provision appears in G.S. 58-131.1, which reads as follows:

> "*Approval of rates.*—No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the Rating Bureau until it shall have been first submitted to and approved by the Commissioner. * * * Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within 60 days after submission."

[8, 9] Thus, the "deemer" provision has application only when there is before the Commissioner for his approval a filing by the Bureau. As above shown, at the time of the orders of the Commissioner from which this appeal is taken, there was no

filing by the Bureau so pending before the Commissioner, the filing of 6 January 1975 having been lawfully withdrawn by the Bureau. Thus, the question for determination on this appeal is, Can the Commissioner of Insurance, acting on his own motion, pursuant to G.S. 58-131.2, order a material reduction in insurance premium rates without notice and without a hearing upon the merits of such rate change? We hold that G.S. 58-27.1(c) and the rules of the Insurance Advisory Board, adopted pursuant thereto, forbid the Insurance Commissioner to do so.

The record discloses that, on three separate occasions since early 1973, the Rating Bureau (i.e., the insurance companies operating in North Carolina) applied to the Commissioner for permission to reduce substantially the rates of premium charged the people of North Carolina for extended coverage insurance. None of these proposed reductions could go into effect until approved by the Commissioner. G.S. 58-131.1. In each instance, had the Commissioner taken no action whatever, the proposed rate reduction would have gone into effect, after a 60 day waiting period, pursuant to the "deemer" provision of G.S. 58-131.1. In each instance, the people of the State have been deprived of the benefit of the rate reduction proposed because the Commissioner did not hold a hearing and requested the company not to put the deemer provision into effect. In each instance, it may well be that the Commissioner, in good faith and for good reason, did not consider the proposed reduction sufficient. We do not, in this decision, intimate any opinion as to the reasonableness of the existing premium rates, or of the proposed reduction therein. The merits of the reduction ordered by the Commissioner are not before us on this appeal.

In the last of these instances, no reason for the asserted inability of the Commissioner to hold the required hearing is mentioned in his request that the Bureau waive the "deemer" provision. In the first two instances, the Commissioner stated only that he was unable to hold the hearing "due to my very busy schedule," the nature of the conflicting activities not being shown. Assuming, as we do, that the Commissioner, then newly in office, found all of his time consumed by the necessary study of and discharge of his official duties, this is no justification for the failure to order and hold a hearing upon the proposed rate reductions. All hearings provided for by Ch. 58 of the General Statutes may be conducted either by the Commis-

sioner personally or "by one or more of his deputies, investigators, actuaries, examiners or employees designated by him for the purpose." Both the public and the insurance companies (acting through the Rating Bureau) are entitled to a prompt hearing of and determination of each proposal by the Bureau for a substantial change in the rates of premium charged. Such hearings must be held as required by the statute.

The "deemer" provision in G.S. 58-131.1 was designed by the Legislature to protect the insurance companies from the failure of the Commissioner of Insurance to perform, in person or through his deputy or other designated employee, this statutory duty. The companies (through the Bureau) are under no compulsion to waive this statutory protection against arbitrary delay in approving or disapproving their rate change proposals. Thus, the companies have a measure of protection against such official inaction. The public does not. If the Commissioner does not conduct hearings and determine the validity of rate changes proposed by the Bureau, these, including substantial rate increases, go into effect under the "deemer" provision without any opportunity on the part of the public to be heard in opposition thereto.

The availability of an application for a writ of mandamus to compel the holding of such a hearing, though not to control the decision thereat, pursuant to Rule 22 of the Rules of Appellate Procedure, 287 N.C. 730, is not presently before us. We are confident that no occasion to pass upon that question will arise in the future now that the duty of the Commissioner to hold hearings and determine the propriety of proposed rate changes filed with him by the Bureau has been determined by this appeal.

Affirmed.

STATE OF NORTH CAROLINA v. HENRY AARON TATUM

No. 4

(Filed 4 November 1976)

1. **Bill of Discovery § 1— discovery in criminal cases**

There is no common-law right of discovery in criminal cases.

2. **Constitutional Law § 31; Criminal Law § 80— motion for discovery of officers' notes**

The denial of defendant's motion in a homicide case for discovery of "the original notes of the arresting officers" pertaining to the house where the homicide occurred did not constitute a violation of defendant's right to due process, although the house was demolished subsequent to the crime, since defendant failed to meet the "favorable character" and "materiality" tests of *Brady v. Maryland*, 373 U.S. 83, and since defendant is not entitled to a detailed accounting of all police investigatory work on the case.

3. **Criminal Law § 80— inspection of police officers' notes — no statutory right**

Defendant had no right under G.S. 15-155.4 to inspect notes of the investigating police officers pertaining to the house where the crime occurred where the notes were not specifically identified and were not exhibits to be used in the trial.

4. **Constitutional Law § 31— appointment of expert for indigent defendant — discretion of court — private investigator**

Whether an expert should be appointed at State expense to assist an indigent defendant rests within the sound discretion of the trial judge; however, the appointment of a private investigator should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. G.S. 7A-450; G.S. 7A-454.

5. **Constitutional Law §§ 31, 32— refusal to appoint investigator for indigent defendant — due process — effective assistance of counsel**

An indigent defendant's rights to due process and the effective assistance of counsel were not violated by the trial court's denial of defendant's motion that the State provide funds for the employment of a private investigator where defense counsel made no showing as to the reasonable availability of any evidence necessary for a proper defense, defendant had the benefit of a favorable discovery order, and defendant's testimony shows that he was aware of all persons who could shed light on the happenings in question.

6. **Constitutional Law § 31— refusal to appoint investigator for indigent defendant — equal protection**

The denial of an indigent defendant's request for a private investigator at State expense did not violate his right of equal protection since the mere refusal to provide defendant with an additional

defense tool which is available to wealthier persons accused of crime does not amount to a denial of equal protection.

7. **Constitutional Law § 31— refusal to appoint investigator for indigent defendant — equal protection**

The denial of the request of an indigent defendant represented by court-appointed counsel for a private investigator at State expense did not constitute a violation of equal protection because defendants represented by a public defender have an investigator available to them pursuant to G.S. 7A-468 since (1) the statute places the services of an investigator at the disposal of a public defender to be used by him whenever, in his discretion, a particular case indicates a need therefor, (2) the trial judge has discretion under G.S. 7A-450 and G.S. 7A-454 to provide an investigator to a defendant represented by court-appointed counsel, and (3) indigent defendants in both instances must therefore make a showing of need sufficient to convince a public official, in the exercise of his discretion, that the services of an investigator are necessary to a fundamentally fair trial.

8. **Jury § 5— juror acquainted with brother of State's witness, police officers — challenge for cause**

The trial court in a homicide prosecution did not err in the denial of defendant's challenge for cause of a juror who stated that he worked with the brother of the State's chief witness, he was friendly with several police officers and he felt uncomfortable about serving on the jury, where the juror also stated that he had formed no opinion about the case, he did not know defendant or the State's witness, and his acquaintance with the witness's brother and with police officers would not prevent him from basing his verdict solely on the evidence presented at trial and the applicable law. G.S. 9-14.

9. **Criminal Law § 98— motion to sequester witnesses — testimony by witnesses not sequestered — lack of knowledge witnesses would testify**

The trial court did not err in admitting testimony of two State's witnesses who testified in corroboration of the chief prosecution witness under the following circumstances: (1) the witnesses were in the courtroom when the chief prosecution witness testified; (2) prior to the chief prosecution witness's testimony the court had ordered that the chief prosecution witness be sequestered and that police officers and technical witnesses be not sequestered; (3) at the time of this ruling, neither the trial judge, defense attorney nor district attorney knew the two witnesses would be called; and (4) the trial judge gave defense counsel time to prepare for cross-examination when he objected to this testimony upon the principal ground that he was not prepared to cross-examine the witnesses.

10. **Criminal Law § 87; Witnesses § 1— list of State's witnesses**

Neither statute nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call. G.S. 15A-903.

11. **Criminal Law § 98— sequestration of witnesses — discretion of court**

The sequestration of witnesses is a matter within the trial judge's discretion, and his ruling thereon is not reviewable absent a showing of abuse of that discretion.

12. Jury § 7; Constitutional Law § 29— peremptory challenge of blacks — no systematic exclusion

Defendant failed to make out a *prima facie* case of arbitrary or systematic exclusion of male blacks from the jury by showing only that the district attorney excluded all male blacks from the jury by use of peremptory challenges.

13. Homicide § 12— indictment for murder — conviction under theories of premeditation and deliberation, felony-murder

A bill of indictment for first degree murder drawn in the form prescribed by G.S. 15-144 was sufficient to support a verdict of guilty of first degree murder if the jury found beyond a reasonable doubt that defendant killed deceased with malice and after premeditation and deliberation or in the perpetration of a robbery or a kidnapping.

14. Criminal Law § 26; Homicide § 31— kidnapping not basis for felony-murder — punishment for kidnapping and murder

Although a homicide and a kidnapping were parts of one continuous transaction, defendant could properly be convicted of both first degree murder and kidnapping and punished for both crimes where the offense of first degree murder was submitted to the jury only on theories of premeditation and deliberation and commission in the perpetration of a robbery, and the offense of kidnapping was submitted to the jury as a separate and distinct offense and not as a basis for a possible finding by the jury that deceased was killed during the perpetration of the felony of kidnapping.

15. Homicide § 31— death sentence vacated — imposition of life imprisonment

Sentence of death imposed for first degree murder is vacated and sentence of life imprisonment is substituted therefor.

APPEAL by defendant from *Albright, J.*, 24 March 1975 Special Session, DURHAM Superior Court.

Defendant was charged in separate bills of indictment with the crimes of kidnapping, armed robbery and first-degree murder. The cases were consolidated for trial and defendant, through his court-appointed counsel William M. Sheffield, entered a plea of not guilty to each charge.

The State offered the testimony of Kenneth Earl Blake who, in substance, testified that on the night of 20 July 1974, he and defendant saw Howard Ellis at about 10:45 p.m. near North Durham Five Points. Ellis, an acquaintance of defendant, was a security guard. Defendant and Blake entered Ellis' automobile. Defendant sat in the front seat and talked to Ellis while Blake sat in the back seat and smoked a cigarette. After a short time defendant and Blake went to the Duke Tavern where they had some beer. They left the tavern some time after

midnight and defendant flagged Ellis down near Carpenter Motors in Durham. When Ellis stopped the car defendant pulled out a .38 caliber pistol, ordered Ellis out of the car and took his pistol. He gave the pistol to Blake and upon defendant's instructions both Ellis and Blake entered the rear of the automobile. Defendant then drove to a deserted house on Scoggins Street where, after ordering Ellis out of the car, he took the officer's handcuffs and handcuffed his hands behind his back. In response to defendant's questions, Ellis stated that the only money he had was a $100 check in the back of the car. Thereupon defendant took a box containing green bags from the trunk of the car and placed it on the back seat. Blake found a check in the box. Defendant then took Ellis into the house and shortly thereafter Blake heard four shots. Defendant came out of the house alone and drove Ellis' automobile to the corner of Gary and Liberty Streets where he and Blake removed a shotgun, a nightstick, a flashlight, shotgun shells and bullets. They left on foot and returned to defendant's home where they found Willie Laney and George Cleveland who had been with them earlier that night. The four of them went to the location where the property was hidden and picked up the guns, ammunition and other property. A few days later, in response to questions by Officers Roop and Rigsbee, Blake related the happenings of 20 July 1974.

On cross-examination, Blake admitted to defense counsel that he had previously told him that the district attorney had assured him that if he presented false testimony against defendant Tatum he would be paid certain sums of money, charges would not be brought against him and he would not have to spend any time in jail. He further admitted that he told defense counsel that he testified for the State at the preliminary hearing because of these promises.

The State offered further testimony of police officers to the effect that the body of Howard Ellis was found on 22 July 1974 at a house on Scoggins Street. He was lying on his back with handcuffs on his wrists and there were four bullet wounds in his head.

George Cleveland and Willie Laney testified that they were in the presence of defendant and Kenneth Earl Blake in the early part of the night of 20 July 1974 and at that time defendant was armed with a pistol. Both of these witnesses saw defendant and Blake enter the automobile of deceased and sit

there for about five minutes. After midnight they accompanied defendant and Blake to the place where they picked up a shotgun, blackjack and some ammunition. They all returned to defendant's home and Blake told them about the shooting and the taking of the property. Their testimony generally corroborated Blake's account of the shooting and theft.

The State also offered evidence tending to show that defendant's fingerprints and Blake's fingerprints were taken from the Ellis automobile. There was medical testimony tending to show that Ellis died as a result of the gunshot wounds to his head.

Defendant testified that he was with Blake, Cleveland and Laney during the early hours of 20 July 1974 and after having a beer with Blake he gave his .38 pistol to Blake and went home. Blake came to his home later that night and asked defendant to go with him. They went to an old house at the corner of Liberty and Gary Streets where Blake removed a shotgun, nightstick and a pistol from nearby bushes and placed them in defendant's car. This property was left in defendant's home for some time. Blake refused to tell him where he had obtained these articles. Defendant testified that he did not commit any of the crimes for which he was being tried.

The jury returned a verdict of guilty as to each charge and defendant was sentenced to death on the verdict of guilty of murder in the first degree. A sentence of imprisonment for 99 years was imposed on the verdict of guilty of kidnapping. The trial judge allowed defendant's motion for arrest of judgment on the charge of armed robbery. Defendant appealed from the judgments entered.

Attorney General Edmisten, by Associate Attorney Jack Cozort for the State.

William M. Sheffield, by John F. Hester, attorney for defendant appellant.

BRANCH, Justice.

Defendant assigns as error the trial judge's ruling on his pre-trial motion for discovery.

Prior to the appointment of defendant's counsel the Durham Redevelopment Commission demolished the house on Scog-

gins Street in which the body of Howard Ellis was found. Defendant contends that, in light of this development, he should have been allowed to discover and inspect photographs taken at the scene, physical evidence taken therefrom, and notes of police investigators pertaining to the house. An examination of defendant's motion for discovery reveals that these items fall within the following requests:

> 3. The original notes of the arresting officers.
>
> * * *
>
> 11. Any and all photographs or other evidence concerning or depicting the situs of the commission of the crimes alleged herein, ballistics tests arising therefrom, fingerprints therein taken, blood and other stains noted or tested, documents, papers (including checks), handcuffs, weapons, or any other tangible things which are evidentiary or which are relevant or material to the case for the defense or for the State.

[1] There is no common-law right of discovery in criminal cases. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, *cert. denied,* 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884. The discovery statute in effect at the time of this trial was G.S. 15-155.4, which, in pertinent part, provided:

> In all criminal cases before the superior court, the superior court judge . . . shall for good cause shown, direct the solicitor or other counsel for the state to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case . . . .

It should be noted initially that the District Attorney in this case indicated his willingness to provide defendant with "all photographs intended to be introduced at trial" and Judge Braswell included such photographs in his order allowing discovery. Likewise, the discovery order directed the District Attorney to allow defendant to inspect those reports relating to physical evidence obtained at the scene of the crime, which the State intended to introduce at the trial. It is apparent that Judge Braswell's discovery order was fully in compliance with G.S. 15-155.4 with respect to the items listed in defendant's request number 11.

[2] We turn to the question of whether the denial of defendant's request for discovery and inspection of "the original notes of the arresting officers" was proper.

In his affidavit in support of his discovery motion, defendant argued that denial of this discovery request would be a violation of due process. This contention is based primarily on the case of *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194, which holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also, Moore v. Illinois,* 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562. One of the minimum requirements of *materiality* of evidence, in the context of discovery, is that the evidence sought might have affected the outcome of the trial. *United States v. Agurs,* ..... U.S. ....., 49 L.Ed. 2d 342, 96 S.Ct. 2392. Defendant explains his need for the police notes relating to the scene of the crime by stating that "[i]t may well be that knowledge of the scene would have enabled defense counsel to have more effectively cross-examined Blake so as to destroy his credibility with the jury." We are not convinced that defendant has met the "favorable character" and "materiality" tests fashioned by *Brady.* Moreover, we believe that defendant's due process argument is overcome when measured by the rule set forth in *Moore v. Illinois, supra,* to wit: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Accord: State v. Goldberg, supra.*

[3] Discovery under G.S. 15-155.4 is limited to exhibits which are "specifically identified" and which are "to be used in the trial of the case." The notes taken by investigating police officers relating to the house on Scoggins Street were not exhibits to be used in the trial. *See State v. Macon,* 276 N.C. 466, 173 S.E. 2d 286. Nor were these particular notes specifically identified as required by the statute. *See State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326. "Defendant was not entitled to the granting of his motion for a fishing expedition nor to receive the work product of police or State investigators." *State v. Davis, supra.* Thus, defendant had no right to inspect the notes of the investigating police officers under G.S. 15-155.4.

We note the current expression of public policy with respect to this type of discovery, contained in G.S. 15A-904. It

is there stated that the present criminal discovery statute "does not require the production of reports, memoranda, or other internal documents made by the solicitor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case . . . . "

We do not attempt to discuss the remaining portions of defendant's sweeping and all-encompassing notice. Suffice it to say that the affidavit filed in support of the motion contained conclusory statements unsupported by any showing that the evidence sought by discovery was favorable to defendant or met the test of materiality.

Judge Braswell's ruling on defendant's motion for discovery was in compliance with constitutional and statutory requirements. We, therefore, overrule this assignment of error.

Defendant next assigns as error the denial of his pretrial motion that the State provide funds for the employment of a private investigator.

The narrow question presented by this assignment of error has not been decided by this Court. We, therefore, turn to other jurisdictions for guidance.

In *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 97 L.Ed. 549, 73 S.Ct. 391, the United States Supreme Court considered the question of whether an indigent was entitled to the appointment of an expert witness to assist in his defense. There, the court stated: "We cannot say that the State has that duty by constitutional mandate." However, the holding in this case clearly indicating that the Federal Constitution does not require that expert witnesses or investigators be supplied to indigent defendants in criminal cases at State expense, was soon beclouded by the now well-recognized holdings that all defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal. *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792; *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321; *Britt v. North Carolina,* 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431; *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.

Some jurisdictions interpret the cases guaranteeing effective assistance of counsel to require the State to furnish expert assistance to an indigent defendant at State expense. *Greer v. Beto*, 379 F. 2d 923; *McCollum v. Bush*, 344 F. 2d 672; *United States ex rel. Robinson v. Pate*, 345 F. 2d 691; *People v. Watson*, 36 Ill. 2d 228, 221 N.E. 2d 645. On the other hand, other courts follow the holding of *Baldi* and adhere to the view that the Constitution creates no right in an indigent to demand that the State pay for expert assistance in his defense. *Watson v. Patterson*, 358 F. 2d 297, *cert. denied*, 385 U.S. 876, 17 L.Ed. 2d 103, 87 S.Ct. 153; *Utsler v. Erickson*, 315 F. Supp. 480, *cert. denied*, 404 U.S. 956, 30 L.Ed. 2d 272, 92 S.Ct. 319; *Houghtaling v. Commonwealth*, 209 Va. 309, 163 S.E. 2d 560, *cert. denied*, 394 U.S. 1021, 23 L.Ed. 2d 46, 89 S.Ct. 1642; *State v. Superior Court of Pima County*, 2 Ariz. App. 458, 409 P. 2d 742.

Our research does not reveal that the United States Supreme Court has reconsidered its decision in *Baldi*, and we adhere to the holding in that decision. However, we do not interpret *Baldi* to obviate the doctrine of "fundamental fairness" guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. *United States ex rel. Robinson v. Pate, supra; State v. Taylor*, 202 Kan. 202, 447 P. 2d 806; *People v. Watson, supra; Corbett v. Patterson*, 272 F. Supp. 602.

We find the language in *State v. Taylor, supra*, particularly persuasive. There the Supreme Court of Kansas considered and rejected defendant's contention that he had been denied effective assistance of counsel because he was not provided with a fingerprint expert at the State's expense. In so deciding the court, in part, stated:

> In the absence of statute the duty to provide such [expert witness] may arise and be exercised because of an inherent authority in courts to provide a fair and impartial trial as guaranteed by Section ten of the Kansas Bill of Rights and the due process clause of the United States constitution. . . .
>
> . . . In the absence of statute a request for supporting services must depend upon the facts and circumstances of each case. Therefore it must rest in the sound discretion of the trial court. [Citations omitted.]

> . . . Mere hope or desire to discover some shred of evidence when not coupled with a showing the same is reasonably available and necessary for a proper defense does not support a claim of prejudicial error.

We are aware that our General Assembly has enacted legislation providing expert services to an indigent defendant. G.S. 7A-454 provides:

> The court, *in its discretion,* may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State. [Emphasis ours.]

Similarly, G.S. 7A-450(b) provides:

> Whenever a person, under the standards and procedures set out in this sub-chapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the *other necessary expenses of representation.* . . . [Emphasis ours.]

The language contained in these statutes is consistent with the rule that appointment of experts lies within the discretion of the trial judge. *In re Moore,* 289 N.C. 95, 221 S.E. 2d 307.

[4] We conclude that our statutes and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. We adopt that rule. However, we feel that the appointment of an investigator as an expert witness is a matter *sui generis.* There is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence. Thus, such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. Mere hope or suspicion that such evidence is available will not suffice. For a trial judge to proceed otherwise would be to impede the progress of the courts and to saddle the State with needless expense. *See State v. Montgomery,* 291 N.C. 91, 229 S.E. 2d 572, decided this day.

[5] In instant case, counsel made no showing as to the reasonable availability of any evidence necessary for a proper defense. Defendant had the benefit of a favorable discovery order and

the testimony of his client makes it obvious that he was aware of all persons who could shed light on the happenings of the night of 20 July 1974. His motion was, in effect, a request for a State-paid fishing expedition. No abuse of discretion on the part of the trial judge has been shown.

[6] By this assignment of error defendant also contends that the refusal of his request for a private investigator at State expense is a denial of equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

The equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination. It "does not require absolute equality or precisely equal advantages." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278. In this case the State has imposed no arbitrary barriers which hinder or impede defense counsel's investigation or preparation of his case. There has merely been a refusal to provide defendant with an additional defense tool which is available to wealthier persons accused of crime. It was recognized in *Griffin v. Illinois,* 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, which defendant cites in support of his argument, that this circumstance alone does not amount to a denial of equal protection by the State:

> . . . Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. (Frankfurter, J., concurring in the judgment.)

[7] Defendant further contends that the State has made an arbitrary and unconstitutional distinction between indigent defendants represented by court-appointed counsel and those represented by a public defender in those districts where such an office has been established. He argues that since the services of an investigator are available to those defendants represented by a public defender, the refusal of his request for similar assistance denies him equal protection of the laws.

G.S. 7A-468 provides that "[e]ach public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure." We interpret this statute to

place the services of an investigator at the disposal of each public defender, to be used by him whenever, *in his discretion,* a particular case indicates the need therefor. As we have indicated above, the statutory plan established in G.S. 7A-454 and G.S. 7A-450 vests in the discretion of the trial court the decision of whether an investigator is a "necessary expense" of representation in the case of a defendant with court-appointed counsel. We believe that these two statutory schemes for providing the services of an investigator to indigent defendants are substantially equivalent. *See Mason v. Arizona,* 504 F. 2d 1345, *cert. denied,* 420 U.S. 936, 43 L.Ed. 2d 412, 95 S.Ct. 1145. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a State-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of State-provided investigative assistance. We, therefore, hold that the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws.

This assignment of error is overruled.

[8] Defendant argues that the trial judge's denial of his challenge for cause of Juror Harry D. Woods constituted prejudicial error.

On the *voir dire* examination of the prospective juror, he stated that he worked with the brother of the State's chief prosecuting witness, Kenneth Earl Blake. He further stated that he was friendly with several law enforcement officers and that he felt uncomfortable about serving on the jury. In response to the court's questions the prospective juror said that he had formed no opinion about the case that would prevent him from giving defendant a fair trial; that he did not know defendant nor the codefendant Kenneth Earl Blake; and that his acquaintance with Blake's brother would not prevent him from basing his verdict solely upon the evidence presented at trial and the applicable law. He further stated that he would require proof of guilt beyond a reasonable doubt before returning a verdict of guilty and that his friendship with police officers (not in-

volved in the investigation of this case) would not prevent him from giving defendant a fair trial. He explained that his discussion of the case with Blake's brother concerned only the question of whether charges had been brought against codefendant Blake. He never discussed the evidence in the case.

"It is provided by G.S., 9-14, that the judge 'shall decide all questions as to the competency of jurors,' and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law." *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523. *Accord: 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. We find no error of law or abuse of discretion in the trial judge's ruling denying the defendant's challenge for cause. We, therefore, overrule this assignment of error.

[9] Defendant next argues that the trial judge erred by admitting into evidence the testimony of the witnesses Laney and Cleveland.

Prior to introduction of evidence defendant moved that all State's witnesses be sequestered. The court ordered that Kenneth Earl Blake be sequestered and "as to police officers and technical witnesses the court will not order them sequestered." At the time of this ruling, neither the trial judge nor defense counsel knew that the witnesses Laney and Cleveland would be called by the State. There is also evidence to the effect that the district attorney was not certain, at this time, that these witnesses would be called. The record discloses that the challenged witnesses were in court at the time the State's chief witness Kenneth Earl Blake testified.

[10, 11] Neither statute nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call. *State v. Davis, supra;* G.S. 15A-901, *et seq. See particularly,* Official Commentary following G.S. 15A-903. Moreover, it is firmly established that the sequestration of the witnesses is a matter within the trial judge's discretion and his ruling thereon is not reviewable absent a showing of abuse of that discretion. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839; *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512; 1 Stansbury's North Carolina Evidence § 20 (Brandis Rev. 1973).

We note that during the argument of this motion defense counsel admitted that his central objection to the admission of

this testimony was that he was not prepared to cross-examine the witnesses. The trial judge then stated that he would allow the witnesses to testify but would permit defense counsel to prepare for cross-examination of the witnesses overnight and that he would require the State to furnish defendant with any criminal record of the witnesses that the State might have in its possession. The record does not reveal that defense counsel asked for any further extension of time to prepare for cross-examination.

Under these circumstances no abuse of discretion or substantial prejudice to defendant is made to appear. This assignment of error is overruled.

[12] Defendant contends that the trial judge erroneously denied his challenge to the jury as constituted because the district attorney arbitrarily and systematically excluded all black males by the use of peremptory challenges. We reject this contention.

This assignment of error is squarely controlled by our holding in *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222. We quote from that case:

> Defendants next contend that their rights under the Fourteenth Amendment to the United States Constitution were violated by the systematic exclusion of blacks from the trial jury. In *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972), we said:
>
> > "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.] . . .
> >
> > * * *
> >
> > "A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. [Citations omitted.]"
>
> The basis for this assignment of error lies in the fact that all prospective black jurors were peremptorily challenged by the district attorney, and that both defendants were blacks. There is no suggestion in the record that the district attorney had previously followed practices which

prevented blacks from serving on the juries in his district. The United State Supreme Court has squarely ruled against the contentions here urged by defendants. In *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965), the Court, in part, stated:

> " . . . The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor thereby subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. . . .
>
> * * *
>
> " . . . But defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes *over a period of time. . . .* " [Emphasis ours.]

Defendants have failed to make out a *prima facie* case of arbitrary or systematic exclusion of blacks from the jury. This assignment of error is overruled.

[14] Defendant assigns as error the ruling of the trial judge in denying his motion in arrest of judgment and to set aside the verdict as to the charge of kidnapping.

Prior to the rewrite of G.S. 14-39, effective 1 July 1975, kidnapping was defined as the unlawful taking and carrying away of a human being against his will by force, threats or fraud. *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897; *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115, *cert. denied*, 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699.

G.S. 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. . . . [Emphasis ours.]

[13] The Bill of Indictment in this case was drawn in the form prescribed by G.S. 15-144 and is therefore sufficient to support a verdict of guilty of murder in the first degree if the jury found beyond a reasonable doubt that defendant killed deceased with malice and after premeditation and deliberation *or* in the perpetration of a robbery or a kidnapping. *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238; *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169.

In this case, the underlying felony of kidnapping would have supported a verdict of murder in the first degree under the felony-murder statute since there was no break in the chain of events leading from the initial felony of kidnapping to the shooting which caused the death of Howard Ellis. In other words, the homicide and the kidnapping were parts of a series of acts which formed one continuous transaction. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666; 40 Am. Jur. 2d *Homicide* § 73, p. 367.

In *State v. Thompson, supra,* the trial judge submitted the charge of first-degree murder on the felony-murder theory where there had been a killing perpetrated during a felonious breaking and entering and larceny. The charges of felonious breaking and entering and felonious larceny were also submitted to the jury as separate charges. The jurors returned verdicts of guilty on all charges and in the murder case the judgment pronounced imposed a sentence of imprisonment for life. In the felonious breaking and entering case and in the felonious larceny case, separate judgments were pronounced imposing prison sentences of ten years to run consecutively.

Arresting the judgments in the breaking and entering and the larceny cases, this Court in part stated:

> . . . When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. Technically, feloniously breaking and entering a dwelling is never a lesser included offense of the crime of murder. However, in the present and similar factual situations, a cognate principle applies. Here, proof that defendant feloniously broke into and entered the dwelling of Cecil Mackey, to wit, Apartment # 3, 3517 Burkland Drive, was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and

> entering that particular dwelling. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. . . .
>
> * * *
>
> . . . For the reasons stated above with reference to the felonious breaking and entering count in the separate bill of indictment, the felonious larceny was, under the circumstances of this case, a lesser included offense of the felony-murder, in the special sense above mentioned.

Accord: State v. Woods, 286 N.C. 612, 213 S.E. 2d 214.

In instant case the trial judge submitted the charge of first-degree murder upon the theory of felony-murder upon a finding by the jury beyond a reasonable doubt that the murder was committed in the perpetration of an armed robbery or upon a finding by the jury beyond a reasonable doubt that defendant killed deceased with malice and after premeditation and deliberation. In this connection the court, in part, charged:

> . . . Now, I instruct you, members of the jury, that for you to find the defendant guilty of first degree murder, either the State must prove beyond a reasonable doubt that the defendant Tatum unlawfully killed the deceased Ellis while perpetrating or attempting to perpetrate the felony of robbery with a firearm, or the State must prove beyond a reasonable doubt that the defendant Tatum unlawfully killed the deceased Ellis with malice and with premeditation and deliberation.

[14] *Thompson* is distinguishable from this case. In *Thompson* the judgments were arrested as to charges which were used as the underlying felonies to prove felony-murder. On the other hand, it is clear that the offense of kidnapping was here sub-

mitted to the jury as a separate and distinct offense and not as a basis for a possible finding by the jury that deceased was killed during the perpetration of the felony of kidnapping. Obviously kidnapping is not a lesser-included offense of murder. Neither was the kidnapping charge an essential or indispensable element in the State's proof of felony-murder. If defendant had been acquitted in a former trial of the charge of kidnapping, a plea of former jeopardy would have been of no avail in the prosecution of murder as here submitted.

The trial judge correctly denied defendant's motion to arrest judgment and set aside the verdict on the charge of kidnapping.

[15] Defendant next 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), effective 8 April 1974, 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.

This case is remanded to the Superior Court of Durham 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 trial.

Death sentence vacated.

STATE OF NORTH CAROLINA v. JOHN NEWMAN MONTGOMERY

No. 46

(Filed 4 November 1976)

1. **Constitutional Law §§ 31, 32— indigent defendant — no right to investigator at State expense**

Defendant, an indigent charged with first degree rape, was not entitled to have the trial court appoint, at State expense, a private investigator to assist his counsel in the areas of pretrial publicity and potential alibi witnesses, since there was nothing to indicate that the employment of an investigator would have been of any assistance whatever to defendant's counsel. G.S. 7A-450(b).

2. **Criminal Law § 66— composite picture of rapist — admissibility**

In a first degree rape prosecution the trial court did not err in allowing into evidence a photograph of a composite picture of the assailant prepared by a detective in collaboration with the victim of the alleged attack, and there was nothing improper in the preparation of the composite or in allowing the victim's two companions to view it and determine that it portrayed the man with whom they had talked.

3. **Criminal Law § 66— photograph of lineup shown to rape victim and companions — admissibility of photograph**

The trial court in a first degree rape prosecution did not err in allowing into evidence a photograph of a lineup and of seven men, including defendant, which the victim of the alleged rape and her companions viewed and from which they identified defendant as the perpetrator of the alleged rape, where the evidence tended to show that the photograph shown to the three witnesses was taken a year before the offense in question occurred; the picture showed defendant in a group of seven young, white men, all save one of approximately the same age, size, build, clothing and coloring; and there was no indication of any inducement of the witnesses by the officers to select any one man over the other six as the perpetrator of the crime.

4. **Criminal Law § 66— rape victim and companions — in-court identification of defendant proper**

The trial court in a first degree rape prosecution did not err in allowing the victim and her two young companions to make in-court identifications of defendant, since the testimony on *voir dire* clearly showed that each of the witnesses was in the presence of the defendant shortly after noon on a clear, sunlit day, was in close proximity to him, walked and talked with him for a substantial period of time, and had ample opportunity to observe his appearance; moreover, each witness testified that her or his identification of defendant in court was based upon what she or he observed on the date of the offense.

5. **Criminal Law § 66— photograph from police files — showing to witness — no violation of constitutional rights**

Where nothing upon a photograph taken from police files suggests the selection of the defendant as the perpetrator of the offense

presently under investigation, the exhibition of such photograph to a witness for purpose of identification of the defendant as the perpetrator of the offense presently under investigation is not, *per se*, a violation of the defendant's constitutional rights, notwithstanding absence of evidence showing the circumstances under which the photograph was obtained by police.

6. **Criminal Law § 66— in-court identification — subsequent objection and request for voir dire — objection too late**

Where defendant waited until after a witness had positively identified him in court before he objected and then moved to strike the testimony and requested a *voir dire*, the trial court did not err in overruling the objection and denying the request for the *voir dire* on the ground that the objection was too late.

7. **Criminal Law § 89— detective's conversation with rape victim — admissibility for corroboration**

The trial court in a first degree rape case did not err in allowing a detective to testify concerning his conversation with the victim in the course of constructing a composite picture of her assailant, since the purpose of the testimony was to show the procedure followed in the construction of the composite; the testimony was substantially in corroboration of the victim's own testimony; and the court properly limited it to that purpose.

8. **Criminal Law § 53— rape prosecution — Pap smear — admissibility of evidence**

In a first degree rape prosecution the possibility that within the Pathology Department of the hospital to which the victim was taken a Pap smear of the victim could have been interchanged with another taken from a different patient was too remote to require the trial judge to grant defendant's motion to strike the testimony of the pathologist who examined the Pap smear.

9. **Criminal Law § 46— flight of defendant — evidence admissible — instruction proper**

The trial court in a first degree rape case did not err in admitting the testimony of two police officers indicating flight by defendant some three or four days after the offense was committed, nor in instructing the jury with reference to flight as a circumstance which the jury might consider as showing consciousness of guilt.

10. **Criminal Law § 95— testimony competent for restricted purpose — failure to request limiting instruction — general objection properly overruled**

Though a police officer's testimony in rebuttal to two of defendant's alibi witnesses was competent only for the purpose of impeaching the credibility of those witnesses, in the absence of a request by defendant for an instruction limiting the jury's consideration of the testimony to the issue of credibility, the overruling of defendant's general objection without such limiting instruction was not error.

11. Constitutional Law § 36; Rape § 7— first degree rape — life imprisonment substituted for death penalty

A sentence of life imprisonment is substituted for the death penalty imposed in a first degree rape case.

12. Criminal Law §§ 145, 154— unnecessary pages in record on appeal — cost of printing taxed against defense counsel

Pursuant to Rule 9(b)(5) of the Rules of Appellate Procedure, the cost of mimeographing 68 pages of the record on appeal concerning the selection of the jury to which no assignment of error discussed in the brief of the appellant related is taxed against defendant's attorney.

APPEAL by defendant from *Rousseau, J.*, at the 5 January 1976 Criminal Session of FORSYTH.

Upon an indictment, proper in form, the defendant was tried and convicted of rape in the first degree. He was sentenced to death.

The defendant did not testify in his own behalf but offered witnesses whose testimony tended to establish an alibi.

The State introduced evidence to the following effect:

Shortly after noon on Saturday, 6 July 1974, the victim of the offense, then a 15 year old girl, two neighbor boys, then 13 and 11 years of age, and a still younger sister of the boys were sitting in a churchyard near their homes talking. A man, positively identified in court by the victim and by each of the two boys, came upon the church property, told the children he was from Connecticut and was visiting friends and had lost his little Chihuahua dog. He asked them if they had seen the dog and, upon their telling him they had not, he left, asking them to keep a watch for it.

After a few minutes the man returned and, the children having told him they had still not seen the dog, he asked them to help him look for it. Thereupon, the younger girl went back to her home and the other three children went with the man to help him search for the dog, walking along a railroad track and thence along a dirt road until they reached a trail which led to a horse barn. At that point they separated, the two boys going to the barn and the man and the girl proceeding along the road for a short distance. The man then suggested that they turn back. As they started back, the man seized the girl. She screamed and tried to get away but he threw her to the ground, held an open pocket knife, with a blade two inches long, against

her side and told her that if she did not keep quiet he would kill her. He then pulled her up and, with his arm around her neck, dragged her into a hay field, in which the grass was quite high.

There he again threw the girl to the ground and, still holding the knife, ordered her to remove her shorts and underwear, which she did. He then proceeded to have sexual intercourse with her, penetrating her. Thereafter, he told her that if she said anything about the occurrence to anyone, he would come back and kill her. He then departed, taking with him the garments he had forced her to remove, saying he would leave them at the road, which he did. After he left, the girl made her way back to the road, found her clothing, put it on, and returned to the point where she and the man had separated from the two boys. There the boys rejoined her and she told them what had occurred.

The police were notified and, after she informed them what had happened and described her assailant, the girl was taken to a hospital where she was examined. A Pap smear disclosed the presence of sperm. She had not previously had sexual intercourse. She was wearing "pierced earrings," one of which was pulled out in the struggle. When she arrived at the hospital there was blood on her neck.

She described her assailant to the investigating police officers as a man about 5 feet 8 inches tall, weighing about 150 pounds, having dark hair and eyes and wearing blue jeans, a T-shirt and black shoes. She described the length of his hair and how it was combed.

Two days after the occurrence, the girl collaborated with a police detective in constructing, partially with plastic materials and partially by drawing upon such materials, a composite picture of her assailant. Upon being shown this composite picture, each of the young boys said it looked like the man. Thereafter, the girl was shown a lineup photograph, made approximately a year prior to this occurrence, in which the defendant and five other young, white men of approximately the same age, size, build, coloring and dress were shown. Upon seeing this, she immediately identified the picture of the defendant therein as that of her assailant. Upon being shown the lineup photograph, each of the boys also immediately picked the picture of the defendant therein as that of the man with

whom they and the girl had gone to look for the dog. Both the composite picture and the lineup photograph were put in evidence. Each of the two boys testified to the same effect as did the girl up to the point where they left the man and the girl and went toward the horse barn. Each also corroborated her testimony as to what occurred when they rejoined her.

At about 1:00 p.m., on the day in question, Mr. A. P. Warner was working around his son's store not far from the church where the children were first accosted. This being Saturday, the store was about to close. Mr. Warner observed a car drive in and park at the back of the store. The driver got out and proceeded rapidly to the road. After the store was closed, the car was still parked at the rear of the building and Mr. Warner made a note of the license number. The driver then returned, spoke briefly to Mr. Warner and drove away. After reading about the assault upon the girl in the next day's newspaper, Mr. Warner reported to the police what he had seen, describing the car and giving the license number. He positively identified the defendant, in court, as the driver of the car.

The police ascertained that the car so observed by Mr. Warner was registered in the name of the defendant's father. Having obtained a warrant for the defendant's arrest, officers proceeded to the father's residence and found an automobile fitting the description given by Mr. Warner and bearing the said license number. The defendant was not there. He and his wife had been staying at his father's residence, but on Wednesday after this offense occurred he left for a destination not disclosed to his wife or parents. He was arrested a year later in Syracuse, New York.

During his absence his wife, a witness called by the defendant to establish his alibi, had no communication with him except for one telephone call, the date of which she did not remember. She was unable to write to him. The defendant's brother, also called as a witness for the defendant for the same purpose, likewise testified on cross-examination that between the defendant's departure and his return, in custody, he had no correspondence with the defendant but did talk to him once by telephone. The brother does not know where the defendant was.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

D. Blake Yokley for defendant.

LAKE, Justice.

The defendant attacks the judgment of the Superior Court alternatively. First, he contends that he is entitled to a new trial for errors in the admission of evidence, in the instructions of the court to the jury and in the denial of certain pretrial motions. Second, he contends that, if the trial was free from error in these respects, the imposition of the sentence to death was a violation of his rights under the Constitution of the United States.

We find no merit in any of his assignments of error relating to his first contention. Since we are compelled to accept as correct, interpretations placed by the Supreme Court of the United States upon provisions of the United States Constitution and to comply with and to follow its decisions applying those provisions to the statutes of this State, and since that Court, in *Woodson v. North Carolina*, ___ U.S. ___, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976), held that the provisions of G.S. 14-17, imposing the death penalty for murder in the first degree, violate the Constitution of the United States and, so, may not be given effect by the courts of North Carolina, and since the provisions of G.S. 14-21, imposing the death penalty for the offense of first degree rape, cannot be distinguished, in this respect, from the provisions of G.S. 14-17, we must hold that there is merit in the defendant's attack upon the death sentence imposed upon him.

We turn first to the assignments of error which the defendant says entitle him to a new trial.

[1] Some two months prior to trial the defendant, through his court appointed counsel, moved that the court appoint, at State expense, a private investigator to assist his counsel. At the pretrial hearing of the motion, the defendant's counsel stated that he had interviewed his client at length and talked with members of the family. He advised the court: "[T]here is extensive investigation that needs to be done in the area of pretrial publicity. There is extensive investigation that needs to be done in other counties in the form of interviewing poten-

tial witnesses for the defendant as well as other witnesses who may appear in the case. I don't know what the strategy of the District Attorney will be at this time."

Eighteen months elapsed between the commission of the offense and the trial. The complete procedure followed in the selection of the jury is set forth in the record on appeal. Nothing therein, or elsewhere in the record, indicates the nature of any pretrial news story about the alleged offense or that the jury panel, or any member of it, was affected by any publicity given to it. The defendant did not exhaust the peremptory challenges allowed him by the law of the State. The defendant, who did not take the stand as a witness in his own behalf, sought to establish an alibi through testimony of his mother, his wife, his brother and a friend. Nothing whatever in the testimony of these witnesses, or elsewhere in the record, suggests the existence of any other person who might have testified that he or she observed the defendant at any place other than the scene of the alleged rape at or about the time when it is alleged to have occurred. The defendant, himself, was obviously the person best prepared to inform his counsel as to his whereabouts at the time in question and as to the identity of any person who might be able or willing to testify in support of his alibi. Nothing whatever in the record suggests the existence of any person who might be able or willing to testify that the alleged offense did not occur, or that it was perpetrated by someone other than the defendant. Consequently, there is nothing to indicate that the employment of an investigator would have been of any assistance whatever to counsel appointed by the court to represent the defendant in this matter.

G.S. 7A-450(b) provides: "Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel *and the other necessary expenses of representation.* * * *." (Emphasis added.) This statute has never been construed to extend to the employment of an investigator in the absence of a showing of a reasonable likelihood that such an investigator could discover evidence favorable to the defendant. We decline so to construe it. We do not have before us, and do not pass upon, the right of an indigent defendant to have such an investigator employed at the expense of the State upon a showing of a reasonable basis for belief that such employment would be pro-

ductive of evidence favorable to him. See *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562, decided this day.

Pursuant to G.S. 7A-465, the office of "Public Defender" has been established in five of the 30 judicial districts of this State, Forsyth County is not being included in any of these. G.S. 7A-468 provides: "Each Public Defender is entitled to the service of one investigator, to be appointed by the Defender to serve at his pleasure. The Administrative Officer of the Courts shall fix the compensation of each investigator, and may authorize additional investigators, full-time or part-time, upon a showing of need." Nothing in this statute requires or contemplates the employment or use of an investigator for the purpose of embarking upon a statewide, or worldwide, search for evidence in the absence of any indication whatever that such evidence exists anywhere. We have not been advised of any such use of his investigative staff by any Public Defender in the State.

The contention of the defendant that the refusal of the court to appoint a private investigator to assist his counsel denies him his constitutional right to counsel in violation of the Sixth Amendment to the Constitution of the United States and his constitutional right to equal protection of the laws in violation of the Fourteenth Amendment thereto is without merit.

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), the Supreme Court of the United States said, "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." The court, therefore, held that the right to counsel, guaranteed, as against the Federal government, by the Sixth Amendment to the United States Constitution, was extended by the Fourteenth Amendment to the states.

Clearly, an indigent charged with first degree rape, for which the statutory penalty is death (presently life imprisonment), is entitled to counsel appointed by the court and paid by the State. G.S. 7A-450(b) so provides. In recognition of this constitutional and statutory right, counsel was appointed for this defendant and diligently represented him at the trial and in this Court. It does not follow that, without any showing of a reasonable basis for believing that substantial benefit to the

defendant would result therefrom, the State must also appoint, at its expense, a private investigator for use of such appointed counsel. Our attention has been directed to no decision of the Supreme Court of the United States so indicating and we decline so to hold. The Equal Protection Clause does not compel the waste of the public's money in Forsyth County merely because it is theoretically possible that some public defender in another judicial district may be extravagant in his use of investigators appointed to assist him, nor is this required merely because some wealthy person accused of a crime may see fit to spend his own money in extravagant and unpromising investigation.

The defendant, by his plea of not guilty, puts in issue all material elements of the State's case. However, where, as here, the defendant seeks to establish an alibi, the crucial question is that of identification of the defendant as the perpetrator of the alleged offense. In the present case, the in-court identification of the defendant as the perpetrator of the alleged rape was clear and positive by each of the three witnesses present at and shortly before the commission of the offense. Their testimony was corroborated, and the defendant's effort to establish an alibi was dealt a staggering blow, by the positive in-court identification of the defendant by Mr. Warner as the driver of the automobile parked in the close vicinity of the alleged crime at approximately the time the State contends it was committed and traced by the officers to the defendant's then place of abode. The defendant contends that each of these in-court identifications was improperly admitted in evidence. We find no merit in these contentions.

[2] As to the identification of the defendant by the victim of the alleged rape and by her two young companions, the defendant contends that these were based upon unlawful out-of-court photographic identification. The first picture so observed by these three witnesses was the composite picture of the assailant prepared by Detective Barker in collaboration with the victim of the alleged attack. She, not the detective, selected the plastic components (eyes, hair, nose, ears, lips, etc.) which went into the basic composite picture and then, from her recollection of the appearance of her assailant, directed the detective in the drawing in of details necessary to make the final product represent her recollection of the appearance of the man who raped her. The two boys, seeing the final result, agreed that

it properly portrayed the man with whom they had conversed and walked from the churchyard to a point near the place of the alleged crime. At this stage, none of these witnesses knew the defendant and nothing in the record indicates that he was then suspected by the artist or any other police officer. The purpose of this picture was not to convict the defendant but to describe the offender. It was merely a recording of the image of the offender then fresh in the minds of each of these witnesses. Clearly, there was nothing improper in this portion of the out-of-court identification, or in the admission of the photograph of the composite in evidence.

[3] After the composite was completed, these three witnesses were shown (separately, so far as the record indicates) a picture of seven men, including the defendant, in a lineup and were also shown a smaller print of the same picture with one of the men, a deputy sheriff, deleted therefrom. Each of these three witnesses, without hesitation, picked the defendant, as shown in that photograph, as the perpetrator of the alleged rape. It is interesting to note that the defendant's objection to the use of this photograph is that, of all the men in it, he was the one who most closely resembled the composite prepared with the collaboration of the victim of the alleged assault.

The picture so exhibited by the officers to these three witnesses was not prepared after the officers had come to suspect the defendant as the alleged rapist and for the purpose of assisting these witnesses to identify him as such. This picture was taken a year before this offense occurred. It shows the defendant in a group of seven young, white men, all save one (a deputy sheriff) of approximately the same age, size, build, clothing and coloring.

Due process of law does not require that all participants in a lineup or in a photograph, viewed by the victim of or witness to a crime, be identical in appearance, for that would, obviously, be impossible. All that is required is that the lineup or photograph be fair and that the officers conducting the investigation do nothing to induce the witness to select one participant or subject rather than another. This record contains no indication of any such inducement by the officer who exhibited this photograph to these witnesses.

Prior to trial, the defendant moved to suppress any in-court identification of the defendant based on these photographs. The

court conducted a voir dire at which the defendant offered no evidence. The witnesses for the State upon the voir dire were the girl and her two young, male companions who testified as above summarized. The defendant offered no evidence on the voir dire. There was no evidence whatever of any suggestive procedure or of anything else creating a substantial likelihood of misidentification. Under these circumstances, there was no error in admitting the photograph of the lineup in evidence. *State v. Shutt,* 279 N.C. 689, 698, 185 S.E. 2d 206 (1971).

At the conclusion of the voir dire, the court found, as to each of these three witnesses, that her or his in-court identification of the defendant was not tainted by any improper out-of-court procedure or suggestion and that no improper out-of-court identification procedure was involved. The court also expressly found, as to each of the two young boys, that his in-court identification of the defendant was based upon his having seen the defendant on 6 July 1974, the date of the alleged offense. While there was no such express finding with reference to the girl's in-court identification of the defendant, the findings and order of the court clearly and necessarily implied a like finding as to her. Accordingly, the court denied the motion to suppress the in-court identification testimony of each of these witnesses. Such findings of fact made by the trial judge are conclusive if supported by competent evidence in the record. *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966).

[4] The evidence overwhelmingly supports each of these findings and, indeed, there is no evidence to the contrary. The testimony on the voir dire clearly shows that each of these witnesses was in the presence of the defendant shortly after noon on a clear, sunlit day, was in close proximity to him, walked and talked with him for a substantial period of time, and had ample opportunity to observe his appearance. Each testified that her or his identification of the defendant in court was based upon what she or he observed on the date of the offense.

[5] Nothing whatever indicates that the lineup picture of the defendant was unlawfully obtained or that, at the time it was taken, this defendant was accused of any crime or that he did not voluntarily participate in the lineup. Where nothing upon a photograph taken from police files suggests the selection of the defendant as the perpetrator of the offense presently under

investigation, the exhibition of such photograph to a witness for purpose of identification of the defendant as the perpetrator of the offense presently under investigation is not, per se, a violation of the defendant's constitutional rights, notwithstanding absence of evidence showing the circumstances under which the photograph was obtained by the police. *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970).

There was, therefore, no error in admitting the in-court identification testimony of the girl and her two young companions.

[6] Mr. Warner positively identified the defendant in the courtroom as the man whom he saw park the automobile, subsequently identified as belonging to the defendant's father, at the store operated by Mr. Warner's son at about the time of the occurrence here in question. It was not until after he had done so that the defendant objected, moved to strike his testimony and requested a voir dire. The court overruled the objection and denied the request for the voir dire, saying the objection was too late. In this there was no error. Stansbury, North Carolina Evidence (Brandis Rev.) § 27.

On cross-examination Mr. Warner testified that the day before he was called to the witness stand, he saw the above mentioned lineup photograph and recognized the defendant therein and he knew the defendant was under arrest, charged with the offense for which he was then being tried, but said, "The fact that I knew that did not make it easier for me to point the finger at him and say he's the man I saw get in that car that day."

[7] The defendant's contention that the court erred in permitting Detective Barker to testify concerning his "conversation" with the victim of the alleged rape in the course of constructing the composite picture of her assailant is without merit. Primarily, the officer testified as to what he told the girl and what he asked her in the construction of this composite picture. In one or two instances the witness told of the girl's objection to a specific feature of the composite picture then in course of construction and of her suggestion for its correction, which suggestion the witness followed. The purpose of the testimony was to show the procedure followed in the construction of the composite. It was substantially in corrobora-

tion of the girl's own testimony and the judge limited it to that purpose. There was no error in the admission of this evidence.

[8] There was no error in the denial of the defendant's motion to strike the testimony of Dr. Lide, the pathologist who examined the Pap smear taken by Dr. Walker from the victim of the attack. Dr. Walker had previously testified that he, himself, took the smear in the hospital emergency room and personally carried it to the pathology laboratory of the hospital and wrote the request slip for its examination by that department. Dr. Lide, the pathologist, testified that he, himself, examined a Pap smear identified as that taken from the girl. He did not remember, and Dr. Walker apparently did not, whether the smear was actually handed to him by Dr. Walker or possibly passed through the hands of one other person. The possibility that within the Pathology Department of this hospital this smear could have been interchanged with another taken from a different patient is too remote to require the trial judge to grant the motion to strike the testimony of Dr. Lide. It would go only to the weight to be given the testimony by the jury.

[9] There was no error in admitting in evidence the testimony of Police Officers Stimpson and Clopton indicating flight by the defendant some three or four days after the offense was committed, nor in the instruction by the court to the jury with reference to flight as a circumstance which the jury might consider as showing consciousness of guilt. Flight from the scene of a crime does not create a presumption of guilt but it is a circumstance which the jury may consider in determining whether the totality of the circumstances shows a consciousness of guilt on the part of the defendant. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973); Stansbury, North Carolina Evidence (Brandis Rev.) § 178. The court so instructed the jury.

[10] After the defendant had introduced the testimony of his brother and that of his friend, Joseph Michael Cook, to the effect that the defendant was in their company at another place, so near to the time of the alleged offense for which he was on trial that it would not have been possible for the defendant to have committed the crime, the State, over objection, called Police Officer Clopton as a rebuttal witness. He was permitted to testify to statements made by these witnesses to

him, shortly after the offense is alleged to have been committed, to the effect that, on the date of the alleged offense, the defendant was not in their presence from 12 o'clock, noon, until more than two hours thereafter (the time within which the State's evidence shows the offense was committed).

Obviously, this evidence, being hearsay, was not competent for any purpose except to impeach the credibility of these witnesses for the defendant. *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954); Stansbury, North Carolina Evidence (Brandis Rev.) § 46. Had the defendant, in apt time, so requested, the court should have instructed the jury that it might consider this testimony of Officer Clopton for that purpose only. *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362 (1967); Stansbury, *op. cit.,* § 79. However, no such request is shown by the record. Consequently, the overruling of the defendant's general objection without such limiting instruction was not error. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968).

The remaining assignments by reason of which the defendant contends he should be granted a new trial have also been carefully considered. None of them has merit and no useful purpose would be served by discussing any of them in detail. Consequently, we find in the record no error which would justify the ordering of a new trial. The defendant has had a fair trial, free from prejudicial error. The jury did not believe his evidence designed to establish an alibi and did believe the evidence of the witnesses for the State. Their verdict will not be disturbed.

[11] By reason of the decision of the Supreme Court of the United States in *Woodson v. North Carolina, supra,* the judgment of the Superior Court sentencing the defendant to death upon this verdict must be, and is hereby, vacated and, by authority of the provisions of 1973 Session Laws, Ch. 1201, § 7 (1974 Session), a sentence of life imprisonment must be, and is, substituted in this case.

This case is remanded to the Superior Court of Forsyth County with directions (1) that the presiding judge, without requiring the presence of the defendant, enter a judgment imposing a sentence of life imprisonment for the first degree rape of which the defendant has been convicted; and (2) that in accordance with this judgment, the Clerk of the Superior Court issue a commitment in substitution for the commitment

heretofore issued. It is further ordered that the Clerk furnish to the defendant and to his attorney a copy of the judgment and commitment as revised pursuant to this opinion.

[12] The record on appeal includes 68 pages devoted exclusively to the selection of the jury to which no assignment of error discussed in the brief of the appellant relates. The inclusion of this material in the record on appeal caused an utterly useless expense which the State should not be required to bear on behalf of this indigent defendant. Pursuant to Rule 9(b)(5) of the Rules of Appellate Procedure, 287 N.C. 671, 693, the cost of mimeographing these 68 pages of the record on appeal is hereby taxed against the attorney for the defendant.

No error in the verdict.

Death sentence vacated.

CHARLES A. NEWTON, DOING BUSINESS AS NEWTON'S HOME FURNISHINGS v. THE STANDARD FIRE INSURANCE COMPANY

No. 123

(Filed 4 November 1976)

1. **Appeal and Error § 6; Rules of Civil Procedure § 54— interlocutory order affecting substantial right — immediate appeal — effect of Rule 54(b)**

   Rule 54(b) does not prohibit appellate review of non-final partial adjudications which, by virtue of G.S. 1-277 and G.S. 7A-27(d), are reviewable despite their interlocutory nature.

2. **Appeal and Error § 6— dismissal of punitive damages claim — right of appeal**

   Rule 54(b) did not bar appellate review of an order dismissing plaintiff's claim for punitive damages for failure to state a claim for relief even though the order did not expressly determine that "there was no just reason for delay" and there were other claims extant in the lawsuit since the order affected a "substantial right" of plaintiff and was appealable under both G.S. 1-277 and G.S. 7A-27(d).

3. **Rules of Civil Procedure § 8— dismissal of complaint for insufficiency**

   A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

4. Damages § 11— punitive damages — sufficiency of complaint — question of law

Whether the facts stated in the pleadings are sufficient to bring the case within the rule allowing punitive damages is a question of law, although the determination whether punitive damages will be allowed and the amount to be allowed, if any, rests in the sound discretion of the jury.

5. Damages § 11— punitive damages — breach of contract — necessity for tort

Punitive or exemplary damages are not allowed for breach of contract, except for breach of contract to marry; however, where there is an identifiable tort, even though the tort also constitutes or accompanies a breach of contract, the tort itself may give rise to a claim for punitive damages.

6. Damages § 11— punitive damages — tort — aggravated conduct

Even where sufficient facts are alleged to make out an identifiable tort, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed, and such aggravated conduct includes fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice or wilfulness.

7. Damages § 12— punitive damages — allegations of aggravated conduct

The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself, as in slander cases, or it may be established by allegations sufficient to allege a tort where that tort, by its very nature, encompasses any of the elements of aggravation, as in the case of fraud.

8. Damages § 11— punitive damages — fraud — overruling of prior case

Swinton v. Realty Co., 236 N.C. 723 (1953), is overruled insofar as that case requires some kind of aggravated conduct in addition to actionable fraud for an award of punitive damages or permits punitive damages only for "aggravated" as distinguished from "simple" fraud.

9. Damages § 12— failure of insurer to pay claim — punitive damages — insufficiency of complaint

The trial court properly dismissed plaintiff's claim for punitive damages for the allegedly "heedless, wanton and oppressive conduct" of defendant insurer in failing to pay plaintiff's claim for loss by theft and burglary when it knew that plaintiff was in a precarious financial position because of his loss since the breach of contract represented by defendant's failure to pay was not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortious behavior, the allegations of oppressive behavior by defendant in breaching the contract being insufficient to plead any recognizable tort.

10. Damages § 11— insurer's bad faith refusal to pay claim — punitive damages — knowledge of insured's precarious financial condition

Even if a bad faith refusal to pay a justifiable claim by an insurer might give rise to punitive damages, which is not decided, the

insurer's knowledge that plaintiff was in a precarious financial position because of his loss does not in itself show bad faith on the part of the insurer in failing to pay the claim or that the refusal was unjustified.

Chief Justice SHARP concurring in result.

Justices BRANCH and MOORE join in the concurring opinion.

ON petition for discretionary review of the decision of the Court of Appeals, 27 N.C. App. 168, 218 S.E. 2d 231 (opinion by *Martin, J.*, concurred in by *Brock, C.J.*, and *Vaughn, J.*), dismissing the appeal by plaintiff from an order of *Kirby, J.*, GASTON County Superior Court, granting defendant's motions pursuant to General Statute 1A-1, Rule 12(b)(6) to dismiss plaintiff's claim as to punitive damages, and pursuant to General Statute 1A-1, Rule 12(f) to strike the allegations of the complaint relating to punitive damages. This case was docketed and argued as No. 2 at the Spring Term 1976.

Basil L. Whitener and Anne M. Lamm, Attorneys for plaintiff appellant.

Hollowell, Stott & Hollowell, by L. B. Hollowell, Jr., Attorneys for defendant appellee.

EXUM, Justice.

There are two questions presented for decision. The first is whether the Court of Appeals erred in dismissing plaintiff's appeal on the ground that the trial court's order of dismissal affected only one of plaintiff's claims, the trial court did not determine there was "no just reason for delay," and the appeal, therefore, was not from a final judgment within the meaning of General Statute 1A-1, Rule 54(b). We think it did. The second, therefore, is whether the trial court erred in dismissing plaintiff's claim for punitive damages for the allegedly "heedless, wanton and oppressive conduct" of defendant insurer in failing to pay plaintiff's claim, and in striking the allegations of the complaint which support the claim for punitive damages. We think it did not.

The Court of Appeals based its dismissal of plaintiff's appeal on the superior court's failure to determine expressly in its order that "there was no just reason for delay." It held that

such a determination was required by 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, 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 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.)

The effect of this rule upon the appealability of the dismissal of plaintiff's claim for punitive damages has been decided by this Court in the strikingly similar case of *Oestreicher v. Stores,* 290 N.C. 118, 225 S.E. 2d 797 (1976). We there held that Rule 54(b) did not bar appellate review of a summary judgment entered for the defendant on the plaintiff's claim for punitive damages even though the judgment did not expressly determine also that "there was no just reason for delay" and there were other claims extant in the lawsuit. That this case involves a dismissal under Rule 12(b)(6) rather than a summary judgment does not affect the applicability of our holding in *Oestreicher.*

In *Oestreicher* this Court illustrated the important distinction between the North Carolina rule and its federal counterpart resulting from the addition of the words italicized in the North Carolina rule quoted above. Federal Rule of Civil Procedure 54(b) is clearly intended to mitigate the rigors of the federal requirement of finality by allowing a trial court to ren-

der final a decision which ordinarily would not be so, and thus would not otherwise be appealable. By finding "no just reason for delay" and making such a determination expressly in the judgment, the federal court secures to itself the power to render final judgment as to "fewer than all of the claims or parties."

[1] In North Carolina there are well recognized and often used exceptions to the requirement of finality before appeal can be taken. Two statutory provisions, in particular, G.S. 1-277 and G.S. 7A-27(d), allow appeal from certain interlocutory orders or judgments, notably those which affect substantial rights of the parties. The addition of the italicized language in the North Carolina counterpart of Rule 54(b) is clearly intended, as is recognized in *Oestreicher*, to except from the prohibition of review of non-final partial adjudications, those orders or judgments which, by virtue of General Statutes 1-277 and 7A-27(d), are reviewable despite their interlocutory nature. The rule in North Carolina, as in the federal courts, is essentially remedial, and while allowing the trial court to render a final, though partial, adjudication which might not be appealable otherwise, it will not be construed to limit the effect of any other rule or statute allowing review of non-final orders or judgments. G.S. 1A-1, Rule 54(b) expands, rather than restricts, the compass of review of orders and judgments in North Carolina.

[2] Since the order of the trial court dismissing plaintiff's claim for punitive damages did affect a "substantial right" of the plaintiff and is therefore appealable under both G.S. 1-277 and G.S. 7A-27(d), the Court of Appeals erred in dismissing plaintiff's appeal.

In considering the second issue, which goes to the merits of the trial court's dismissal of plaintiff's claim for punitive damages under Rule 12(b)(6) (failure to state a claim), it is necessary to consider in some detail the allegations of the complaint.

The plaintiff alleged that on August 24, 1974, while its policy insuring against loss by theft was in effect, the plaintiff lost merchandise and experienced damage to its building, furniture and fixtures by theft and burglary in the sum of more than $5500.00. Plaintiff demanded payment of defendant insurer and defendant refused to pay. Since the remaining allegations

of the complaint constitute the basis for plaintiff's claim for punitive damages, they are set out at length:

"7. That from time to time the plaintiff has made known to defendant and its agents, servants and employees that he was in desperate need of the proceeds of said insurance policy to which he was entitled to satisfy pressing financial matters caused by the loss above mentioned, and by reason of a loss by fire with which defendant was familiar. Notwithstanding the knowledge of defendant of said conditions, the defendant has neither made nor offered to make payment to plaintiff or to negotiate a settlement of plaintiff's claim under said policy of insurance.

"8. Defendant at said times knew that plaintiff had floor plan and financing arrangements with creditors in the regular course of business and that each day great and high costs of financing were being incurred by plaintiff. Defendant further knew that plaintiff had payments to make upon liens and deeds of trust which constituted an expense of his said business and that said obligations involved the payment of interest each day. Defendant further knew that by reason of the losses sustained by plaintiff and the failure and refusal of defendant to properly settle and pay plaintiff the sums to which he was entitled under the said policy of insurance for the two losses sustained by plaintiff, that plaintiff would not be able to effectively carry on his business and that it was essential that he receive from the defendant the sums to which plaintiff was entitled under said policy of insurance in a prompt and expeditious manner.

"9. Defendant, notwithstanding the foregoing, in heedless disregard of the consequences which it knew plaintiff would experience by defendant's failure to comply with the terms of its policy of insurance and in an oppressive manner failed and refused to comply with the express terms of its policy of insurance issued to plaintiff.

"10. That by reason of its heedless, wanton and oppressive conduct as aforesaid, defendant has subjected itself to the penalty of punitive damages, and the plaintiff is entitled to recover of defendant punitive damages in the sum of at least $50,000.00."

The superior court allowed defendant's motions to dismiss the claim for punitive damages for failure to state a claim for relief and to strike those allegations which supported that claim as immaterial; judgment was rendered accordingly.

[3, 4] "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke,* 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970), *quoting* 2A Moore's Federal Practice § 12.08 (2d ed. 1968). Whether the facts stated in the pleadings are sufficient to bring the case within the rule allowing punitive damages is a question of law, *Worthy v. Knight,* 210 N.C. 498, 187 S.E. 771 (1936); *Picklesimer v. R. R.,* 194 N.C. 40, 138 S.E. 340 (1927), although the determination whether punitive damages will be allowed and the amount to be allowed, if any, rests in the sound discretion of the jury. *Worthy v. Knight, supra.*

[5] North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract, with the exception of breach of contract to marry. *Oestreicher v. Stores, supra; King v. Insurance Co.,* 273 N.C. 396, 159 S.E. 2d 891 (1968). The general rule in most jurisdictions is that punitive damages are not allowed even though the breach be wilful, malicious or oppressive. *See, e.g.,* John C. McCarthy, *Punitive Damages in Bad Faith Cases* (1976). Nevertheless, where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages. *Oestreicher v. Stores, supra* at 134-35, *citing Saberton v. Greenwald,* 146 Ohio St. 414, 66 N.E. 2d 224 (1946) and 25 C.J.S. Damages § 120.

The early case of *Richardson v. R. R.,* 126 N.C. 100, 101, 35 S.E. 235 (1900) relies on three older cases to support the proposition that "[t]here are many cases where an action for tort may grow out of a breach of contract, but punitive damages are never given for breach of contract, except in cases of promises to marry: *State v. Skinner,* 25 N.C. 564; *Purcell v. R. R.,* 108 N.C. 414; *Solomon v. Bates,* 118 N.C. [311] . . . . " While the quoted statement is arguably equivocal, *Purcell v. R. R.,* 108 N.C. 414, 12 S.E. 954 (1891), cited in support of it, recognized the rule noted in *Oestreicher,* and allowed punitive damages where a separate tort was identified, even though the tortious conduct also constituted a breach of contract. While the

distinction between malicious or oppressive breach of contract, for which punitive damages are generally not allowed, and tortious conduct which also constitutes, or accompanies, a breach of contract is one occasionally difficult of observance in practice, it is nevertheless fundamental to any consideration of the question of punitive damages in contract cases. *See* 84 A.L.R. 1345, where an annotation upon "Punitive or exemplary damages for breach of contract . . . . " expressly excepts from its scope "[t]he recovery of exemplary damages in tort actions for breach of a duty growing out of a contract, which are, therefore, not actions purely ex contractu for failure to comply with the contract . . . . "

[6] Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed. *Oestreicher v. Stores, supra; Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570 (1922). Such aggravated conduct was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness . . . . " *Baker v. Winslow, supra, citing Holmes v. R. R.,* 94 N.C. 318 (3 Davidson) (1886).

[7] The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself, as in slander cases. *Cf. Baker v. Winslow, supra; Cotton v. Fisheries Products Co.,* 181 N.C. 151, 106 S.E. 487 (1921). Or it may be established by allegations sufficient to allege a tort where that tort, *by its very nature,* encompasses any of the elements of aggravation. Such a tort is fraud, since fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded. *See Saberton v. Greenwald, supra,* which allowed punitive damages for a fraudulent representation that induced the plaintiff to buy an old watch in a new case.

In North Carolina the law has been singularly confused in this area since *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785 (1953). Although *Swinton* purportedly relies on *Saberton,* it does not follow it, but holds instead that, despite the sufficiency of plaintiffs' proof of actionable fraud inducing the plaintiffs to enter a contract for the sale of land, no punitive damages were allowable. The court reasoned that additional

elements of aggravation must accompany the fraud to warrant punitive damages, concluding, "[t]hough the conduct of the defendants was reprehensible, they have now been required to compensate the plaintiffs fully for the loss and injury caused by their false representations. We do not think the law requires that an additional amount for punishment should be meted out in this action." *Swinton v. Realty Co., supra* at 727, 73 S.E. 2d at 788.

This language in *Swinton* may represent a misapprehension concerning our traditional public policy which supports the doctrine of punitive damages. Although some jurisdictions do allow punitive damages to compensate the plaintiff for non-quantifiable compensatory damages, *see generally Saberton v. Greenwald, supra,* North Carolina has consistently allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing and to deter others from similar behavior. *Baker v. Winslow, supra; Cotton v. Fisheries Products Co., supra; Motsinger v. Sink,* 168 N.C. 548, 84 S.E. 847 (1915). The same policy is expressly recognized in *Oestreicher v. Stores, supra,* and in *Transportation Co. v. Brotherhood,* 257 N.C. 18, 30, 125 S.E. 2d 277, 286, *cert. denied,* 371 U.S. 862, *reh. denied,* 371 U.S. 899 (1962), where this Court observed:

> "Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords the court to inflict punishment for conduct intentionally wrongful."

[8] In North Carolina, actionable fraud *by its very nature* involves intentional wrongdoing. As defined by Justice, now Chief Justice, Sharp in *Davis v. Highway Commission,* 271 N.C. 405, 408, 156 S.E. 2d 685, 688 (1967): " 'Fraud is a malfeasance, a positive act resulting from a wilful intent to deceive . . . . ' " *quoting Walter v. State,* 208 Ind. 231, 241, 195 N.E. 268, 272, 98 A.L.R. 607, 613; 37 C.J.S. Fraud § 1. The punishment of such intentional wrongdoing is well within North Carolina's policy underlying its concept of punitive damages. Insofar as *Swinton v. Realty Co., supra,* requires some kind of aggravated conduct in addition to actionable fraud or makes any distinction between "simple" and "aggravated"

fraud, permitting punitive damages only for the latter, that case is overruled, as are all cases so holding. Neither the cases relied upon in *Swinton* nor the cited annotation at 165 A.L.R. 616 support such a distinction.

Thus we allowed a claim for punitive damages to stand in *Oestreicher* where fraudulent misrepresentations accompanying a breach of contract were sufficiently alleged.

[9] Unlike *Oestreicher*, however, this case involves no tort. The breach of contract represented by defendant's failure to pay is not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortious behavior. As in *King v. Insurance Co., supra,* and *Ledford v. Travelers Indemnity Co.,* 318 F. Supp. 1333 (W.D. Okla. 1970), the allegations in the complaint of oppressive behavior by defendant in breaching the contract are insufficient to plead any recognizable tort. They are, moreover, unaccompanied by any allegation of intentional wrongdoing other than the breach itself even were a tort alleged. Punitive damages could not therefore be allowed even if the allegations here considered were proved. The trial court properly allowed defendant's motion to dismiss this claim.

In *King v. Insurance Co., supra,* plaintiff contended that his insurer refused to defend him against a counterclaim which he lost. His action was for an alleged "wilful breach" of the insurance contract, a breach which plaintiff further alleged "was calculated conduct . . . to hamper, prevent, and/or impair the plaintiff's legal position" and done "in wilful and wanton disregard of the rights of the plaintiff" and in bad faith. This Court held that plaintiff's claim for punitive damages based on these allegations was properly stricken on motion of the defendant. The Court said that plaintiff's allegations "do not give rise to a cause of action sounding in tort and, therefore, do not constitute allegations of fact, which if proved, would subject the defendant to liability for punitive damages."

Plaintiff relies upon a number of authorities to support his contention that "an unjustified failure to pay may subject the insurer to a penalty or to punitive damages . . . . " 16 G. Couch, Cyclopedia of Insurance Law 2d, § 58:9 (1966). Several authorities cited recognize a special implied-in-law duty of good faith on the part of insurers to do nothing wrongful to deprive the insured of the benefits of the policy. *See, e.g., Crisci v. Security Ins. Co.,* 66 Cal. 2d 425, 426 P. 2d 173, 58 Cal. Rptr. 13

(1967). We note, however, that even the California decisions relied on primarily by plaintiff and which have been most liberal in allowing tort damages in insurance cases, have nevertheless done so only in cases in which there was more than simple breach of contract. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) involved, for instance, a claim for intentional infliction of mental distress resulting *inter alia* from threatening communications made by defendant to induce the surrender of the policy by plaintiff and to promote the settlement of a nonexistent dispute. In *Wetherbee v. United Ins. Co.*, 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968), subsequent appeal 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971), the plaintiff alleged false representations of intended payment made by defendant to induce plaintiff not to cancel the policy. In *Crisci v. Security Ins. Co., supra,* there was involved an intentional infliction of mental distress caused by the insurer's refusing to settle which subjected plaintiff to judgment exceeding the limits of the policy which insurer likewise refused to pay. For similar cases from other jurisdictions *see, e.g., State ex rel. Larson v. District Court of Eighth Judicial District,* 149 Montana 131, 423 P. 2d 598 (1967) (breach of contract which constituted violation of state insurance laws) ; *Vernon Fire & Cas. Ins. Co. v. Sharp,* 316 N.E. 2d 381 (Ind. Ct. App. 1974) (insurer stipulated liability and still refused to pay).

While in most of these cases there were separate identifiable, aggravated torts, of the sort we have already discussed, a common element in all was a bad faith refusal of the insurer to pay a valid claim. While there was a conclusory allegation of bad faith as well as aggravated fraud in *King v. Insurance Co., supra,* one basis for the decision in *King* was that no facts were alleged which would support these conclusions.

[10] We need not now decide whether a bad faith refusal to pay a justifiable claim by an insurer might give rise to punitive damages. No bad faith is claimed here, nor are any facts alleged from which a finding of bad faith could be made. Insurer's knowledge that plaintiff was in a precarious financial position in view of his loss does not in itself show bad faith on the part of the insurer in refusing to pay the claim, or for that matter, that the refusal was unjustified. Had plaintiff claimed that after due investigation by defendant it was determined that the claim was valid and defendant nevertheless refused to pay or that defendant refused to make any investigation

at all, and that defendant's refusals were in bad faith with an intent to cause further damage to plaintiff, a different question would be presented.

We are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.

On the other hand, because of the great disparity of financial resources which generally exists between insurer and insured and the fact that insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest, we recognize the wisdom of a rule which would deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith. Punitive damages "have been allowed for a breach of duty to serve the public by a common carrier or other public utility. See: *Carmichael v. Southern Bell Telephone & Telegraph Co.*, 157 N.C. 21, 72 S.E. 619; *Hutchinson v. Southern R. R.*, 140 N.C. 123, 52 S.E. 263." *King v. Insurance Co., supra* at 398, 159 S.E. 2d at 893. Suffice it to say that we are not called upon here to adopt or reject such a rule.

Since the claim for punitive damages was properly dismissed by the trial court, the supportive allegations of the complaint were also properly stricken.

The decision of the Court of Appeals is therefore reversed, and the order of the superior court dismissing the claim for punitive damages is affirmed.

Chief Jusice SHARP concurring in result.

For the reasons stated in my dissent in *Oestreicher v. Stores*, 290 N.C. 118, 144, 225 S.E. 2d 797, 813 (1976), I concur in the result reached in the majority opinion with reference to punitive damages. In my view, in neither this case nor in *Oestreicher* are punitive damages appropriate. Further, I do not think we will clarify the law by overruling *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953). On the contrary, this action can only further confuse an area of the law which is rapidly becoming confusion worse confounded.

On its facts, the decision in *Swinton* was clearly correct. It has been cited by each of the five members of the present Court who became members prior to 1 January 1975 as authoritative and as supporting the propositions variously stated as follows:

(1) Punitive damages can be recovered only in tort actions and upon allegations and proof of facts showing actual malice, oppression, gross and willful wrong, insult, indignity or a reckless disregard of plaintiff's rights. *Van Leuven v. Motor Lines,* 261 N.C. 539, 546, 135 S.E. 2d 640, 645 (1964). *See also Hinson v. Dawson,* 244 N.C. 23, 27, 92 S.E. 2d 393, 396 (1956); *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 344, 88 S.E. 2d 333, 342 (1955).

(2) Without such a showing, punitive damages cannot be recovered for false representations. *Nunn v. Smith,* 270 N.C. 374, 377, 154 S.E. 2d 497, 499 (1967); *Horne v. Cloninger,* 256 N.C. 102, 103, 123 S.E. 2d 112, 113 (1961).

(3) A plaintiff is not entitled to punitive damages in an action for fraud merely upon a showing of misrepresentations which constituted the cause of action (the situation in *Swinton). Hardy v. Toler,* 288 N.C. 303, 306, 311, 218 S.E. 2d 342, 344, 348 (1975).

(4) It is the general rule that ordinarily exemplary, punitive or vindictive damages are not recoverable in an action for fraud. *Davis v. Highway Commission,* 271 N.C. 405, 409, 156 S.E. 2d 685, 688 (1967).

(5) With the exception of a breach of promise to marry, punitive damages are not given for breach of contract. *King v. Insurance Co.,* 273 N.C. 396, 398, 159 S.E. 2d 891, 893 (1968).

In my view the foregoing propositions are sound law, and I would not cast doubt upon them by overruling *Swinton.* An appropriate disposition of this case makes is unnecessary to overrule *Swinton* or to consider the implications inherent in such a course.

Justices BRANCH and MOORE join in this concurring opinion.

State v. White

STATE OF NORTH CAROLINA v. JOE LEWIS WHITE

No. 23

(Filed 4 November 1976)

1. **Criminal Law § 75— voluntariness of confession — consideration of entire record**

The ultimate test of the admissibility of a confession is whether the statement made by the accused was in fact voluntarily and understandingly made, and compliance with the technical procedural requirements of *Miranda*, standing alone, will not suffice; rather the controlling question of whether the alleged confession was voluntarily and understandingly made must be found from a consideration of the entire record.

2. **Criminal Law § 75— subnormal mentality — illiteracy — effect on voluntariness of confession**

Subnormal mentality is a factor to be considered in determining the voluntariness of a confession, but this condition, standing alone, does not render an otherwise voluntary confession inadmissible. It follows that inability to read or write does not render an otherwise voluntary confession inadmissible, since illiteracy does not preclude understanding or a free exercise of the will.

3. **Criminal Law § 75— Miranda warnings given — lapse of time — statement made — voluntariness**

Though 45 minutes elapsed between the time defendant was warned of his constitutional rights and the time he made his first statement to officers and 30 minutes elapsed between the second warning and second statement, there was no showing that defendant was unaware of his constitutional rights because of the lapse, since the lapse was extremely short, the warnings were given in the same place by the same officers on each occasion, and, though defendant was illiterate, there was no apparent emotional condition or lack of intellectual ability which would have prevented his making a voluntary statement.

4. **Arson § 1; Homicide § 8— murder in perpetration of arson — defense of intoxication — specific intent not element of crime**

Voluntary intoxication is a defense to crimes which require a showing of a specific intent. Since specific intent is not an essential element of the crime of common-law arson, the crime for which defendant was indicted, voluntary intoxication is not a defense to that crime; moreover, since voluntary intoxication is not a defense to a charge of arson, it likewise is not a defense to a charge of felony-murder having as its underlying felony the crime of arson, and the trial court therefore properly refused to give defendant's requested instructions on voluntary intoxication.

5. **Criminal Law § 26; Homicide § 31— felony-murder — separate punishment for felony — error**

Where defendant was indicted for first degree murder and arson, but proof of the arson charge was an essential and indispensable

element in the State's proof of felony-murder, the trial court erred by imposing additional punishment on the verdict of guilty of arson.

6. **Constitutional Law § 36; Homicide § 31— first degree murder — life imprisonment substituted for death sentence**

Sentence of life imprisonment is substituted for the death penalty imposed for a first degree murder committed prior to the 1974 enactment rewriting G.S. 14-17 and after the interpretation of G.S. 14-17 (1969) in *State v. Waddell*, 282 N.C. 431 (decided 18 January 1973).

APPEAL by defendant from *McLelland, J.*, 24 November 1975 Special Session ROBESON Superior Court.

Defendant was indicted in separate bills of indictment for first-degree murder and arson.

This case has previously been before this Court and a new trial was awarded. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557. Upon defendant's motion for a change of venue the case was removed to Robeson County for trial.

The State offered evidence which tended to show that deceased, Mose Watson, had testified against defendant's brother in cases charging him with burglary and robbery. Thereafter defendant made numerous statements of his intentions to kill Watson. On the night of 19 May 1973, after determining that Watson was home, defendant poured gasoline on and set fire to the Watson home. Watson was burned to death in his home.

The State offered evidence of confessions which will hereinafter be more fully discussed.

Defendant denied that he had committed the charged crimes. His testimony and the testimony of his other witnesses indicated that at the time of the alleged crimes he was at his parents' home in a highly intoxicated condition.

The jury returned verdicts of guilty as to each charge and judgments imposing the death penalty were entered in each case.

Attorney General Edmisten by Special Deputy Attorney General William F. O'Connell, for the State.

J. Robert Gordon for the defendant appellant.

BRANCH, Justice.

By his Assignments of Error Nos. 3 and 4 defendant contends that the rulings of the trial judge admitting into

evidence inculpatory statements made by him to police officers constituted prejudicial error. Only one *voir dire* hearing was held as to the two separate statements made by defendant and we elect to consider these assignments of error jointly.

Detective L. E. Smith of the Laurinburg, North Carolina, Police Department testified as a State's witness. When it became apparent that the officer was about to testify concerning inculpatory statements made by defendant, counsel objected and Judge McLelland properly excused the jury and conducted a *voir dire* hearing as to the admissibility of this evidence.

On *voir dire*, Detective Smith testified that on 3 May 1974 he and SBI Agents Dowdy and Currin were transporting defendant to North Carolina from Paterson, New Jersey, by automobile. Defendant had been given two extradition hearings in Paterson, New Jersey, at which times he was advised of the charges pending against him in North Carolina. After approximately an hour of travel, defendant was fully warned of his constitutional rights as mandated by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. Defendant stated that he fully understood his rights and that he did not desire a lawyer to be present during questioning by the police officers. In response to ensuing questions defendant proceeded to make an inculpatory statement concerning the charges pending against him. Detective Smith specifically stated that on this occasion defendant was not threatened and no one promised him anything in exchange for the statements made. He did not hear SBI Agent Dowdy tell defendant that Delores Austin had made a statement accusing him of burning Mose Watson's house. Neither did he hear Agent Dowdy tell defendant that he would talk to the solicitor in his behalf or that things would go easier for defendant if he made a statement.

The witness related that on 4 May 1974 defendant and Delores Austin were questioned at the police station in Laurinburg, North Carolina. Both Delores Austin and defendant were warned of their constitutional rights at that time. Defendant was also read a waiver of rights which contained an acknowledgment that he understood his rights and that no promises or threats had been made by the officers and that he was willing to make a statement without the presence of a lawyer. Defendant then stated that he understood his rights and he did not desire a lawyer at that time.

On cross-examination Detective Smith admitted that he knew defendant could not write and that a period of about 45 minutes elapsed between the giving of the warning and the interrogation when the statement was made on 3 May 1974. He testified that defendant's statement on 4 May 1974 was made about 30 minutes after he was warned of and had waived his constitutional rights. Officer Smith stated that although defendant was uneducated, he appeared to fully comprehend what was being said.

Defendant testified that on the trip from Paterson, New Jersey, SBI Agent Dowdy told him that Delores Austin had made a statement to the effect that she and defendant killed Mose Watson. Agent Dowdy also told him that if he would enter a plea of guilty he (Dowdy) would talk to the solicitor in his behalf and would see about getting a lawyer for him. Dowdy said that things would be better for defendant and Delores if defendant would make a statement. In response to these promises by SBI Agent Dowdy, he then made a statement. He testified that Detective Smith did not warn him of his constitutional rights and that he never told anyone that he would waive his right to an attorney or that he wished to proceed without one. On cross-examination, he stated: "As far as I remember, the officer could have advised me exactly as he testified." He also admitted that he was not threatened or physically attacked by anyone.

At the conclusion of the *voir dire* hearing Judge McLelland found facts consistent with the State's evidence concerning the statement made on 3 May 1974. He then concluded and ruled:

> I conclude from these findings that the defendant waived his rights to remain silent and to have counsel present before and during interrogation and that this waiver was freely, voluntarily and understandingly made.
>
> The motion to suppress evidence of that statement is therefore denied.

The trial judge also found facts consistent with the testimony of the State's witness concerning the statements allegedly made on 4 May 1974 and entered the same conclusions and ruling as above quoted.

The jury returned to the courtroom and Detective Smith, in substance, testified that on the trip from Paterson, New

Jersey, defendant stated that he did pour gas on Mose Watson's house and set it on fire. However, he said that he did this to frighten Mose Watson so that he would not testify against defendant's brother and he did not know that Mose was inside the house. The witness further testified that on the following day (4 May 1974) Delores Austin and defendant were brought to an interrogation room at the Laurinburg Police Station and after both Delores Austin and defendant had again been warned of their constitutional rights, Delores Austin, in essence, stated that defendant had planned for some time to kill Mose Watson; that he ascertained that Mose Watson was in his home on the night of 19 May 1973; and that he poured gasoline on the Watson house and thereafter there was an explosion and a fire. As defendant ran from the flaming house, he said, "I told you I was going to get him." Defendant was within four feet of Delores Austin while she made this statement. He was asked if he listened to her statement and whether he agreed with what she said. He replied "that he had heard and understood, and that he did not disagree with any of it."

[1] It is well settled that the trial judge's findings of fact after a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when supported by competent evidence. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453, *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2278. This is so even when the evidence is conflicting. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363. Nevertheless the conclusions of law drawn from the facts are reviewable by the appellate courts. The ultimate test of the admissibility of a confession is whether the statement made by the accused was in fact voluntarily and understandingly made. Compliance with the technical procedural requirements of *Miranda*, standing alone, will not suffice and the controlling question of whether the alleged confession was voluntarily and understandingly made must be found from a consideration of the entire record. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92.

Here there was plenary evidence that the *Miranda* requirements were fully met and there was ample, competent evidence to support the trial judge's findings. However, defendant contends that a consideration of all the circumstances discloses as a matter of law that defendant did not voluntarily and understandingly make the alleged inculpatory statements. He argues

that defendant was unable to read and write and, therefore, the State's evidence was not sufficient to permit a finding that there was a voluntary waiver of his constitutional rights.

[2] This Court has recognized that subnormal mentality is a factor to be considered in determining the voluntariness of a confession but that this condition, standing alone, does not render an otherwise voluntary confession inadmissible. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666. It follows, and we so hold, that inability to read or write does not render an otherwise voluntary confession inadmissible. Illiteracy does not preclude understanding or a free exercise of the will.

[3] Defendant next attacks the admission of both the statements because a period of approximately 45 minutes elapsed between the giving of the warnings and the making of the first statement and because a period of 30 minutes elapsed between the giving of the warnings and the making of the second statement. Such an argument was advanced in *State v. McZorn,* 288 N.C. 417, 219 S.E. 2d 201. Rejecting this contention Chief Justice Sharp, speaking for the Court, stated:

> Many courts have considered the question whether *Miranda* warnings must be repeated at subsequent interrogations when they have been properly given at the initial one. *See* Note, The Need to Repeat Miranda Warnings at Subsequent Interrogations, 12 Washburn Law Journal 222 (1973), where the cases are collected and analyzed. The consensus is that although *Miranda* warnings, once given, are not to be accorded "unlimited efficacy or perpetuity," where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. . . . However, the need for a second warning is to be determined by the "totality of the circumstances" in each case. . . . "[T]he ultimate question is: Did the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquish them?" . . . [Citations omitted.]
>
> Courts have included the following factors, among others, in the totality of circumstances which determine whether the initial warnings have become so stale and remote that there is a substantial possibility the individual

was unaware of his constitutional rights at the time of the subsequent interrogation: (1) the length of time between the giving of the first warnings and the subsequent interrogation. *See State v. Gilreath*, 107 Ariz. 318, 487 P. 2d 385 (1971) (second and third interrogations occurred 12 and 36 hours respectively after the first; repeated warnings not required) (applying *Escobedo* principles); *Watson v. State*, 227 Ga. 698, 182 S.E. 2d 446 (1971) (7 hour interval held not to require repeated warning); . . . (2) whether the warnings and the subsequent interrogation were given in the same or different places, . . . (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers. *Id;* (4) the extent to which the subsequent statement differed from any previous statements; . . . (5) the apparent intellectual and emotional state of the suspect. . . . [Citations omitted.]

In instant case the lapse of time was extremely short and the warnings were given in the same place by the same officers on each occasion. Although defendant was illiterate, there was no apparent emotional condition or lack of intellectual ability which would have prevented his making a voluntary statement. We hold that the totality of the circumstances does not show a substantial possibility that defendant was unaware of his constitutional rights because of the lapse of time between the warnings and his waiver and the statements made by him.

We note that the trial judge did not expressly conclude that the defendant voluntarily and understandingly made the confessions. However, when considered with the findings of fact his conclusion that "defendant waived his rights to remain silent and to have counsel present before and during interrogation and that he did so freely, voluntarily and understandingly" is tantamount to a conclusion that the confessions were understandingly and voluntarily made.

The trial judge correctly admitted the inculpatory statements made by defendant on 3 May 1974 and 4 May 1974.

Defendant argues that the trial court erred in refusing to instruct the jury as to the defense of voluntary intoxication and as to lesser included offenses of the murder charge.

At the conclusion of the evidence and prior to the arguments of counsel, defendant presented to the court written

requests for special instructions to the jury. Those instructions, in pertinent part, were as follows:

> The defendant has raised the defense that he was in a state of voluntary intoxication at the time the alleged homicide took place. Generally, voluntary intoxication is not a legal excuse for crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for a conviction of arson. In order for you to find the defendant guilty of arson, you must find, beyond a reasonable doubt, that he had the ability to formulate the specific intent, the wilful intent to burn the dwelling house of Mose Watson. If, as a result of intoxication, the defendant did not have the required specific intent, you must find the defendant not guilty of arson.
>
> I instruct you that if you find the defendant not guilty of arson, you must then find him not guilty of murder in the first degree, under the felony-murder rule because the death would not have resulted from the commission or the attempted commission of a felony. I further instruct you that if you find the defendant did not have the specific intent to commit arson because of his intoxication he could not be guilty of murder in the first degree because it would follow that he did not have the specific intent required to commit first degree murder. The law does not require any specific intent for the defendant to be guilty of the crime of manslaughter. Thus the defendant's intoxication can have no bearing upon your determination of his guilt or innocence of manslaughter.
>
> * * *
>
> So, therefore, I charge you that if you find from the evidence that the defendant was so intoxicated he could not formulate the specific intent required for a conviction of arson and first degree murder, it would be your duty to find him not guilty of arson and first degree murder, but you may find him guilty of voluntary manslaughter or involuntary manslaughter as I have just defined those crimes to you.

As to the first-degree murder charge, the State elected to proceed solely under the felony-murder theory based on the underlying felony of arson. The jury was instructed as follows:

> . . . Therefore, I charge that if you find beyond a reasonable doubt that the defendant burned the dwelling of Mose Watson when it was inhabited by Mose Watson; that he [did] so maliciously, that is intentionally and without lawful excuse or justification, your duty is to return a verdict that he is guilty of arson, a felony.
>
> And if you further find beyond a reasonable doubt that Mose Watson's death was proximately caused by that act of arson, on the part of the defendant, it is your duty to find him guilty also of first-degree murder. I instruct you that if you do not find the defendant guilty of the crime of arson, you must find him not guilty of murder as well.

[4] Voluntary intoxication is a defense only to those crimes which require a showing of a specific intent. *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238; *State v. Bunn,* 283 N.C. 444, 196 S.E. 2d 777; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560. In this case defendant was indicted for common-law arson, which is defined as the wilful and malicious burning of the dwelling house of another person. *State v. White,* 288 N.C. 44, 215 S.E. 2d 557; *State v. Arnold,* 285 N.C. 751, 208 S.E. 2d 646. As we stated on the prior appeal of this case:

> . . . For a burning to be "wilful and malicious" in the law of arson it must simply be done "voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense" of common law arson.

Specific intent is not an essential element of the crime of common-law arson. *State v. McLaughlin, supra;* 5 Am. Jur. 2d, Arson and Related Offenses § 10. Therefore, voluntary intoxication is not a defense to that crime. Since voluntary intoxication is not a defense to a charge of arson, it likewise is not a defense to a charge of felony-murder having as its underlying felony the crime of arson.

We, therefore, hold that the trial judge correctly refused to give the instructions proffered by defendant. This assignment is overruled.

[5] Defendant also contends that the trial judge erred by imposing additional punishment on the verdict of guilty of arson.

The State proceeded solely on the theory that Mose Watson's death was proximately caused by defendant's perpetration of the felony of arson. Proof of the arson charge was an essential and indispensable element in the State's proof of felony-murder and as such affords no basis for additional punishment. *State v. McLaughlin, supra; State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214; *State v. Thompson, supra.* We, therefore, arrest the judgment in the arson case.

In his final assignment of error defendant attacks the imposition of the death penalty upon the verdicts of guilty of arson and guilty of first-degree murder.

Since we arrest the judgment in the arson case, it is not necessary to reach this question as it relates to the arson charge.

[6] 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). By virtue 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 for crimes of first-degree murder committed *after* its effective date of 8 April 1974. However, in the murder case *sub judice* the offense was committed prior to that date. We have held that the appropriate sentence for one convicted of first-degree murder and sentenced to death *prior* to the 1974 enactment and *after* the interpretation of G.S. 14-17 (1969) in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (decided 18 January 1973), is life imprisonment. *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97. For the reasons stated in *Davis,* we substitute a sentence of life imprisonment in lieu of the death penalty imposed in this case.

This case is remanded to the Superior Court of Robeson County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for first-degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court of Robeson County issue a commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish to the de-

fendant and his attorney a copy of this judgment and commitment as revised in accordance with this opinion.

In 74CR3313 (arson)—Judgment arrested.

In 74CR2007 (first-degree murder)—No error in the verdict. Death sentence vacated.

VERNON R. WHETSELL, EUGENE HOLLOMAN & R. E. HATCH, TRUSTEES OF SALEM ADVENT CHRISTIAN CHURCH (SUCCESSOR TO THE SECOND ADVENT BAPTIST CHURCH) v. GLADYS L. JERNIGAN & HUSBAND, ROLAND R. JERNIGAN

No. 42

(Filed 4 November 1976)

1. **Deeds §§ 12, 15— 1884 deed — reversion clause after description — ineffectiveness**

A clause in an 1884 deed providing for reverter of title to the grantors is not valid and effective when it appears only at the end of the description and is not referred to elsewhere in the deed.

2. **Deeds § 12— inconsistent clauses in deed — construction — conveyance after 1 January 1968 — effect of G.S. 39-1.1**

Conveyances executed after 1 January 1968 in which there are inconsistent clauses shall be construed in accordance with G.S. 39-1.1 so as to effectuate the intent of the parties as it appears from all the provisions of the instrument so long as such construction does not prevent the application of the rule in Shelley's case; however, G.S. 39-1.1 does not apply to conveyances executed prior to 1 January 1968, and such conveyances will be construed in accordance with the principles enunciated in *Artis v. Artis*, 228 N.C. 754 and *Oxendine v. Lewis*, 252 N.C. 669.

Justice COPELAND dissenting.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 29 N.C. App. 136, 223 S.E. 2d 397 (1976), which reversed the summary judgment for defendant entered by *Griffin, J.*, at the September 1975 Regular Session of WAYNE Superior Court.

Plaintiffs, trustees of Salem Advent Christian Church, brought this action to have the church declared the sole owner of a one-acre lot conveyed by deed dated 17 November 1884 from D. E. Newell and wife, Nancy Newell, and Mary Newell

to the Second Advent Baptist Church. Plaintiffs alleged that the church is the successor to the original grantee, Second Advent Baptist Church.

Defendants claim ownership under a clause in the 1884 deed which appears to be a part of the description:

> ". . . thence north 70 yards to the begin., containing one acre more or less—*Now the condition of this deed is that if the said denomination of the Second Advent Baptist Church fail to build a church house, or if said denomination change their name, or if they fail to occupy said land with a church for a space of three years then said land is to return back to the parties of the first part or their legal representatives.*" (Emphasis added.)

The granting clause in the deed conveyed an unqualified fee and the *habendum* contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title. The italicized portion of the description does not appear and is not referred to in any other part of the deed.

Defendants alleged that around 1969 Second Advent Baptist Church changed its name to Salem Advent Christian Church and that the Salem Advent Christian Church has failed to occupy the land with a church for a period of three years. These facts do not appear to be controverted.

Each party filed a motion for summary judgment. After a hearing and argument by counsel for both parties, the trial judge concluded that the language imposing conditions on the conveyance was legally effective and imposed certain conditions on the title conveyed by the deed. The trial judge further found that the grantee, Salem Advent Baptist Church, had breached the conditions imposed and therefore defendants were entitled to entry and possession of the lot. He further concluded that title vested in Gladys Jernigan, sole heir of the grantor, and thereupon entered summary judgment for defendants.

Plaintiffs appealed and the Court of Appeals reversed. We allowed petition for discretionary review on 9 April 1976.

Kornegay, Bruce & Rice by G. R. Kornegay, Jr., and Robert T. Rice for plaintiff appellees.

Smith, Everett & Womble by James N. Smith and James D. Womble, Jr., for defendant appellants.

MOORE, Justice.

[1] The sole question for decison is whether a clause in a deed providing for a reverter of title to the grantors is valid and effective when it appears only at the end of the description and is not referred to elsewhere in the deed. The Court of Appeals held that it was not effective. We agree.

In *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228 (1948), the plaintiff claimed title to certain land under a deed in which the granting clause conveyed a fee simple and the *habendum* and warranty clauses were in accord. However, following the description in the deed, a clause appeared which plaintiff contended gave defendant a life estate and not a fee in a certain piece of land. The Court held that a fee was conveyed. In so holding, the following rule was stated:

> "Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum,* the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveved, will be rejected." 228 N.C. at 761, 47 S.E. 2d at 232.

In arriving at the rule, the Court reviewed much of the prior law relating to the construction of deeds which contained contradictory clauses. In *Blackwell v. Blackwell,* 124 N.C. 269, 32 S.E. 676 (1899), the Court formulated the rule that the essence of the deed is the granting clause and that when two clauses in a deed are repugnant to each other, the clause appearing first in a deed shall control the interpretation of the deed. The reason for this rule was enunciated in *Rowland v. Rowland,* 93 N.C. 214 (1885), in which it was stated that once an estate was vested in a grantee by the premises or the granting clause of a deed, a later clause could not divest the grantee of the first estate conveyed. *See also* 2 W. Blackstone, Commentaries 298 (Christian ed. 1794).

The rule stated in *Artis* has been applied in numerous subsequent decisions of this Court. *See, e.g., Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706 (1960); *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391 (1953); *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783 (1953); *Pilley v. Smith,* 230 N.C. 62, 51 S.E. 2d 923 (1949).

In *Oxendine v. Lewis, supra,* certain property was conveyed to Malinda Hunt. The deed of conveyance contained a granting clause which conveyed a fee, and the *habendum* and warranty portions of the deed were in harmony with the granting clause. At the beginning of the description of the deed, it appeared that Malinda was conveyed "[a] life estate in and to the following described tract of land. . . ." At the end of the description the following clause appeared:

> " 'It is distinctly understood between the parties of the first part and the party of the second part that the said Malinda Oxendine Hunt is to have a lifetime right and full control of the possession of the property herein conveyed, and the remainder, subject to said lifetime right, is retained by Roy Oxendine.' "

The Court held that under the decisions of *Artis v. Artis, supra, Jeffries v. Parker, supra,* and other cases, the words appearing in the description were not sufficient to limit the unqualified fee conveyed by the granting clause when the *habendum* contained no limitation on the fee therein conveyed and a fee simple title was warranted in the covenants of title. The Court then quoted from *Jeffries v. Parker, supra,* at 673, 114 S.E. 2d at 709:

> " '. . . This is now settled law in this jurisdiction. *Krites v. Plott,* 222 N.C. 679, 24 S.E. 2d 531 [1943], and *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745 [1941], to the extent they conflict with this conclusion, have been overruled.' "

The defendants in the case at bar contend that although the rule in *Artis v. Artis, supra,* exists, this Court should not follow it. Rather, defendants argue that the principles stated in *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79 (1908), should control. In *Triplett,* the premises and the granting clause conveyed fee simple title. The *habendum,* however, limited the grantee to a life estate with the remainder going to the grantee's children. This Court held that a life estate was created.

In reaching its conclusion, the Court reasoned that the *habendum* clause in a deed may enlarge or restrict the estate conveyed by the granting clause and that the two clauses were not repugnant to each other. The Court then went on, in dictum, to state that the intention of the grantor should be ascertained

from the entire instrument in those cases where the clauses in a deed are contradictory.

We do not feel, however, that *Triplett* is controllng in the case at bar. In *Triplett*, the limitation upon the estate granted was contained in the *habendum*. The reason for the *habendum* in a deed is to "define the extent of ownership in the thing granted to be held and enjoyed by the grantee . . . to lessen, enlarge, explain, or qualify the estate granted in the premises . . . but not to contradict or be repugnant to the estate granted therein. . . ." *Bryant v. Shields*, 220 N.C. 628, 632, 18 S.E. 2d 157, 159 (1942).

Two cases cited by defendants, *Mattox v. State*, 280 N.C. 471, 186 S.E. 2d 378 (1972), and *Lackey v. Board of Education*, 258 N.C. 460, 128 S.E. 2d 806 (1963), are to the same effect. In *Mattox*, a lengthy condition subsequent was set out in the *habendum*. In *Lackey*, a reverter clause followed both the description and the *habendum*. Thus, these cases are distinguishable from the conveyance in the case at bar which had no qualifying clause in the *habendum*.

Were it not for the decisions in *Artis v. Artis, supra*, and *Oxendine v. Lewis, supra*, and cases cited therein, and had the General Assembly not addressed itself to this problem by passing G.S. 39-1.1, we would be inclined to agree with defendants that the deed in this case should be construed to effectuate the apparent intention of the grantors, and that title should revert to the heirs of the grantors. However, by the adoption of G.S. 39-1.1, the legislators, in their wisdom, provided that the existing law only be changed as to conveyances executed after 1 January 1968. G.S. 39-1.1 provides:

> "(a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.
>
> "(b) The provisions of subsection (a) of this section shall not prevent the application of the rule in Shelley's case."

By the enactment of this statute, the General Assembly clearly indicated its intention to leave the law relating to conveyances executed prior to 1 January 1968 unchanged and that

the rule as stated in *Artis v. Artis, supra,* and *Oxendine v. Lewis, supra,* should remain in effect for conveyances executed prior to that date. Granting that this rule may occasionally subvert the real intention of the grantor, these particular instances of hardship can better be endured than the uncertainty and confusion of titles resulting from sudden and radical changes in well settled rules of property.

As Chief Justice Shepherd said in *Starnes v. Hill,* 112 N.C. 1, 18, 16 S.E. 1011, 1016 (1893), quoting from Fearne, Contingent Remainders and Executory Devises 171 (Butler ed. 1862):

> " 'Certain established maxims as to the legal import and effect of technical expressions will render the decisions of title to property as little dependent as the nature of things will admit upon the occasional opinion, humor, ingenuity or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained, and under them a permanent peaceful enjoyment may be expected.' "

[2] By the passage of G.S. 39-1.1, it would appear that "[i]t is the legislative will that the intention of the grantor and not the technical words of the common law shall govern." *Triplett v. Williams, supra,* at 398, 63 S.E. at 80. *See also* Comment, 4 Wake Forest Intra. L. Rev. 132 (1968). Thus, we are of the opinion that so long as it does not prevent the application of the rule in Shelley's case, conveyances executed after 1 January 1968 in which there are inconsistent clauses shall be construed in accordance with G.S. 39-1.1 so as to effectuate the intent of the parties as it appears from all the provisions in the instrument. However, we hold that G.S. 39-1.1 does not apply to conveyances executed prior to 1 January 1968 and that such conveyances will be construed in accordance with the principles enunciated in *Artis v. Artis, supra,* and *Oxendine v. Lewis, supra.* Hence, in present case, the clause inserted after the description in the conveyance which tends to delimit the estate will be deemed mere surplusage without force or effect.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

Justice COPELAND dissenting.

The majority concedes that its decision in this case will thwart the grantor's apparent intent and further indicates that it would be inclined to disavow its rule laid down in *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228 (1948) and extended in *Oxendine v. Lewis,* 252 N.C. 669, 114 S.E. 2d 706 (1960), were it not for the legislature's passage of G.S. 39-1.1. The majority's interpretation of the legislature's prospective application of G.S. 39-1.1 as an approval of the *Artis-Oxendine* rule is purely speculative.

The majority's concern that land titles remain stable is certainly respectable but should not be taken to extremes. First of all, to revere the *Artis-Oxendine* rule as one of North Carolina's "well settled rules of property" which should not be tampered with is unjustified. Our Court has reversed itself on this issue within the last thirty-five years, seemingly unmindful of the effect on land titles. In *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745 (1941) and *Krites v. Plott,* 222 N.C. 679, 24 S.E. 2d 531 (1943), we recognized grantor's intent as drawn from the four corners of the instrument only to return in *Artis v. Artis* to a harsh technical rule. The majority appears implicitly, if not explicitly, to agree that the *Artis-Oxendine* rule is a bad rule in that it frustrates grantor's intent. Following the majority's reasoning, any inequitable rule of property law once pronounced must be upheld *ad infinitum* because of the sanctity of land titles or until the legislature rectifies our mistakes.

More importantly, the notion that admittedly arbitrary rules once laid down should be preserved for the sake of stable land titles should only be applied to technical rules that serve some justifiable social purpose. I submit that the reason our Court has vacillated on this rule in the past and the reason the legislature has acted to curb this rule is that it furthers no useful social purpose. The majority opinion notably lacks any mention of a policy reason supporting the rule, but points only to the policy behind keeping the existing rule intact once it has been handed down for better or for worse. When the relevant policy considerations are examined they cut in favor of an abandonment of the *Artis-Oxendine* rule. *See* Webster, *Doubt Reduction Through Conveyancing Reform—More Suggestions in the Quest for Clear Land Titles,* 46 N.C. L. Rev. 284, 295-96 & n. 42 (1968).

Apparently, North Carolina was at one time recognized as a leader of the "modern" and now majority view giving preference to the intention of the partes as gleaned from the four corners of the deed. Note, *Deeds—Construction—Use of Fee Simple Form Versus Intent to Convey Life Estate*, 39 N.C. L. Rev. 283, 284 & n. 9 (1961). The rationale behind the "modern view" notes that a rule favoring certain clauses of a deed over other clauses is not a rule of property but merely a rule of construction which should be resorted to when the court *cannot* determine which of the clauses the grantor intended to be controlling. *See* 84 A.L.R. 1054, 1063-64 (1933). What this Court has done is to convert into a rule of law what should be a rule of construction, providing at most a presumption in favor of the estate described in the formal clauses.

While it is true that most of the cases which call for the grantor's intent to prevail where it can be determined, address conflicts between the granting and habendum clauses and not conflicts between those clauses and the description in the deed, our Court has not suggested a reason why the rule should be different in the two conflict situations. *See* 58 A.L.R. 2d 1374, 1393 (1958); 84 A.L.R. 1054, 1063 (1933). Certainly the language of our own cases and those of other jurisdictions is broad enough to encompass any conflict among clauses in a deed concerning the extent of the estate conveyed. In *Triplett v. Williams*, 149 N.C. 394, 397-98, 63 S.E. 79, 80 (1908), which has yet to be overruled, we said:

> " 'Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered, or arbitrarily thrust aside.'
>
> "To discover the intention of the parties 'is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention.'
>
> "We can see no reason why the manifest intention of the grantor should be so carefully regarded in determining what property his deed covers and so entirely disregarded in determining what estate in that property the grantee shall take.
>
> " 'The inclination of many courts at the present day is to regard the whole instrument without reference to formal divisions. The deed is so construed, if possible, as to give

effect to all its provisions, and thus effectuate the intention of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains as upon the intention of the parties as indicated by the whole instrument.' " [Citations omitted.] *See Mattox v. State*, 280 N.C. 471, 186 S.E. 2d 378 (1972); *Lackey v. Board of Education*, 258 N.C. 460, 128 S.E. 2d 806 (1963).

Although we may distinguish *Triplett v. Williams* by limiting it to its facts, a conflict between a habendum and a granting clause, differences in treatment should be based on substantive distinctions.

There can be no doubt as to what the grantor intended when he placed his reverter clause in the present deed. To place the grantor in a straightjacket and say that he must put his reverter clause at a particular place in the deed is to make a sham of the law. To say that we must continue the *Artis-Oxendine* rule because it might upset titles in North Carolina is to decide this case on the basis of an unfounded fear, given that our recent change in the rule precipitated no such disastrous consequences. Moreover, I cannot conceive of an attorney unconditionally passing title on property with the words that are included in this deed, regardless of where they are inserted.

The General Assembly expressed its concern over this Court's rule by enacting G.S. 39-1.1. Justice Bobbitt (later Chief Justice) and the late Justice Rodman, eminent scholars in the field of real property law, voiced their displeasure at the extension of this rule in *Oxendine, supra.* Clearly, the polar star should always be the grantor's intent and this can be determined only by examining the deed from its four corners.

For these reasons, I would reverse the Court of Appeals and respectfully dissent.

STATE OF NORTH CAROLINA v. LEWIS EDWARD BEAVER

No. 36

(Filed 4 November 1976)

1. **Criminal Law § 147— no motion to quash indictment — issue properly raised on appeal**

Though defendant made no motion to quash the bill of indictment, he could, pursuant to Rule 10(a) of the Rules of Appellate Procedure, present for review on appeal, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter, and whether the criminal charge was sufficient in law.

2. **Burglary and Unlawful Breakings § 3— first degree burglary — indictment — sufficiency of description of premises**

In a prosecution for first degree burglary, the indictment which alleged that defendant "in the county aforesaid [Cabarrus], the dwelling house of one Marvin O. VanPelt there situate, and then and there actually occupied by one Marvin O. VanPelt feloniously and burglariously did break and enter" with the requisite intent sufficiently described the premises which were allegedly entered and alleged all the essential elements of the offense with sufficient certainty to (1) identify the offense; (2) protect the accused from being twice put in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) support judgment upon conviction or plea.

3. **Burglary and Unlawful Breakings § 1— burglary defined**

Burglary is a common law offense which consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not.

4. **Burglary and Unlawful Breakings § 3— burglary indictment — ownership of house must be alleged**

There are only two reasons for requiring ownership of the house to be stated in the indictment for burglary: (1) for the purpose of showing on the record that the house alleged to have been broken into was not the dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into one's own house, and (2) for the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense.

5. **Burglary and Unlawful Breakings § 3— first degree burglary — occupation or possession of house tantamount to possession**

In burglary cases occupation or possession of a dwelling or sleeping apartment is tantamount to ownership, and there is no requirement that actual ownership of the occupied premises be alleged and proved.

6. **Criminal Law § 131— motion for new trial for newly discovered evidence — denial proper**

The trial court in a first degree burglary case did not err in denying defendant's motion for a new trial made on the ground that

while the jury deliberated defendant was informed by two police officers that prior to trial they had located a man who had lived with defendant and the burglary victim and who would testify that defendant was living in the house allegedly broken into on the day of the crime, since the proposed testimony of the witness would only have been cumulative and corroborative to that of defendant, defendant had ample opportunity to examine the officers on the stand as to their knowledge concerning the witness's whereabouts, and defendant, if he considered the witness important and material, could have moved for a continuance to enable him to locate the witness.

7. **Criminal Law § 131— new trial for newly discovered evidence — prerequisites**

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from *Albright, J.*, at the 5 January 1976 Schedule "B" Session of CABARRUS Superior Court.

Defendant was tried and convicted of first degree burglary and sentence of life imprisonment was imposed.

The State introduced evidence tending to show that on 9 December 1974 at approximately 4:30 a.m., Marvin VanPelt was awakened by a noise in his house. As he arose from his bed, he was struck on the head and was rendered unconscious. When he regained consciousness, his hands were tied behind his back and his feet were tied with some bootlaces. He was in a weakened condition from loss of blood, but saw defendant in the house and watched as defendant took $58.00 from VanPelt's wallet and the keys to VanPelt's 1965 Ford Fairlane automobile. As a result of the injuries sustained when he was struck, VanPelt was hospitalized for nine days.

VanPelt testified that he had known defendant for about a year, and that in early November 1974 defendant had moved into VanPelt's house. VanPelt stated that prior to 9 December 1974, he had asked defendant to move from the house. VanPelt further testified that defendant did so, and that he had not seen defendant for some two weeks prior to 9 December 1974.

The State also introduced evidence tending to show that a window to VanPelt's house had been opened and that the window screen had been removed. VanPelt stated that at the time he went to bed his doors were locked.

A friend of defendant, Terry Stowe, testified that he had visited defendant in Florida during December 1974. During the visit, defendant told Stowe that he had hit an old man with a two-by-four and taken the man's money and car in order to return to Florida. Stowe also stated that while in Florida he had seen a 1965 Ford Fairlane with North Carolina license plates parked at the house in which defendant was staying.

Defendant took the stand and testified in his own behalf. He stated that he was actually living at VanPelt's house on 9 December 1974. He testified that it was his custom to enter the house through the window because he did not have a key. He further stated that he entered the house to pick up his belongings and move out. While in the house, VanPelt struck him on the arm with a piece of aluminum pipe and defendant then "beat him up." He left for Florida a day or two later. Defendant denied taking VanPelt's money or car.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten, Deputy Attorneys General Millard R. Rich, Jr., and Isham B. Hudson, Jr., and Associate Attorney James E. Scarbrough for the State.

J. Robert Rankin for defendant appellant.

MOORE, Justice.

[1, 2] Defendant first challenges the sufficiency of the bill of indictment, contending that the indictment was defective for two reasons: (1) that the house was not sufficiently described, and (2) that ownership was alleged in VanPelt, when actually the property belonged to Barber Scotia College. Defendant made no motion to quash the bill of indictment. Ordinarily, motions to quash after the evidence is in come too late. *State v. Walker*, 251 N.C. 465, 112 S.E. 2d 61 (1960). However, under Rule 10(a) of the Rules of Appellate Procedure, 287 N.C. 671, 698, upon appeal, any party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a

criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. *See State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901 (1960), for comparable practice under former Rule 21, 221 N.C. 544, 558. Under Rule 10(a), we proceed to examine the bill of indictment in this case which is as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Edward Beaver, late of the County of Cabarrus on the 9th day of December 1974 about the hour of 4:30 A.M. in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Marvin O. VanPelt there situate, and then and there actually occupied by one Marvin O. VanPelt feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Marvin O. VanPelt in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away the goods and chattels of Marvin O. VanPelt against the peace and dignity of the State."

In *State v. Coffey,* 289 N.C. 431, 222 S.E. 2d 217 (1976), we approved a bill of indictment almost identical to the one in this case. There, Justice Lake, speaking for the Court, said:

> "It is true that an indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. *State v. Smith,* 267 N.C. 755, 148 S.E. 2d 844 (1966). The indictment in the present case charges that the defendant 'in the county aforesaid [Rutherford], the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny * * * did break and enter' with the requisite intent. This is a sufficient description to withstand a motion to quash."

In present case, defendant testified that at one time he had lived in this house, and admitted that he was there on the night in question. He had ample information on which to prepare his defense. The bill of indictment alleged all the essential elements of the offense with sufficient certainty to (1) identify the offense; (2) protect the accused from being twice put in jeopardy for the same offense; (3) enable the

accused to prepare for trial; and (4) support judgment upon conviction or plea. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). *See also Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

[3] Defendant further contends that the indictment was defective in that it identifies the premises by its occupant VanPelt rather than its owner, Barber Scotia College. Burglary is a common law offense. It consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949). By statute, G.S. 14-51, the offense is divided into two degrees, first and second. The distinction between the two degrees depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime. "The purpose of the law [in the offense of first degree burglary] was and is to protect the habitation of men, where they repose and sleep, from meditated harm." *State v. Surles, supra*, at 275, 52 S.E. 2d at 882.

[4, 5] There are only two reasons for requiring ownership of the house to be stated in the indictment for burglary: (1) for the purpose of showing on the record that the house alleged to have been broken into was not the dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into one's own house, and (2) for the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense. *People v. Gregory*, 59 Ill. 2d 111, 319 N.E. 2d 483 (1974); *People v. Jamison*, 92 Ill. App. 2d 28, 235 N.E. 2d 849 (1968); *State v. Knizek*, 192 Wash. 351, 73 P. 2d 731 (1937). As was held in *Taylor v. State*, 214 Miss. 263, 266, 58 So. 2d 664, 665 (1952), in a burglary indictment, "the occupant of the building at the time of the burglary is the owner," and it is unnecessary to allege ownership of the title to the building. The decisions of this Court require only that the breaking and entering in the nighttime with intent to commit a felony be into a dwelling or a room used as a sleeping apartment which is actually occupied at the time of the offense. *State v. Davis, supra; State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). Thus, in burglary cases, we hold that occupation or possession of a dwelling or sleeping apartment is tantamount to ownership. There is no

requirement that actual ownership of the occupied premises be alleged and proved.

In the case at bar, VanPelt was occupying the house in question in the nighttime and was using it as a sleeping apartment. The bill of indictment so alleged and the evidence so showed. This is all that is required. We hold that there was no variance between the allegation and the proof.

Judgment was entered in this case on 7 January 1976. The next day, apparently during the same term but after appeal entries were entered, defendant moved for a new trial on the ground of newly discovered evidence. The motion was denied on 17 May 1976.

In *Wiggins v. Bunch,* 280 N.C. 106, 108, 184 S.E. 2d 879, 880 (1971), Justice Branch quoted with approval from *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659 (1963), as follows:

> " 'As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* . . . Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal.' " *See also State v. McLamb,* 208 N.C. 378, 180 S.E. 586 (1935).

Assuming, without deciding, that the trial court had jurisdiction to pass on the motion made during the same term, but not decided for several months thereafter, we go to the merits of defendant's motion.

[6] Defendant, in his motion for a new trial, states that while the jury deliberated he was informed by Detectives Taylor and Lee that prior to trial they had located Mick Gucanski, a man who had lived with VanPelt and defendant. He further states that Gucanski was not at the house on 9 December 1974 but would testify that defendant was living there on 9 December 1974. Defendant argues that the State concealed the whereabouts of Gucanski and that this act entitles him to a new trial.

The district attorney filed a verified response to defendant's motion denying that the officers knew Gucanski's whereabouts or that they had withheld any information from

defendant. The court then considered the motion and verified response as affidavits and made the following findings of fact:

> "1. That the Concord City Police Detectives Lee and Taylor made diligent efforts to locate the requested witness Mick Gucanski, whose testimony even available before the jury would only tend to corroborate the defendant and would not open up new matters.
>
> "2. That the State through its detectives provided the defendant with all information at their disposal regarding said witness."

[7] The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules as are applicable in civil cases. G.S. 15-174. A new trial may be granted for newly discovered evidence when it is shown that the moving party could not, with reasonable diligence, have discovered and produced the evidence at the trial, or for all other reasons which were heretofore recognized as grounds for a new trial prior to the passage of the statute. G.S. 1A-1, Rule 59(a)(4),(9). A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Williams*, 244 N.C. 459, 94 S.E. 2d 374 (1956); *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931). In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. *State v. Casey, supra.*

In *State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965), a State's witness, Summers, testified that he and defendant raped the prosecuting witness. The prosecutrix and her husband also testified that defendant had raped the woman. After trial, Summers recanted his testimony and defendant made a motion for a new trial. The trial court denied the motion and this Court

affirmed, holding that Summers' testimony was merely cumulative and corroborative of the testimony of the prosecutrix and her husband.

In *State v. Dixon,* 259 N.C. 249, 130 S.E. 2d 333 (1963), defendant was convicted of driving under the influence of alcohol. At trial, an expert testified that he had taken a sample of defendant's blood and analyzed it for content of alcohol. After conviction, defendant moved for a new trial on the ground that subsequent to the trial he had discovered that the blood sample had been disposed of prior to trial. Defendant made no inquiry as to the whereabouts of the blood sample prior to or during trial. The trial court denied the motion and this Court affirmed, holding that the denial of defendant's motion was not an abuse of discretion because defendant had the opportunity to inquire about the sample at trial but failed to do so.

[6] In present case, the proposed testimony of Gucanski would only have been cumulative and corroborative to that of defendant. Both detectives who purportedly knew of the location of Gucanski testified at trial. Defendant had ample opportunity to examine them as to their knowledge of the whereabouts of Gucanski. This he failed to do. Furthermore, if defendant considered Gucanski an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness. This he did not do. We hold, therefore, that the trial judge did not abuse his discretion in denying defendant's motion for a new trial.

Accordingly, we find no error in the trial.

No error.

NASCO EQUIPMENT COMPANY, PLAINTIFF v. RICHARD H. MASON, DBA DICK MASON LUMBER COMPANY, ORIGINAL DEFENDANT; DICK MASON LUMBER COMPANY, INC., ADDITIONAL DEFENDANT; AND FIRST-CITIZENS BANK & TRUST COMPANY, THIRD PARTY DEFENDANT

No. 41

(Filed 4 November 1976)

1. **Appeal and Error § 6; Rules of Civil Procedure § 54— partial summary judgment — no finding of "no just reason for delay" — judgment appealable**

Order of the trial court granting a partial summary judgment denied plaintiff a jury trial on the issue of its claim against defendant bank and, in effect, determined the claim in favor of the bank; thus, the order affected a substantial right of plaintiff and was appealable under G.S. 1-277 and 7A-27, even in the absence of a finding by the trial court pursuant to G.S. 1A-1, Rule 54(b) that there was "no just reason for delay."

2. **Rules of Civil Procedure § 54— interlocutory order — no finding of "no just reason for delay" — statutory right of appeal**

Where a party has a statutory right of appeal even from an interlocutory order, Rule 54(b) will never bar appeal even though the order appealed from fails to find "no just reason for delay."

3. **Uniform Commercial Code § 27— when security interest attaches — "rights in the collateral" — title not involved**

"Rights in the collateral" as used in G.S. 25-9-204(1), the statute setting forth when a security interest attaches, signifies not title, but merely *some* rights which may be transferred to the secured party.

4. **Uniform Commercial Code § 73— security interest in loadster — sufficiency of evidence**

In an action to recover possession of a loadster allegedly wrongfully possessed by defendant where defendant interpled a bank as third-party defendant on the basis of an alleged security agreement granting the bank a security interest in the loadster, the bank's affidavits and exhibits showed that the bank loaned defendant a specified sum and took back a note secured by the loadster in question as collateral, the security agreement was valid and enforceable under G.S. 25-9-203, defendant was in possession of the loadster prior to the bank's security agreement, a financing statement covering the loadster was filed with the office of the Secretary of State and with the county Register of Deeds, and that no financing statement for plaintiff covering the loadster appeared of record; such evidence was sufficient to show as a matter of law that the bank had a valid, enforceable and perfected security interest in the loadster and that plaintiff had no security interest with priority, and the trial court properly entered summary judgment for the bank. G.S. 25-9-204(1); G.S. 25-9-401.

5. **Uniform Commercial Code § 71— security interest in loadster — plaintiff's claim of consignment — failure to comply with statute**

In an action to recover possession of a loadster allegedly wrongfully possessed by defendant where defendant interpled a bank as third-party defendant on the basis of an alleged security agreement granting the bank a security interest in the loadster, there was no genuine issue of material fact as to plaintiff's contention that the transaction between plaintiff and defendant was a consignment and that the bank therefore could not acquire a security interest in the loadster where (1) the evidence demonstrated that the transfer of the loadster to defendant was a sale and not a consignment, and (2) even if the transaction was a consignment, the bank would still prevail with its security interest, since plaintiff failed to establish its contention of compliance with G.S. 25-2-326(3)(b) by showing that defendant was generally known by his creditors to be substantially engaged in selling the goods of others.

6. **Uniform Commercial Code § 16— consignment — allegations of retention of title — dealer as "agent" of supplier**

Plaintiff's allegations of title retention of a loadster delivered to defendant dealer were not of themselves sufficient to allow any inference of a consignment absent evidence of some commission for sales made by defendant or of defendant's right to return unsold goods; nor did the description of defendant as the "agent" of plaintiff in itself imply a consignment.

7. **Uniform Commercial Code § 16— rights of consignor against creditors of consignee — public notice**

Since G.S. 25-2-326(3)(b) is designed to require *public* notice of the rights of the consignor before he will be allowed to defeat the interests of creditors of the consignee, the statute must be interpreted to give emphasis to the *general* notice requirement.

8. **Uniform Commercial Code § 16— passage of title upon delivery**

Title to a loadster passed at the time of its delivery by plaintiff to defendant where there was no "explicit agreement" to the contrary within the purview of G.S. 25-2-401.

9. **Uniform Commercial Code § 73— retention of title by seller — possession of goods by debtor — necessity for written security agreement**

Since the debtor acquired possession of goods, the seller would have been required to execute a written security agreement to render its security interest created by retention of title to the goods enforceable even as against the debtor itself under G.S. 25-9-203; therefore, the retention of title by the seller would give the seller no rights as against a bank which perfected a security interest in the goods after their delivery to the debtor.

ON petition to review pursuant to General Statute 7A-31 the decision of the Court of Appeals, *Hedrick, J.*, reported without opinion in 29 N.C. App. 185, 223 S.E. 2d 411 (1976), dismissing under Rule 54(b) the plaintiff's appeal from summary

judgment entered by the trial court in favor of third-party defendant First-Citizens Bank & Trust Company.

Basil L. Whitener and Anne M. Lamm, attorneys for plaintiff appellant.

Hollowell, Stott & Hollowell by James C. Windham, Jr., attorneys for defendant appellee.

EXUM, Justice.

The Court of Appeals dismissed plaintiff's appeal on the ground that the judgment appealed from "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" without determining that there is "no just reason for delay" as required by General Statute 1A-1, Rule 54(b). Since plaintiff asserted a right of appeal under General Statutes 1-277 and 7A-27, the first issue in the case is whether a partial summary judgment which "affects a substantial right" but which fails to satisfy certain requirements for appeal under Rule 54(b) is nevertheless appealable. We hold that it is.

On the merits the contest before us is between competing creditors of Mason Lumber Company, both of whom claim an interest in a chattel which had been delivered to Mason, a dealer, in the ordinary course of business by its supplier, Nasco Equipment Company. The creditors are the plaintiff Nasco and the third-party defendant First-Citizens Bank. The second issue thus presented is whether, upon the factual showing made by the parties, the bank is entitled to summary judgment in its favor. We hold that it is.

This action began with a complaint alleging debts owed plaintiff Nasco by defendant Mason for merchandise delivered. In addition, the complaint alleged that on April 12, 1973, defendant took into possession one Nasco Loadster, Serial No. 554, Model GF8, with 24-foot mast, and that the loadster was plaintiff's property and was being wrongfully possessed by Mason. Plaintiff sought to recover the possession of the loadster or in the alternative its value. Mason answered, denying Nasco's right to possession, counterclaiming for certain commissions owed him by plaintiff and interpleading First-Citizens as third-party defendant on the basis of an alleged security agreement granting the bank a security interest in the loadster. Mason's answer also alleged that Nasco conducted the business described

in the complaint with Dick Mason Lumber Company, Inc., a corporation wholly owned by Mason. Mason prayed that the corporation "be named as the proper party defendant." By order the corporation was made a party defendant and claims against it were asserted in later pleadings by Nasco. Mason, individually, and his corporation will be referred to herein simply as "Mason." First-Citizens answered, alleging a perfected security interest in the loadster and denying Nasco's right to possess. In its response, Nasco contended that Mason had no power to create a security interest in the loadster. On the bank's motion the trial court granted summary judgment for First-Citizens.

[1] The order granting summary judgment denies plaintiff a jury trial on the issue of its claim against the bank and, in effect, determines the claim in favor of the bank. Thus the order affects a substantial right and is appealable under General Statutes 1-277 and 7A-27. Rule 54(b) was designed to expand opportunities for appellate review to those circumstances where no other rule or statute allows appeal and, absent the requisite determination by the trial judge that there is "no just reason for delay," an appeal of the order would be barred because of lack of finality. Rule 54(b) allows the trial court to render a final, though partial, adjudication in these circumstances.

[2] Thus, where a party has a statutory right of appeal even from an interlocutory order, Rule 54(b) will never bar appeal even though the order appealed from fails to find "no just reason for delay." This question was recently determined by this Court in *Oestreicher v. Stores,* 290 N.C. 118, 225 S.E. 2d 797 (1976). *Oestreicher,* which held a summary judgment on the issue of punitive damages to be appealable, controls in this case. *See also Newton v. Insurance Company,* 291 N.C. 105, 229 S.E. 2d 297 (1976), decided this day. For these reasons, the Court of Appeals erred in dismissing plaintiff's appeal.

We therefore turn to a consideration of the merits of plaintiff's contention that summary judgment was improperly entered in the trial court. Rule 56(c) provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that any party is entitled to judgment as a matter of law."

The nature and purpose of the summary judgment rule becomes more apparent upon a consideration of Rule 56(e), which provides, *inter alia:*

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." (Emphasis added.)

This Court has previously observed that the purpose of the rule is to eliminate formal trials where only questions of law are involved. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The procedure under Rule 56 is designed to allow a "preview" or "forecast" of the proof of the parties in order to determine whether a jury trial is necessary. *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975). *See* Louis, "Federal Summary Judgment Doctrine: A Critical Analysis," 83 Yale L.J. 745 (1974). Thus a motion under Rule 56 allows the court to "pierce the pleadings" to determine whether any genuine factual controversy exists. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972).

Since the "heart of the summary judgment procedure and the test applied in reviewing . . . a trial court's ruling" on a Rule 56 motion is the finding that there is "no genuine issue as to any material fact," *Railway Co. v. Werner Industries,* 286 N.C. 89, 95, 209 S.E. 2d 734, 737 (1974); 10 Wright & Miller, Federal Practice and Procedure: Civil §§ 2716 and 2725 (1973), it is necessary to resolve the significance of the term "material fact." We said in *Railway Co. v. Werner Industries, supra* at 95, 209 S.E. 2d at 737:

> " 'The determination of what constitutes a "genuine issue as to any material fact" is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. *A question of fact which is immaterial does not preclude summary judgment.*' " (Emphasis added.)

It is apparent that one of the situations in which the use of Rule 56 would be appropriate is that in which a "material fact" is alleged and denied by the parties but in which the preview of the proof reveals the existence or nonexistence of that fact to be indisputable. In other words, although the allegations of the pleadings are sufficient to withstand a motion for dismissal under Rule 12(b)(6), the party against whom summary judgment is rendered is wholly unable to support his allegations with facts.

To avoid the possibility of any party's manufacturing "facts" to meet a motion for summary judgment, Rule 56(e) requires that: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Since, on a motion for summary judgment, the court scrutinizes closely the supporting papers of the movant, while treating indulgently those of the opposing party, accepting as true all facts duly asserted by the responding party, *Railway Co. v. Werner Industries, supra,* genuine factual controversies are reserved for the jury. Of course, any party with insufficient access to necessary facts to meet a motion for summary judgment is protected by compliance with Rule 56(f) which provides:

> *"When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The Court has recognized the peculiar difficulties posed by a Rule 56 motion supported by affidavits of an interested party where no direct challenge to their truth or credibility is made by the opponent. *Taylor v. City of Raleigh,* 290 N.C. 608, 227 S.E. 2d 576 (1976); *Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976).

[4] In this case the record to be considered consists of the pleadings, answers to interrogatories, affidavits and exhibits attached. First-Citizens Bank submitted two affidavits in sup-

port of its motion. The first is that of Betty Morris, Deputy Registrar for the Gaston County Register of Deeds. Her affidavit establishes that:

> "On October 24, 1973, a financing statement was filed in the office of the Register of Deeds for Gaston County by First-Citizens Bank & Trust Company as secured party against Dick Mason Lumber Co., Inc. as debtor; that said financing statement is duly recorded in File Number 7111 and names and describes as collateral, '1973 NASCO GF 8000 Lb. Fork Lift S#554'; that there does not appear of record a financing statement for Nasco Equipment Company covering the above-described collateral."

A copy of the financing statement was attached and appears to be in proper form. The affiant is not a party, nor does any issue as to her credibility appear in the record.

The second affidavit submitted by the bank is that of Ronald O. Turlington, Assistant Vice President of First-Citizens at its Gastonia office. This affidavit, unopposed by any factual assertions in the record, establishes that First-Citizens loaned $8,350.00 to the defendant Dick Mason Lumber Co., Inc., taking back a note secured by the loadster in question as collateral. The security agreement (a copy of which was attached as an exhibit) appears valid and enforceable under General Statute 25-9-203. The affidavit further establishes that a financing statement covering the loadster was filed with the office of the Secretary of State of North Carolina in Raleigh and with the Register of Deeds of Gaston County. Although Turlington is an employee of an interested party, his averments are unchallenged by plaintiff and the only doubts as to his credibility are "latent" doubts. *See Kidd v. Early, supra* at 370, 222 S.E. 2d at 410. Moreover the affidavit is supported by documentary evidence as to the existence and nature of the security agreement, and by the affidavit of Betty Morris as to the Gastonia filing.

[3] General Statute 25-9-204(1) provides that a security interest attaches when "there is agreement that it attach and value is given and the debtor has rights in the collateral." "Rights in the collateral" is a term signifying not title, but merely *some* rights which may be transferred to the secured party. *See* 1 Bender's Uniform Commercial Code Service, Secured Transactions § 4.06[1] (1976). A debtor may acquire "rights in the collateral" even where the collateral consists of

consigned goods. J. White and R. Summers, Uniform Commercial Code, § 23-4 at 795 (1972). The bank's affidavits and exhibits show agreement and value given. The possession of the loadster by Mason prior to the bank's security agreement is established by plaintiff's own verified complaint. *Schoolfield v. Collins,* 281 N.C. 604, 189 S.E. 2d 208 (1972). There is thus sufficient evidence in the record unencumbered by any question of credibility to establish that the bank had a security interest in the loadster valid and enforceable against the debtor Mason. Moreover, the bank's security interest was properly perfected by filing pursuant to General Statute 25-9-401.

Although Nasco had averred in its "Answer to [First-Citizens'] Motion to Intervene" that the bank's "purported filing" was not in compliance with the Uniform Commercial Code and was insufficient to give the bank rights superior to those of the plaintiff, Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on such conclusory allegations unsupported by facts.

[4] In this case the bank has shown that it has a valid, enforceable and perfected security interest in the loadster. Under the Uniform Commercial Code the bank must prevail unless plaintiff shows itself to have a security interest *with priority* under Article 9 of the Code or a non-security type consignment in compliance with General Statute 25-2-326(3). That the plaintiff might have any perfected security interest in the loadster is thoroughly negated by Betty Morris' affidavit showing no financing statement of record for Nasco. No factual showing to the contrary is made by plaintiff. Instead, plaintiff relies on (1) allegations of a reservation of title in plaintiff; (2) allegations that the bank "knew or should have known" that the loadster did not belong to Mason. Plaintiff alleges, in essence, that Mason had no title to the loadster and the bank knew it. Therefore the bank cannot have perfected any security interest in the loadster as against the plaintiff. No facts are produced to support these allegations. Moreover, even if they were resolved in plaintiff's favor, the allowable inferences would be insufficient to preclude a summary judgment for the bank. In other words, even if Nasco's allegations as to title and the bank's knowledge were taken as "fact," they are not "material fact" within the meaning of Rule 56 as defined in *Railway Co. v. Werner Industries, supra.*

It seems likely that plaintiff has mistakenly relied on the traditional North Carolina rule that the mere entrustment to a bailee by an owner of a chattel would not preclude the owner from recovering possession as against the mortgagee of the bailee since the bailee had no title and the mortgagee did not occupy the position of a *bona fide* purchaser. The exception to this rule lay in circumstances where the owner clothed the mortgagor with the indicia of ownership. *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908 (1954). Plaintiff, in essence, is relying on our traditional concepts of title in order to resolve what is essentially a security interest problem, the answer to which must be found in the Uniform Commercial Code. The Code has significantly modified our traditional rules in this area. "The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems." *Insurance Co. v. Hayes*, 276 N.C. 620, 632, 174 S.E. 2d 511, 518 (1970).

[5] The plaintiff contends in substance that the record is sufficient to allow an inference that the transaction between Nasco and Mason was a consignment. To this contention there are two answers. First, everything in this record demonstrates that the transaction was a sale and not a consignment. Second, even if it was a consignment, the bank must still prevail because plaintiff has not complied with General Statute 25-2-326.

[6] "[T]he hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods." Hawkland, "Consignment Selling Under the Uniform Commercial Code," 67 Commercial L.J. 146 (1962). According to the "Dealer Contract" between Nasco and Mason, offered as an exhibit, Mason as dealer would receive a 25 percent discount off list price of goods delivered to it by Nasco with all invoices payable within ten days and a one percent per month charge to be added when Mason's payment was late. Although plaintiff alleges in its unverified "Reply to Amended Answer" that Mason "dealt with plaintiff on an open account basis on merchandise other than the Nasco loadster mentioned in the Complaint" and that Mason "never at any time purchased" the loadster, it failed to support these conclusory allegations with any factual assertions. These allegations, moreover, of title retention even if true are not sufficient of themselves to allow any inference of a consignment, absent evidence of some commission for sales made by Mason or of Mason's right to return unsold goods. Nor does

the "mere fact that the seller has not been paid or is selling on credit . . . give rise to any presumption or implication that the transaction is to be a secured transaction or that title is to be retained by the vendor until payment has been made." 2 R. Anderson, Uniform Commercial Code, § 2-401:14 (2d ed. 1971). The description in the affidavit of C. R. Kennett, Vice President and Sales Manager of Nasco, of Mason as "agent" of Nasco does not in itself imply a consignment.

Even if a consignment were intended by Nasco and Mason, the bank must still prevail under the Code. If the consignment were intended as security, the consignor must comply with the filing requirements of Article 9 to prevail. G.S. 25-1-201(37). This was not done. If the consignment is not for security, reservation of title is not a security interest, but the consignor must nevertheless comply with the requirements of General Statute 25-2-326 in order to defeat any creditor of the consignee. G.S. 25-1-201(37). General Statute 25-2-326(3) allows a consignor to prevail by (a) complying with "an applicable law" by erecting a sign, (b) establishing "that the person [consignee] conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others," or (c) filing under Article 9.

[7] Plaintiff rests its hopes of recovery on an argument that the record shows its compliance with subsection (b) above. The only evidence in the record, however, to support this argument is Mason's answers to interrogatories describing his business as "Lumber business and fork lift sales." Plaintiff apparently relies on the absence of evidence of Lumber Company's *manufacturing* loadsters to support its position. The mere lack of manufacturing does not establish that all loadsters sold by Mason were "the goods of others." Nor is there anything in the record to support the real test to be met under Section 25-2-326(3)(b): that the consignor show general knowledge by creditors of the consignee that the consignee is substantially engaged in selling the goods of others. Since the statute is designed to require *public* notice of the rights of the consignor before he will be allowed to defeat the interests of creditors of the consignee, the statute must be interpreted to give emphasis to the *general* notice requirement. The purpose of the section is to protect "innocent creditors from deception by ostensible ownership." "Commercial Transactions: UCC Section 2-326 and Creditors Rights to Consigned Goods," 65 Columbia L. Rev. 547 (1965).

See General Electric Co. v. Pettingell Supply Co., 199 N.E. 2d 326 (Mass. 1964).

Plaintiff's reliance on *In re Mincow Bag Co.*, 29 App. Div. 2d 400, 288 N.Y.S. 2d 364 (1st Dep't 1968) is misplaced since in that case the majority held Section 2-326 of the Code to be inapplicable on the basis of the consignee's failure to "maintain a place of business at which he deals in goods of the kind involved." In this case Mason clearly has a place of business dealing in fork lifts. Moreover, a consideration of the facts in *Mincow Bag*, which apparently involved a true consignment, lends support to our conclusion that no consignment exists at all in the case at bar.

[8] Under the sale theory of this transaction, title likewise offers no solution to plaintiff's predicament. General Statute 25-2-401 provides that, "unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." There is no "explicit agreement" even alleged in the case at bar. Thus title passed by law in this case to Mason long before any security interest was created in favor of the bank.

[9] Even if title had been retained by Nasco, however, General Statute 25-1-201(37) provides: "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of a 'security interest.' " Under General Statute 25-9-113, such a security interest is subject to the provisions of Article 9, "except . . . to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods." Since the debtor, Mason, did acquire possession of the goods, Nasco should have had executed a written security agreement to render its security interest (created by the retention of title) enforceable even as against the debtor itself under General Statute 25-9-203. *See* 1 Bender's Uniform Commercial Code Service, Secured Transactions, § 4.07[2] at 314.2-314.3 (1976). The retention of title in these circumstances gives Nasco no rights as against First-Citizens.

In summary, plaintiff has failed to support its contentions by the factual showing required to oppose First-Citizens' affidavits under Rule 56. Moreover, even if the issues of title retention and consignment were resolved in plaintiff's favor, the bank

must still prevail. There are, therefore, no issues of "material fact" to be found in this record, and the trial court was eminently correct in granting summary judgment for First-Citizens.

The decision of the Court of Appeals dismissing plaintiff's appeal is reversed. The order of the trial court granting summary judgment for First-Citizens Bank & Trust Company is affirmed.

JUDITH C. HENRY v. HAROLD J. HENRY

No. 25

(Filed 4 November 1976)

1. **Courts § 21; Husband and Wife § 7— right of wife to sue husband in tort — what law governs — effect of G.S. 52-5.1**

The rule that the law of the state wherein the injury occurred determines the right of an injured wife to maintain in the courts of this State an action for damages against the husband whose negligence was the proximate cause of the injury was rescinded by G.S. 52-5.1 with reference to the right of a wife domiciled in North Carolina to maintain, in the courts of this State, an action for damages for injuries proximately caused by the negligence of her husband in another state; however, that statute did not affect the rule with reference to the right of a nonresident wife to sue her husband in the courts of this State to recover damages for injuries inflicted in this State and proximately caused by his negligence.

2. **Courts § 21; Husband and Wife § 7— right of wife to sue husband in tort — what law governs — significant contacts test**

The Supreme Court declines to adopt the rule that the right of one member of a family to sue another member thereof for injuries proximately caused by such defendant's negligence should be governed by the law of the state having "the most significant relationship or contacts with the matter in dispute," which is normally, though not always, the state of the domicile of the family.

3. **Courts § 21; Husband and Wife § 7— accident in this State — right of nonresident wife to sue husband**

A wife injured in an automobile collision upon a highway in North Carolina proximately caused by the negligence of her husband, the driver of the automobile, may maintain in the courts of North Carolina an action against her husband for damages on account of her injuries, although the parties were domiciled at the time of the collision in the State of Pennsylvania and the laws of that state do not permit such an action to be maintained by a wife against her husband.

APPEAL from the decision of the Court of Appeals, reported in 29 N.C. App. 174, 223 S.E. 2d 564 (1976), from which *Chief Judge Brock* dissented. The Court of Appeals affirmed the order of *Preston, J.*, at the 2 September 1975 Session of Durham overruling the motion of the defendant to dismiss the action.

The parties are, and at all times pertinent to this action were, husband and wife domiciled in Pennsylvania. The complaint alleges that, on 11 February 1973, the defendant husband was driving his automobile, in which the plaintiff wife was riding as a passenger, on Interstate Highway 85 in Granville County, North Carolina, that the automobile collided with another motor vehicle owned and operated by Franklin Delano Allen, in the collision the plaintiff wife sustained substantial bodily injuries in the treatment of which she incurred substantial expenses for hospital and medical services, that the defendant husband was negligent in specified respects in driving his said automobile and that such negligence was the proximate cause of the collision and of the resulting injuries sustained by the plaintiff, for which injuries she prays judgment in the amount of $110,000.

Prior to answering the complaint, the defendant husband moved to dismiss the action for want of jurisdiction over the subject matter by reason of the fact that the parties are residents of Pennsylvania and by the law of that state a wife may not maintain such an action against her husband. Simultaneously, the defendant husband made certain other motions not pertinent to this appeal.

Judge Preston concluded that the laws of North Carolina and not the laws of Pennsylvania control the right of the plaintiff wife to maintain this action and denied the motion to dismiss.

DeMent, Redwine, Yeargan & Askew by Garland L. Askew for plaintiff.

Bryant, Bryant, Drew & Crill by Victor S. Bryant, Jr., for defendant.

LAKE, Justice.

[3] The sole question upon this appeal is: May a wife, injured in an automobile collision upon a highway in North Carolina proximately caused by the negligence of her husband, the driver

of the automobile, maintain in the courts of North Carolina an action against her husband for damages on account of such injuries, the parties being domiciled at the time of the collision in the State of Pennsylvania, under the laws of which state no such action may be maintained by a wife against her husband?

In *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101 (1931), the husband and wife were domiciled in North Carolina. She brought an action against him in North Carolina for injuries alleged to have been proximately caused by his negligent driving of an automobile in which she was riding as a passenger in the State of New Jersey. The law of North Carolina then, as now, permitted a wife to sue her husband for damages for injuries proximately caused by his negligence. The law of New Jersey did not allow a wife to maintain such an action against her husband. In affirming a judgment of nonsuit, this Court, speaking through Justice Adams, said:

> "The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done; that is, the measure of the defendant's duty and his liability for negligence must be determined by the law of New Jersey. (Citations omitted.) If an act does not give rise to a cause of action where it is committed the general rule is that the party who commits the act will not be liable elsewhere, and in such event it is immaterial that a cause of action would have arisen if the wrong had been done in the jurisdiction of the forum."

Thus, *Howard v. Howard, supra,* held that although under the law of the state of the domicile (North Carolina) a wife may maintain an action against her husband for injuries proximately caused by his negligence, she may not maintain such an action in the courts of this State if the injury occurred in a state under the laws of which she could not maintain such an action.

In *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649 (1940), the facts were similar to the present case. The parties were husband and wife domiciled in Ohio, the law of which state did not permit a wife to maintain an action against her husband for injuries proximately caused by his negligence. The plaintiff wife brought such an action in the court of this State alleging

such injury to her in an automobile accident which occurred in North Carolina, the law of this State permitting the wife to maintain an action against her husband for such injury. The husband's motion to dismiss was denied by the trial court. This Court affirmed. In an opinion by Justice Clarkson, in which Justice Devin, later Chief Justice, joined, it was said: "In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband, *Roberts v. Roberts,* 185 N.C. 566; *Shirley v. Ayers,* 201 N.C. 51 (55); *Jernigan v. Jernigan,* 207 N.C. 831. We think that although the p'aintiff is a nonresident and the action transitory, the doors of the courts of this State are open to her to determine her rights," citing *Howard v. Howard, supra.* In a concurring opinion by Chief Justice Stacy, in which Justice Schenck joined, it was said: "There is no occasion to inquire whether a wife can sue her husband under the Ohio law. The law of the forum is alone applicable to the case," citing *Howard v. Howard, supra.* Justice Barnhill, later Chief Justice, wrote a dissenting opinion in which Justice Winborne, later Chief Justice, and Justice Seawell joined. The basis of the dissent was that if the wife recovered judgment in North Carolina, she would have to sue upon that judgment in Ohio "so as to be entitled to execution" and, when she did so, she would be "met at the threshold of that suit by her disability," so that in practical effect she would own nothing. The question of whether the Full Faith and Credit Clause of the Constitution of the United States would require Ohio to recognize the judgment of North Carolina as valid was not discussed in the dissenting opinion, nor did the dissenting opinion discuss the possibility that the North Carolina judgment might be enforceable by execution in some state other than that of the then domicile of the parties.

Thus, in *Bogen v. Bogen, supra,* this Court held that the law of the state in which the injury occurred (or the law of the state of the forum), not the law of the domicile, would govern the right of a wife to maintain against her husband a suit for damages for injury proximately caused by his negligence and the action could be maintained in a North Carolina court if maintainable where the injury occurred.

In *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523 (1940), the parties were husband and wife domiciled in Massachusetts, under the law of which state a wife could not maintain an action against her husband for injuries proximately caused by his neg-

ligence. The plaintiff wife sued in North Carolina for injuries sustained by her in an automobile accident which occurred in this State and which she alleged was proximately caused by the negligence of her husband. The husband's motion to dimiss was overruled and this Court affirmed, saying through Justice Clarkson, without dissent, "We think that although plaintiff is a nonresident and the action transitory, the doors of the courts of this State are open to her to determine her rights." While the opinion in *Alberts v. Alberts, supra,* does not mention the inability of the wife to sue in the state of her domicile, the decision, in effect, was that the of the state wherein the injury occurred (or the state of the forum), not the law of the state of the domicile, controlled the right of the wife to maintain such action.

Thus, as of 1940, the decisions of this Court clearly established that the right of a wife to sue in the courts of North Carolina for damages for personal injuries proximate'y caused by the negligence of her husband depended upon the law of the state wherein the injury occurred, not upon the law of the state of the domicile of the parties and this was true whether such rule resulted in the allowance or disallowance of the action in North Carolina.

In *Shaw v. Lee,* 258 N.C. 609, 129 S.E. 2d 288 (1963), the parties were husband and wife domiciled in North Carolina. The wife brought suit in the courts of North Carolina to recover damages for personal injuries received by her in an automobile accident which occurred in Virginia and which she alleged to have been proximately caused by the negligence of her husband. The law of Virginia did not allow a wife to bring such an action against her husband. The husband's demurrer to the complaint was sustained by the Superior Court and, on appeal, this Court affirmed that decision in a unanimous opinion written by Justice Rodman, thus reaffirming the rule of *Howard v. Howard, supra,* to the effect that the wife, though domiciled in North Carolina, could not maintain such an action in the courts of this State for injuries received in a state wherein the law did not permit a wife to bring such an action, although she could have maintained the action in the courts of this State had the accident occurred in North Carolina. Justice Rodman, speaking for a unanimous Court, said:

> "We have in previous decisions held claimant's right to recover and the amount which may be recovered

for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injured party has none which can be enforced elsewhere. * * *

"We have given thoughtful consideration to the cases and articles to which plaintiff, in her well prepared brief, called our attention. In our view it is not a question of the capacity of the spouse to sue but a question of whether the spouse ever had a cause of action. * * *

"The reasoning supporting the conclusions reached in *Howard v. Howard, supra,* and *Bogen v. Bogen, supra,* is, we think, sound. To depart from the principles on which those cases were based will open the door to a multitude of claims founded on the assertion that the law of the *lex domicilii* is more equitable and just than the *lex loci*—justifying the application of our substantive law instead of the *lex loci.* We do not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules."

In *Petrea v. Tank Lines,* 264 N.C. 230, 141 S.E. 2d 278 (1965), the parties were domiciled in North Carolina and the plaintiff wife was injured in an automobile accident in West Virginia under the law of which the wife could not bring an action for personal injuries proximately caused by the negligence of her husband. The plaintiff instituted action against the owner of the other vehicle involved in the accident and the original defendant brought a cross-action against the plaintiff's husband for contribution. The husband demurred to the cross-action. The demurrer was sustained and the cross-action dismissed. This Court affirmed in a Per Curiam opinion stating:

"Original defendant * * * argues * * * that we should overrule *Shaw v. Lee, supra,* and thus abandon our well-established conflicts rule, in order to apply the law of the State which has had 'the most significant relationship or contacts with the matter in dispute.' — in this case, appellant contends, North Carolina. Such an approach is referred to as the 'center of gravity' or 'grouping of contacts' theory. * * * Notwithstanding that appellant's counsel in his brief and in his argument presented his case to this Court in the best possible light, the same reasons which

dictated our decision in *Shaw v. Lee, supra,* constrain us to adhere to it."

Thus, as of 1965, the decisions of this Court clearly established that the right of the wife in maintaining such an action against her husband in the courts of North Carolina was governed by the law of the state in which the injury occurred, not by the law of the domicile of the parties and this was true whether the parties were domiciled in North Carolina and the injury occurred in another state, or vice versa.

[1] In 1967, the Legislature enacted G.S. 52-5.1 which provides: "A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts." Thus, the Legislature, by the enactment of this statute, rescinded the rule of *Howard v. Howard, supra, Shaw v. Lee, supra,* and *Petrea v. Tank Lines, supra,* with reference to the right of a wife domiciled in North Carolina to maintain, in the courts of this State, an action for damages for injuries proximately caused by the negligence of her husband in another state. This statute left untouched the rule of *Bogen v. Bogen, supra,* and *Alberts v. Alberts, supra,* with reference to the right of a nonresident wife to sue her husband in the courts of North Carolina to recover damages for injuries inflicted in this State and proximately caused by his negligence.

G.S. 52-5.1, therefore, does not constitute a legislative rescission in its entirety of the rule that the law of the state wherein the injury occurred determines the right of the injured wife to maintain in the courts of this State an action for damages against the husband whose negligence was the proximate cause of the injury. With the wisdom of that statute, we are not concerned. Our function is simply to give it the effect intended by the Legislature, not to broaden its effect. Clearly, this statute was designed by the Legislature to enable a North Carolina resident to sue in the courts of this State, notwithstanding such rule. This statute may not lawfully be construed so as to deprive the nonresident wife of her previously established right to maintain in the courts of this State an action against her husband for injuries sustained within North Carolina and proximately caused by his negligence.

The defendant contends that, irrespective of G.S. 52-5.1, we should now overrule *Bogen v. Bogen, supra,* and *Alberts v. Alberts, supra,* and deny to the nonresident wife access to the courts of North Carolina for redress of her injuries in such case if she and her husband are domiciled in a state whose law would not permit her to maintain such action in its courts. As the Court of Appeals observed, the defendant, in his brief and oral argument, has presented forcefully and persuasively substantial authority supporting his position. His arguments and his authorities are, however, the same as those presented to and rejected by this Court in *Shaw v. Lee, supra,* with the addition of a few more recent decisions of courts of other states, notably *Thompson v. Thompson,* 105 N.H. 86, 193 A. 2d 439, 96 A.L.R. 2d 969 (1963), and cases cited in the annotation appearing in 96 A.L.R. 2d 973.

[2] It is apparent that there has been an increase in the jurisdictions which reject the rule that this matter is to be determined by the law of the state where the injury occurs. These decisions, originating with the case of *Emery v. Emery,* 45 Cal. 2d 421, 289 P. 2d 218 (1955), are, generally, to the effect that the right of one member of a family to sue another member thereof for injuries proximately caused by such defendant's negligence should be governed by the law of the state having "the most significant relationship or contacts with the matter in dispute," which, in the opinion of these courts, is normally, though not always, the state of the domicile of the family. This is the view adopted by the American Law Institute's Second Restatement of Conflicts of Laws. Restatement, Conflict of Laws 2d, §§ 145, 169, a departure from the position taken by the First Restatement, which was current at the time of the above cited decisions of this Court.

The Second Restatement of Conflicts, § 145, states:

> "(1) The rights and liabilities of the parties with respect to an issue in tort are to be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> "(2) *Contacts to be taken into account* in applying the principles of § 6 to determine the law applicable to an issue *include:*
>
> (a) the place where the injury occurred;

(b) the place where the conduct causing the injury occurred;

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties;

(d) the place where the relationship, if any, between the parties is centered.

"These contacts are to be evaluated according to their relative importance with respect to the particular issue." (Emphasis added.)

[3] In our opinion, for us to direct the trial courts of this State to determine the right of the nonresident wife to maintain an action for negligent injuries against her husband by considering these and other "contacts" and weighing them in each situation would be to "voyage into such an uncharted sea" as was envisioned by Justice Rodman in *Shaw v. Lee, supra.* For the reasons which he there found persuasive against the same arguments now advanced to us by the defendant in this action, we do not deem it wise to embark upon such a voyage and leave behind the well established conflict of laws rules, laid down for the determination of this matter by our predecessors, so as to close the doors of the courts of North Carolina to a wife (or husband) injured in North Carolina by the negligence of her husband (or his wife) on account of the fact that the parties are domiciled in a state which, for reasons satisfactory to it, does not permit the bringing of such action by one spouse against the other. If, as a matter of state policy, such change in our law should be made, it should be made by the Legislature through the adoption of a counterpart to G.S. 52-5.1.

Affirmed.

STATE OF NORTH CAROLINA v. WILLIE JAMES ASBURY

No. 31

(Filed 4 November 1976)

Criminal Law § 126— polling the jury — question of juror — response of judge not prejudicial

Where one juror, during the polling of the jury, asked why three questions were put to each juror and asked what the differences in

the questions were, the trial court's response to the juror's inquiry that all three questions would call for the same response, though erroneous, was not prejudicial to defendant, since the juror in question unequivocally assented to the verdict at least twice, the questions propounded were simple and self-explanatory, the attorneys argued on defendant's motion for mistrial in the jury's presence concerning the nature of the questions and a juror's right to dissent from the verdict, and there was substantial evidence adduced at trial pointing to defendant's guilt.

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. 291, 224 S.E. 2d 200 (1976) (Clark, J. dissenting), finding no error in judgment of *Kirby, J.* entered 14 May 1975, GASTON County Superior Court.

Defendant was tried under an indictment proper in form charging him with the crime of robbery with a firearm. Upon call of the case and upon motion of the State, defendant's case was consolidated for trial with that of Edward Conner, Jr., another defendant allegedly involved in the same robbery.

The evidence for the State tended to show that on 14 January 1975 at about 4:15 p.m., the defendant and Edward Conner, Jr. drove to the Fairview Grocery and Service Station in Gastonia. Upon entering the store, the defendant went to the candy counter and Conner went to the ice cream box. The defendant asked Raymond H. Robinson, the proprietor, for a candy bar located underneath the counter. When Robinson stood up from getting the candy, he saw the defendant pointing a small pistol at him. The defendant demanded money and instructed him to open the cash register. Conner searched Robinson and took his wallet along with $25.00 from the cash register. As they drove off, Robinson wrote down the license plate number of the vehicle.

At the trial Robinson identifed the defendant and Conner as the two people that robbed him on 14 January 1975. Other evidence for the State tended to show that defendant Conner had possession, at the time of the robbery, of a license plate identical to the one on the getaway car. The license tag in question had been in the trunk of a vehicle delivered to Conner for repair purposes.

The defendant relied upon alibi testimony from several witnesses but did not testify himself. Upon a verdict of guilty,

both defendants moved for a poll of the jury and the manner in which this poll was conducted is the subject of this appeal. The facts incident thereto will be related in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Robert P. Gruber for the State.

Goeffrey A. Planer for the defendant.

COPELAND, Justice.

The defendant brings forward only one assignment of error, relating to the jury poll. In particular, the defendant cites as error the trial judge's interpretation of the three questions that were asked each juror by the clerk during the poll. "Was this your verdict? Is this now your verdict? Do you still agree and assent thereto?"

During the poll of the jury for the defendant Conner, as to juror David M. Houck, the following appears of record:

"CLERK: David M. Houck. (Stands.) Your foreman has reported to the Court a verdict of guilty of robbery with a firearm as to Edward Conner, Jr. Was this your verdict?

"DAVID M. HOUCK: (No response.)

"CLERK: Was this your verdict?

"DAVID M. HOUCK: Can I ask—uh. I hate to be—can I ask what the difference in the three questions is?

"THE COURT: I'm sorry. Will you phrase your question again?

"DAVID M. HOUCK: What are the differences in the three questions that she asked?

"THE COURT: I'll let her ask the questions again.

"CLERK: The three questions are: 'Was this your verdict? Is this now your verdict? Do you still agree and assent thereto?'

"DAVID M. HOUCK: What I'm asking is, why are there three questions?

"THE COURT: They would really call for the same response, I would say. I just don't know how better to explain. Ask the first question.

"CLERK: Was this your verdict?

"DAVID M. HOUCK: Yes, it was.

"CLERK: Is it now your verdict?

"DAVID M. HOUCK: (Long pause.) Yes.

"CLERK: Do you still agree and assent thereto?

"DAVID M. HOUCK: What would happen if I said no?

"MR. FUNDERBURK: (Counsel for Conner) Your Honor, I think that he should be instructed that he has a right to say no, and that he should do so, if he so feels.

"THE COURT: Well, sir. You will just have to answer the questions, and the Court will take such steps as must be taken, but you must answer the question. Ask the question again.

"CLERK: Do you still agree and assent thereto?

"DAVID M. HOUCK: Yes, sir."

When the jury was polled for defendant Asbury the following occurred when the Clerk reached David M. Houck:

"CLERK: David M. Houck. Your foreman has reported to the Court a verdict of guilty of robbery with a firearm as to Willie James Asbury. Was that your verdict?

"DAVID M. HOUCK: Yes, ma'am.

"CLERK: Is that now your verdict?

"DAVID M. HOUCK: Yes, ma'am.

"CLERK: Do you still agree and assent thereto?

"DAVID M. HOUCK: Yes, ma'am."

At the conclusion of the polling of the jury for each defendant, the following occurred:

"CLERK: Members of the jury, you have found the defendant, Willie James Asbury, guilty of robbery with a firearm. This is your verdict, so say you all?

"JURORS: Yes."

After the clerk had polled the last juror, both defendants moved for a mistrial based on Juror Houck's request for in-

structions and the court's failure to instruct. After the court heard arguments from counsel in the presence of the jury, the following exchange took place:

"THE COURT: Mr. Houck, stand up. (Mr. Houck stands.) Poll Mr. Houck again. Mr. Houck, listen to the questions. As I indicated to you, I think the questions are self-explanatory. Ask the juror the first question—

"MR. FUNDERBURK: Your Honor, if I might, I think the problem is Mr. Houck doesn't understand—

"THE COURT: All I want is Mr. Houck's verdict. That's all. With reference to what happens, that's of no concern to him. All I want to know is what his verdict is. So ask the questions again.

"CLERK: Mr. Houck, your foreman has reported to the Court a verdict of robbery with a firearm as to Edward Conner, Jr. Was this your verdict?

"MR. HOUCK: Yes, ma'am.

"CLERK: Is this now your verdict?

"MR. HOUCK: Yes, ma'am.

"CLERK: Do you still agree and assent thereto?

"MR. HOUCK: Yes, ma'am.

"THE COURT: Now, as to Mr. Asbury.

"CLERK: Your foreman has reported to the Court a verdict of guilty of robbery with a firearm as to Willie James Asbury. Was this your verdict?

"MR. HOUCK: Yes, ma'am.

"CLERK: Is this now your verdict?

"MR. HOUCK: Yes, ma'am.

"CLERK: Do you still agree and assent thereto?

"MR. HOUCK: Yes, ma'am.

"THE COURT: Now, Mr. Houck, is there any misunderstanding on your part about the time frame and the essence of those questions?

"MR. HOUCK: No, sir.

"THE COURT: MOTIONS FOR A MISTRIAL IS [sic] DENIED.

The North Carolina Constitution insures to each criminal defendant the right to a unanimous jury verdict:

> "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N. C. Const. Art. I, § 24.

At least since 1877 our Court has held that a defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict. *State v. Young,* 77 N.C. 498 (1877). The function of the jury poll is:

> " . . . to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented." *Davis v. State,* 273 N.C. 533, 541, 160 S.E. 2d 697, 703 (1968).

Interestingly, at the time of the first reported case by our Court on this subject, *State v. Young, supra,* our Court required only that the clerk read the verdict, as reported by the foreman, to the jury and ask "So say you all?" At that point a juror could retract his assent for any reason. Later, in *Owens v. R. R. Co.,* 123 N.C. 183, 31 S.E. 383 (1898), this Court recognized that the abbreviated form of jury poll was insufficient to protect the defendant's right to a unanimous verdict at least where the juror appeared to be uncertain of his verdict. In *Owens v. R. R. Co., supra,* Justice Clark (later Chief Justice) speaking for our Court held that "[a]ny juror may dissent from a verdict, to which he has agreed in the jury room, at any time before it is received and entered up . . . " *Owens v. R. R. Co., supra* at 184, 31 S.E. at 383. In that case the jury had answered the issue of contributory negligence "no" and during the jury poll one of the jurors answered "I think she was to blame in part." The trial judge then asked the juror had he not consented to the jury's verdict in the jury room. Upon the juror's replying that he had so consented, the trial court accepted his verdict. Our Court held that it was error to receive the juror's verdict

without ascertaining whether, notwithstanding his remark, he still adhered to the assent given in the jury room.

More recently, in *State v. Boger,* 202 N.C. 702, 163 S.E. 877 (1932), this Court decided that a criminal defendant's right to have the jury polled is the right to have questions propounded to the jurors, individually, concerning " . . . whether each juror assented and still assents to the verdict tendered to the court." *State v. Boger, supra* at 704, 163 S.E. at 878. In *State v. Norris,* 284 N.C. 103, 199 S.E. 2d 445 (1973), this Court implicitly approved the three question formula used by the clerk of court in the instant case.

From the above authority, it is apparent that this Court, in assuring the unanimity of verdicts, is concerned with each juror's assent to the verdict at two different time periods. Because of the possibility of improper influence and coercion in the jury room, the questions must be designed to find out if the juror assented in the jury room and still assents in open court to the jury verdict.

Obviously, only two questions are necessary to elicit this information. The second question "Is this now your verdict?" relates to the same time period addressed in the third question "Do you still agree and assent thereto?" The second and third questions refer to the present in-court state of mind of the juror and serve only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom.

Given the foregoing, it is clear that the trial court's initial response to Juror Houck's inquiry was error. The questions do *not* all relate to the same time period and do *not* necessarily call for the same response. It remains to be determined whether this error was prejudicial. Upon examination of all the circumstances, we find the error was not prejudicial to this defendant.

It is noted first that the error occurred when Juror Houck was being questioned about his verdict as to defendant Conner. There was no hesitation whatsoever by the juror when questioned about his verdict as to defendant Asbury. Juror Houck was questioned twice individually and finally jointly with the other jurors as to his assent to the verdict against defendant Asbury and never wavered.

More importantly, a number of factors lead us to conclude that Juror Houck as well as the other jurors understood that they had a right to dissent from the verdict arrived at in the jury room. The questions addressed to the jurors were essentially self-explanatory. Counsel for each defendant on the motion for mistrial argued in the jury's presence concerning the nature of the questions and the right to dissent. Following these arguments by counsel and while the judge was still considering the motion for mistrial, the judge asked Juror Houck if there was any misunderstanding on his part "about the time frame and the essence of those questions." The juror replied "No, sir."

We have no way of knowing what prompted the original questions of Juror Houck during the jury poll for defendant Conner. A jury verdict is not defective if it appears that the juror eventually freely assented to the verdict. *See Owens v. R. R. Co., supra.* We are satisfied that Juror Houck understood his right to dissent and freely chose to affirm the verdict as to this defendant. We base this belief on the juror's unequivocal, multiple assents to the verdict, the simplicity of the questions propounded, the discussions of the attorneys in the jury's presence concerning the right to dissent, and the substantial evidence adduced at trial pointing to defendant's guilt. The defendant has failed to show prejudicial error, thus the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. RANDOLPH THOMAS FAIR

No. 50

(Filed 4 November 1976)

1. **Burglary and Unlawful Breakings § 5; Larceny § 5— larceny by breaking and entering — possession of recently stolen property — inferences**

When it is established that a larceny was accomplished by a breaking and entering, discovery of the stolen articles in defendant's possession soon after the theft raises the inference that defendant was guilty of both the breaking and entering and the larceny.

2. **Larceny § 5— inference from possession of stolen property — prerequisites**

The inference that the person in possession of stolen goods is the thief arises upon proof beyond a reasonable doubt that (1) the prop-

erty described in the indictment was stolen; (2) the property shown to have been possessed by the accused was the stolen property; and (3) the possession was recently after the larceny.

3. Larceny § 8— possession of item not listed in indictment — doctrine of possession of recently stolen property — instructions

Where the only stolen articles found in defendant's possession were cuff links which were not lised in the indictment, the trial court should have instructed that in order for the doctrine of possession of recently stolen property to apply the jury must find beyond a reasonable doubt that the cuff links were stolen at the same time and place as the property listed in the indictment.

ON petition by defendant under G.S. 7A-31 for discretionary review of the decision of the Court of Appeals reported in 29 N.C. App. 147, 223 S.E. 2d 704 (1976), affirming judgment of *Kirby, J.* entered 24 June 1975, GASTON County Superior Court.

On a two-count bill of indictment, proper in form, defendant was tried and convicted of (1) felonious breaking and entering and (2) felonious larceny of two stereo tape players, two bicycles, two radios, twenty-five silver dollars, and $25.00 in coins, having a total value of more than $200.00.

The evidence for the State tended to show that on 25 February 1975 the home of Alex W. Stuart was broken into between 8:15 a.m. and 6 p.m. while the family was away. Mr. Stuart reported to the police on the day of the breaking and entering that the items shown in the bill of indictment were taken. No cuff links were mentioned in the list of stolen objects given to the police that day.

Mr. Stuart's son owned a pair of gold cuff links that were last seen on the top of one of the stolen stereos the morning of 25 February 1975. The defendant was arrested at 5 p.m. on 26 February 1975 approximately one hundred yards from the Stuart home with a pair of gold cuff links in his pocket. At 5:30 p.m. on the same day the cuff links were identified as the son's cuff links. A warrant dated 27 February 1975 charged defendant with breaking and entering and felonious larceny of the items reported stolen by Mr. Stuart, but did not include the gold cuff links.

The defendant's evidence, produced on cross-examination, tended to show that the police took out a warrant charging Bruce Nelson Johnson with breaking and entering the Stuart home and stealing the cuff links on 26 February 1975.

Attorney General Rufus L. Edmisten by Assistant Attorney General Ralf F. Haskell and Associate Attorney Sandra M. King for the State.

Don H. Bumgardner for defendant appellant.

COPELAND, Justice.

Defendant assigns as error the trial judge's failure to charge the jury that the doctrine of recent possession was applicable only if the jury found beyond a reasonable doubt that the cuff links discovered in the defendant's possession were stolen at the same time and place as the items listed in the bill of indictment.

[1] The State relied heavily on the doctrine of recent possession. Upon an indictment for larceny, recent possession of stolen property has always been considered by this Court as a circumstance tending to show the guilt of the possessor. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Hullen,* 133 N.C. 656, 45 S.E. 513 (1903); *State v. Graves,* 72 N.C. 482 (1875). Similarly, recent possession is evidence of the fact that the defendant broke and entered the house when the breaking and entering was necessary to enable the thief to gain access to the property. *State v. Jackson,* 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Bell, supra; State v. Hullen, supra.*

The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession "is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *State v. Baker,* 213 N.C. 524, 526, 196 S.E. 829, 830 (1938); *accord State v. Greene,* 289 N.C. 578, 223 S.E. 2d 365 (1976); *State v. Bell, supra.* Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Greene, supra, State v. Baker, supra.*

The State in order to invoke the permissible inference must prove beyond a reasonable doubt each fact necessary to give rise to the inference. *See State v. Jackson, supra;* N.C.P.I.—Crim. § 104.40 (June 1972). "Inference may not be based on infer-

ence. Every inference must stand upon some clear and direct evidence, and not upon some other inference on presumption." *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966); *accord State v. Greene, supra.*

[2] The inference that the person in possession of the goods is the thief arises upon proof beyond a reasonable doubt that (1) the property described in the indictment was stolen, (2) the property shown to have been possessed by the accused was the stolen property, and (3) the possession was recently after the larceny. *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966). It follows that where the defendant is indicted for stealing items different from those actually found in his possession, the inference cannot arise unless it is also shown that the property in his possession was stolen at the same time and place as the property listed in the bill of indictment. *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). *See State v. Hullen, supra.*

[3] The jury should have been instructed that in order for the doctrine of recent possession to apply they must find beyond a reasonable doubt that the cuff links were stolen at the same time and place as the other property for which defendant stands indicted. The failure to so instruct was error and, under the facts of this case, we cannot say that it was harmless. The cuff links were not listed in the original police report as stolen, and a warrant was taken out alleging that the cuff links were stolen by another person on a different day.

Thus, the defendant is entitled to a

New trial.

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

COMR. OF INSURANCE v. MOTORS INSURANCE CORP. ET AL

No. 61 PC.

Case below: 30 N.C. App. 596.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 November 1976.

COMR. OF INSURANCE v. RATING BUREAU

No. 69 PC.

Case below: 30 N.C. App. 549.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 November 1976.

FAY v. BOARD OF ALCOHOLIC CONTROL

No. 58 PC.

Case below: 30 N.C. App. 492.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1976.

IN RE APPEAL OF MATTHEWS

No. 71 PC.

Case below: 30 N.C. App. 401.

Petition for discretionary review under G.S. 7A-31 denied 4 November 1976.

IN RE WILL OF WADSWORTH

No. 67 PC.

Case below: 30 N.C. App. 593.

Petition by propounder for discretionary review under G.S. 7A-31 denied 4 November 1976.

NORTON v. SAWYER

No. 64 PC.

Case below: 30 N.C. App. 420.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

OIL CO. v. POCHNA

No. 48 PC.

Case below: 30 N.C. App. 360.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1976.

PARSONS v. BAILEY

No. 57 PC.

Case below: 30 N.C. App. 497.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1976.

PONDER v. BUDWEISER OF ASHEVILLE

No. 16 PC.

Case below: 30 N.C. App. 200.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1976.

SELF v. ASSURANCE CO.

No. 72 PC.

Case below: 30 N.C. App. 558.

Petition by defendant Provident Life and Accident Insurance Co. for discretionary review under G.S. 7A-31 denied 4 November 1976.

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

SHULER v. DYEING MACHINE CO.

No. 70 PC.

Case below: 30 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

STANBACK v. COBLE, SEC. OF REVENUE

No. 62 PC.

Case below: 30 N.C. App. 533.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

STATE v. GRIER

No. 65 PC.

Case below: 30 N.C. App. 281.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 November 1976.

STATE v. JOHNSON

No. 47 PC.

Case below: 30 N.C. App. 376.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

STATE v. McKENZIE

No. 59 PC.

Case below: 30 N.C. App. 64.
30 N.C. App. 258.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1976.

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

STATE v. RIGGSBEE

No. 55 PC.

Case below: 30 N.C. App. 597.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

STATE v. TOLLEY

No. 13 PC.

Case below: 30 N.C. App. 213.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1976.

STATE v. WASHINGTON and PARTLOW

No. 68 PC.

Case below: 30 N.C. App. 751.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1976.

STUTTS v. SWAIM

No. 75 PC.

Case below: 30 N.C. App. 611.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1976.

TOWNSEND v. FRYE

No. 63 PC.

Case below: 30 N.C. App. 634.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 November 1976.

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

UTILITIES COMM. v. UTILITY CO.

No. 52 PC.

Case below: 30 N.C. App. 336.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1976. Motion of defendant to dismiss appeal allowed 4 November 1976.

ANNE B. RAFTERY, ADMINISTRATRIX OF THE ESTATE OF ALLEN G. RAFTERY, DECEASED v. WM. C. VICK CONSTRUCTION CO. AND CLARK EQUIPMENT COMPANY, A CORPORATION

No. 66

(Filed 7 December 1976)

1. **Death § 4— wrongful death — statute of limitations**

The two year period prescribed by G.S. 1-53(4) in conjunction with G.S. 1-46 for the commencement of a wrongful death action is a statute of limitations, not a condition precedent to the cause of action.

2. **Death § 4— wrongful death — statute of limitations**

An action for wrongful death allegedly caused by the negligent design or manufacture of a crane was not barred by G.S. 1-53(4) where it was brought within two years from the intestate's death.

3. **Death § 3— wrongful death action — condition precedent**

G.S. 28A-18-2 makes it a condition precedent to a wrongful death action against the manufacturer of a crane that the death of plaintiff's intestate was caused by a wrongful act, neglect or default of the manufacturer of the crane "such as would, if the injured person had lived, have entitled him to an action for damages therefor."

4. **Death § 4; Limitation of Actions § 4— injury not discovered or discoverable — statute of limitations — purpose of G.S. 1-15(b)**

The purpose of G.S. 1-15(b) was to give relief to injured persons from harsh results flowing from the rule established by case law that the statute of limitations begins to run from the time when plaintiff is initially injured even though the injury is not discovered or discoverable by plaintiff at such time.

5. **Death § 4; Limitation of Actions § 4— actions for bodily injury — injury not apparent — statute of limitations — proviso of statute**

The ten-year limitation in the proviso of G.S. 1-15(b) applies only to cases in which the bodily injury or defect in property for which damages are sought was not readily apparent to the claimant at the time of its origin.

6. **Death § 4; Limitation of Actions § 4— wrongful death — defect in crane — statute of limitations — apparent injury — accrual of action**

At the time plaintiff instituted an action for wrongful death allegedly caused by a defect in a crane manufactured by defendant nineteen years prior to the intestate's injury, the intestate would not have been barred by the ten-year limitation in the proviso of G.S.

1-15(b) from instituting an action for bodily injury received in the incident because his injury was apparent as soon as it occurred; nor would plaintiff's intestate have been barred by the three-year limitation of G.S. 1-52(5) since his cause of action would have accrued and the limitation period would have begun to run when he was injured, not at the time of defendant's negligent act or omission, and plaintiff's action was instituted within that three-year period. Therefore, plaintiff's wrongful death action was not barred on the ground that an action by her intestate for bodily injuries would have been barred by the time limitations of either of those two statutes.

Justices BRANCH and EXUM concurring.

Judge HUSKINS joins in the concurring opinion of Justice Branch.

Chief Justice SHARP and Justice MOORE dissenting.

Justice COPELAND joins in the dissenting opinions.

ON *certiorari* to the Court of Appeals to review its decision, reported in 29 N.C. App. 495, 224 S.E. 2d 706 (1976), vacating summary judgment, dismissing the action as against the defendant Clark Equipment Company, entered by *Brewer, J.*, at the 4 August 1975 Session of JOHNSTON.

The plaintiff took a voluntary dismissal of the action, without prejudice, as to the defendant William C. Vick Construction Company. Thus, only the action against Clark Equipment Company is involved in this appeal.

This action was instituted 12 June 1974. As against Clark Equipment Company, the complaint alleges in substance: On 14 June 1972, plaintiff's intestate, an employee of Roger K. Barbour, trading as Industrial Welding Service, while in the course of his employment, was struck upon the head by a portion of a crane manufactured and sold by Michigan Equipment Company, to which Clark Equipment Company is the successor and the liabilities of which Clark Equipment Company has assumed. The injury resulted in the death of the plaintiff's intestate on 14 June 1972. The proximate cause of the injury and death was the negligence of Michigan Equipment Company in the design and manufacture of the crane. Home Indemnity Company, the workmen's compensation insurance carrier for

Roger K. Barbour, the employer, paid death benefits due under the North Carolina Workmen's Compensation Act and this action was instituted for its benefit under the provisions of that Act.

Clark Equipment Company filed answer denying negligence by its predecessor and, as one of several further defenses, pleading the three-year statute of limitations, alleging that the crane was manufactured and sold by its predecessor more than three years prior to 14 June 1972.

By reason of the statute of limitations so pleaded, Clark Equipment Company moved for summary judgment dismissing the action as to it. In support of its motion, it filed affidavits to the effect that the crane was manufactured and sold, new, by its predecessor on 23 June 1953 and neither it nor its predecessor has owned, had possession of or done any work upon the crane since that date. The crane has been in use since that time by its purchaser and subsequent owners.

Judge Brewer found there is no genuine issue of fact and dismissed the action, as against Clark Equipment Company, as a matter of law, concluding that the plaintiff's action is barred by the statute of limitations.

The Court of Appeals vacated the judgment of dismissal and remanded the case for further proceedings.

Hedrick, Parham, Helms, Kellam & Feerick by Richard T. Feerick and John A. Gardner III for plaintiff.

Maupin, Taylor & Ellis by Armistead J. Maupin and Richard M. Lewis for defendant.

LAKE, Justice.

For the purpose of this appeal it must be assumed that, although the crane in question had been in use for 19 years without any known malfunction, the falling of the boom was due to a defect proximately caused by the negligence of the manufacturer in the design or manufacture of the crane. Thus, we are not presently concerned with whether the plaintiff, upon trial of the action, can produce evidence of such negligence and causation. The sole question is whether, assuming such negligence was a proximate cause of the death of the plaintiff's

intestate, the statutes of this State preclude any recovery for such death.

G.S. 28A-18-2 provides:

> *"Death by wrongful act of another; recovery not assets.*—(a) When the death of a person is caused by *a wrongful act, neglect or default* of another, *such as would, if the injured person had lived, have entitled him to an action for damages therefor*, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. * * * ." (Emphasis added.)

[1] G.S. 1-53(4), in conjunction with G.S. 1-46, provides that an action for damages on account of the death of a person caused by the wrongful act, neglect or default of another must be brought within two years. This is a statute of limitations, not a provision establishing a condition precedent to the cause of action such as was the provision of G.S. 28-173, the predecessor of G.S. 28A-18-2, prior to its amendment in 1951. *Brown v. Casualty Co.*, 285 N.C. 313, 204 S.E. 2d 829 (1974); *Kinlaw v. R. R.*, 269 N.C. 110, 119, 152 S.E. 2d 329 (1967); *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963); *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958).

G.S. 1-15(a), a general provision applicable to all statutes of limitations, provides, "Civil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*, except where in special cases a different limitation is prescribed by statute." (Emphasis added.) "In no event can a statute of limitations begin to run until plaintiff is entitled to institute action." Strong, N. C. Index 2d, Limitation of Actions, § 4. "The cause of action does not accrue until the injured party is at liberty to sue. The statute of limitations begins to run only when a party becomes liable to an action." *Aydlett v. Major & Loomis Co.*, 211 N.C. 548, 551, 191 S.E. 31 (1937). "Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability." *Insurance Co. v. Insurance Co.*, 277 N.C. 216, 222, 176

S.E. 2d 751 (1970). "Ordinarily, the period of the statute of limitations begins to run when *the plaintiff's right* to maintain an action *for the wrong alleged* accrues. The cause of action accrues *when the wrong is complete,* even though the injured party did not then know the wrong had been committed." (Emphasis added.) *Wilson v. Development Co.,* 276 N.C. 198, 171 S.E. 2d 873 (1970). "The only exception [prior to 1971], as pointed out in *Lewis v. Shaver* [236 N.C. 510, 73 S.E. 2d 320 (1952)], relates to actions grounded on allegations of fraud and mistake. G.S. 1-52(9)." *Shearin v. Lloyd,* 246 N.C. 363, 370, 98 S.E. 2d 508 (1957).

[2] Obviously, the plaintiff could not bring an action for the wrongful death of her intestate until he died. She did so within two years from his death. Consequently, the action is not barred by G.S. 1-53(4), the statute of limitations relating specifically to actions for wrongful death.

[3] We are thus brought to the question of whether the uncontroverted facts (for the purpose of this appeal) gave rise to a cause of action in the plaintiff for the wrongful death of her intestate. G.S. 28A-18-2, above quoted, makes it a condition precedent to such right of action in this plaintiff that the death of her intestate was caused by a wrongful act, neglect or default of the manufacturer of this crane "such as would, if the injured person had lived, have entitled him to an action for damages therefor."

It will be observed that this condition precedent to the maintenance of this action does not, by its express terms, include a time limitation but, upon its face, relates to the nature of the "wrongful act, neglect or default" which caused the death and to the legal capacity of the decedent to sue therefor had he lived. For example, the administrator of an employee within the Workmen's Compensation Act cannot sue the employer for the wrongful death of the employee since the employee could not have sued the employer for his injury had he lived. *Horney v. Pool Co.,* 267 N.C. 521, 148 S.E. 2d 554 (1966). Likewise, except as G.S. 1-539.21 now provides, the administrator of an unemancipated minor child cannot bring an action for wrongful death against the child's negligent parent. *Capps v. Smith,* 263 N.C. 120, 139 S.E. 2d 19 (1964); *Lewis v. Insurance Co.,* 243 N.C. 55, 89 S.E. 2d 788 (1955); *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835 (1931). In *Hoover v. R. R.,*

46 W.Va. 268, 33 S.E. 224 (1899), quoted with approval by this Court in *Causey v. R. R.*, 166 N.C. 5, 81 S.E. 917 (1914), the Supreme Court of West Virginia said the similar wrongful death statute of that state, "plainly relates to the character of the injury, without regard to the question of time of suit or death."

The alleged "wrongful act, neglect or default" of the defendant's predecessor (which, for the purposes of this appeal, we must take to be established as a fact) is in the manufacture and sale of a crane which, by reason of its design and the materials used in its manufacture, was defective so that the boom fell while it was being used as contemplated by the manufacturer, struck the plaintiff's intestate on the head and killed him, death apparently being instantaneous. Clearly, nothing else appearing, the plaintiff's intestate, an employee of the ultimate purchaser and owner of the crane, had he lived, could have maintained an action for damages against such manufacturer-seller. *Douglas v. Mallison,* 265 N.C. 362, 370, 144 S.E. 2d 138 (1965); *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960); *Gwynn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302 (1960); *Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868 (1960); *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170 (1959). Thus, if the condition precedent to the maintenance of the plaintiff's action for his wrongful death is limited to the nature of the manufacturer-seller's "wrongful act, neglect or default" and to the legal capacity of the plaintiff's intestate to sue, that condition has been satisfied and the action is maintainable.

The defendant, however, contends that the condition precedent set forth in G.S. 28A-18-2(a) is not so limited. The defendant contends that this condition precedent extends also to the time period within which the plaintiff's intestate could have instituted an action against the defendant for damages had the plaintiff's intestate lived. Courts of other states have so construed similar provisions in the wrongful death statutes of those states. *Ellis v. Black Diamond Coal Mining Co.*, 268 Ala. 576, 109 So. 2d 699 (1959); *Milford Memorial Hospital, Inc. v. Elliott,* 58 Del. 480, 210 A. 2d 858 (1965); *Myers v. Plattsburgh,* 214 N.Y.S. 2d 773 (1961); *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 A. 613 (1932); *Street v. Consumers Mining Corp.*, 185 Va. 561, 39 S.E. 2d 271 (1946). These cases hold that if a statute of limitations has run so that, at the time of the bringing of the wrongful death action, a suit by the deceased for his

injuries would have been barred, the action for wrongful death cannot be maintained.

That is, the defendant contends that, had the plaintiff's intestate survived the blow on the head, he would not have been "entitled" to an action for damages for his injury, due to the passage of time (approximately 19 years) between the manufacture and sale of the crane and the injury to the plaintiff's intestate, and, for that reason, the plaintiff may not maintain this action for wrongful death. We, therefore, turn to the question of whether, had the plaintiff's intestate survived the blow on the head, he could lawfully have instituted against the defendant an action for his injuries proximately caused by the alleged negligence in the design and manufacture of the crane 19 years before the boom fell upon him.

We turn first to G.S. 1-52, which, in conjunction with G.S. 1-46, provides as follows:

> *G.S. 1-46: "Periods prescribed.* — The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article."
>
> *G.S. 1-52: "Three years.* — Within three years an action—
>
> * * *
>
> "(5) For criminal conversation, or for any other *injury to the person* or rights of another, not arising on contract and not hereafter eumerated. * * * ." (Emphasis added.)

Obviously, the negligence of the defendant (assumed for the purposes of this appeal) would confer no right of action upon the plaintiff's intestate until he suffered an injury proximately caused thereby. Until then, his cause of action was not complete and, nothing else appearing, the three-year statute would not begin to run against his right to sue. *Wilson v. Development Co., supra; Insurance Co. v. Insurance Co., supra;* Strong, N. C. Index 2d, Limitation of Actions, § 4; McIntosh, North Carolina Practice and Procedure, 2d Ed. § 291; 51 AM. JUR. 2d, Limitation of Actions, § 107; 54 C.J.S., Limitation of Actions, §§ 108, 109. The cited section in American Jurisprudence states, "In other words, an action cannot be maintained until a right of action is complete, and hence the statute of

limitations cannot run before that time." The above cited section 108 in Corpus Juris Secundum states, "No statute of limitations runs against a person until he is allowed by law to do the things as to which the statute is interposed."

The defendant says, however, the condition precedent established by G.S. 28A-18-2(a) has not been met because the plaintiff would not have been entitled to maintain an action for damages for his injuries, had he survived, for the reason that G.S. 1-15(b) would deprive him of that right. That statute reads:

> "(b) Except where otherwise provided by statute, a cause of action, *other than one for wrongful death,* having as an essential element *bodily injury* to the person or a defect in or damage to property *which originated under circumstances making the injury,* defect or damage *not readily apparent to the claimant at the time of its origin,* is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that *in such cases* the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief." (Emphasis added.)

To construe this statute, enacted in 1971, we must take into account the law of this State, as declared by this Court, prior to its enactment. In *Shearin v. Lloyd, supra,* and in *Lewis v. Shaver, supra,* this Court affirmed judgments of involuntary nonsuit in actions for medical malpractice for the reason that the plaintiff had not brought the action within the period of the applicable statute of limitations. In each case, the plaintiff contended that the action was not barred by the statute because it was brought within three years after the plaintiff discovered the injury. In *Shearin v. Lloyd, supra,* the action was brought for damages caused by the negligence of a surgeon who was alleged to have left a gauze sponge within the plaintiff's body when he closed the surgical incision. This was not discovered until a second operation was performed, substantially later. The action was brought within three years from the discovery of the foreign object in the patient's body but more than three years after the first operation. In *Lewis v. Shaver, supra,* the surgeon was sued for the alleged unauthorized tying of the plaintiff's Fallopian tubes in the course of a surgical procedure,

the plaintiff not knowing this was contemplated and, so, not having consented thereto. This was not discovered by the plaintiff until a substantial time thereafter. She brought her action within three years after the discovery of the alleged trespass but more than three years after it occurred. In each case, this Court held the injury occurred and the cause of action was complete at the time of the first operation and the statute of limitations began immediately to run although the plaintiff did not then know of the injury.

Similarly, in *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965), this Court affirmed a judgment of involuntary nonsuit on the ground that the plaintiffs' action for damage to their home from a defective oil-burning furnace was barred by the statute of limitations. The plaintiffs alleged that, by reason of defects in the furnace sold to them and installed by the defendant, their home and furnishings were damaged by smoke and soot. This Court held the cause of action was for breach of contract and accrued when the defective furnace was installed and the statute of limitations began then to run. We said: "The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained. * * * It is likewise unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued." To the same effect was the decision of this Court in *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962), in which this Court held the right of action for breach of warranty in the sale of a truck accrued immediately upon the sale and delivery of the truck, not upon its subsequent destruction by fire due to a defect in its manufacture, and, therefore, the statute of limitations applicable to such action began to run at the time of the sale and delivery, even though the defect was not then discovered or readily discoverable.

[4] The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh results flowing from this previously established rule of law. By the enactment of this statute in 1971, the Legislature provided that a cause of action, having as an essential element bodily injury or a defect in property, "which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin," is deemed to have accrued at the time of the injury, was discovered or ought reasonably to have been dis-

covered by the claimant. Thus, the purpose of this statute was to enlarge, not to restrict the time within which an action for damages could be brought.

[5] To prevent the statute from subjecting tort feasors to suit for alleged acts or defaults so far in the past that evidence as to the event would be difficult to secure and intervening causes would be likely, though difficult to prove, the Legislature added this proviso: "[p]rovided that *in such cases* the period [i.e., the period within which the action may be brought] shall not exceed ten years from the last act of the defendant giving rise to the claim for relief." (Emphasis added.) Expressly, the proviso is limited to "such cases"; that is, the proviso applies only to cases in which the bodily injury, or defect in property, for which damages are sought was not readily apparent to the claimant at the time of its origin. In such case, the action must be brought within ten years from the wrongful act or default even though the plaintiff did not discover the injury until later.

[6] This statute has no application whatever to the present case for two reasons. First, it expressly states that it does not apply to an action for wrongful death. Second, had the plaintiff's intestate survived, his cause of action would not come within the terms of this statute because his injury was apparent as soon as it occurred. The plaintiff's intestate would have been suing for personal injury caused by the negligence of one with whom he had no contractual relation, not for a defect in a product constituting a breach of warranty made to him by the manufacturer-seller. Thus, his cause of action would have accrued when he was injured and the three-year statute of limitations would have begun to run at that time, not at the time of the defendant's negligent act or omission.

This is not inconsistent with *Shearin v. Lloyd, supra,* and the other cases above cited which gave rise to the enactment of G.S. 1-15(b). In each of those cases, the cause of action accrued, and the statute began to run, when the injury occurred, not before that date. What this Court there held was that, the injury having occurred, the statute began then to run, even though the plaintiff did not know he or she had been injured. In the present case, there was no injury to the plaintiff's intestate until the boom fell on 14 June 1972, and so, had he survived, his right of action then accrued and would not have been barred by the three-year statute at the time the plaintiff administratrix instituted the present action for wrongful death.

The present case is distinguishable from *Brown v. Casualty Co.*, 285 N.C. 313, 204 S.E. 2d 829 (1974). In that case, the plaintiff sued under the uninsured motorist insurance endorsement affixed to an automobile liability insurance policy to recover damages for the death of the plaintiff's intestate in an automobile collision caused by the negligence of a hit and run driver. The action was brought more than two years after the death. Therefore, when the suit on the contract of insurance was instituted, an action against the unknown hit and run motorist for wrongful death would have been barred by G.S. 1-53(4). The plaintiff contended that the action against the insurance company was for breach of contract and, therefore, the three-year statute applied and the action was not barred. The policy provided that the company would "pay all sums *which the insured or his legal representative shall be legally entitled to recover* as damages from the owner or operator of an uninsured automobile because of: (a) bodily injury, sickness or disease, including death resulting therefrom sustained by the insured * * *." (Emphasis added.) Thus, the contract imposed a condition precedent to recovery from the insurance carrier, which condition was that the plaintiff be "legally entitled to recover" from the wrongdoer. Speaking through the present Chief Justice, this Court held that since the two-year statute of limitations had barred the insured's claim against the tort feasor, he was not "legally entitled to recover" damages from the tort feasor and so could not recover against the insurer. This was a matter of construing the insurance contract.

[6] It is not necessary, however, in the present case, for us to determine whether, if, at the time the action for wrongful death was instituted, the statute of limitations had fully run so that an action by the plaintiff's intestate would have been barred, the plaintiff administratrix would, in consequence, be barred even though the statute of limitations specifically relating to actions for wrongful death had not run its course. In the present case, for the reasons above stated, the plaintiff's intestate, had he lived, would not have been barred by G.S. 1-52(5), the three-year statute, nor would he have been barred by the proviso in G.S. 1-15(b).

We are not unmindful of the fact that the alleged wrongful act or neglect of the defendant's predecessor occurred, if it occurred at all, 19 years prior to the injury sustained by the plaintiff's intestate. It is for the Legislature, not for this Court,

to impose, as a condition precedent to liability for personal injury, that the injury must occur within a specified time after the wrongdoing which is alleged to have been the proximate cause. Neither G.S. 1-52(5), the three-year statute of limitations, nor G.S. 1-15(b), creates such a condition precedent to liability in a case, such as this, where no injury, to the plaintiff's intestate, known or unknown, occurred more than three years prior to the institution of the action.

As this Court said, speaking through Justice Bobbitt, later Chief Justice, in *Shearin v. Lloyd, supra,* at page 371:

> "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Butler v. Bell,* 181 N.C. 85, 106 S.E. 217. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind *Lord Campbell's* caution: 'Hard cases must not make bad laws.' "

Likewise, concern for manufacturers charged with negligence in the distant past, when memories have grown dim and records hard to locate in the files, does not authorize this Court to enlarge the protections given them by the Legislature and, thus, cut off the right of one injured by a negligently made product to sue for redress of his injury before the injury occurs.

In *Williams v. General Motors Corp.,* 393 F. Supp. 387 (MDNC 1975), United States District Judge Ward held, in a case quite similar to the one now before us, that the action for wrongful death did not accrue until the death occurred and G.S. 1-15(b) does not require such action to be brought within ten years from the last act of the defendant giving rise to the claim for relief. The Court said, "The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action." Likewise, in *Stell v. Firestone Tire & Rubber Co.,* 306 F. Supp. 17 (WDNC 1969), the Court held that a cause of action for injury sustained in an accident allegedly caused by the failure of a defectively manufactured tire did not accrue, and the statute of limitations did not begin to run thereon, until the accident occurred and the injury was thereby sustained.

In *Causey v. R. R., supra,* the plaintiff's intestate was injured in 1903 and his death, conceded to have been caused by the injury, did not occur until 1912. Obviously, the plaintiff's intestate's right of action for damages for his injuries was barred by the statute of limitations when he died. Suit for wrongful death was brought by his administrator and this Court held the cause of action for wrongful death was not barred by the statute of limitations, saying:

> "If there is no privity between the administrator and the intestate as to this cause of action, and the former succeeds to no rights of the other, it is illogical, as it appears to us, to hold that the failure of the intestate to sue for personal injury will bar the right of the administrator to recover damages for death, when the first right of action could not pass to the administrator and the second did not exist until death."

It is not necessary for us in the present action to determine whether *Causey v. R. R., supra,* was correctly decided or whether it is consistent with our decision in *Brown v. Casualty Co., supra.* In the present case, contrary to the situation in each of those cases, the plaintiff's intestate, had he lived, would not, at the time the plaintiff instituted this action, have been barred from instituting an action for damages for his bodily injuries.

Consequently, the Superior Court was in error in granting the motion of Clark Equipment Company for summary judgment dismissing the action as to it and the Court of Appeals correctly vacated that judgment.

Affirmed.

Justice BRANCH concurring.

In her dissenting opinion, Chief Justice Sharp condemns the holding of the Court in *Causey v. Railroad,* 166 N.C. 5, 81 S.E. 917, to the effect that the statute of limitations does not begin to run against a personal representative until the death of his decedent notwithstanding the fact that the action for the personal injuries which caused decedent's death was barred when he died. I agree. I am also in accord with that portion of Justice Moore's dissent in which he concluded that "the exclusion of wrongful death actions from the operation of G.S. 1-15(b) was intended only to preserve the two-year statute of

limitations . . . for wrongful death actions." However, for reasons hereinafter stated, I do not believe that the questioned holding in *Causey* or the wrongful death exclusion of G.S. 1-15(b) is before us on this appeal.

[6] I am in agreement with the principal reasoning and the result reached in the majority opinion because, in my view, *the provisions of G.S. 1-15(b) have no application whatever to the facts of this case.*

For more than 144 years it has been recognized in this jurisdiction that a statute of limitations does not begin to run until after the cause of action has accrued and the plaintiff has a right to maintain a suit. *City of Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147; *Miller v. Shoaf,* 110 N.C. 319, 14 S.E. 800; *Godley v. Taylor,* 14 N.C. 179. If the demanding party is under no disability, the statute begins to run at the time the plaintiff suffers some injury, however slight, such as entitles him to maintain an action. It then continues to run until stopped by appropriate judicial process. This rule is subject to certain exceptions such as torts grounded on fraud or mistake. *Matthieu v. Piedmont Natural Gas Co.,* 269 N.C. 212, 152 S.E. 2d 336; *B-W Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570. In each of the above-cited cases there was a wrong committed and *some* injury suffered by each plaintiff which resulted in an immediate right to bring the action.

The rule that the appropriate statute of limitations begins to run from the accrual of the action, *i.e.,* the time when the plaintiff is initially injured, became so firmly embedded in our case law that we rigidly applied the rule even when the plaintiff was without knowledge as to the facts constituting the cause of action. *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320; *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508; *Matthieu v. Piedmont Natural Gas Co., supra; Sellers v. Refrigerators, Inc.,* 283 N.C. 79, 194 S.E. 2d 817. The enforcement of this unyielding and rigid rule often produced harsh and inequitable results. It, therefore, seems apparent that the legislature enacted G.S. 1-15(b) to relieve the harsh results flowing from the existing case law.

G.S. 1-15(b) provides:

> (b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a

defect in or damage to property *which originated under circumstances making the injury, defect or damage not readily apparent to the claimant* at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that *in such cases* the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief. [Emphasis ours.]

[5] The provisions of G.S. 1-15(b) relate to causes of action which originate under circumstances making the injury, defect or damage not readily apparent to the claimant. The ten-year limitation contained in the proviso of the statute, therefore, must refer only to cases in which the injury was not readily apparent. Obviously, under the facts of instant case, the injury was readily apparent. Plaintiff had no privity or contractual relationship with defendant and was not injured in any way when the crane was manufactured, sold or assembled. His initial injury occurred on 14 January 1972 and at that time his cause of action accrued.

Had the legislature intended to apply the ten-year proviso of the statute to *all cases*, it could have easily so provided without resorting to the cumbersome language of G.S. 1-15(b).

For the reasons stated, I concur in the majority opinion.

Justice HUSKINS joins in this concurring opinion.

Justice EXUM concurring.

I concur in the opinion of the majority and, except as noted, in the concurring opinion of Justice Branch.

General Statute 1-15(b) provides:

"Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element *bodily injury to the person or a defect in or damage to property* which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such

cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief." (Emphasis added.)

It is clear to me that the words "bodily injury to the person or a defect in or damage to property" refer to bodily injury to the claimant or a defect in or damage to property *belonging to the claimant* which injury, defect or damage is latent, or, in the words of the statute "not readily apparent to the claimant." It is also clear that the word "injury" in the seventh line of the statute as quoted above includes personal injury, property damage, and defects in property upon which a claim for relief might be based. The statute amends our traditional rule by which the claim for relief accrued at the time the claimant suffered some injury, however latent, technical or inconsequential, because of a trespass to his person or a defect in or damage to *his own* property. Under the statute his claim accrues from the time the personal injury, defect in or damage to property, if latent, was actually discovered or should reasonably have been discovered "by the claimant." (How could a claimant be expected ever to discover a latent defect in the property of another before he is hurt by it?) The statute then provides that in this kind of case the claimant shall have no more than 10 years from the last act of the defendant giving rise to his claim to make discovery and to bring suit.

It is not necessary to condemn or overrule this Court's holding in *Causey v. R. R.*, 166 N.C. 5, 81 S.E. 917 (1914) and I am not willing to say now that this case was wrongly decided.

[5, 6] The essential point made well by the majority opinion and by Justice Branch in his concurring opinion is that here there is no latent injury. Therefore General Statute 1-15(b) simply has no application to these facts. In *Pinkston v. Hamilton Company*, No. 120, Fall Term 1976, argued in this Court on November 11, 1976, involving facts which, materially, are the same as in the instant case, both counsel for the plaintiff and the defendant in oral argument agreed that General Statute 1-15(b) did not apply.

The error in the reasoning of the dissenters becomes apparent, it seems to me, when they base their view on an assumed defect in the crane which they say was "not readily apparent to the claimant." The only references in the record to the defect

in the crane are allegations in the complaint that the crane was negligently manufactured and designed. Nowhere is the precise nature of the defect described. It may be that the defect is perfectly obvious to any knowledgeable observer. Furthermore when, if ever, should the decedent, who never owned the crane or, as far as we know, had it in his possession, have reasonably discovered the defect? I am at a loss to understand how the dissenters would dismiss this claim on their assumption, unsupported by anything in the record, that the defect in the crane was latent, hidden, or "not readily apparent to the claimant."

Brown v. Casualty Co., 285 N.C. 313, 204 S.E. 2d 829 (1974), relied on by the Chief Justice in her dissent stands ultimately for the proposition that if a claim for wrongful death is brought more than two years from the date of death it is barred by General Statute 1-53(4) whether the defendant is the hit and run motorist or the deceased's liability insurance carrier. The Chief Justice's statement that General Statute 1-15(b) when "[r]ead in context . . . also refers, by necessary implication, to bodily injury caused by a defect in property not apparent at the time of its origin" is correct only if the "property" referred to is that of the claimant himself. If the "property" referred to belongs to someone other than the claimant then this statement seems to amend rather than construe the statute.

Neither do I understand the import of the Chief Justice's statement that under the majority's interpretation General Statute 1-15(b) "will extend the time for bringing an action in a situation similar to that in *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965), where a plaintiff sued to recover damages for the destruction of his home by a fire caused by a defective furnace, but it will bar the same plaintiff if he sues to recover for personal injuries sustained in the same blaze." In such a case, the statute, as interpreted by the majority, would operate as follows: When a defective furnace is installed in a home, the owner has an immediate claim for relief grounded on this defect. If the defect is not readily apparent to the owner when the furnace is installed, General Statute 1-15(b) provides that the owner's claim, instead of accruing at the time of installation, accrues when the defect is discovered or ought reasonably to have been discovered by him. In no event may the owner have longer than 10 years from the defendant's last act causing the defect in the furnace to make discovery and to

bring suit. If the defective furnace caused the home to be burned and the owner to be injured in the fire, the owner's claims for property damage and personal injury would both be subject to a statute of limitations defense if the owner delayed filing suit more than three years from the date of the fire or more than 10 years from the last act of the defendant causing the defect in the furnace. The distinction between this situation and the case now before us is that there was an extant claim which could have been brought immediately after the defective furnace was purchased. Raftery on the other hand had no claim whatever until he was hurt and killed by the crane.

Chief Justice SHARP dissenting:

I concur in the dissenting opinion of Justice Moore and add the following additional observations.

The rationale of the majority opinion is: (1) that G.S. 1-15(b), by its terms, has no application to any action for wrongful death or to an action for personal injuries when the injury is instantaneous and immediately apparent; and (2) that since plaintiff's intestate sustained no injury until the time of his death, no statute of limitation bears upon plaintiff's action except G.S. 1-53(4), which prescribed a two-year period for the bringing of an action for wrongful death.

For the reasons hereinafter stated, it is my view that plaintiff's suit is barred by the interaction of G.S. 1-15(b) and G.S. 28A-18-2, the statute which authorizes an action for wrongful death. Our wrongful death statute has remained basically unchanged since 1868 and, like the majority, I begin my analysis of this case with it.

In pertinent part G.S. 28A-18-2 provides:

"(a) When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured person had lived, have entitled him to an action for damages therefor,* the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, . . ." (Emphasis added.)

The clear meaning of the italicized clause is that had the deceased survived the injuries which caused his death and had he been legally entitled to recover damages therefor, his per-

sonal representative then has a cause of action for his wrongful death based on whatever legal rights the decedent possessed at the time of his death. If the deceased had no legal rights, his administrator has none. The proviso thus refers not only to a deceased's substantive rights, but to the procedural limitations attending those rights. Therefore, if the deceased was barred by the applicable statute of limitations at the time of his death from maintaining an action for personal injuries then his personal representative will also be barred from maintaining an action for wrongful death resulting from those injuries.

This construction follows that of a majority of the jurisdictions which have considered this problem. *See* page 5 of the majority opinion and cases therein cited. It is also the rationale adopted by this Court in *Brown v. Casualty Co.*, 285 N.C. 313, 204 S.E. 2d 829 (1974). In *Brown*, the plaintiff's intestate died on 26 April 1969 when his car left the highway and crashed after having been struck in the rear by a hit-and-run driver. The plaintiff sought to recover the policy limit from the deceased's automobile liability insurance carrier under the uninsured motorist rider which required the insurer "to pay all sums which the insured . . . shall be *legally entitled to recover as damages* from the owner or operator of an uninsured automobile. . . . " (Emphasis added.) The plaintiff brought her suit on 25 April 1972.

In *Brown v. Casualty Co., supra,* we held that "[t]o be 'legally entitled to recover damages' a plaintiff must not only have a cause of action but a remedy by which he can reduce his right to damages to judgment," *id.* at 319, 204 S.E. 2d at 833, and that the defense of the statute of limitations stands upon the same plane as any other legal defense. Since the insured had died, any suit against the hit-and-run motorist to recover for his wrongful death would have had to have been brought within two years of the death. G.S. 1-53(4). Therefore, a recovery based on the insured's legal rights also had to meet the two-year bar. The suit against Casualty Company having been filed almost three years after the accident and death, we held that the insured was not "legally entitled to recover" from the unidentified uninsured motorist and hence the plaintiff, his personal representative, could not recover from his insurer.

There can be no significant difference between the import of the italicized phrase in the insurance policy, which required

the insurer to pay the sums which the insurer was "legally entitled to recover as damages" from the owner or operator of an uninsured automobile, and the similar phrase in the wrongful death statute giving a personal representative a cause of action when the death of his decedent was caused by the wrongful or negligent act of another such as would, had the injured party lived, "have entitled him to an action for damages therefor." It matters not that one clause is found in an insurance contract and the other in the statute books. The same logic which compelled the first construction compels the second.

In support of its conclusion that the plaintiff's action is not barred by the statute of limitations, the majority cites *Causey v. R. R.*, 166 N.C. 5, 81 S.E. 917 (1914). This case holds, *inter alia*, that the statute does not begin to run against a personal representative's action for wrongful death until the demise of the decedent, notwithstanding the fact that his action for the personal injuries which caused his death was barred when he died.

The facts in *Causey v. R. R., supra*, were these: Causey, a railroad employee, died on 7 June 1912 from injuries sustained on 1 December 1903 as a result of the negligence of defendant Railroad. On 27 December 1903, in consideration of $75.00, the Railroad's claim agent obtained a release from the injured Causey. In the action brought by Causey's administrator in 1912 for his wrongful death, the release was set aside and the plaintiff allowed to recover for his intestate's wrongful death.

At the time of Causey's death both his action to rescind the release and to recover for his personal injuries were barred by the statute. Notwithstanding, this Court held that although "[o]rdinarily, the bar of the statute is a good defense against the administrator, if available against the intestate," in an action for wrongful death there was no privity between the administrator and his intestate. Therefore, the lapse of time between the injury and the death of the intestate would not bar the administrator's action for wrongful death, which did not come into existence until the death. The rationale was that the statutory requirement that the deceased, at the time of his death, must have been entitled to recover for the injuries which caused his death relates to the character of the injury without regard to the question of time of suit or death.

Causey had not been decided two years before the Court began to back away from that decision. In *Edwards v. Chemical Co.*, 170 N.C. 551, 87 S.E. 635 (1916), the Court held that the intestate's action for personal injuries and his administrator's action for wrongful death were based on "a single wrong," and a defendant who had compensated the deceased for his injuries during his lifetime did "not answer the description of 'the person who would have been liable if death had not ensued.' . . . " The Court said, "The statute may well be construed as meaning that the party who at the time of the bringing of the action 'would have been liable if death had not ensued' shall be liable to an action notwithstanding the death, etc." *Id.* at 555, 87 S.E. at 637. With reference to *Causey* the Court said: "We were referred by counsel to *Causey v. R. R.*, 166 N.C. 5, as being in contravention of our present ruling, but we do not so interpret the decision." *Id.* at 555, 87 S.E. at 637.

Not since *Mitchell v. Talley*, 182 N.C. 683, 109 S.E. 882 (1921), a case involving only a personal representative's right to attach the property of the defendant in a wrongful death action, has this Court cited *Causey* in any case involving the wrongful death statute. When infrequently cited during the past 55 years, it has been with reference to fraud as grounds for rescission of an instrument.

It is my view that the decision in *Causey* was clearly wrong. It cannot be reconciled with the express words of the wrongful death statute, and it is inconsistent with the Court's unanimous decision in *Brown v. Casualty Co., supra,* rendered in 1974, sixty years later. *Causey* should be specifically overruled forthwith and not left, like a misplaced street sign, to create confusion. *See Williams v. General Motors Corporation,* 393 F. Supp. 387, 395 (1975).

Since a personal representative's action for wrongful death is barred by any statute of limitation which would have barred his decedent's action for personal injuries, the question we must decide here is whether the deceased Raftery, had he lived, could have maintained an action. Defendant contends that had Raftery survived his injuries, G.S. 1-15(b) (1971) would have prevented him from maintaining an action. This statute provides:

"(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or

damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of defendant giving rise to the claim for relief."

As noted earlier, the majority's first contention with reference to G.S. 1-15(b) is that it has no application to this case because wrongful death is specifically excepted from those actions deemed to have accrued at the time the personal injury, defect in or damage to property is or should have been discovered by the claimant. This same contention, along with the effect of G.S. 1-15(b) upon the wrongful death statute (G.S. 28A-18-2), was considered in *Arrowood v. General Motors Corp.*, 539 F. 2d 1321 (4th Cir. 1976). That case involved an action for wrongful death arising out of an instantaneously fatal automobile accident which was caused by a concealed defect in a car purchased by decedent more than three years before his death. Except when quoted, the analysis of G.S. 1-15(b) by Russell, Circuit Judge, who wrote the opinion of the court in *Arrowood*, is summarized below:

1. By the "excepting phrase" in G.S. 1-15(b) the legislature expressed its intention that this section should not "permit an action for wrongful death, whether one arising out of a product defect or otherwise, to be begun more than two years after death; it intended that § 1-53(4) should continue to control the accrual date of actions for wrongful death and the time when the statute of limitations should begin to run. Specifically, it did not intend to delay the accrual of . . . wrongful death actions involving a product defect until discovery of the defect, which was the effect of § 1-15(b) for personal injury actions, but intended that the accrual of such action should remain the date of death as fixed by § 1-53(4)." 359 F. 2d at 1324.

2. Without the excepting language, G.S. 1-15(b) would have changed the date on which the statute of limitations began to run on an action for wrongful death involving a product defect from the date of death to "the time when the defect in the product causing death was discovered or by the exercise of due diligence should have been discovered." (However, the period

for discovery "shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.") Without the excepting clause, "the accrual of a right of action in such a situation [would be] identical for personal injury actions and for wrongful death actions"; and, in some cases, the omission of the exception of wrongful death actions would have extended the time for the accrual of such an action far beyond two years from the date of death. To this extent G.S. 1-15(b) would have amended G.S. 1-53(4). *Id.* To prevent this result the General Assembly inserted the exception for wrongful death.

3. "The excepting phrase in § 1-15(b), though, did not mean that actions for wrongful death due to an allegedly defective product were to be held to accrue, and the statute of limitation to begin to run, as of the date of the purchase of the product. . . . " When G.S. 1-15(b) is considered along with the wrongful death statute itself, it is clear that it bears directly on the one basic condition for the right to an action for wrongful death, *i.e.*, that " 'injured party,' if he had lived, could have maintained an action for personal injuries. If he could, the action for wrongful death exists; if he could not, the action does not exist." *Id.*

4. When G.S. 1-15(b) removed the requirement that an action for personal injuries arising out of a concealed product defect must be brought within three years after purchase of the product it removed the requirement not only for any suit for personal injuries not barred on the date of its ratification (21 July 1971) but also "for the hypothetical [suit for personal injuries] stated in § 28-173 [now 28A-18-2] by way of a condition to the maintenance of an action for wrongful death. However, . . . [a]n action for wrongful death must still be brought within two years from death as expressly provided in § 1-53(4) and not two years from the discovery of the defect in the product. This was the purpose, and the sole purpose, as we see it, of the excepting phrase in § 1-15(b)." *Id.* at 1325.

I find no flaw in Judge Russell's interpretation and analysis of G.S. 1-15(b). Thus interpreted G.S. 1-15(b) bars plaintiff's right to recover for Raftery's death because, at the time of the injury which caused his death, more than ten years had elapsed since "the last act of the defendant giving rise to the claim for relief."

The majority view that obvious personal injuries caused by a defect in or damage to property not readily apparent at the time of its origin are not within the purview of G.S. 1-15(b) is inconsistent with the purpose of the statute and too strict a construction to be reasonable. *See Arrowood v. General Motors Corp., supra* at 1322-23. As already noted, causes of action affected by G.S. 1-15(b) are those, other than one for wrongful death, "having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of *its* origin." (Emphasis added.) The pronoun *its* refers equally to an injury to the person, a defect in property, and an injury to property. Read in context it also refers, by necessary implication, to bodily injury caused by a defect in property not apparent at the time of its origin.

In this case, taking the allegations of the complaint as true —which we must do at this stage of the proceedings—a defect in the crane, which was not apparent at the time of its origin in 1953, was the proximate cause of the bodily injury which resulted in the death of plaintiff's intestate in 1972. This concealed defect in property would have been "an essential element" in intestate's action for his personal injuries, had he survived them. However, since the defect had not been discovered for more than 10 years after its origin, G.S. 1-15(b) would have barred his action. That section therefore relates to and bars plaintiff's action for wrongful death. G.S. 28A-18-2.

The majority's assumption that in an action for an obvious personal injury caused by a hidden defect in property, the pronoun *its* (as used in G.S. 1-15(b)) refers to the personal iujury alone, enures to plaintiff's benefit in this case. However, it will inevitably operate to the detriment of many future claimants and lead to some absurd results. For instance, this limited interpretation will extend the time for bringing an action in a situation similar to that in *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965), where a plaintiff sued to recover damages for the destruction of his home by a fire caused by a defective furnace, but it will bar the same plaintiff if he sues to recover for personal injuries sustained in the same blaze.

As the majority correctly observed, "The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh

results" flowing from such cases as *Jewell v. Price, supra; Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1967); and *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320 (1952). *See Green v. M.T.D. Products, Inc.,* 449 F. 2d 757, 758 (4th Cir. 1971) "where the pertinent cases are collated." In view of this manifest legislative purpose I can only perceive G.S. 1-15(b) as having been broadly drawn to cover all cases where a claimant is exposed to a dormant peril which causes him injury at a time past the limits of otherwise applicable statutes of limitation, but not more than "10 years from the last act of the defendant giving rise to the claim for relief." This case falls within the 10-year proscription.

Under this interpretation, the right of plaintiff's intestate to recover for his personal injuries, had he survived, not only was barred by the passage of time before he ever suffered any injury, but also it might just as well have banished before he was born. The majority seems to have adopted its interpretation of G.S. 1-15(b) in order to avoid this result. However, even within the majority's construction, the statute operates to bar many causes of action before the claimant suffers injury. For example, the current owner of the crane is barred by G.S. 1-15(b) from recovering for the hidden defect which caused its failure in 1972. Indeed, his right was barred in 1963, three years before he bought the crane from its original purchaser. However, we must face the fact that solons cannot eliminate the possibility that in unusual situations hardships may result from the application of any statute however salutary its operation in general. Indubitably there can be perils and defects which will not cause injury until long after their origin. It is equally true that the passage of time may make impossible the proof of valid substantive defenses to an action based upon allegations of ancient wrongs or defects. This could be such a case.

Here it appears from the affidavits considered by the trial judge at the hearing upon the motions for summary judgment (1) that defendant-manufacturer had had no contact with the crane in suit since its sale to the J. M. Thompson Company in June 1953; (2) that Thompson Company used the crane in its general construction business for 13 years before selling it in 1966 to intestate's employer, Roger K. Barbour, t/a Industrial Welding Service; and (3) that Barbour had similarly used the crane for 6 years before it failed and caused intestate's death.

In any event, the General Assembly has decided that for certain injuries resulting from nonapparent perils, the statute of limitations shall begin to run from the last act of the defendant giving rise to the claim for relief. That decision necessarily implies that some causes of action will be barred before the injury occurs or becomes reasonably discoverable. A sound public policy requires that at sometime an end must be put to liability, even if some meritorious claims are thereby cut off. The ultimate purpose behind statutes of limitation has not been to goad procrastinating claimants into asserting their rights but to protect defendants from claims which are too old to be adequately refuted. "The purpose of a statute of limitation is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. . . . In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear there. In such case, we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad laws.'" *Shearin v. Lloyd, supra* at 371, 98 S.E. 2d at 514.

For the reasons stated, I join with Justice Moore in voting to reverse the decision of the Court of Appeals and to affirm the judgment of the Superior Court dismissing plaintiff's action.

Justice COPELAND joins in this dissenting opinion.

Justice MOORE dissenting:

I respectfully dissent from the opinion adopted by the majority and I would hold that the claim of plaintiff against defendant, Clark Equipment Company, should be barred.

G.S. 1-15(b) provides:

> "Except where otherwise provided by statute, a cause of action, other than one for wrongful death, *having as an essential element* bodily injury to the person *or a defect in* or damage to *property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin,* is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that *in such cases the period shall not exceed 10 years from the last*

act of the defendant giving rise to the claim for relief." (Emphasis added.)

Under the rules of statutory construction, a statute is to be construed by its "plain meaning." G.S. 1-15(b) states that it is applicable to " . . . a cause of action . . . having as an essential element . . . a defect in . . . property . . . not readily apparent to the claimant at the time of its origin. . . . " The statute clearly states that the only requirement for an application of the ten-year statute is that the cause of action contain, as an essential element of proof, the fact of a defect in property. In instant case, an essential element of plaintiff's claim is that there was a defect in the property (a crane), and therefore G.S. 1-15(b) should operate to bar plaintiff's claim against defendant Clark Equipment Company.

The wording of the statute, "a cause of action, other than one for wrongful death," does not change my opinion that the ten-year limitation period applies to the case at bar. The words "cause of action" in the above quoted portion of the statute refer to a legislatively created claim for relief. In other words, the statute creates a remedy for those persons who are injured by an undiscoverable defect and extends the time for bringing such action to not more than ten years. As stated in the majority opinion, "The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh results flowing from this previously established rule of law [as delineated in *Jewell v. Price, supra,* and *Motor Lines v. General Motors, Corp., supra*] . . . . Thus, the purpose of this statute was to enlarge, not to restrict the time within which an action for damages could be brought." I would add, however, that in no event was the statute intended to extend the limitation period beyond ten years.

In my opinion, the exclusion of wrongful death actions from the operation of G.S. 1-15(b) was intended only to preserve the two-year statute of limitations, which we already had, for wrongful death actions. Otherwise, the two-year limitation would have been meaningless. For, if wrongful death actions had not been excluded, the time for bringing such actions would have been extended to not more than ten years from the time the hidden defect caused the death.

As the majority opinion states, the wrongful death statute, G.S. 28A-18-2, creates a condition precedent to the right of

action by a plaintiff that the death of the intestate was caused by the wrongful act, default, or neglect of the manufacturer of this crane, "such as would, if the injured person had lived, have entitled him to an action for damages therefor. . . ." The intent of the wrongful death statute was and is to require that a decedent, had he lived, have a cause of action in order for his personal representative to bring such action. The majority opinion defeats this intention and requirement.

Plaintiff brought this wrongful death action within two years of the date on which it occurred. Hence, it is not barred by the two-year statute. However, had plaintiff lived, he would have been barred by the ten-year statute which provides that for personal injuries "the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief." In this case, this period would be twenty years.

I agree with the majority that G.S. 1-15(b) was passed to prevent tort feasors from being subjected to suits arising from facts occurring many years in the past. I cannot agree that plaintiff is entitled to maintain an action for wrongful death due to an injury caused by an alleged defect in a crane over which defendant has had no control for twenty years. To so hold would be to place an unconscionable burden upon a manufacturer and subject him to stale claims arising from defects which occurred, if at all, ten, twenty-five or even fifty years ago. In such cases, a defendant would be without records or witnesses which may have been available at an earlier date. In my opinion, the majority defeats the intent of the legislature to limit such claims to a period not to exceed ten years.

I vote to reverse and, if necessary, to overrule *Causey v. R. R., supra,* relied on by plaintiff, which was decided prior to the enactment of G.S. 1-15(b).

Justice COPELAND joins in this dissenting opinion.

CAROLINA-VIRGINIA FASHION EXHIBITORS, INC., A CORPORATION v. WILLIAM L. GUNTER AND ROBERT B. RUSSELL, GENERAL PARTNERS TRADING AND DOING BUSINESS UNDER THE NAME OF CHARLOTTE DEVELOPMENT ASSOCIATES, A LIMITED PARTNERSHIP

No. 15

(Filed 7 December 1976)

1. **Arbitration and Award § 9— arbitrators' testimony about award — permissible testimony**

Though the testimony of arbitrators is not competent to impeach the mental process involved in determining the award, nor is testimony of the arbitrators competent with respect to how well they followed instructions in ascertaining damages, proof is admissible for the purpose of showing that all matters included in the submission were considered and adjudicated by the arbitrators, and of showing what entered into their decision; moreover, testimony of a dissenting arbitrator is admitted to show misconduct on the part of the other arbitrators, and testimony is admitted where it is not objected to and where the responding party cross-examines the arbitrator.

2. **Arbitration and Award § 9— reasonable belief misconduct occurred — arbitrators' depositions admissible in proceeding to vacate award**

Where an objective basis exists for a reasonable belief that misconduct on the part of arbitrators has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct, and such depositions are admissible in a proceeding under G.S. 1-567.13 to vacate an arbitration award.

3. **Arbitration and Award § 9— misconduct by arbitrators — proceeding to vacate award — admissibility of arbitrators' depositions**

An objective basis existed for a reasonable belief that misconduct by arbitrators occurred in an arbitration proceeding to determine the proportion of taxes, utilities and insurance premiums owed by a lessee under the terms of a lease where the terms of the lease agreement called for a mathematical calculation and the award was unsupported by the evidence of either party; therefore, it was proper for defendants to depose the arbitrators relative to misconduct which apparently led to such result, and such depositions were admissible in a proceeding to vacate the award.

4. **Arbitration and Award § 9— arbitrators gathering evidence outside hearings — no notice to parties — misconduct sufficient to vacate award**

Action of arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties was a violation of the N. C. Uniform Arbitration Act and hence of the parties' arbitration agreement which constituted misconduct sufficient to vacate the award of the arbitrators.

DEFENDANTS appeal from judgment of *Snepp, J.*, 14 July 1975 Session, MECKLENBURG Superior Court. The appeal was

duly docketed in the Court of Appeals and defendant petitioned this Court for discretionary review prior to determination of the cause by the Court of Appeals. We allowed the petition, and the case is now before us for initial appellate review.

On 28 September 1970 plaintiff (CVFE) and defendants (CDA) entered into an Agreement to Lease under the terms of which plaintiff agreed to lease approximately 175,000 square feet of permanent showroom space on two adjacent floors of a building to be constructed by defendants in Charlotte. The building was constructed and upon its completion plaintiff took possession of its designated space on 1 January 1972. Said building is known as the Carolina Trade Mart at 531 South College Street, Charlotte, North Carolina.

A dispute arose between the parties as to the proper construction of certain portions of the lease agreement and plaintiff commenced this action for a declaratory judgment. After extensive discovery proceedings the parties settled a portion of the dispute and, on 2 August 1974, entered into a stipulation by which the remaining issues in dispute were submitted to arbitration. Pursuant to the stipulation, each party selected an arbitrator and the two arbitrators selected a third arbitrator. The plaintiff selected W. Cleve Davis, defendants selected Edward L. Vinson, Sr., and those two arbitrators selected Willis I. Henderson.

At the hearings conducted by the arbitrators each side relied on the provisions of the lease agreement which provided in paragraph four, in part:

> "In addition to said rental, CVFE agrees to pay to CDA or to its designate that proportion of (all ad valorem taxes on the land above described and any improvements thereon, all charges for public utility services thereto, and) all premiums for fire and extended coverage, public liability insurance and such multi-peril coverage as CDA deems necessary in connection with the use of said land and the improvements thereon, which the total square feet of gross heated area occupied by its bears to the total square feet of gross heated area in all of the improvements constructed on said land."

In addition, CDA relied upon a portion of paragraph seven of the lease agreement reading:

> "The building will consist of a parking area at ground level and three floors above, the second and third floors being reserved for the exclusive use of CVFE."

There was evidence tending to show that CVFE (plaintiff) had divided the cost of insurance, utilities, ad valorem taxes and maintenance on the basis of one third to CDA (defendants) which occupied the first floor above the parking area and two thirds to CVFE which occupied the second and third floors above the parking area. CVFE made payments for insurance, utilities, ad valorem taxes and maintenance expense on this basis, although there were numerous disputes about which items of maintenance expenses should be shared and which items of insurance cost of the first year should be shared. Finally, in November 1973, plaintiff contended that its share was less than two thirds with respect to ad valorem taxes, that it was not bound by its previous statements, and that because of extra utility consumption on the floor it did not occupy, as well as other matters, it was not required to pay two thirds of the taxes, utilities and insurance cost. Plaintiff contended that, under the lease agreement, the amount owed by it for taxes and utilities ranged from 47 to 60 percent of the total charge for those items. Defendants steadfastly maintained that 66⅔ percent was plaintiff's correct portion.

Four questions were submitted to and answered by the arbitrators. The fourth question, and the answer thereto, reads as follows: What proportion of taxes, utilities and insurance premiums should be borne by the parties? Answer: CVFE 61 percent, CDA 39 percent. Defendants contend that the activities of the arbitrators in relation to this question amount to misconduct prejudicial to defendants' rights and require the award to be vacated.

After various hearings at which the parties submitted both documentary and testimonial evidence, together with written statements of their contentions, the arbitrators on 20 November 1974 notified the parties by mail of their decision by signing and mailing to counsel for each party a copy of the questions submitted with the questions answered and signed by each of the arbitrators. Thereafter, defendants gave timely notice of their intention to take the depositions of the three arbitrators,

and such depositions were taken over the objection of the plaintiff.

Those depositions revealed that the arbitrators made an inspection of the building on several occasions and, as a result of the visits, concluded that certain portions of the two floors reserved for the "exclusive use" of plaintiff were in fact open to the public. Consequently, they deducted 14,200 square feet from the total square feet of the two floors occupied by plaintiff to determine what portion of the building was occupied by plaintiff and what portion of the taxes, utilities and insurance cost plaintiff should pay. Mr. Vinson testified: "The 14,200 square feet that we excluded, we excluded on the basis of that being open to the public. . . . In that respect, we made an inspection of the building on several occasions. . . . During the hearings, I went through it by myself after each of the meetings. . . . I personally carefully inspected the so-called showroom space which is off of each side of the lobby, to determine in my mind if those corridors were in anyway open to the public. . . . I also inspected the bathrooms for the same purpose, to determine in my mind if they were not wholly occupied and controlled by Carolina-Virginia. . . . Willis was with me at least once, if not twice. . . . We concluded that the provision in the lease that those two floors were for the exclusive use of CVFE was not correct."

Willis I. Henderson, one of the arbitrators, deposed that he made an investigation "of the physical situation there at the building on my own. I walked over all the different floors and looked it over to my full satisfaction. . . . I considered the lobby was not occupied by the tenant. . . . As a result of my examination of the building on my own, I concluded that the areas embraced by the lobby, and the ramp, and the open areas on each of the CVFE floors was open to the public, on all floors. . . . I did not observe the signs in . . . the two CVFE lobbies of the two CVFE floors warning against unauthorized presence." The evidence of the third arbitrator, Mr. Davis, was to the same effect.

In light of the depositions defendants filed motion and application under G.S. 1-567.13 and .14, to vacate or correct the award of the arbitrators. Plaintiff moved to suppress the depositions of the arbitrators and filed application for confirmation of the award.

At a hearing before Judge Snepp upon the motions, defendants contended there was misconduct on the part of one of the arbitrators in consulting an outside attorney before the arbitrators made their award and further misconduct by the arbitrators in going upon and viewing the premises without the consent of any of the parties and, partially at least, basing the award upon information thus obtained.

Among other things, Judge Snepp found as a fact: (1) That one of the arbitrators did seek the advice of an outside attorney during the course of the proceedings but further found there was no *admissible* evidence that the decision of the arbitrators would have been different had the advice of the attorney not been received, (2) that the award was properly made and entered in accordance with the arbitration stipulation and applicable statutes, and (3) that "[b]ut for the conclusion of law No. 6 set forth below the court would find as a fact that the action of [arbitrator] Vinson in consulting with outside counsel and the action of the arbitrators in going on the premises and forming an opinion from what they observed, which was unsupported by evidence at the open hearing, constituted misconduct." Judge Snepp's conclusion of law No. 6 was as follows: "The depositions of the arbitrators are not competent to show the basis by which the arbitrators arrived at their decision or to show misconduct on the part of the arbitrators."

Based upon the foregoing crucial findings of fact and conclusion of law, plaintiff's motion to suppress the depositions of the arbitrators was allowed, defendants' motion and application to vacate the finding was denied, and plaintiff's application for confirmation of the arbitration award was allowed and said award was confirmed "and shall stand as a Judgment." Defendants appealed.

Harry C. Hewson of the firm of Jones, Hewson & Woolard, attorney for defendant appellants.

Bradley, Guthery & Turner by Paul B. Guthery, Jr., attorneys for plaintiff appellee.

HUSKINS, Justice.

Judge Snepp, in his judgment, found no misconduct on the part of the arbitrators, *supported by competent evidence,* which justified setting aside the award. He did find, however, that

but for his conclusion of law that the depositions of the arbitrators were not admissible to impeach their award, he would have found such misconduct. The threshold question presented to this Court, therefore, is whether the trial judge correctly concluded that the "depositions of the arbitrators are not competent to show the basis by which the arbitrators arrived at their decision or to show misconduct on the part of the arbitrators."

The plaintiff argues that the cases and encyclopedias of law support the ruling of the trial judge. At 5 Am. Jur. 2d *Arbitration and Award* § 187, we find the statement that it is "the general rule that an arbitrator may not by affidavit or testimony impeach his own award or show fraud or misconduct on the part of the arbitrators." Similarly, it is stated in 6 C.J.S. *Arbitration* § 177, that "an arbitrator is not a competent witness to prove his own fraud or misconduct. . . ." Many cases give lip service to this rule. *See e.g., Sapp v. Barenfeld,* 34 Cal. 2d 515, 212 P. 2d 233 (1949); *Giannopulos v. Pappas,* 80 Utah 442, 15 P. 2d 353 (1932). "It has been held with great unanimity that the admissions of an arbitrator made after the filing of an award are inadmissible in proceedings to set aside the letter." *Bisnovitch v. British American Assur. Co.,* 100 Conn. 240, 123 A. 339 (1924).

Examination of the many cases cited in support of this proposition, however, demonstrates that the decisions are neither unanimous nor clear as to what may and what may not be impeached. To clarify the present state of the law it is necessary to examine the decisions and exceptions in some detail.

[1] It is clear that the testimony of the arbitrators is not competent to impeach the *mental process* involved in determining the award. For example, in *Grudem Brothers Co. v. Great Western Piping Corp.,* 297 Minn. 313, 213 N.W. 2d 920 (1973), the appellants contended that the arbitrators meant to allow offsets for damages but that, through inaccurate wording, this intent was not apparent on the face of the award. An attempt to introduce testimony of an arbitrator to show intent was rejected, the court stating that "[t]o allow such testimony would vary the terms of the agreement and work to impeach it. The award should be interpreted from the language used therein rather than the testimony of one of the arbitrators as to what they meant to do by the award." *But see Black v. Woodruff,*

193 Ala. 327, 69 So. 97 (1915); *Oregon-Washington R. & Nav. Co. v. Spokane, P. & S. Ry. Co.*, 83 Or. 528, 163 P. 989 (1917).

Similarly, a court will not admit testimony of the arbitrators as to how well they followed instructions in ascertaining damages, *Gramling v. Food Machinery and Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957).

In *Matter of Weiner Co.*, 2 App. Div. 2d 341, 155 N.Y.S. 2d 802 (1956), it was summed up in this way: "An arbitrator should not be called upon to give a reason for his decision. Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in law. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203, 76 S.Ct. 273; *Shirley Silk Co. v. American Silk Mills*, 257 App. Div. 375, 377, 13 N.Y.S. 2d 309, 311."

On the other hand, it is widely accepted that proof is admissible "for the purpose of showing that all matters included in the submission were considered and adjudicated by the arbitrators, and of showing what entered into their decision. . . ." *Jensen v. Deep Creek Farm & Live Stock Co.*, 27 Utah 66, 74 P. 427 (1903). *See also Sapp v. Barenfeld, supra; Twin Lakes Reservoir & Canal Co. v. Platt Rogers*, 112 Colo. 155, 147 P. 2d 828 (1944); *Stowe v. Mutual Home Builders' Corp.*, 252 Mich. 492, 233 N.W. 391 (1930); *Grudem Brothers Co. v. Great Western Piping Corp., supra; Giannopulos v. Pappas, supra.* This principle has been firmly implanted in the law of North Carolina. The Court early stated that "[p]arol evidence is not only admissible, but necessary in order to show what matters the arbitrators acted on." *Brown v. Brown*, 49 N.C. 123 (1856). *See Cheatham v. Rowland*, 105 N.C. 218, 10 S.E. 986 (1890); *Osborne v. Calvert*, 83 N.C. 365 (1880); *Walker v. Walker*, 60 N.C. 255 (1864). The reason for this rule has been stated thusly: "[I]t often becomes necessary, in determining what questions are concluded by the award, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him and what matters entered into his decision. The referee is a competent witness himself to establish these facts." *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52 (1877).

There are other acknowledged exceptions to the "general rule" as stated. Testimony of a dissenting arbitrator is admitted to show misconduct on the part of the other arbitrators. *Grif-*

fith Co. v. San Diego College for Women, 45 Cal. 2d 501, 289 P. 2d 476 (1955); *Cont. Bk. Supply Co. v. Int. Brotherhood of Bookbinders*, 239 Mo. App. 1247, 201 S.W. 2d 531 (1947). Testimony is admitted where it is not objected to and where the responding party cross-examines the arbitrator. *William H. Low Estate Co. v. Lederer Realty Corp.*, 35 R.I. 352, 86 A. 881 (1913).

Here, appellants do not seek to introduce the testimony of the arbitrators under any of the exceptions which we have noted thus far—nor would they have any grounds to do so. The depositions were taken over strenuous objection by the plaintiffs. It is conceded that the award was duly signed and assented to by all the arbitrators.

Rather, appellants contend that the action of the arbitrators in entering the building in the absence of the parties and in basing their decision in part on information gathered at that time constitutes misconduct. They further contend that this Court should hold, contra to the oft-stated "general rule," that such misconduct may be proved by the depositions and testimony of the arbitrators themselves. For the reasons which follow, we agree.

First, we note that many cases which cite the "general rule" relative to the incompetency of testimony of an arbitrator to impeach his own award or show fraud or misconduct on the part of an arbitrator *do not support that statement with respect to misconduct.* In *Griffith Co. v. San Diego College for Women, supra,* the "general rule" is cited but testimony of an arbitrator was admitted under the dissenting arbitrator exception discussed above. *Sapp v. Barenfeld, supra,* again citing the "general rule," allowed the testimony as it tended to show what matters were considered. The court in *Lauria v. Soriano,* 180 Cal. App. 2d 163, 4 Cal. Rptr. 328 (1960), found it to be "settled law that an arbitrator cannot impeach the award by testifying to his fraud or misconduct," yet in the next sentence found that no such testimony had been offered. In *Bisnovitch v. British American Assur. Co., supra,* the plaintiffs attempted to introduce the testimony of a witness as to a conversation he had with the referee. The testimony was excluded. The court said the plaintiff should have allowed the *arbitrator* to testify first and then used the statement of the witness to impeach him if necessary. Later, however, the court cited the general rule

that admissions of an arbitrator are inadmissible *to impeach an award.* In *Giannapolus v. Pappas, supra,* the court cited the "general rule" that the testimony of an arbitrator is inadmissible to prove misconduct, yet found "misbehavior" on the part of one of the arbitrators based in part on the affidavits of the other arbitrators.

Plaintiff relies strongly on *Fukaya Trading Company, S. A. v. Eastern Marine Corp.,* 322 F. Supp. 278 (E.D. La. 1971), a federal district court decision. Examination of this case reveals that its support is not as strong as plaintiff would contend. The court did refuse to allow depositions to be taken of the arbitrators, yet it implied that *were there any objective evidence on which to base the allegations of misconduct,* the depositions would have been allowed. The requirement of an objective basis of misconduct was derived from *Continental Materials Corp. v. Gaddis Mining Co.,* 306 F. 2d 952 (10th Cir. 1962), and reflects the court's concern that "fishing expeditions" might be encouraged without the objective evidence requirement.

Although cases may be found in which the rule is arguably applied and an arbitrator's testimony of misconduct is excluded, *see e.g., Ellison v. Weathers,* 78 Mo. 115 (1883), it is apparent from an examination of the cases discussed that the law is not so settled nor the rule so general as the plaintiff asserts. Rather, it appears that the "general rule" is subject to many exceptions, depending upon the particular fact situation presented.

It is therefore instructive to examine those cases where, as here, an ex parte investigation by the arbitrator is alleged. None of the cases examined speak directly to the issue of impeachment by the testimony of the arbitrator. Several, however, base the finding of misconduct on the affidavit of the arbitrator.

In *Berizzi Co. v. Krausz,* 239 N.Y. 315, 146 N.E. 436 (1925), the arbitrator was held to have been engaged in misconduct where he made an investigation by himself of the quality of a product. Speaking for the court, Judge Cardozo noted that "one gains the impression, when one reads his [the arbitrator's] affidavit, that what he did by himself and without notice was the real basis for his decision."

In *Moshier v. Shear,* 102 Ill. 169, 40 Am. Rep. 573 (1881), the arbitrator was allowed to testify that he had an ex parte

discussion with a former arbitrator. This testimony formed the basis for the court's decision that misconduct had occurred.

In early English cases the court received testimony from arbitrators as to their alleged misconduct. *Stalworth v. Inns,* 13 Mee & W. 466 (1844); *Walker v. Frobisher,* 6 Ves. Jr. 70 (1801). *Cf. Modern System Bakery v. Salisbury,* 215 Ky. 230, 284 S.W. 994 (1926); *E. Arthur Tutein, Inc. v. Hudson Valley C & P Corp.,* 230 App. Div. 419, 245 N.Y.S. 125 (1930); *Young v. Insurance Co.,* 207 N.C. 188, 176 S.E. 271 (1934); *Hill v. Insurance Co.,* 200 N.C. 502, 157 S.E. 599 (1931); *David Harley Co. v. Barnefield,* 22 R.I. 267, 47 A. 544 (1900).

It is clear from the cases discussed that no consensus has emerged on the issue presented in the present case. Rather, different resolutions have been adopted by different courts. We do not feel compelled, through considerations of *stare decisis* or uniformity in the law, to adopt any particular position. We therefore look to considerations of policy and the practical administration of justice.

We have found no uniform rule from the texts and treatises on arbitration. Sturges, in Commercial Arbitrations and Awards § 365 (1930), notes that "ordinarily an arbitrator may not testify to his own acts of mistake or misconduct any more than he may to those of the arbitral board generally, to establish a cause sufficient to defeat or vacate an award. . . ." The policy considerations grounding this position are clear. One court has said that to permit impeachment would be to restrict "private, frank, and free" discussion of the issues involved. Further, such practices could lead to "tampering" with the arbitrators thereby allowing a corrupt arbitrator to destroy an award to which he had given his assent under oath. *Gramling v. Food Machinery and Chemical Corp., supra.* It is also true that a strong policy supports upholding arbitration awards. A foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure, and to allow "fishing expeditions" to search for ways to invalidate the award would tend to negate this policy. *Gramling v. Food Machinery and Chemical Corp., supra; Fukaya Trading Company, S.A. v. Eastern Marine Corp., supra; Big-W Construction Corp. v. Horowitz,* 24 Misc. 2d 145, 192 N.Y.S. 2d 721 (1959). Arbitration proceedings would then become a superfluous step in "the course of litigation, causing delay and

expense, but settling nothing finally." *Patriotic Order, Sons of America v. Hartford F. Ins. Co.*, 305 Pa. 107, 157 A. 259 (1931).

On the other hand, John Morse, in his work entitled *The Law of Arbitration and Award*, ch. 21 (1872), cites *Russell on Arbitration* (3d ed.) for the proposition that "a narration of mere facts concerning the proceedings in the reference, stands on a very different footing from an explanation of the mode in which the arbitrator has performed his judicial functions, and . . . there seems no reason why an arbitrator should not depose to them as well as anybody else. Accordingly we find on motions for setting aside awards, or in showing cause against such motions, affidavits of arbitrators are constantly used in the courts of law and equity to explain alleged irregularities, to answer charges of misconduct, to show under what circumstances particular meetings were held, and in what manner the award was executed." More recently it has been said "[t]hat an arbitrator's *misconduct* is material to invalidate the award cannot be doubted. . . . The sound doctrine admits him to testify." 8 Wigmore, Evidence § 2358 (McNaughton rev. 1961).

We find the Wigmore statement very persuasive. The use of an arbitrator's sworn testimony to prove misconduct or fraud on the part of the arbitrators does not unduly disturb public policy restricting impeachment of arbitrator's awards. We therefore hold that such evidence is competent for that restricted purpose.

We do not, by this ruling, authorize inquisition into the mental processes of the arbitrators. We share the view expressed by other courts that such inquiry into the reasoning behind an award would relegate arbitration to a superfluous role in the judicial process. Nor do we open the door to "tampering" with arbitration awards. Unlike error which arises in the mind of the arbitrator and must rise or fall solely on his statements, we are here concerned with misconduct which can likely be corroborated or denied, either by other members of the arbitration panel or by extrinsic evidence. Furthermore, this decision will not lead to "fishing expeditions" by the loser, thus destroying the abbreviated format of the arbitration panels. An arbitrator's deposition of misconduct may be allowed in evidence *only when some objective basis exists for a reasonable belief that misconduct has occurred. Compare Continental Materials*

Corp. v. Gaddis Mining Co., supra, with Fukaya Trading Company, S.A. v. Eastern Marine Corp., supra.

In contrast to the weak policy considerations advanced against proof of misconduct by evidence of the arbitrators, we find strong reasons for admission of such testimony. The Legislature has defined certain acts which, if proven, are grounds for vacation of an arbitration award. G.S. 1-567.13. To refuse to admit testimony of the arbitrators where there is an objective basis reasonably to believe that misconduct has occurred, would deprive the aggrieved party of its most effective means of ascertaining and proving the alleged misconduct. This may well thwart the legislative intent expressed in G.S. 1-567.13. Finally, we note that admission of the testimony will, in many instances, aid in averting substantial injustice, which is surely the first duty of any court.

[2, 3] Accordingly, we hold that where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct; and that such depositions are admissible in a proceeding under G.S. 1-567.13 to vacate an award. Here, the objective basis is provided by the obvious inconsistency of the award with the evidence presented at the hearing. Plaintiff's evidence and contentions fixed the percentage owed by it for taxes, utilities and insurance at 47 to 60 percent, while defendants' contentions and proof set it at 66⅔ percent. Yet the arbitrators established plaintiff's portion at 61 percent, a figure unsupported by the evidence of either party. The terms of the lease agreement call for a mathematical calculation—not a result reached by compromise. Thus it was proper for defendants to depose the arbitrators relative to misconduct which apparently led to such result.

In a special finding of fact Judge Snepp found that but for his conclusion of law that the depositions of the arbitrators were inadmissible, the "action of the arbitrators in going on the premises and forming an opinion from what they observed, which was unsupported by evidence at the open hearing, constituted misconduct." We have determined that the depositions are admissible. The question at this point, therefore, is whether this special finding of fact is correct.

We note at the outset that the "finding of fact" is in reality a mixed finding of fact and law. Such findings are re-

viewable on appeal. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335 (1967). Initially the judge determined that the arbitrators privately visited and viewed the premises, formed an opinion based on this visit, and that this opinion was not supported by evidence received at the open hearing. This constitutes a finding of fact and is conclusive on this Court if supported by any competent evidence. *See* 1 Strong's N. C. Index 3d, Appeal and Error § 57.2, and cases cited therein. We find ample evidence in the depositions of the arbitrators to support the findings.

Based on these findings Judge Snepp decided that the stated acts constitute misconduct. This is a conclusion of law and, although denominated as a finding of fact, is reviewable on appeal. *Casualty Co. v. Funderburg,* 264 N.C. 131, 140 S.E. 2d 750 (1965); *Warner v. W & O, Inc.,* 263 N.C. 37, 138 S.E. 2d 782 (1964).

Jurisdictions which have considered the question of ex parte investigations by arbitrators have consistently held that such acts amount to misconduct. This is true whether the acts of the arbitrator were taken in the absence of one party, *Jackson v. Roane,* 90 Ga. 669, 16 S.E. 650 (1893); *Fred J. Brotherton, Inc. v. Kreielsheimer,* 8 N.J. 66, 83 A. 2d 707 (1951); *E. Millius & Co. v. Regal Shirt Corp.,* 113 N.Y.S. 2d 385 (1952); *Seaboard Surety Co. v. Commonwealth,* 350 Pa. 87, 38 A. 2d 58 (1944); *Walker v. Frobisher, supra,* or in the absence of both. *Jessup & Moore Paper Co. v. A. S. Reed & Bro. Co.,* 10 Del. Ch. 146, 87 A. 1011 (1913); *Moshier v. Shear, supra; Berizzi Co. v. Krausz, supra; Saffir v. Wilson,* 100 N.Y.S. 2d 263 (1950); *290 Park Avenue v. Fergus Motors,* 275 App. Div. 565, 90 N.Y.S. 2d 613 (1949). *See* Annotation, 27 A.L.R. 2d 1160. As one court succinctly stated, "[t]he obligation of arbitrators . . . is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him." *Fred J. Brotherton, Inc. v. Kreielsheimer, supra.*

An examination of the Uniform Arbitration Act indicates that our Legislature has adopted this view. G.S. 1-567.6(1)

provides that the arbitrators shall "appoint a time and place for the hearing and cause notification to the parties to be served. . . . " Judge Cardozo, in interpreting similar language, has stated that "[t]here would be little profit in fixing a time and place of hearing, if the arbitrators were at liberty when the hearing was over to gather evidence ex parte, and rest their award upon it." *Berizzi Co. v. Krausz, supra.*

[4] An even clearer indication of legislative intent is found in G.S. 1-567.6(2) to the effect that, unless otherwise provided by the agreement, "[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." No stronger language could have been used to insure that arbitration decisions are based solely on evidence presented at the required hearings. The parties to this action agreed to abide by the North Carolina Uniform Arbitration Act. Actions of the arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties is a violation of the Act and hence of the arbitration agreement. The "violation of the agreement, however innocently conceived, constitutes misconduct. . . . " *Fred J. Brotherton, Inc. v. Kreielsheimer, supra.*

We hold, on these principles, that the ex parte acts of the arbitrators constitute misconduct. A final matter to be resolved is whether this misconduct is sufficient cause to vacate the award. We hold that it is.

Vacation of an award is controlled by G.S. 1-567.13. One of the grounds upon which the court *shall* vacate an award is where "[t]he arbitrators . . . so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party. . . . " G.S. 1-567.13(a)(4).

Arbitrator Vinson stated that he personally visited the premises in order to determine in his own mind whether the areas were open to the public. It is apparent from his testimony and that of the other arbitrators that the decision to exclude the lobby, stairwell and elevators from the part "occupied" by plaintiff was based on the unauthorized ex parte visits. It is also apparent from the depositions that the arbitrators did not consider certain factors which the defendants could have pointed out if present during the visits. For example, the arbitrators did not notice signs in the elevators warning people against unauthorized presence on the second and third floors; they were

not cognizant of the fact that display windows and display cases in the lobbies of those floors were rented out by plaintiff; and they did not consider whether plaintiff occupied space on the first floor. Under these circumstances we hold that defendants were substantially prejudiced by the misconduct of the arbitrators in violation of G.S. 1-567.6, and that under G.S. 1-567.13 the award must be vacated.

Our decision here is inapplicable to jurors and jury verdicts. It is settled law that jurors will not be heard to impeach their verdict after it has been rendered and received by the court and the jury has been discharged. *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1 (1960). Attempts to depose jurors relative to their verdict, or relative to alleged misconduct in arriving at it, have been consistently rejected by this Court. *Selph v. Selph,* 267 N.C. 635, 148 S.E. 2d 574 (1966). "Beginning with *Sutrell v. Dry,* 5 N.C. 94 (1805), and in an unbroken line of decisions to the same effect since, it is firmly established in this State, as a general rule at least, based upon wise reasons of public policy that jurors, after their verdict has been rendered to and received by the court and after they have been discharged and separated, will not be allowed by testimony or affidavit to impeach, to attack, or to overthrow their verdicts, nor will evidence from them be received for such purpose, and that evidence for that purpose, if admitted at all, must come from some other source." *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235 (1964), and cases therein cited. We adhere to that view. Sound policy considerations distinguish jury verdicts from arbitration awards.

We find it unnecessary to decide whether consultation by one of the arbitrators with Attorney Robert Hovis, a disinterested outsider to the litigation, constitutes prejudicial misconduct. See Annotation in 47 A.L.R. 2d 1362 where decisions both ways are discussed. It suffices to say that consultation by an arbitrator with an outsider is apt to raise more questions than it answers. The practice should be avoided.

For the reasons stated the award of the arbitrators, and the judgment confirming it, are vacated. The case is remanded to the Superior Court of Mecklenburg County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

State v. Harding

STATE OF NORTH CAROLINA v. DONALD LEE HARDING

No. 58

(Filed 7 December 1976)

1. **Criminal Law § 15— change of venue — denial of motion proper**

Where the trial judge conducted a full inquiry on defendant's motion for change of venue on the ground of prejudicial pretrial publicity and examined the press releases and the affidavits in support of the motion, and where the record failed to show that any juror objectionable to the defendant was permitted to sit on the trial panel or that defendant had exhausted his peremptory challenges before he passed the jury, the denial of the motion for change of venue was not error.

2. **Criminal Law § 92; Homicide § 16— three murders — dying declarations of one victim — consolidation of cases proper**

Where defendant was charged with three murders, two of which occurred in the same room within seconds of each other and the third of which occurred shortly thereafter, and all three were committed under similar circumstances, consolidation was proper, and it was not rendered improper by the admission into evidence of the dying declarations of one of the victims, since, pursuant to G.S. 8-51.1, the declarations of the victim were admissible against the defendant on all three murder charges, regardless of whether the cases were tried separately or were consolidated.

3. **Criminal Law 89; Homicide § 16— dying declaration — evidence admissible for corroboration**

The trial court in a homicide prosecution did not err in permitting a witness to testify to an alleged dying declaration of one of the murder victims, since the testimony was admissible for the purpose of corroboration.

4. **Homicide § 16— statements not mentioning death — subsequent dying declarations not invalidated**

The mere fact that a homicide victim had made earlier statements implicating the defendant in which he did not express a fear of death in no way invalidated later statements to the same effect which clearly qualified as dying declarations, and the trial court properly allowed testimony of the declarations into evidence.

5. **Criminal Law § 69— homicide victim's phone call — identity of caller established — evidence admissible**

The trial court in a homicide prosecution did not err in allowing a telephone operator to testify concerning telephone calls she received from a man who identified himself as one of the victims who had been shot by defendant, since evidence was sufficient to establish the identity of the caller.

6. **Criminal Law § 101— failure to sequester jury — no error**

The trial court did not err in denying defendant's motion to sequester the jury overnight where the court gave the jurors instruc-

tions not to read newspapers about the case, watch the news, listen to the radio or discuss the trial with anyone, the jurors indicated the next morning that they followed the instructions, and nothing in the record indicated any impropriety on the part of any juror.

7. **Homicide § 16— dying declarations — showing required of State**

In a prosecution for homicide, defendant's contention that the trial court, before allowing the victim's dying declarations into evidence, should have required the State to prove that the declarant had a reputation for veracity and that the declarant did not harbor any feeling of ill will toward the defendant is without merit.

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

Evidence was sufficient to withstand defendant's motion for directed verdict in a homicide prosecution where it tended to show that one of the victims made dying declarations to the effect that defendant shot him and another victim in the other victim's home; the third victim, who was the wife of the declarant, accompanied her husband to the other victim's home; her death occurred within a half hour after her arrival at the home; she was shot in a manner similar to the other victims; her body was found nine miles from the house; someone tried to burn her car, just as defendant had tried to burn the house where the other two victims were found; and bullets removed from her body could have been fired from the same gun used to shoot the other victims.

9. **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 previously imposed in this homicide prosecution.

APPEAL by defendant from *Kivett, J.*, at the 2 February 1976 Session of IREDELL Superior Court.

Upon three indictments proper in form and consolidated for trial, defendant was convicted of first degree murder in the deaths of Mary Bowen Englebert, Douglas MacArthur Harding, and Clyde Ray Englebert and sentenced to death in each case.

The State's evidence tended to show:

About 1:00 a.m., on 20 September 1975, deceased Clyde Ray Englebert received a telephone call from deceased Douglas Harding requesting that he come to the Harding residence at once. Englebert could hear defendant Donald Harding's voice in the background. Englebert and his wife, Mary, drove to the Harding residence in their Javelin automobile, arriving about 1:30 a.m. Mary waited in the car.

When Englebert walked inside, the defendant, Donald Harding, was standing in the middle of the den with a gun in his hand. Englebert went over to the sink behind the bar to get a drink of liquor. When he turned around, he observed Donald Harding pointing the gun at him and asked the defendant not to aim at him. As Englebert turned away, Donald Harding shot him causing him to fall to the floor. Donald Harding then turned to his cousin, Douglas Harding, who was sitting on the couch, and proceeded to shoot him. Returning to where Englebert was lying the defendant shot him again, this time in the head as he tried to stand up. Defendant finished by shooting Douglas Harding a second time. Englebert received two bullet wounds in the chest area and one in the head area. Douglas Harding's body had two head wounds, a chest wound and a back wound from which he died almost immediately. Before leaving the Douglas Harding house, the defendant turned up the stereo and tried to set fire to the house.

After Donald Harding had left, Englebert tried several times to call the telephone operator between 2 a.m. and 3 a.m. to let her know he had been shot before he was finally able to advise her of his condition and location. The operator could hear loud country and western music in the background. At one point Englebert crawled out to the carport apparently in search of his wife. Shortly after the last telephone call, Cecil Cook, a Detective Sergeant with the Iredell County Sheriff's Department, and other officers arrived at the scene. Loud country and western music was still playing. Clyde Ray Englebert was transferred to the hospital where he died four days later as a result of the gunshot wounds.

The body of Mary Bowen Englebert was discovered the same morning about nine miles from the Harding residence and about two miles from the Javelin automobile. Mrs. Englebert had been shot twice, once in the abdomen and once in the back of the head. Her handbag and a bottle of Ancient Age Whiskey with a Mount Pleasant, North Carolina liquor store stamp, were found in the car. An identical bottle with a Mount Pleasant stamp had been seen at the Douglas Harding residence the evening before but had disappeared by the time the police arrived. Someone had apparently unsuccessfully started a fire in the car. According to medical testimony, the estimated time of Mary Englebert's death was 2 a.m., 20 September 1975.

Bullets, either .38 caliber or .357 magnum, removed from the bodies of Douglas Harding and Clyde Ray Englebert, were fired by the same gun. The .38 caliber bullet removed from Mrs. Englebert could have been fired from the same gun that fired the other bullets. Some live ammunition and spent shells were found in the driveway at the Douglas Harding residence. The spent cartridges were fired in the gun that was used to kill Douglas Harding and Clyde Ray Englebert. The death weapon was never recovered.

The State relied for its case upon circumstantial evidence and dying declarations made by Clyde Ray Englebert to Detective Cecil Cook. The State offered other declarations of Clyde Ray Englebert to Detective David Henson, Brenda Josey, Lettie Walker, Steven Ray Englebert, and Special Agent Richard Lester for the purpose of corroborating the alleged dying declaration made to Detective Cook.

The defendant offered no evidence.

Other facts pertinent to the decision will be related in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Roy A. Giles, Jr. for the State.

Warren A. Winthrop for defendant appellant.

COPELAND, Justice.

[1] Under Assignment of Error No. 1, defendant contends that the trial court erroneously denied his motion requesting a change of venue on the ground that unfavorable and inflammatory pretrial publicity would prevent him from receiving a fair and impartial trial in Iredell County.

In support of his motion, argued about one month before trial, defendant's attorney offered seven newspaper clippings concerning the murders and an affidavit to the effect that he, defense counsel, had talked with fifteen to twenty people in the county about the murders, all of whom indicated that they had formed opinions as to defendant's guilt. In addition, it was stipulated that the Statesville Record and Landmark in which accounts of the crimes had appeared had a circulation of approximately 17,000 in Iredell County and that the county had a population of between 70,500 and 75,000.

On 2 February 1976, the date the trial commenced, defendant renewed his motion and introduced an article describing the crimes which appeared in the February 1976 Issue of "Inside Detective" magazine. However, no showing was made of the number of issues of this magazine circulated in the county. Defense counsel also pointed out that news accounts of the crimes were broadcast over local radio and television stations.

On both occasions, the court concluded that the defendant could receive a fair and impartial trial in Iredell County and denied the motion for change of venue. Defendant did not bring forward on appeal the newspaper and magazine articles.

Defendant's motion for a change of venue was addressed to the sound discretion of the trial court. *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. McKethan,* 269, N.C. 81, 152 S.E. 2d 341 (1967); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955); G.S. § 1-84 (Cum. Supp. 1975). Where the record discloses, as it does in the instant case, that the presiding judge conducted a full inquiry, examined the press releases and the affidavits in support of the motion, and where the record fails to show that any juror objectionable to the defendant was permitted to sit on the trial panel, or that defendant had exhausted his peremptory challenges before he passed the jury, denial of the motion for change of venue was not error. *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969); *See State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967).

[2] Under Assignment of Error No. 2, defendant maintains the trial court erred in consolidating the three cases for trial.

Defendant argues that it was improper to consolidate these cases in light of our decision in *State v. Puett,* 210 N.C. 633, 188 S.E. 75 (1936), holding that dying declarations are admissible only where the death of the declarant "is the subject of the trial, and the circumstances of the death are the subject of the declarations." *State v. Puett, supra* at 636, 188 S.E. at 76. In *Puett,* the defendant was not permitted to introduce into evidence the dying declaration of his son who was mortally injured in the same fight in which the person for whose death the defendant was being prosecuted was killed. The son's death was not the subject of the trial.

In the present case, the homicide of the declarant, Clyde Ray Englebert, was at issue and the declarations admitted into

evidence related to the circumstances surrounding his death. Nevertheless, defendant argues that the consolidation allowed the State to put into evidence otherwise inadmissible statements because if the defendant had not been tried separately for the three murders, the statements could not have been introduced, under the *Puett* rule, in separate trials for the deaths of Douglas Harding and Mary Bowen Englebert.

While the defendant presents a tenable argument for severance of the cases under prior law, we note that the passage of G.S. 8-51.1 (Cum. Supp. 1975) eliminated the need for our resolution of this issue. Since the enactment of G.S. 8-51.1 (effective 1 October 1973), the "dying declarations of a deceased person regarding the cause or circumstances of his death" have been admissible in evidence in all civil and criminal trials and other judicial and administrative proceedings. The statute effectively overruled this Court's holding in *Puett* and thus the declarations of Englebert were admissible against the defendant on all three murder charges, regardless of whether the cases were tried separately or were consolidated. For one commentator's view of the effect of G.S. 8-51.1, see 1 Stansbury's N. C. Evidence, § 146 (Brandis Rev. Supp. 1976) at 151, 152 n. 12.

Consolidation is a discretionary matter with the trial judge and where the offenses charged constitute a continuing criminal episode and are so related in time and circumstance as to permit the admission in evidence of each in the trial of the others, consolidation is appropriate. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967); G.S. 15A-926 (Supp. 1975). Two of the murders occurred in the same room within seconds of each other and the murder of the wife followed shortly thereafter. All were committed under similar circumstances and thus consolidation was unquestionably proper.

[3] Next, under Assignment of Error No. 3, the defendant challenges the trial court's permitting David Henson to testify to an alleged dying declaration of Clyde Ray Englebert.

Henson was the first witness called to testify by the State and was also the first member of the Sheriff's Department to arrive at the murder scene. When it became apparent that Henson's testimony would involve alleged dying declarations, a voir dire was held. The district attorney wisely took this opportunity

to examine on voir dire all prospective witnesses that he planned to use in connection with alleged dying declarations.

After the voir dire, the district attorney called to the witness stand, Detective Cecil Cook. Detective Cook indicated that he talked with Clyde Ray Englebert in the hospital on 23 September 1975 when Englebert was in the Intensive Care Unit. At that time, Englebert told Detective Cook that "he didn't think he would pull through." Detective Cook promptly took Englebert's full statement implicating the defendant in the shootings of Englebert and Douglas Harding. After this statement was given, Detective Cook asked Englebert if he would "testify to what he had told me in Court." Englebert replied "I don't think I will be able to, but I hope I live to see that crazy S.O.B. behind bars." Englebert "was breathing very heavily and had a rattling noise from his chest and he was awful pale [in] color." Clyde Ray Englebert died the next day.

Defendant did not object to the above testimony.

David Henson was then recalled and, upon objection by defense counsel to a statement he was about to make implicating the defendant in the murders, Judge Kivett instructed the jury "that you may consider any statement this witness makes attributed to Clyde Ray Englebert solely for the purpose of corroborating the statement Clyde Ray Englebert allegedly made to Detective Cook who testified a moment ago." The judge defined corroboration and reiterated his admonition to the jurors that the testimony was to be considered as corroboration only.

Assuming, without deciding, that the declarations of Clyde Ray Englebert to David Henson did not qualify as dying declarations under G.S. 8-51.1, this testimony was clearly competent to corroborate the statements made by Englebert to Detective Cook. *State v. Cadell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); 1 Stansbury's N. C. Evidence, §§ 51, 52 (Brandis Rev. 1973).

Moreover, a statement by Englebert to Deputy Sheriff Henson, who was the first officer to arrive on the scene, may have been competent as a spontaneous utterance had it not been proffered for the purpose of corroboration. *See State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); 1 Stansbury's N. C. Evidence, § 164 (Brandis Rev. 1973).

This assignment of error is without merit and overruled.

[4] Under Assignments of Error Nos. 4, 5, and 6, defendant asserts the trial court erred in allowing Detective Cecil Cook, Lettie Walker, and Steven Ray Englebert to testify concerning alleged dying declarations of Clyde Ray Englebert.

Counsel for the defendant in his brief appears to concede that Englebert's statements to these three witnesses were made when he was cognizant of imminent death, but argues that they were nevertheless inadmissible because earlier statements of the deceased admitted into evidence did not qualify as dying declarations. Defendant cites no authority to support his contention.

During the victim's conversations with these three witnesses, he expressed his apprehension of impending death. When he talked with Detective Cook on 23 September 1975, he told him he did not think he would be able to testify against the defendant, because he did not think he would pull through. When he discussed returning to work with Lettie Walker on 21 September 1975, he told her "I doubt if I make it two more days." When he spoke to his son, Steven Ray Englebert, on 22 September 1975, he said, "No, I won't be able to come back [to the store]. I don't believe I'll get better . . . Donald really messed me up." Each of these statements indicated that the "deceased was conscious of approaching death and believed there was no hope of recovery." G.S. 8-51.1 (Cum. Supp. 1975).

The mere fact that Clyde Ray Englebert had made earlier statements implicating the defendant in which he did not express a fear of death in no way invalidated later statements to the same effect which clearly qualified as dying declarations. Moreover, the earlier statements were competent to corroborate the later dying declarations. *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562 (1942); *State v. Bell,* 212 N.C. 20, 192 S.E. 852 (1937).

This assignment of error is devoid of merit and overruled.

[5] Defendant contends in Assignment of Error No. 8, that the trial judge erred in allowing the telephone operator, Brenda Josey, to testify concerning telephone calls she received from a man who identified himself as Clyde Ray Englebert. Defendant contests the admissibility of this testimony on the ground that the identity of the caller was not sufficiently established.

We first note that the entire testimony of this witness was introduced into evidence without objection and that no exception appears in the record to any portion of this testimony.

In *State v. Strickland*, 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948) we held on the subject of telephone callers: "It is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case, either then or later."

Brenda Josey testified that the caller identified himself as Ray Englebert and stated he had been shot, that she heard "extremely loud" country and western music in the background and that the caller gave his location as the Douglas Harding residence off Wilkesboro Road, Windy Hill Acres. After the operator reported this information to the Sheriff's Department, Detective Henson went to the Harding residence where he found Clyde Ray Englebert wounded and the stereo still playing loud country and western music. Later, Englebert stated to Detective Cook and Agent Lester that he called the operator for help but that she did not understand him. Clearly, this evidence established the identity of the caller as Clyde Ray Englebert.

[3] Defendant argues, in Assignment of Error No. 9, that the court erred in allowing SBI Agent Richard Lester to testify concerning alleged dying declarations of Clyde Ray Englebert.

Agent Lester spoke with the deceased twice on 20 September 1975 and once on 22 September 1975 when Englebert was in the Intensive Care Section of the hospital. Englebert's statements on these occasions to Agent Lester were admitted solely for the purpose of corroborating other testimony and *not* as dying declarations. Out of an abundance of caution, the able trial judge restricted the admission of these statements to corroboration, which was entirely proper under our case law. *State v. Debnam, supra; State v. Bell, supra.* However, considering Englebert's failing physical condition at the hospital and the statements he made to other hospital visitors evidencing his acceptance of approaching death, we believe Agent Lester's testimony could also have been admitted as dying declarations. G.S. 8-51.1.

This assignment of error lacks merit and is overruled.

[6] Defendant says in Assignment of Error No. 10 that the court erred in overruling defendant's motion to sequester the jury overnight.

The record discloses that Judge Kivett gave explicit instructions to the jurors before permitting them to go home for the evening. The jurors were told not to read any newspapers about the case, not to watch the local news on television, not to listen to the radio, and not to discuss the trial with anyone. They were also reminded of their oath. All jurors indicated that they understood the instructions and the next morning, indicated that they had followed the instructions.

Nothing in the record suggests any impropriety on the part of any juror. Sequestration is a discretionary matter with the trial judge and here no abuse of discretion appears. *State v. Bynum and Coley*, 282 N.C. 552, 193 S.E. 2d 725 (1973). The assignment of error is meritless and overruled.

Under Assignment of Error No. 11, defendant contends the court erred in allowing into evidence the dying declarations of Clyde Ray Englebert.

[7] Defendant maintains that the court should have required the State to prove two things prior to allowing the dying declarations into evidence: (1) that the declarant had a reputation for veracity, and (2) that the delarant did not harbor any feeling of ill will toward the defendant. Defendant offers no authority for this proposition and certainly nothing in G.S. 8-51.1 or our common law required this proof. Nothing in the record indicates that Clyde Ray Englebert had a reputation for lying or that he was motivated by ill will. As a matter of fact, the record fails to disclose any previous trouble between them.

If the defendant had evidence tending to impeach the credibility of the declarant, Clyde Ray Englebert, he should have introduced it. "A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached in the same manner as any other sworn statement." *State v. Debnam, supra* at 270, 22 S.E. 2d at 565.

In Assignment of Error No. 12, defendant claims the court erroneously denied his motion for a directed verdict.

On a defense motion for a directed verdict, evidence is considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976).

[8] The evidence, when considered in the light most favorable to the State, was clearly sufficient to withstand a motion for directed verdict in the murders of Clyde Ray Englebert and Douglas Harding. Without repeating the other evidence, we feel that Clyde Ray Englebert's statements that the defendant shot him and Douglas Harding were sufficient to carry these cases to the jury.

While there is no direct evidence that the defendant shot Mary Bowen Englebert, the circumstantial evidence points unerringly to that conclusion. Mary Bowen Englebert accompanied her husband to the Harding residence and waited in the car; when her injured husband crawled outside to the carport shortly thereafter, she and the Javelin automobile were apparently gone; the medical testimony placed her time of death within a half hour of her arrival at the Harding residence; her body was discovered nine miles from the Harding residence and two miles from the Javelin automobile; she was shot in a manner similar to the other victims—all the victims were shot in the chest or abdomen and in the head with the same caliber bullets; her handbag was found in the automobile along with a liquor bottle identical to the one which had been seen at the Harding residence earlier in the evening, but which was missing when the police arrived; someone had attempted to burn the car, just as the defendant had attempted to burn the house; spent cartridges found in the driveway of the Harding residence were fired in the same gun that was used to shoot the other victims, and bullets removed from Mary Bowen Englebert's body could have been fired from the same gun. When viewed as a whole, this evidence was sufficient to survive a motion for directed verdict.

Under Assignment of Error No. 13, defendant contends the trial court erred in failing to instruct the jury that it was not to consider the dying declarations of Clyde Ray Englebert in the cases of Mary Bowen Englebert and Douglas Harding.

The substance of this assignment is similar to defendant's contentions in Assignment of Error No. 2, relating to the consolidation of the three cases for trial. In essence, defendant says that even if consolidation was proper, *State v. Puett, supra,* would, at a minimum, require an instruction to the jury limiting their consideration of the dying declarations to the case of the murder of Charles Ray Englebert. Failure to give such an in-

struction, defendant contends, was prejudicial error because jurors cannot be expected to "segregate evidence into separate intellectual boxes" and Englebert's declarations directly implicated defendant in the murder of Douglas Harding and were an important piece of circumstantial evidence implicating defendant in the death of Mrs. Englebert.

In our disposition of Assignment of Error No. 2, we held that G.S. 8-51.1 would permit the admission of dying declarations of Clyde Ray Englebert, "concerning the circumstances of his death," in all three murder cases regardless of whether they were tried separately or consolidated. Similarly, G.S. 8-51.1 would make the instruction now requested by defendant unnecessary and improper.

[9] The attorney general's office in its brief calls to our attention 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), the statute under which defendant was sentenced. *Ex mero motu*, and by authority of the provisions of 1973 Sess. Laws, c. 1201 § 7 (1974 Session), we substitute a sentence of life imprisonment for the death penalty in each of these cases.

This case is remanded to the Superior Court of Iredell County with directions (1) that the presiding judge, without requiring the presence of defendant, enter judgments imposing life imprisonment for the three first-degree murders of which defendant has been convicted, and (2) that, in accordance with these judgments, the clerk of the 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 difficult case was well prepared by the district attorney and ably tried by Judge Kivett. We have considered all assigned errors and, because of the serious nature of this case, searched the record for errors other than those assigned and have found none prejudicial to the defendant, other than the failure of defense counsel to assign error under *Woodson v. North Carolina, supra.*

In the trial we find

No error.

Death sentences vacated, and in lieu thereof, life sentences imposed.

STATE OF NORTH CAROLINA v. NELSON CALDWELL MONTGOMERY

No. 5

(Filed 7 December 1976)

1. **Constitutional Law § 30— testimony obtained by police coercion — admissibility — due process**

A denial of due process occurs when the State contrives a conviction by the knowing use of perjured testimony; however, when a witness testifies to facts earlier obtained by coercive police action and all of the circumstances surrounding the alleged coercive acts are before the jury, the requirements of due process are met, and it is then for the jury to determine the weight, if any, to be given to the testimony.

2. **Constitutional Law § 30— testimony allegedly obtained by police coercion — admissibility**

The testimony of three witnesses who gave incriminating testimony against defendant was not rendered inadmissible on the ground the police coerced the witnesses into giving perjured testimony where the only evidence of police coercion was testimony by each witness that he was questioned by the police several times and on one occasion was told that he could get ten years if he lied, a full disclosure of the alleged coercive police action was before the jury, and under vigorous and searching cross-examination each witness steadfastly asserted the truth of the material facts in his testimony.

3. **Constitutional Law § 30— repudiation of statement to police — insufficiency to show knowing use of perjured testimony — effect of alleged coercion by police**

The fact that a witness at trial repudiated his prior sworn statement given to police officers was not sufficient, standing alone, to bring into operation the rule regarding the knowing use of perjured testimony; furthermore, the witness's testimony incriminating defendant was brought out on cross-examination in an effort by defense counsel to show that the witness had been coerced by police officers into making a false statement, thereby impugning the credibility of the State's other witnesses, and the alleged coercion of the witness presented only a question of credibility which was for the jury.

4. Criminal Law § 62— witness's reference to polygraph test — motion for mistrial

The trial court did not err in the denial of defendant's motion for mistrial made when a State's witness stated during cross-examination by defense counsel that he had been given a polygraph test where there was no evidence before the jury as to the nature and results of the test, and the trial court allowed defense counsel's motion to strike the testimony and instructed the jury not to consider it.

5. Criminal Law § 66— in-court identification — reference to perjury by police — conversation with other witnesses

A witness's in-court identification of defendant as the perpetrator of a robbery was not rendered inadmissible by the fact that the witness had been told by the police that if he told a lie he could be prosecuted for perjury or by the fact that the witness had talked to other State's witnesses before he agreed to testify.

6. Criminal Law § 66— in-court identification — opportunity for observation — exhibition of photograph to witness

The evidence supported the court's determination that a witness who identified defendant in court had ample opportunity at the crime scene to observe defendant, whom he had known well for some two or three years, that the in-court identification was not based on any suggestion as to defendant's name by the police or by any exhibition of a photograph to the witness, and that the in-court identification was of independent origin based solely on what the witness saw at the time of the crime and on his personal acquaintance with defendant.

7. Constitutional Law § 29; Jury § 7— exclusion of jurors because of death penalty views — death penalty vacated

Defendant's constitutional rights were not violated by the exclusion of jurors because of their views concerning the death penalty in a trial for first degree murder since the death penalty for that crime has been invalidated and the decision of *Witherspoon v. Illinois*, 391 U.S. 510, invalidated only the sentence of death and in no way affected the conviction itself.

8. Constitutional Law § 29; Jury § 7— jury — cross section of community — exclusion of jurors opposed to capital punishment

The exclusion of veniremen who expressed scruples against the death penalty in a prosecution for first degree murder did not violate defendant's right to a jury reflecting a fair and representative cross section of the community.

9. Criminal Law §§ 98, 128— jurors viewing defendant in handcuffs — motion for mistrial

The trial court in a prosecution for first degree murder did not err in the denial of defendant's motion for mistrial made on the ground that some of the jurors viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse.

10. Constitutional Law § 36; Homicide § 31— first degree murder — substitution of life imprisonment for death penalty

A sentence of life imprisonment is substituted for the death penalty for a murder committed between the date of the decision of *State v. Waddell*, 18 January 1973, and the effective date of the session law rewriting G.S. 14-17, 8 April 1974.

APPEAL by defendant from *Ervin, J.*, 29 September 1975 Session of CATAWBA Superior Court.

Defendant was charged in separate bills of indictment with the first-degree murder of Kristin Cress Elizabeth Andrews and the armed robbery of Jordan's LeCharolais Steak House. The charges were consolidated for trial and defendant entered a plea of not guilty as to each charge.

The State's evidence tended to show that on the night of 24 October 1973, at about 11:45 p.m., Frederick Roebuck, Mildred Burns, Ann Jarrett and Kristin Cress Elizabeth Andrews, employees of the establishment, and three unidentified customers were in or near the dining area of Jordan's LeCharolais Steak House in Hickory, North Carolina. Ted Richards, a dishwasher, was in the kitchen. Three masked black men, one of whom was armed with a pistol, entered the kitchen through the back door. After a short pause, the men proceeded to the dining area where, by the use of the pistol, they took checks and cash from the cash register amounting to $1,150.00. During the course of this robbery Kristin Cress Elizabeth Andrews was fatally shot by the man who was carrying the pistol. The robbery and killing took place within a period of about three minutes. None of the people in the dining area were able to identify the robbers. However, Ted Richards made an in-court identification of defendant as the man who carried the pistol. Richards' testimony will be hereinafter more fully considered.

The jury returned verdicts of guilty as charged in each case. The trial judge entered a judgment imposing the death penalty on the murder charge and arrested judgment on the verdict of guilty of armed robbery.

Attorney General Edmisten, by Associate Attorney William H. Boone and Special Deputy Attorney General Myron C. Banks, for the State.

James E. Ferguson II, attorney for defendant appellant.

BRANCH, Justice.

Defendant contends that he was denied his constitutional right by due process by the investigative methods of the police officers who allegedly coerced State's witnesses to give perjured testimony against him. Defendant relies upon a line of cases represented by *Mooney v. Holohan,* 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340. In *Mooney,* the petitioner sought relief under the Federal habeas corpus act alleging that his due process rights were violated because the State knowingly used perjured testimony against him and deliberately suppressed evidence which would have refuted the testimony against him. The United States Supreme Court denied the petition because the petitioner had not exhausted the remedies afforded to him by the State courts. However, defendant relies on this language from *Mooney:*

> . . . It [due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Defendant also cites in support of this contention: *Miller v. Pate,* 386 U.S. 1, 17 L.Ed. 2d 690, 87 S.Ct. 785; *Pyle v. Kansas,* 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177; *Hysler v. Florida,* 315 U.S. 411, 86 L.Ed. 932, 62 S.Ct. 688; *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280; *United States v. Swope,* 232 F. 2d 853. The majority of the cases cited by defendant are cases in which relief was sought under the Federal habeas corpus act upon allegations that the State knowingly used perjured testimony *and suppressed this knowledge.* In considering this assignment of error, it must be borne in mind that we are considering the admissibility of testimony obtained by the alleged coercion of a witness rather than a *confession* by an accused obtained by police coercion.

In *People v. Portelli,* 15 N.Y. 2d 235, 205 N.E. 2d 857, a witness gave incriminating testimony against defendant and on cross-examination disclosed that he was taken to a police station

by police officers where he denied any knowledge of the crime. He disclosed his knowledge of the crime only after he was severely beaten and tortured. Defendant contended that this testimony should have been stricken because of the coercive tactics of the police officers in obtaining the witness' statement. Rejecting this contention, the New York Court of Appeals stated:

> . . . [T]he testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury. (See 3 Wigmore, Evidence [3d ed., 1940], § 315, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.

In *People v. Bradford,* 10 Mich. App. 696, 160 N.W. 2d 373, the Michigan Court of Appeals considered a similar question. There a witness, Payne, implicated defendant as his accomplice in the shooting of two police officers. He also testified as to physical harm inflicted upon him during police interrogations. The court, overruling defendant's contention that Payne's testimony was untrustworthy as a matter of law, stated:

> . . . Witness Payne's testimony was certainly to be considered and weighed with no small amount of suspicion. Yet for the trial judge to exclude it as untrustworthy as a matter of law would result in an invasion of the jury's exclusive and unquestioned province as the trier of fact.
>
> In *People v. Treichel* (1924), 229 Mich. 303, 200 N.W. 950, the fact situation and question raised were very similar to that herein. There the implicating accomplice was slapped into a confession by a sheriff. The Michigan Supreme Court by Mr. Justice Wiest stated on p. 309, 200 N.W. on p. 952:
>
> > "Defendants may not urge the exclusion of the testimony of Howard Long on the ground he was led to confess by trickery, deceit, brutality or promises. He was not on trial. Methods and means employed to get him to confess went to the jury along with his testimony, and it was for the jury to say, under the cir-

cumstances, what weight, if any, they would give to what he said in court."

The jury in the instant case was made aware of the circumstances surrounding and leading to witness Payne's implication of defendant.

. . .

The Georgia Supreme Court considered the question of the exclusion of coerced testimony in the case of *Rawlins v. State*, 124 Ga. 31, 52 S.E. 1. The court, in part, stated:

> . . . Evidence that the officers first obtained information as to his participation in the crime by placing him [the witness] under the influence of fear, and that at the time of the trial he still labored under this fear, would be admissible to go to the jury along with his testimony, in order that they might determine upon the weight to be given it; but neither the improper methods used in obtaining the confession nor the apprehension under which the witness labored during the trial would render him an incompetent witness. . . .

Accord: Long v. United States, 360 F. 2d 829; *Adler v. State*, 248 Ind. 193, 225 N.E. 2d 171.

[1] It is self evident that a denial of due process occurs when the State contrives a conviction by the knowing use of perjured testimony. However, when a witness testifies as to facts earlier obtained by coercive police action and all of the circumstances surrounding the alleged coercive acts are before the jury, the requirements of due process are met. It is then for the jury to determine the weight, if any, to be given to the testimony. *United States v. West*, 170 F. Supp. 200; 3 Wigmore, Evidence § 815 (Chadbourne rev. 1970); Annot., 3 L.Ed. 2d 1991, *Due Process — Perjured Testimony.*

[2] We apply the above-stated principles of law to the rulings of the trial judge concerning the admission of the testimony of Johnny Ray Shuford, Melvin Dula, Henry Thomas, Jr., and Ted Richards.

The testimony of the witness Johnny Ray Shuford tended to show that he saw defendant at the home of Melvin Dula at about 12:30 p.m. on the morning after the LeCharolais Steak House had been robbed. Jerry Cromwell, Billy Little and Nelson

Montgomery were present. Nelson Montgomery had a stack of money with a rubber band tied around it. He also had a charge card and a piece of paper with LeCharolais Steak House written on it. The witness testified that he heard Nelson Montgomery say that he "had to shoot that bitch." On cross-examination the witness made many contradictory statements about the circumstances under which defendant's statement was made and was very vague as to the time and place. However, he did not change his testimony as to the material facts. The only evidence of police coercion was his testimony that he was questioned several times and on one occasion was told that he could get ten years if he lied.

Melvin Dula testified to substantially the same facts, including the fact that one of the police officers told him that he could get up to ten years if he did not tell the truth.

The strongest evidence against defendant came from the witness Ted Richards. He testified that he recognized the man carrying the pistol during the robbery of the LeCharolais Steak House on 24 October 1973 as a schoolmate and neighbor, Nelson Montgomery. Again the only evidence of police coercion was that police officers questioned Richards on several occasions and once told him that he could get up to ten years if he lied. He stated that he was not scared by this statement. Officer McGuire denied making such statement to any of the witnesses. Richards' testimony was also filled with contradictory and inconsistent statements. Nevertheless, he never changed his trial testimony as to the material facts.

The evidence in this case reveals a tenacious investigation by the police officers but shows little evidence of coercive action against the witnesses, Dula, Shuford and Richards. Even had there been strong evidence of coercion, this record does not disclose that defendant's conviction resulted from the use of known perjured testimony. A full disclosure of the alleged coercive police action was before the jury. Under vigorous and searching cross-examination each witness steadfastly asserted the truth of the material facts.

Under these circumstances, we hold that the evidence was admissible. Evidence of any police coercion or of contradictory statements and withholding of information on the part of the witnesses goes to their credibility. This, of course, is a jury question.

We digress in order to make it eminently clear that we do not approve of any police tactics which include beatings and torture. However, our system of jurisprudence provides safeguards against such acts without affecting the admissibility of allegedly coerced testimony.

[3] Finally, we consider the admission of the testimony of the State's witness Henry Thomas. When it became apparent that Thomas was hostile to the State, the District Attorney requested that he be allowed to examine the witness in the absence of the jury. The jury was excused and the witness testified that on 30 September 1975, he made a statement to police officers Tucker and Keller of the Hickory Police Department to the effect that in September 1973 he borrowed a .22 six-shot revolver from Tony Wilson. He went to the Two Spots Club in Lenoir, North Carolina, that night and there sold the pistol to Nelson Montgomery for the sum of seventy dollars. He later told Tony Wilson that someone had stolen the pistol. About two weeks later he heard about the girl being killed at the steak house. He admitted that his statement was reduced to writing, signed by him and sworn to before a magistrate. However, he testified that police had his cousin Tony Wilson in custody on two felony charges. Wilson had told them about loaning him the pistol and he (Thomas) at first told the officers that the gun had been stolen. Thereupon, the officers told him that his cousin would be held without bond and asked him if he didn't see Nelson Montgomery on the night he borrowed Wilson's pistol. The officers told him and Wilson to go outside and get a story together. After conferring with Wilson for a few moments, he returned and made the false statement about selling the pistol to Montgomery. He made this statement in order to get Wilson out on bond and Wilson was, in fact, allowed to leave after he signed the statement. The jury returned to the courtroom and in reply to the District Attorney's question, the witness testified that he never saw Nelson Montgomery at a club named the Two Spots Club in Lenoir. The State made no further direct examination of the witness. Defense counsel then proceeded to elicit testimony similar to that set out above concerning the coercion of the witness Thomas by the police officers.

The fact that the witness Thomas at trial repudiated the prior sworn statement given to police officers is not sufficient, standing alone, to bring into operation the rule regarding the knowing use of perjured testimony. *Lott v. United States,* 262

F. 2d 332. Further, it clearly appears that it was a part of defense counsel's trial tactics to show that Thomas had been coerced by the police officers into making a false statement, thereby impugning the credibility of the State's witnesses, Dula, Shuford and Richards. Again the alleged coercion of this witness presented only a question of credibility which was for the jury. *See People v. Portelli, supra; People v. Bradford, supra.*

This record does not permit the conclusion that the defendant has been deprived of his constitutional right to due process by coercive action directed against the State's witnesses.

This assignment of error is overruled.

[4] Defendant assigns as error the failure of the trial judge to grant his motion for mistrial because the witness Richards stated that he had taken a polygraph examination.

Defense counsel had vigorously and repeatedly cross-examined the witness Richards regarding his prior conversations and contacts with police officers. The record discloses the following exchange and ruling during that cross-examination:

> A. . . . I did not stay over fifteen minutes. After I talked to McGuire that day, he took me home.
>
> Q. Just Captain McGuire?
>
> A. Yes. Nobody was home when I got home. I can't remember if I talked to Captain McGuire some more before I went to Court to give my testimony in this case. I know somewhere between those dates they took me up to Lenoir and give me a polygraph.
>
> MR. FERGUSON: I move to strike that.
>
> Q. Did you talk to Captain McGuire any more?
>
> COURT: Motion to strike is allowed. Don't consider the last statement of the witness where he went or for what purpose, members of the jury.
>
> MR. FERGUSON: We move for a mistrial.
>
> COURT: Motion is denied. EXCEPTION No. 77.

It is well settled in this jurisdiction that the results of a polygraph test are inadmissible into evidence and that the parties may not be allowed to introduce such results directly or

by indirection. *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94; *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169. However, every reference to a polygraph test does not necessarily result in prejudicial error. *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282.

In *Foye,* the State offered evidence of the results of a polygraph examination given to defendant Foye which indicated that he told the truth about the charged crime of murder. This testimony implicated the codefendant Williams. The State further offered evidence that Williams was also given a polygraph test on the same day but the result of the Williams test was not offered into evidence. The trial judge instructed the jury to apply this evidence only to the defendant Foye. This Court found the admission of this evidence to be prejudicial error as to defendant Williams because "it was designed to leave the inference that the defendant (Foye) was telling the truth about the whole matter and amounted to informing the jury of the results of the lie detector test."

Foye is readily distinguishable from instant case. Here the State did not introduce the evidence upon which the motion for mistrial was based. This came forth after defense counsel had cross-examined the witness for a part of the preceding day and for some length of time on 8 October 1975. There was no evidence before the jury as to the nature of the test, the questions propounded, the answers given or the *result* of the test. Further, when defense counsel's cross-examination unintentionally elicited the one reference to a polygraph test, the trial judge immediately allowed his motion to strike and instructed the jury not to consider the evidence. We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with this instruction by the court. *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453. We, therefore, cannot say that this one phrase used by the witness in an otherwise responsive answer constituted prejudicial error requiring a new trial.

The trial judge correctly denied defendant's motion for a mistrial.

Defendant contends that his constitutional rights to due process was violated by the action of the trial judge in admitting the identification testimony of Ted Richards.

We have previously addressed defendant's contention that the police coerced the witness into offering perjured testimony. There remains for our consideration the contention that the witness' identification testimony should have been suppressed on the grounds that it was tainted by "police persuasion and suggestion."

When the State offered the identification testimony of Ted Richards, upon defendant's objection, the trial judge excused the jury and conducted a *voir dire* examination as to the admissibility of this evidence.

On *voir dire* Ted Richards testified that he recognized one of the robbers as Nelson Montgomery. He had known Nelson Montgomery for about two years and had played with him and "hung around with him." Montgomery lived right behind his home. He stated that he was able to see Montgomery's face through the stocking which he had over his head and he observed him for a period of about ten seconds while standing about one-half step from him. He also recognized him by his voice and the "way he was built." The witness stated unequivocally that his in-court identification of defendant was based on his observations at the time of the commission of the crime. He admitted on cross-examination that he did not tell the police on the night of the crime that he had recognized Nelson Montgomery but that he did tell his mother, father and brother that morning that he recognized Nelson Montgomery. The reason he did not tell the police officers was that he was scared that someone would hurt him. He talked to the police the next day and he mentioned the name of Nelson Montgomery first. Officer McGuire showed him a photograph only *after* he, Richards, had named defendant as the man he had recognized at the steak house that night. He also admitted that he testified at a preliminary hearing that he could not identify defendant as one of the men who committed the crimes at the steak house. He further admitted testifying that a single photograph of defendant was shown him prior to the time that he made the identification. He said that the statements he made at the preliminary hearing were false and that he made them out of fear.

Officer McGuire testified that the witness Ted Richards told him on 26 October 1973 that Nelson Montgomery was one of the men who robbed the steak house. He had not mentioned a name or shown Richards a photograph before the statement

was made. He attended the preliminary hearing on 13 November 1973 when Richards failed to make an identification. The courtroom was full and about 99% of the people in the courtroom were black. The officer said that Ted's mother had told him that she was afraid for her son because of several "incidents."

Melvin L. Tucker testified that he became Chief of Police in the town of Hickory in August 1974. He talked with Ted Richards in the month of February or March 1975 concerning the crimes committed in the LeCharolais Steak House on 24 October 1973. Richards indicated that he was afraid and did not want to be the only witness. He then made arrangements for Richards to talk to prospective witnesses Dula, Shuford and Roberts on 2 April 1975. After talking with these prospective witnesses, Ted Richards stated that he would testify.

Sgt. T. F. Suddreth, a black police officer, was present during the interview on 2 April 1975. Ted told them what happened at the steak house the night of 24 October 1973, and explained that one of the reasons he had been unwilling to testify was that he did not want to be known as a "Tom," *i.e.*, a traitor to the black cause.

Rosalee Abraham, mother of Ted Richards, testified that she talked with Ted during the early morning hours of 25 October 1973 and he told her that he knew who did the shooting but he did not actually tell her that it was Nelson Montgomery until three or four days later.

At the conclusion of the *voir dire* hearing, Judge Ervin made extensive findings of fact consistent with the testimony above set forth. He thereupon concluded and ruled:

> 1. That Ted Richards had ample opportunity to observe the defendant, whom he had known well for two or three years;
>
> 2. That there is nothing to indicate any suggestion by any person which would color the identification of the defendant;
>
> 3. That there were no illegal identification procedures or lineups involving the defendant;
>
> 4. That the in-court identification of the defendant is of independent origin, based solely on what Ted Rich-

ards saw at the time of the robbery and on his prior personal acquaintances with and knowledge of the defendant, and does not result from any out-of-court confrontation or from any photograph or from any pre-trial identification procedures suggestive or conducive to mistaken identifications;

5. That there was no evidence of any confrontation or other pre-trial identification procedure so unnecessarily conducive or suggestive as to lead to any possibility of irreparable mistaken identification;

6. That the inconsistent statements made by Ted Richards are proper subjects for cross examination; and may be used to impeach him, but they do not require the Court to suppress his identification testimony and the Court declines to do so;

IT IS, THEREFORE, ORDERED that the evidence of the identification of the defendant by Ted Richards is competent evidence in the trial of this case.

[5, 6] Police procedures which are "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to amount to a denial of due process constitute a recognized ground of attack upon a conviction in a criminal case. *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283. Defendant argues that the in-court identification by the witness Richards resulted from such unlawful procedures and in support of that argument he contends: (1) that Richards' identification of defendant was based on incriminating information received during a meeting with Dula and Shuford at the police station; (2) that the police had threatened Richards with prosecution for perjury unless he testified against defendant; (3) that Captain McGuire had asked Richards to identify a single photograph of defendant as being the person who had robbed the steak house and had mentioned defendant's name prior to his identification of the photograph; and (4) that Richards' in-court identification could not have an independent origin since he had no opportunity to observe the perpetrator of the crime.

[5] The trial judge found that the officers told Richards that if he told a lie he could be prosecuted for perjury. He also found that Richards talked to other State's witnesses before he

agreed to testify. Both of these findings were supported by the evidence. However, these facts, standing alone, are not "so unnecessarily conducive to irreparable mistaken identification" as to preclude the admission of the identification testimony.

[6] The trial judge's other findings of fact were adverse to defendant's remaining contentions. There was ample evidence to support all the findings of fact and they are, therefore, binding upon this Court. The findings in turn support the conclusions of law and the trial judge's ruling. *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677; *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420.

The trial judge correctly admitted the challenged testimony.

[7] Defendant next contends that the trial judge erroneously allowed the State to challenge for cause five veniremen who expressed scruples against the death penalty.

This contention is based wholly on the case of *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770. In light of the holding in *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978, invalidating the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), defendant's contention requires little discussion. In *Witherspoon* the Supreme Court made it clear that its decision invalidated the sentence of death and in no way affected the conviction itself. *See State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629.

This assignment of error is without merit.

[8] By his Assignment of Error No. 1 defendant contends that the exclusion of death scrupled veniremen violated his right to a jury reflecting a fair and representative cross section of the community.

This same argument was rejected in the case of *Witherspoon v. Illinois, supra,* in which the United States Supreme Court held:

> . . . We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared

to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

In *Bumper v. North Carolina,* 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788, the Supreme Court restated the rule applicable to this argument:

> In *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in Witherspoon does not govern the present case, because here the jury recommended a sentence of life imprisonment. The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. [Citations omitted.] We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone" . . . .

See also State v. Williams, 275 N.C. 77, 165 S.E. 2d 481.

These cases are clearly dispositive of the argument presented here and we, therefore, overrule this assignment of error.

[9] Defendant argues that the trial judge erred by refusing to grant his motion for mistrial because the jury observed defendant in handcuffs.

The only record evidence concerning this matter is contained in defense counsel's oral motion and the oral reply by the District Attorney. According to defense counsel he observed the defendant as he was brought from the jail to the courthouse. He was handcuffed and he passed within three or four feet of jurors who were standing beside the courthouse steps. The District Attorney replied that the jail and the courtroom were in separate buildings and the handcuffs were on all occasions removed before the defendant entered the courtroom.

In *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353, we recently considered the question of whether a defendant was denied due process by reason of the fact that he was shackled in the courtroom during his trial. In a well-reasoned and fully documented opinion by Justice Huskins, the Court concluded that as a general rule a defendant is entitled to appear at trial free from bond or shackles except in extraordinary instances. The opinion contained a full discussion of exceptional circumstances which will allow a trial judge to order defendant to be shackled or restrained during the course of a trial. In deciding that the trial judge did not err under the particular circumstances of that case, the Court said that shackling should be avoided because:

> . . . (1) [I]t 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.

We reaffirm the holding and reasoning of *Tolley*. However, it is readily apparent that instant case differs factually from *Tolley*. Here defendant was never shackled or bound while in the courtroom. The only basis upon which the trial judge could have granted a new trial was that the fleeting view of the handcuffed defendant while being transported from the jail to the courtoom may have suggested to some of the jurors that defendant was "an obviously bad and dangerous person whose guilt is a foregone conclusion."

The question of whether a mistrial is required because jurors had an opportunity to see an accused in handcuffs while being escorted from the jail to the courthouse has not been before this Court. However, we find guidance from other jurisdictions.

The Supreme Court of Missouri considered a similar question in the case of *State v. Temple*, 194 Mo. 237, 92 S.W. 869. There the defendant was manacled when he was brought into the courtroom from the jail and was again manacled in the presence of some of the jurors when he was returned to the jail. The restraints were removed during the course of the trial. The Missouri Supreme Court emphatically adopted the general rule

followed by our Court in *Tolley* but modified it with this language:

> " . . . But there is no pretense that the prisoner in this case was shackled during the trial. On the contrary, it clearly appears that he was not in any way deprived of the free and calm use of all of his faculties. We do not, however, intend to be understood as holding that any explanation was due from the officer in charge of the defendant for placing shackles upon him in taking him to and from the courthouse during the trial." All of which is applicable to the facts of this case and conclusively establish that the defendant has no ground of complaint on account of the action of the officer in handcuffing him while bringing him to, and taking him from, the court. . . .

The defendant was observed by three or more jurors for a short time while being transported from the jail to the courtroom in *State v. Jones*, 130 N.J. Super. 596, 328 A. 2d 41. Rejecting defendant's motion for a mistrial, the court stated:

> Defendant's right to be free of shackles during trial need not be extended to the right to be free of shackles while being taken back and forth between the courthouse and the jail. *Commonwealth v. Carter*, 219 Pa. Super. 280, 281 A. 2d 75 (Super. Ct. 1971); *Moffett v. State*, 291 Ala. 382, 281 So. 2d 630 (Sup. Ct. 1973); *People v. Panko*, 34 Mich. App. 297, 191 N.W. 2d 75 (App. Ct. 1971). It is within the sound discretion of an officer charged with the custody of a person to place handcuffs or shackles on him to prevent escape and to protect public safety while the prisoner is being transported. *State v. Moore*, 257 S.C. 147, 184 S.E. 2d 546 (Sup. Ct. 1971). In *State v. Warriner*, 506 S.W. 2d 103 (Mo. Ct. App. 1974), defendant was removed from the courtroom at the end of the first day of trial in handcuffs and was viewed by the jury outside the courtroom for two or three minutes. Quoting from *United States v. Leach*, 429 F. 2d 956, 962 (8 Cir. 1970), the court held (at 104), "It is a normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this."

A contention by defendant that his rights of due process were violated when he was seen handcuffed while being taken

from the jail to the courtroom was summarily disposed of by the Kentucky Court of Appeals in the case of *Donehy v. Commonwealth,* 170 Ky. 474, 186 S.W. 161, with the following language:

> We entertain no doubt that it is within the sound discretion of an officer in custody of criminals, taking into account the nature of the offense charged and the character and disposition of the offender, to place handcuffs on him when he is taken to the court from the jail for trial.

Accord: McCoy v. State, 175 So. 2d 588; *State v. Duncan,* 116 Mo. 288, 22 S.W. 699; 21 Am. Jur. 2d, Criminal Law § 240.

This record indicates that some of the jurors may have momentarily viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse. It is common knowledge that bail is not obtainable in all capital cases and the officer having custody of a person charged with a serious and violent crime has the authority to handcuff him while escorting him in an open, public area. Indeed, it would seem that when the public safety and welfare is balanced against the due process rights of the individual in this case, such action was not only proper but preferable. Under the circumstances of this case, the trial judge correctly denied defendant's motion for a mistrial.

[10] Defendant next attacks the imposition of the death penalty upon the verdict of guilty of first-degree murder.

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. Supp. 1975). By virtue 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 for crimes of first-degree murder committed *after* its effective date of 8 April 1974. However, in instant case the offense was committed prior to that date. We have held that the appropriate sentence for one convicted of first-degree murder committed *prior* to the 1974 enactment and *after* the interpretation of G.S. 14-17 (1969) in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (decided 18 January 1973), is life imprisonment. *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97. For the reasons stated in *Davis,* we substitute a sentence of life imprisonment in lieu of the death penalty imposed in this case.

Defendant does not support his remaining exceptions with reason, argument or citation in his brief. However, we have carefully examined this entire record and find no error warranting that the verdict and judgment be disturbed.

This case is remanded to the Superior Court of Catawba County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for first-degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court of Catawba County 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 this judgment and commitment as revised in accordance with this opinion.

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA v. SEARS WILLIAM SAULS

No. 54

(Filed 7 December 1976)

1. **Criminal Law § 10— accessory before the fact — elements**

The elements necessary to be proved under G.S. 14-5 in order to sustain a conviction for accessory before the fact are: (a) that defendant counseled, procured or commanded the principal to commit the offense; (b) that defendant was not present when the principal committed the offense; and (c) that the principal committed the offense.

2. **Forgery § 2— accessory before the fact to forgery — sufficiency of evidence**

Evidence was sufficient to withstand a motion for nonsuit on defendant's charges of accessory before the fact to forgery and to the uttering of forged instruments where it tended to show that two men went to defendant and told him they needed to get N. C. driver's licenses in fictitious names in order to cash stolen checks; defendant gave them directions to the license bureau and instructed them that, in order to get licenses, they would be required to take a written test and show identification; defendant loaned the men a car to drive to the license bureau; the men obtained the licenses and forged and cashed checks using the licenses; defendant personally received $2000

in cash from the men in return for the checks which were forged and cashed; one of the men stated to police that a third man provided fictitious identification cards and the stolen blank checks for $3000 "plus taking care of [defendant] with some of the money from the cashing of the blank checks in N. C."; when one of the men relayed his worry to defendant that a patrolman had taken down the license plate number of their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]"; and some days later, defendant called one of the men to inform him that the police knew who he was and advised him to get out of town.

3. **Criminal Law § 73— hearsay testimony — definition**

To be hearsay, evidence must be offered to prove the truth of what the declarant said, and it is not hearsay if offered only to prove that the declarant made the statement or for any other purpose.

4. **Criminal Law § 102— statement of district attorney — no motion to strike — no prejudice to defendant**

Defendant was not prejudiced where the district attorney stated that "this is where perhaps a voir dire would be appropriate to establish conspiracy," defendant requested that the jury be instructed to disregard the statement, there was a conference at the bench, the request for the jury instruction was not renewed, and defendant made no motion to strike.

5. **Criminal Law § 89— corroborative statement — failure to request limiting instruction**

The trial court did not err in allowing a witness's written statement to be introduced into evidence over defendant's general objection, since defendant failed to request an instruction restricting the consideration of the statement to corroboration of the witness's testimony.

6. **Criminal Law § 131— incompetent and immaterial evidence — new trial on ground of newly discovered evidence properly denied**

In a prosecution for accessory before the fact to forgery and uttering forged checks, defendant was not entitled to a new trial based upon newly discovered evidence which consisted of (1) testimony by a polygraph expert concerning results of tests administered defendant and (2) testimony by a witness who stated that she had cashed some of the forged checks for the principals, since the first would have been incompetent in a new trial and the second would have been immaterial.

7. **Criminal Law § 134— prayer for judgment continued — sentencing at subsequent term of court proper**

Where the trial judge after verdict ordered that prayer for judgment be continued until the next criminal term, and the presiding judge at that term conducted a hearing before entering judgment that defendant be imprisoned for three years, such sentence was properly imposed.

APPEAL by the State pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 29 N.C. App. 457,

224 S.E. 2d 702 (1976), which reversed the conviction of the defendant before *Collier, J.*, at the 5 May 1976 Criminal Session of GUILFORD Superior Court.

Defendant was tried on an indictment, proper in form, with the offenses of forgery and uttering a forged instrument. He was convicted as an accessory before the fact to forgery and an accessory before the fact to uttering a forged instrument. From judgment imposing a prison sentence, defendant appealed. The Court of Appeals held that there was not sufficient evidence to go to the jury and reversed. One member of the panel dissented, and the State appealed. Defendant, by his brief, brought forward other assignments of error not passed upon by the Court of Appeals.

The State's evidence tended to show that Edward George Busby and Ronald McVey purchased some stolen checks and fictitious credit cards from a man named Frasier in Portsmouth, Virginia. Some of the checks had been stolen from a law firm in Greensboro, North Carolina, and others from a construction company. At the time of the purchase of the checks (on or about 1 November 1973), Frasier told the men to go see defendant in Greensboro for help in getting North Carolina driver's licenses for use in cashing the checks.

Busby and McVey went to Greensboro during the last week of November and located defendant, whom Busby had known for over a year. The men told defendant that they needed a car in which to take a driver's test to secure driver's licenses in the fictitious names shown on the credit cards. They told defendant that they needed the identification to enable them to cash stolen checks. Defendant loaned them a car from the car lot at which he was employed and gave the men directions to the license bureau. Busby and McVey successfully procured North Carolina driver's licenses in the fictitious names shown on the credit cards. When they returned from the license bureau, Busby stated to defendant that he was concerned because the highway patrolman who administered the driving test had taken down the license number of the car. Defendant told Busby that if anything ever came of it he would "cover up" for Busby.

Busby and McVey then began cashing forged checks throughout Greensboro, using the North Carolina driver's licenses for identification. After several days, the two men returned to the car lot where defendant was employed and

purchased and paid cash for two cars from defendant. At this time, McVey placed an additional $2,000 in defendant's pocket which, as stated by McVey, was "in return for these checks." Busby stated to the police: "The price for this [the identification cards and checks from Frasier] was $3,000.00 plus taking care of Sears Sauls with some of the money from the cashing of the blank checks in North Carolina."

On or about 11 December 1975, defendant phoned Busby and told him that the FBI had been making an investigation concerning the vehicle which defendant had loaned Busby and McVey. Defendant further stated that the FBI knew who they were and that the two men had "better split."

Defendant did not testify but offered evidence tending to show that he was employed by Leith Lincoln-Mercury and that he sold two cars to two gentlemen for cash. He also offered testimony that it was not unusual for a car from this lot to be loaned to an individual. Defendant further introduced testimony tending to show he was a man of good character.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Archie W. Anders for the State appellant.

William C. Ray for defendant appellee.

MOORE, Justice.

Defendant strongly contends that the Court of Appeals correctly held that a nonsuit should have been granted in this case. The basis of this contention is that the evidence is insufficient to show that defendant is an accessory before the fact to the crimes of forgery and uttering forged instruments.

G.S. 14-5, in pertinent part, provides:

> "If any person shall counsel, procure or command any other person to commit any felony . . . the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted . . . as an accessory before the fact to the principal felony. . . . "

[1] In *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961), this Court analyzed the elements necessary to be proved under G.S.

14-5 in order to sustain a conviction for accessory before the fact. These elements were: (a) that under G.S. 14-5 defendant counseled, procured or commanded the principal to commit the offense; (b) that defendant was not present when the principal committed the offense; and (c) that the principal committed the offense.

In *Bass*, the Court further stated:

> "To render one guilty as an accessary before the fact to a felony he must counsel, incite, induce, procure or encourage the commission of the crime, so as to, in some way, participate therein by word or act. . . . It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. . . . " 255 N.C. at 51-52, 120 S.E. 2d at 587. *See also State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974).

[2] Under the principles stated in *State v. Bass, supra*, we hold that there is sufficient evidence to withstand a motion for nonsuit on defendant's charges of accessory before the fact to forgery and to the uttering of forged instruments. A motion to nonsuit is properly denied if there is any competent evidence which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State. *See also State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); 4 Strong, N. C. Index 3d, Criminal Law § 106 (1976).

In present case, evidence for the State tends to show the following:

1. Busby and McVey went to defendant in the last week of November 1973 and told him they needed to get a North Carolina driver's license in a fictitious name in order to cash stolen checks.

2. Defendant gave Busby and McVey directions to the license bureau and instructed them that in order to get the licenses, they would be required to take a written test and show identification.

3. Defendant loaned the men a car to drive to the license bureau.

4. At the license bureau, Busby obtained a North Carolina driver's license in the name of Irvin R. Squires and McVey obtained a North Carolina driver's license in the name of Hugh C. Harrison.

5. On 27 November 1973, Busby filled out a check in the name of E. E. Boone, Jr., a member of the law firm from which the checks had been stolen, as maker. The next day McVey cashed this check at the First Union National Bank in Greensboro, signing the name Hugh C. Harrison and presenting his North Carolina driver's license in the name of Hugh C. Harrison.

6. Defendant personally received $2,000 in cash from Busby and McVey in return for the checks which were forged and cashed.

7. Busby stated to the police: "The price for this [the identification cards and checks from Frasier] was $3,000.00 plus taking care of Sears Sauls with some of the money from the cashing of the blank checks in North Carolina."

8. When Busby relayed his worry to defendant that a patrolman had taken down the license plate number of their car while at the license bureau, defendant told him "not to worry about anything, that if anybody came by, he'd cover up for [him]."

9. Some days later, defendant called Busby to inform him that the police "know who you are" and advised him to get out of town.

Considering the facts outlined above, it is established for the purpose of a motion for nonsuit: (a) that defendant was not present at the time of the forgery and uttering of the instruments; (b) that Busby and McVey in fact committed the crimes of forgery and uttering as principals; and (c) that defendant by his acts encouraged, participated in, and contributed to the commission of the crimes. We hold, therefore, that there was ample evidence to go to the jury.

[3] We turn now to the other assignments of error brought forward by defendant. He first argues that certain testimony

admitted at trial was hearsay and prejudicial. As is stated in 1 Stansbury, N. C. Evidence § 138 (Brandis Rev. 1973):

> "[W]henever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay."

This is the general rule and has been applied by this Court in cases too numerous to list. To be hearsay, the evidence must be offered to prove the truth of what the declarant said. The evidence is not hearsay if offered only to prove that the declarant made the statement or for any other purpose. *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Griffis*, 25 N.C. (3 Ired.) 504 (1842).

Defendant makes numerous assignments of error to testimony which he contends was hearsay. We find no merit in these contentions. In most instances, the witness was testifying as to what he personally saw or what he said to someone else. This a witness may properly do.

Defendant strenuously argues that witnesses Busby and McVey should not have been permitted to testify that they told defendant that Frasier had sent them to see defendant. As stated in *State v. Dilliard*, 223 N.C. 446, 447, 27 S.E. 2d 85, 86 (1943): "This was a statement made to defendant in explanation of the visit by prosecutrix. Its probative force does not depend, in whole or in part, upon the competency and credibility of any person other than the witness. [Citations omitted.]" *See also State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973). Likewise, in present case, the testimony by Busby and McVey was merely an explanation of why they had come to see defendant. The probative force of the evidence depended upon the credibility of witnesses Busby and McVey, not Frasier. Thus, these assignments are overruled.

[4] During the trial, the following exchange took place:

> "Q. When you indicated that you were going to buy the checks, what did he say?
>
> MR. RAY: OBJECTION.
>
> THE COURT: Who are you talking about—he?
>
> MR. IDOL: Referring to Mr. Frasier.

THE COURT: SUSTAINED.

MR. IDOL: Your Honor, this is where perhaps a voir dire would be appropriate to establish conspiracy.

MR. RAY: I respectfully move that the jury be instructed to disregard his statement."

Following a conference at the bench, no further request was made by defendant for an instruction to the jury to disregard the comment and defendant did not make a motion to strike the statement made by the district attorney.

In *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1971), defendant stated that a witness was not in court and would not testify because "he didn't want to come to court." The prosecutor then asked the question: "He didn't want to go on the stand and perjure himself, did he?" Defendant did not object to the statement and made no motion to strike the statement. This Court held that the solicitor's question was objectionable, but further stated: "However, it is inconceivable that it affected the outcome of the case, and under all the circumstances, it cannot be held prejudicial error. [Citations omitted.]" 280 N.C. at 374, 185 S.E. 2d at 880. In instant case, defendant lodged an objection to the solicitor's request. However, he did not make a motion to strike. After a conference at the bench, the request for the jury instruction was not renewed. Further, we do not feel that the statement was prejudicial to defendant. It is not sufficient grounds for a new trial that there is an error in the trial, "unless . . . it appears that there is a reasonable basis for the belief that, had this error not been committed, a different verdict would have been rendered." *State v. Turner*, 268 N.C. 225, 233, 150 S.E. 2d 406, 412 (1966). In the case at bar, there was more than sufficient evidence to convict defendant and the district attorney's comment could not have had any material effect upon the verdict reached by the jury. Thus, we find no merit in this assignment.

[5] During his testimony, witness Busby read to the jury a written statement which he had previously made to police concerning the forgery and uttering of the checks. He testified that to the best of his knowledge the statement was true. His testimony on the stand was in substantial agreement with the written statement. Over a general objection, the written statement was introduced into evidence. Defendant contends this was error.

A prior consistent statement of the witness to strengthen his credibility is admissible. "And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not." *Bowman v. Blankenship*, 165 N.C. 519, 522, 81 S.E. 746, 747 (1914). *See also* 1 Stansbury, N. C. Evidence § 51 (Brandis Rev. 1973), and cases cited therein.

When a defendant does not specifically request an instruction restricting the use of evidence which corroborates the testimony of a witness, the admission of the evidence and the failure of the trial judge to give a limiting instruction is not error. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Corl*, 250 N.C. 252, 108 S.E. 2d 608 (1959); *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958).

In *State v. Sawyer*, 283 N.C. 289, 297, 196 S.E. 2d 250, 255 (1973), statements made by the witness Ward were admitted over defendant's general objection and were introduced to corroborate the witness's testimony. In *Sawyer*, Chief Justice Bobbitt stated:

> " 'The general admission of evidence competent for a restricted purpose will not be held reversible error in the absence of a request at the time that its admission be restricted.' 7 Strong N. C. Index 2d, Trial § 17. See also Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 803. Obviously, the testimony to which these assignments refer was offered as tending to corroborate the testimony of Ward. Undoubtedly, if defendant had so requested, the trial judge would have given an explicit instruction to the effect that this evidence was competent for consideration only as corroborative testimony."

Although Rule 21, relied upon in *Sawyer*, has been superseded, we feel that the comment of Dean Brandis is instructive:

> "The new Rules of Appellate Procedure supersede but contain nothing comparable to former Rule 21. . . . However, existing case law rather clearly indicates that the disappearance of Rule 21 will work no change." 1 Stansbury, N. C. Evidence § 52 at 52, n. 59 (Brandis Rev. Supp. 1976).

In the case at bar, defendant failed to request a limiting instruction when the corroborative written statement was admitted. Therefore, this assignment is overruled.

Defendant assigns as error the trial court's denial of his motion to set aside the verdict as against the greater weight of the evidence. Such motion is addressed to the sound discretion of the trial court and its refusal to grant the motion is not reviewable on appeal. *State v. Mason,* 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555 (1966); *State v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657 (1941). This assignment of error is therefore without merit.

[6] After verdict, but before sentence was imposed, defendant moved to set aside the verdict based upon newly discovered evidence. Apparently, defendant intended to move for a new trial based upon this newly discovered evidence. The prerequisites for such motions are set out by Stacy, Chief Justice, in the oft-cited case of *State v. Casey,* 201 N.C. 620, 161 S.E. 81 (1931). *See also State v. Beaver,* 291 N.C. 137, 229 S.E. 2d 179 (1976). One prerequisite is that the newly discovered evidence be competent, material, and relevant.

Defendant, in support of his motion, first offered the testimony of an expert in the field of polygraph. This witness testified that he gave defendant a lie detector test and that this test showed defendant was telling the truth when he testified he did not receive $2,000 from Busby or McVey for assisting them in obtaining North Carolina identification. The witness further testified that the test also showed that defendant was telling the truth when he said that he did not in any way help Busby or McVey obtain North Carolina identification for illegal purposes.

Charlene Handy, the other witness who testified at the hearing on this motion, stated that she had entered a plea of guilty for cashing some of the forged checks for Busby and McVey. She further testified that she did not know Frasier and that she did not know that there was a case against defendant until she read about it in the Greensboro newspaper.

The testimony concerning the lie detector examination would not have been competent. *State v. Jackson,* 287 N.C. 470, 215 S.E. 2d 123 (1975); *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961). The testimony of Charlene Handy was immaterial and it could not have affected the verdict. Moreover, a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and the re-

fusal to grant the motion is not reviewable in the absence of an abuse of discretion. *State v. Morrow*, 264 N.C. 77, 140 S.E. 2d 767 (1965); *State v. Dixon*, 259 N.C. 249, 130 S.E. 2d 333 (1963); *State v. Williams*, 244 N.C. 459, 94 S.E. 2d 374 (1956). No abuse of discretion appears on this record. This assignment is overruled.

[7] After verdict, the trial judge, Judge Collier, ordered that prayer for judgment be continued until 7 July 1975, the next criminal term. On 7 July 1975, Judge Lupton, the presiding judge, conducted a hearing and then entered judgment that defendant be imprisoned for a term of three years in the State Prison. Defendant contends it was error for Judge Lupton, who was not the trial judge, to pronounce judgment. In support of this contention, defendant's counsel, in his brief, states: "Counsel is frank to admit that after carefully researching the law in this case, he has found no authority to support this position." This Court considered a similar contention in *State v. Graham*, 225 N.C. 217, 34 S.E. 2d 146 (1945). In that case, defendant had been tried before Burney, J., at the January 1944 Term of Bladen Superior Court. Prayer for judgment was continued and defendant was sentenced by Nimocks, J., at the January 1945 Term of Bladen Superior Court. The judgment discloses that Judge Nimocks heard evidence before imposing sentence. Defendant contended that the court, having failed to pronounce judgment at the January Term 1944, at which the defendant was convicted, was without jurisdiction to impose a sentence at a subsequent term. This Court held otherwise, stating:

> "In the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had, and courts of general jurisdiction, having stated terms for the trial of criminal actions, have the power to continue the case to a subsequent term for sentence.
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> * * *
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> " . . . It is sometimes found to be expedient, if not necessary, to continue a prayer for judgment and when no conditions are imposed, the judges of the Superior Court may exercise this power with or without the defendant's consent. [Citation omitted.]" 225 N.C. at 219, 34 S.E. 2d at 147. *See also State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966).

In the case at bar, Judge Lupton conducted an extensive hearing before passing sentence. He heard the statement made by Busby to the officers and other testimony for the State. Several witnesses, including the defendant, testified in defendant's behalf. Defendant denied accepting any money from Busby or McVey, or in any manner assisting them in obtaining fictitious driver's licenses or in the cashing of forged checks. Further, evidence was introduced that defendant was on federal probation, having been convicted in two cases involving the interstate transportation of a stolen motor vehicle. His probation officer testified concerning defendant's good behavior while on probation. Other witnesses testified as to defendant's good character.

We hold that the sentence, which was determined after hearing, and was within the limits prescribed by statute, was properly imposed by Judge Lupton.

A careful review of the entire record discloses no prejudicial error in the trial in the superior court. The decision of the Court of Appeals is therefore reversed.

Reversed.

STATE OF NORTH CAROLINA v. MARGIE C. BOYKIN

No. 29

(Filed 7 December 1976)

1. **Constitutional Law § 30; Criminal Law § 15— fair trial — change of venue — word-of-mouth publicity**

Prejudice resulting to a defendant from pretrial word-of-mouth publicity as well as from media publicity may violate the constitutional requirement of a fair trial or require a change of venue or a special venire under N. C. statutes.

2. **Constitutional Law § 30; Criminal Law § 15— change of venue or special venire**

If, under the evidence presented upon a motion for a change of venue or a special venire because of word-of-mouth publicity, there is a reasonable likelihood that a fair trial cannot be had because of such publicity, it is an abuse of discretion for the court to fail to grant a change of venue or a special venire.

3. Criminal Law § 15— word-of-mouth publicity — denial of change of venue or special venire

The trial judge in a first degree murder case did not abuse his discretion in the denial of defendant's motion for a change of venue or, in the alternative, for a special venire because of pretrial word-of-mouth publicity where defendant presented seventy-three printed form statements signed by residents of the county of trial in which the residents indicated they had heard one or more of seven rumors listed in the statement concerning defendant's participation in the crime charged or in various other criminal activities, but there was no evidence to show how the persons contacted by defendant were chosen, the total number of persons contacted, or that defendant did not aggravate the publicity problem by her poll of county residents, and none of the statements indicated that the persons signing them had any preconceived opinion as to defendant's guilt of the crime charged; furthermore, defendant was not prejudiced by the denial of her motion since all the jurors stated on *voir dire* that they could give defendant a fair trial, defendant failed to exhaust her peremptory challenges, and the convincing quality of the State's evidence would have produced the same result if the jury had been chosen from another county.

4. Jury § 6— questioning of jurors — rumors about defendant

The trial judge in a first degree murder case did not err in refusing to permit defense counsel to ask prospective jurors whether they had heard certain rumors about defendant where defendant did not request that the prospective jurors be separately sworn and separately examined since an unfavorable answer by a juror might have prejudiced the remaining jurors in the jury box.

5. Constitutional Law § 36; Homicide § 31— substitution of life imprisonment for death penalty

Sentence of life imprisonment is substituted for the death penalty imposed upon defendant's conviction of first degree murder.

Chief Justice SHARP dissenting.

Justice EXUM joins in the dissent.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgment of *Brewer, J.*, entered at the 1 December 1975 Session of JOHNSTON County Superior Court. Defendant's conviction of conspiracy to commit murder was certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) on 16 May 1976.

On indictments, proper in form, defendant was charged and convicted of first degree murder and conspiracy to commit murder. The death sentence was imposed for the murder conviction and a term of ten years imprisonment for the conspiracy conviction to commence at the expiration of the first degree murder sentence.

The evidence for the State tended to show the following: Defendant was married to the deceased, Daniel S. Boykin, known as "Chick" Boykin. Shortly after midnight on 15 August 1975, Daniel Davis, a neighbor, arrived at the Boykin home in response to a hysterical telephone call from the defendant, saying that she and her husband had been robbed and that "Chick" had been killed. Davis examined "Chick" Boykin's body which was lying in a pool of blood in the bathroom and found it to be almost cold. While in the living room with the defendant, Davis heard her say "Is that god-dam son-of-a-bitch dead, I hope that god-dam son-of-a-bitch is dead."

The defendant reported to officers who later arrived on the scene that she and her husband had been robbed and that in the course of it she was knocked in the head. Defendant's face was red around her left eye.

Garland Sanders testified that he was employed by the defendant to murder her husband. Under a plea bargain arrangement with the State, he received a life sentence in return for a guilty plea to second degree murder. Sanders was first introduced to the defendant by her maid, Minnie Dublin, a year and a half before the murder. He revealed that he had a number of conversations with defendant at Minnie Dublin's house during which she solicited him to kill "Chick" Boykin. At first Sanders indicated that he was not interested and she inquired if he knew anyone else who would do it. Later she brought him a .22 caliber pistol and said "Here is the gun. I have got the gun for you I want you to kill him with." Sanders continued to decline and returned the pistol to Minnie to give to the defendant. Finally, he agreed to do "the job" on Thursday, 14 August 1975, for $2,000.

Defendant provided Sanders a rifle and some bullets. She instructed Sanders to ring the front door bell and then go around to the back of the house. She told him that gloves, masking tape, and a shotgun would be at the back door, a key to her 1974 225 Electra Buick would be in the ignition switch, the back door would be unlocked and the floodlight would be out. The defendant told Sanders to get someone to drive him to the Boykin home so he arranged to have Johnny Edmondson drop him off about 11 p.m.

Before going to the house that night, Sanders called the defendant from a service station phone. She said "Everything

is right, to come on in about 30 minutes." A half hour later Edmondson left Sanders at the Boykin house. Armed with the rifle, Sanders went to the back door and put on the gloves which he found on the doorsteps. He then rang the front doorbell. Returning to the back where the floodlight was out as defendant had promised, he picked up the masking tape and the 12 gauge single barrel shotgun which defendant had said would be on the steps. Defendant came to the back window, raised it and said "Come on in, Mr. Boykin is up front watching television."

When Sanders opened the storm door, "Chick" opened the wooden door. Defendant said "shoot," and, after the first shot, "shoot again." "Chick" was first hit under the left arm. He fell to the floor and Sanders shot him two more times in the head. Defendant then instructed Sanders to tie her up with the tape but Sanders refused, got in her car and drove off carrying the rifle and the shotgun. Later Sanders met Johnny Edmondson and abandoned defendant's car. Edmondson pawned the rifle and shotgun.

About two weeks after the murder, defendant gave Sanders an envelope containing $1,100 in cash. He used $343 of the money to get his car out of the garage and deposited $700 of it in the Micro bank. Defendant made no further payments but promised to pay Sanders the balance out of the insurance proceeds.

Substantial direct and circumstantial evidence from numerous sources corroborated Sanders in every minute detail.

Expert testimony disclosed that the three bullets removed from "Chick" Boykin's body were fired from a rifle which was identified as belonging to "Chick" Boykin and which Sanders said he used in the murder.

A bank cashier testified that the defendant withdrew $1,200 in cash including ten $100 bills on 28 August 1975.

The defendant's evidence tended to show that she had nothing to do with the murder of her husband. She contended that a large amount of cash and "Chick's" shotgun and rifle were stolen the night of the murder. She said that $900 of the money, which she withdrew from the bank on 28 August 1975 after the murder, was loaned to her son, but he was unable to account for it.

Other facts relevant to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by James E. Magner, Jr., Assistant Attorney General for the State.

Knox V. Jenkins, Jr., and Thomas S. Berkau for defendant appellant.

COPELAND, Justice.

Defendant contends that the trial court erred in denying her motion for a change of venue as provided in G.S. 15A-957 or in the alternative, for a special venire panel under G.S. 15A-958. At the pretrial motion hearing, defense counsel argued that prejudice against the defendant in Johnston County would not allow her to obtain a fair and impartial trial. In support of his motion, counsel filed five affidavits and seventy-three unsworn statements of county residents. The form statements, printed in advance, contained a number of rumors concerning the defendant which had allegedly circulated throughout Johnston County. The person being asked to sign a statement was apparently requested to choose from the following rumors about the defendant those he had heard: "(1) That she hired some blacks to kill her husband; (2) That she killed her first husband; (3) That she killed her husband's brother-in-law and fed him to some hogs; (4) That she killed an individual formerly married to her daughter; (5) That she had performed abortions and a girl died; (6) That she was instrumental in the death of her son's former fiancee who was killed in an automobile accident; (7) That she was involved in the theft of television sets from Sylvania." Defendant had never been charged with or convicted of any of these crimes, other than those involved in the present case. The trial judge agreed to consider the unsworn statements in support of defendant's motion.

Defendant also offered as Exhibit No. 80 a "color-coded" map of townships in Johnston County. We were not provided a key to the map and thus cannot determine its significance. At the motion hearing the trial judge indicated that he would exclude jurors from "two particular townships in that area," provided the defendant and the district attorney agreed. Whether or not this precaution was followed does not appear of record. Presumably, Exhibit No. 80 had something to do with this.

A motion for change of venue or for a special venire panel "is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error." *State v. Harrill,* 289 N.C. 186, 190, 221 S.E. 2d 325, 328 (1976); accord *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

At the pretrial hearing no mention was made of any adverse publicity in newspapers, magazines, radio or television. In fact, defendant candidly admits that newspaper accounts in this case have not been inflammatory. All of our previous criminal cases were directed toward this type of unfavorable publicity. We find no criminal cases in North Carolina or elsewhere dealing with word-of-mouth publicity.

[1] "Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed. 2d 600, 620 (1966). While every criminal case that we have been able to find in which change of venue was in issue has dealt with prejudice resulting from pretrial *media* publicity, we believe the constitutional requirement of a fair trial is not so limited. Nor are our statutes which require a change of venue or a special venire panel where prejudice is so great as to prevent a fair trial, restricted to media inspired prejudice. As the late Mr. Justice Holmes once wrote:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by outside influence, whether of *private talk* or public print." (Emphasis added.) *Patterson v. State of Colorado ex rel. Attorney General,* 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 881 (1907); accord, *Sheppard v. Maxwell, supra* at 351, 86 S.Ct. at 1516, 16 L.Ed. 2d at 614.

[2] The burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. G.S. 15A-957. In *Sheppard v. Maxwell, supra,* involving pretrial press publicity, the United States Supreme Court held, where there is a "reasonable likelihood" that prejudicial news prior to trial will prevent a fair trial, the trial judge should transfer the case to another county not so permeated with publicity. The same standard of proof should apply where

the prejudice alleged is attributable to word-of-mouth publicity. If, under the evidence presented, there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion to fail to grant a change of venue or a special venire panel.

In considering the type of prejudice here alleged for the first time this court is sensitive to the difficulty of proving prejudice generated by "private talk." At the same time, this court must be solicitous of the potential for manufacture and manipulation of proof of this type of prejudice. By this statement we do not imply that the able trial counsel engaged in this type of conduct. In the case of adverse media publicity, a trial judge in arriving at his determination can easily examine the allegedly inflammatory articles and take evidence on the number of copies circulated in the county and the number of county residents. These figures are objective.

[3] With printed statements of rumors as were used in this case, defense counsel should, at a minimum, introduce evidence of the number of persons approached, if any, who had *not* heard the rumors concerning this defendant. Here no evidence was offered of the total number of persons contacted before seventy-three individuals returned statements saying that they had heard at least one prejudicial rumor about the defendant. Nor was any evidence presented as to how the individuals solicited were chosen. Were they selected at random from voter registration lists or off the streets from all sections of the county?

In essence, defendant attempted with her unsworn statements to introduce a public opinion poll without giving the trial judge the vital statistics necessary for him to judge the likelihood of pretrial prejudice throughout the county. It should also be remembered that the critical questions are whether the person interviewed thought the defendant was guilty of the crimes charged and whether the person questioned believed the defendant could receive a fair trial in the county. None of the affiants or statement makers indicated that they had any preconceived opinion as to defendant's guilt. With the exception of defense attorney's own affidavit, none of the statements or affidavits expressed any opinion on the possibility of defendant's receiving an impartial trial in Johnston County.

A disturbing aspect of this case involves the type of prepared statements used by defense counsel. The forms printed in advance with seven rumors about the defendant obviously

helped to resurrect and disseminate stories about the defendant. Certainly, when anyone who had never heard the rumors was shown one of the forms, he could no longer truthfully say he had not heard them and probably he and others who viewed the form went on to spread the rumors to even greater audiences.

We note that all jurors questioned on voir dire stated that they could give the defendant a fair trial and that defendant did not exhaust her peremptory challenges.

Although the trial judge would have been fully justified in allowing either of defendant's motions, we cannot say he abused his discretion in denying the motions under the circumstances. While recognizing that there may be cases where widespread, word-of-mouth publicity may be as damaging to a defendant's right to an impartial trial as mass media publicity, we will be reluctant to conclude that there was a "reasonable likelihood" that a fair trial could not be had until defendant has demonstrated that steps were taken to insure the reliability of the opinion poll and that defendant did not aggravate the publicity problem. No abuse of discretion having been shown, the assignment of error is overruled.

[4] At the pretrial hearing, the trial judge indicated that defense counsel would have the opportunity to ask each juror whether or not he could give the defendant a fair and impartial trial and that if the juror could not do so, then he would be subject to challenge for cause. In the course of the hearing, counsel for defendant, inquired of the court "Can I ask them what they have heard about it, about her?" The court replied: "No, Sir. That would not be a competent question to pose to the jurors or prospective jurors." Defendant contends that the court committed error in this ruling.

The record does not disclose the manner in which the jury was chosen. In recent years it has become the practice in North Carolina to choose jurors in capital cases as well as others by placing twelve jurors in the jury box in the manner approved by our Court in *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970). Prior to that case, it has been the custom in capital cases in North Carolina to require each prospective juror to be separately sworn and separately examined, touching his or her fitness to serve on the trial panel. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970).

Nothing else appearing, we assume that the jury in this case was selected in the manner approved by *State v. Perry, supra.* That being so, we cannot conceive of the able trial counsel asking a prospective juror whether he or she had heard any of the rumors set forth in the affidavits or unsworn statements. Had counsel done so and the answers been unfavorable, the rest of the jurors in the jury box might have been prejudiced and defense counsel would have then been importuning the court for a continuance.

"Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him." *State v. Perry, supra* at 177, 176 S.E. 2d at 731. However, "[I]n this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. [Citation omitted.] The overwhelming majority of the states follow this rule." *State v. Bryant,* 282 N.C. 92, 96, 191 S.E. 2d 745, 748 (1972), cert. denied, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973); accord, *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974).

If defendant wished to pursue a line of questioning concerning the rumors to ascertain whether there existed grounds for challenge for cause or to enable her to exercise intelligently the peremptory challenges allowed by law, she should have requested that the prospective jurors be separately sworn and separately examined. No such request appearing in the record, we must assume that it was not made.

We reiterate that jurors accepted by the defendant all stated that they could give the defendant a fair and impartial trial and that defendant did not exhaust her peremptory challenges. Although a few of the jurors on the panel indicated that they had heard this case discussed prior to trial, of those, none had apparently heard the defendant's reputation discussed. Pretrial discussion of a case does not necessarily render a prospective juror impartial, especially where the discussion is limited to information appearing in noninflammatory newspaper articles. In *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751, 756 (1961), the United States Supreme Court said:

"It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case."

In the absence of a request to have the jurors examined separately, we cannot hypothesize what the jurors heard concerning this case prior to trial. This Court finds itself in a position analogous to that presented when a trial judge sustains an objection to a question and examining counsel fails to have recorded what the answer would have been.

The evidence in this case was overwhelming, and thus we cannot conceive of any prejudice resulting to this defendant. We conclude that the convincing quality of the State's evidence would have certainly produced the same result if the jury could have been chosen from Cherokee County, the most distant point from Johnston County. If error there be in either of these assignments, it was harmless beyond a reasonable doubt. *Chapman v. Calif.*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

[5] The attorney general's office in its brief calls to our attention 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 sentenced. Ex mero motu and 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.

This case is remanded to the Superior Court of Johnston County with directions (1) that the presiding judge, without requiring the presence of the defendant, enter a judgment imposing life imprisonment for the murder of which defendant has been convicted and (2) 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 her attorney a copy of the judgment and commitment as revised in accordance with this opinion.

Because of the serious nature of this case, we have searched the record for errors other than those assigned and have found none prejudicial to the defendant other than the failure of defense counsel to assign error under *Woodson v. North Carolina, supra.*

In the trial we find

No error.

Death sentence vacated and, in lieu thereof, life sentence imposed.

Chief Justice SHARP dissenting.

Despite defendant's inadequate and unscientific methods of garnering evidence in support of her motion for a change of venue, the record convinces me that the motion should have been allowed and that the court's failure to grant it entitles her to a new trial. When rumors have begun to circulate, so damaging to the defendant that her counsel dares not ask a prospective juror if he has heard them, it seems to me that neither counsel's failure to exhaust his peremptory challenges nor to request that prospective jurors be separately examined on *voir dire* can constitute a waiver of defendant's right to a change of venue. The separate examination of jurors, which the majority suggests as the solution in such a situation, could be a safeguard only if every juror examined and excused were held incommunicado until the trial jury had been impaneled and committed to the bailiff's custody. In a case like this such a procedure would seem to be obviously impractical.

Nor should we say that, because the evidence of defendant's guilt is so overwhelming that any jury anywhere would have returned a verdict of "guilty as charged," an error of law which otherwise would have been grounds for a new trial is harmless. Such an approach nullifies both the presumption of innocence and the requirements of due process, and it harbors the implication that the trial itself was unnecessary. I therefore respectfully dissent and vote for a new trial.

Justice EXUM joins in this dissent.

STATE OF NORTH CAROLINA v. JOHN DEWEY SLADE AND DOUGLAS McARTHUR SLADE

No. 59

(Filed 7 December 1976)

1. **Criminal Law § 23— plea bargaining — no agreement reached — evidence of bargaining properly excluded from record**

In the absence of an agreement between defendants and the prosecutor, defendants were not prejudiced by the trial court's denial of their motion that prior plea bargaining negotiations be made a part of the record.

2. **Robbery § 5— jury instructions — incomplete instruction not prejudicial**

In an armed robbery prosecution where the trial court fully instructed the jury as to the elements of the crime charged, failure of the court in instructing on aiders and abettors to state that the jury must find that the life of the victim was endangered or threatened by use of a firearm did not contradict other portions of the charge, amount to an erroneous definition of the offense, or prejudice defendants.

3. **Criminal Law § 92— defendants charged with same armed robbery — joinder proper**

Joinder of cases against defendants was proper where each defendant was accountable for the same offense of armed robbery, and defendants were not denied a fair determination of their guilt or innocence because of the joinder.

4. **Criminal Law § 92— joinder on oral motion — no error**

The district attorney's motion for joinder of defendants' cases, made at the beginning of trial, came within the purview of G.S. 15A-951(a) and was not required to be in writing; defendants' contention that G.S. 15A-926(b)(2) required the motion to be in writing is without merit, since that statute applies only in those instances in which joinder of defendants is requested prior to trial.

5. **Criminal Law § 114— defendants referred to as principal and aider and abettor — no expression of opinion**

The trial court in an armed robbery prosecution did not express an opinion in violation of G.S. 1-180 by referring to one defendant as the principal and the other defendant as the aider and abettor for the purpose of differentiating between them.

6. **Criminal Law § 9; Robbery § 6— aider and abettor — sentence same as that given principal — no error**

Contention of one defendant in an armed robbery prosecution that the trial court should have sentenced him as the aider and abettor to a lesser sentence than that imposed upon the principal is without merit, since principals and aiders and abettors are equally guilty.

State v. Slade

APPEAL by defendants pursuant to G.S. 7A-27(a) from *Falls, J.*, at the 2 February 1976 Schedule B Criminal Session of MECKLENBURG Superior Court.

Defendants were tried upon indictments, proper in form, for the armed robbery of a Li'l General store in Charlotte, North Carolina. The jury found both defendants guilty and a sentence of life imprisonment was imposed upon each defendant.

The State introduced evidence tending to show that Douglas Slade and Arthur Parks entered a Li'l General store in Charlotte at approximately 9:00 p.m. on the evening of 7 October 1975. After purchasing a pack of gum and a can of soda, Parks pointed a gun at the store clerk and stated that this is a "stick-up." Douglas then took a paper bag from his pocket and began filling it with the contents of the cash register. Parks opened the money order drawer and removed the contents therefrom. Douglas then told Parks to take a pocketbook located beneath the counter. The two men fled from the store and got into a white Ford automobile, parked behind the store, which defendant John Slade was driving.

The white Ford was observed by Officer W. F. Grooms of the Charlotte Police Department, as it ran a stop sign at an intersection adjacent to the Li'l General. The Ford was traveling at a high rate of speed and Officer Grooms gave chase. After several blocks, the Ford ran off the road and into a church parking lot. As the car stopped, two of the occupants of the vehicle opened the door and fled. Officer Grooms chased the two men; and after Parks fired a shot at the officer, the officer shot Parks. Douglas continued running into the woods.

Meanwhile, a second officer, J. D. Cooper, arrived at the church parking lot and apprehended John. A third officer, T. C. Runyan, found Douglas hiding in the woods. The pistol used in the robbery, $77.81 and some food stamps were recovered.

Both defendants took the stand. John testified that he knew nothing of the plans of Douglas and Parks to rob the store. Rather, he had driven the two men to the store to enable Parks to get some change in order to pay John a debt. He stated that when Parks and Douglas returned to the car after having been in the store, he thought something was amiss. He further stated that when he saw that Parks had a gun, he became nerv-

ous. He thus drove at a high rate of speed, finally coming to a stop in a church parking lot where he was apprehended.

Douglas testified that he followed Parks as he walked toward the store. Shortly before reaching the store, Parks exhibited a pistol and stated that he intended to rob the store. Douglas stated that he refused to assist Parks. However, Parks forced him into the store by threatening him with the pistol and stating that "someone might get hurt" if he did not help. Douglas then related the story of being chased into the woods by a police officer and later apprehended.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Special Deputy Attorney General John M. Silverstein for the State.

Michael S. Scofield, Public Defender, James Fitzgerald and Keith M. Stroud, Assistant Public Defenders, for defendant appellant.

MOORE, Justice.

Defendants were arraigned before Judge Grist on 7 January 1976 and entered pleas of not guilty. At the time of arraignment, defendants' attorney announced that there were no pretrial motions. The cases were called for trial before Falls, J., on 2 February 1976, and the trial judge, in his discretion, ordered these cases consolidated for the purpose of trial.

[1] On the second day of trial, defendants' attorney moved that prior plea bargaining negotiations be made a part of the record. This motion was denied and defendants contend that this denied them the right to an effective appeal. We are aware that "plea bargaining" has emerged as a major aspect in the administration of criminal justice. As stated by Mr. Chief Justice Burger in *Santobello v. New York*, 404 U.S. 257, 260-61, 30 L.Ed. 2d 427, 432, 92 S.Ct. 495, 498 (1971):

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to

a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

"Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. . . ."

In the past, "plea bargaining" was carried on informally between the prosecution and the defendant or defendant's attorney subject to the approval of the presiding judge as to the proper sentence to be imposed. In 1973, the procedure for "plea bargaining" was formalized by the enactment of G.S. 15A-1021 through G.S. 15A-1026. G.S. 15A-1026 provides:

"A verbatim record of the proceedings *at which the defendant enters a plea of guilty or no contest* and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and transcribed." (Emphasis added.)

G.S. 15A-1021(c) allows the parties to a plea arrangement to advise the trial judge of the terms of the proposed agreement, provided an agreement has been reached. These provisions are consistent with *Santobello v. New York, supra,* and permit a record to be made of the judge's consideration of the agreement. However, the statutes permitting a record to be made are conditioned upon an agreement being reached and a plea of guilty being entered.

In present case, there is no evidence or intimation by defendants that any agreement was made or bargain struck. This is borne out by defendants' plea of not guilty. The safeguards associated with "plea bargaining" and contained in the statutes are designed to insure that defendant is fully aware of the ramifications of his plea of guilty. Additionally, the prosecution is bound by the terms and conditions utilized to obtain the guilty plea. *Santobello v. New York, supra.* In present case, the fact that no agreement was reached removes the necessity for these particular safeguards.

Defendants do not contend that the negotiations concerning "plea bargaining" should have been introduced in evidence before the jury. Neither do they contend that such evidence would have been competent before the jury. *See State v. Harrill,* 289 N.C. 186, 221 S.E. 2d 325 (1976); G.S. 15A-1025. In

the absence of an agreement reached, we fail to see how defendants' right to appeal was abridged or how defendants were prejudiced by the denial of the motion to include the negotiations in the record. This assignment is overruled.

[2] Defendant John Slade assigns as error the following portion of the charge in which the court was instructing the jury as to the aider and abettor:

> "Now with respect to the aider and abettor, John, if you find from the evidence and beyond a reasonable doubt that on or about the 7th of October, 1975, the principal Parks and Douglas Slade committed the armed robbery, that is, Parks and Douglas Slade entered the store with a firearm and robbed the assistant manager of his cash in the cash drawer and money order box and other property and that the defendant John Slade was outside in his automobile waiting to carry the two that went in the store away as a get-away man and that in so doing he knowingly instigated or encouraged or advised or aided the principal Parks and Douglas Slade to commit the crime of armed robbery, even though he was not physically present in the store, that John Slade shared the criminal purpose of the principals Parks and Douglas Slade and to the knowledge of both of them and in so doing John Slade aided and abetted the principals or was in a position to aid and abet the principals at the time the crime was committed, it would be your duty to return a verdict of guilty."

Defendant John Slade contends that in this instruction the trial court erroneously defined the offense of armed robbery and that this instruction contradicted other portions of the charge. He relies upon *State v. Harris,* 289 N.C. 275, 221 S.E. 2d 343 (1976), to support his position. In *Harris,* the trial court in a second degree murder case erroneously charged the jury that the defendant had the burden of satisfying the jury that the victim's death was the result of an accident. There, it was held that the incorrect charge was not cured by the correct portions of the charge, " 'particularly . . . when the incorrect portion of the charge is the application of the law to the facts.' " 289 N.C. at 280, 221 S.E. 2d at 347. That case is distinguishable from the present case.

A case more clearly in point is *State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972). In *Bailey,* this Court considered

a charge in an armed robbery case wherein the jury was instructed that "it is incumbent upon you to find as one of the necessary elements of the offense charged, that is robbery with a firearm, that the defendant had a firearm in his possession at the time that he obtained the property." As in instant case, the defendant in *Bailey* contended that these instructions would enable the defendant to be convicted of armed robbery without a finding by the jury that the life of the victim had been endangered or threatened by the use of a firearm. In *Bailey*, we held that there was no merit to this assignment because elsewhere in the charge the court had properly instructed the jury that defendant had obtained the property by "endangering or threatening the life of Loretta Williams with a firearm."

In present case, immediately prior to that portion of the charge to which defendants have taken exception, the trial judge instructed the jury:

> "So I charge you, members of the Jury, if you find from the evidence in this case and beyond a reasonable doubt that . . . the defendants . . . had a firearm and took and carried away money and food stamps and other property from the person or presence of the assistant manager of the Little General Store without his voluntary consent by violence or putting him in fear whereby his life was threatened or endangered with the use or threatened use of a pistol, to wit: a .22 caliber pistol. . . . "

Furthermore, prior to having given this instruction, the court had fully instructed the jury as to the elements of the offense of armed robbery, including, "that the defendants had a firearm in their possession at the time they obtained the property; and seven, that the defendants obtained the property by endangering or threatening the life of the assistant manager with the firearm." Thus, there was no contradiction in the charge and the jury could not have been misled as to the elements required to constitute armed robbery.

We have said many times that a charge must be construed contextually, and an isolated portion of it will not be held prejudicial when the charge as a whole is correct. *State v. Bailey, supra; State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Construed in its entirety, the charge to the jury regarding John Slade was both fair and proper. This assignment is overruled.

[3] At the beginning of trial, Judge Falls granted the oral motion of the State to consolidate the trials of defendants John Slade and Douglas Slade. In opposition to this motion, defendants made a motion for severance which was denied. Defendants, on appeal, contest the ruling of the trial judge in ordering that the cases be consolidated. They further contend that G.S. 15A-926(b)(1) requires that the district attorney make a written motion to join defendants for trial and that the failure of the district attorney to make such a written motion entitles them to a new trial. The two statutes relevant to the disposition of this issue are G.S. 15A-926(b)(2) and G.S. 15A-927(c)(2).

G.S. 15A-926(b)(2), in pertinent part, provides:

"(2) Upon written motion of the solicitor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense. . . ."

G.S. 15A-927(c)(2), in pertinent part, provides:

"(2) The court, on motion of the solicitor, or on motion of the defendant . . . must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants. . . ."

Under these statutes, two or more defendants may be joined for trial when they are accountable for the same crime. However, joinder of defendants may not be permitted where such joinder would not promote a fair determination of the guilt or innocence of one or more of the defendants. This was essentially the law prior to the passage of G.S. 15A-927(c)(2). For example, in *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972), six defendants were charged in separate bills of indictment with the commission of the same offense. The trial court consolidated the cases for trial and defendants contended that this was error. This Court, speaking through Chief Justice Bobbitt, stated:

"'[W]hether defendants . . . [should] be tried jointly or separately [is] in the sound discretion of the trial

court, and, in the absence of a showing that a joint trial [has] deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. . . .' " 280 N.C. at 332-33, 185 S.E. 2d at 865.

See also State v. Alford, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Brower,* 289 N.C. 644, 224 S.E. 2d 551 (1976).

In instant case, the joinder was proper. First, each defendant was accountable for the same offense—the armed robbery of the Li'l General. Secondly, we fail to see how defendants were denied a fair determination of their guilt or innocence because of the joinder.

[4] We cannot agree with defendants' contention that G.S. 15A-926(b)(2) requires that a motion for joinder of defendants for trial be in writing.

G.S. 15A-951(a), in pertinent part, provides:

"A motion must:

(1) Unless made during a hearing or trial, be in writing. . . ."

The district attorney's motion, made at the beginning of trial, comes within the purview of G.S. 15A-951(a) and was not required to be in writing. The language in G.S. 15A-926(b), which states, "Upon written motion of the district attorney . . ." applies only in those instances in which joinder of defendants is requested prior to trial. Thus, we overrule these assignments.

[5] Defendants contend that the trial judge committed error by expressing an opinion in violation of G.S. 1-180 when he instructed the jury and referred to John Slade as an "aider and abettor" and Douglas Slade as a "principal." During the charge, the trial judge stated:

"Now with respect to the aider and abettor, John, if you find from the evidence and beyond a reasonable doubt that on or about the 7th of October, 1975, the principal Parks and Douglas Slade committed the armed robbery . . . and that the defendant John Slade was outside in his automobile waiting to carry the two that went in the store away as a get-away man and that in so doing he knowingly instigated or encouraged or advised or aided the principal

Parks and Douglas Slade to commit the crime of armed robbery. . . ."

Later in the charge, the trial judge again referred to Douglas Slade as a "principal."

We find no merit in defendants' contention. This Court has repeatedly held that a charge must be construed as a whole, and isolated portions of a charge will not be held to be prejudicial where the charge as a whole is correct and free from objection. 4 Strong, N. C. Index 3d, Criminal Law § 168 (1976), and the plethora of cases cited thereunder. As was stated in *State v. Gatling*, 275 N.C. 625, 633, 170 S.E. 2d 593, 598 (1969), "It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred." *See also State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975); *State v. Allen*, 283 N.C. 354, 196 S.E. 2d 256 (1973); *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971).

Reading the charge as a whole, it is clear that the trial judge was differentiating between the two defendants, one of whom was a principal, the other an aider and abettor. A trial judge is required to "explain the law arising on the evidence given in the case." G.S. 1-180. The trial judge properly did so in this case. Accordingly, we find no merit in this assignment.

[6] Defendant finally contends that the trial court erred in sentencing both defendants to life imprisonment. The basis of this contention is that the trial judge should have sentenced John Slade to a lesser sentence than that imposed upon Douglas Slade because John Slade was an aider and abettor.

A principal in the first degree is the person who actually perpetrates the deed, either by his own hand or through an innocent agent. Any other person who is actually or constructively present at the place of the crime, either aiding, abetting, assisting, or advising in the commission of the crime, or is present for that purpose, is a principal in the second degree. The distinction between principals in the first and second degrees is a distinction without a difference; both are principals and equally guilty. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

G.S. 14-87(a) provides that a defendant who is convicted of robbery with a firearm or other dangerous weapon "shall be

punished by imprisonment for not less than five years nor more than life imprisonment in the State's prison." A sentence which does not exceed the maximum length as stated in the statute will not be considered cruel and unusual punishment. *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883 (1968); *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875 (1967). Further, as long as a sentence is within the statutory limits, the punishment imposed by a trial judge is in his discretion. *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901 (1965).

In *State v. Benton, supra,* the defendant was convicted as an accessory before the fact to murder and sentenced to life imprisonment. Life imprisonment was authorized by statute as a sentence for the offense. On appeal, defendant contended that her punishment was excessive, since the actual murderer was sentenced to 20-30 years upon a plea of guilty. Since life imprisonment was authorized by the statute, this Court affirmed the sentence of defendant.

In the case at bar, the sentence imposed upon each defendant was within the statutory limits prescribed by G.S. 14-87. Each defendant was given an opportunity to present any evidence which he deemed desirable to be considered by the judge. In fact, defendant Douglas Slade did so. *See State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591 (1965). Further, the evidence showed that defendants actively participated in a robbery with a firearm in which a person, albeit a codefendant, was killed. Thus, we find that the trial judge did not abuse his discretion in sentencing defendants to life imprisonment.

An examination of the entire record discloses no error in law sufficient to constitute a basis for awarding a new trial.

No error.

STATE OF NORTH CAROLINA v. JOSEPH LEE PERRY

No. 61

(Filed 7 December 1976)

1. Constitutional Law §§ 30, 33— assault — use of mask by assailant — requiring defendant to don mask at trial — no error

In a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury where the victim

testified that her assailant wore an orange stocking over his head and face, the trial court's requirement that defendant place the stocking mask which had been introduced into evidence over his head and face and stand before the jury did not violate defendant's constitutional right against self-incrimination, nor did it violate the due process clause of the Fourteenth Amendment to the Constitution of the U. S. or the like provision of Article I, § 19 of the N. C. Constitution.

2. **Criminal Law §§ 34, 96— evidence of defendant's guilt of other offense — evidence withdrawn from jury's consideration — defendant not prejudiced**

In a prosecution for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not prejudiced by the victim's statements on cross-examination that she had read nothing in the newspapers about this case but she had read something concerning a "shooting at Hardee's," a reference to a separate robbery for which defendant had already been tried and convicted, since the witness did not state what she had read about the shooting at Hardee's, and the trial court immediately instructed the jury not to consider the statement of the witness.

APPEAL by defendant from *Lee, J.*, at the 12 April 1976 Session of DURHAM.

By indictments, proper in form, the defendant was charged with armed robbery and with assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. He was found guilty on both charges and sentenced to imprisonment for 20 years for the assault and imprisonment for life for the robbery, the latter sentence to commence upon the expiration of the former, which, in turn, is to commence upon the expiration of a previously imposed sentence for an unrelated crime. He did not testify but offered evidence sufficient, if true, to establish an alibi.

The evidence for the State was to the following effect:

On the evening of 5 November 1975, Mrs. Barbara Powell was working alone in the Kwik-Pik Store on North Duke Street in Durham, she being the only employee in the store, which was well lighted. Shortly after 11:30 p.m., while crouched down on the floor in performance of her duties, she heard someone enter the store. When she rose to her feet she was confronted with a man with a gun in his hand, wearing a blue jacket, a blue shirt over an orange T-shirt, blue pants, tan cloth gloves with blue trimming and tennis shoes, and having an orange stocking over his head and face. He had a small mustache. Due

to runs in the stocking, she could see his face without difficulty. In court, without objection, she positively identified the defendant as this man.

The intruder ordered Mrs. Powell to open the cash register, which she did, and he removed the money therefrom. He then demanded that she open the safe. She informed him, correctly, that she could not because opening the safe required the use of two keys, only one of which was on the premises. He then directed Mrs. Powell to get down on her knees in front of the safe, which she did. He picked up her pocketbook, saying, "I ought to shoot you," and calling her an ugly name. He then shot her in the chest and left the store, having been in it approximately ten minutes. Just before he shot her, she was face to face with him for three or four minutes with nothing to obscure her vision of him except the stocking over his head and face.

Upon the intruder's departure, Mrs. Powell called the police. She observed just outside the door the orange stocking mask. When the police arrived, an officer picked up the mask and Mrs. Powell identified it as the one worn by the intruder. She so identified it in court, saying that it was then in the same condition as when worn by the robber, except it was torn "a little bit more" in one place indicated by her.

Mrs. Powell gave the officers a detailed description of the robber, describing him as being about 6 feet in height, weighing about 180 pounds and clothed as above stated. Thereupon, she was taken to the hospital for treatment of her injury, which was severe and required hospitalization for approximately two weeks and substantial medical attention after her discharge from the hospital.

On the day before her discharge from the hospital, Detective Overby of the Durham Police Department requested Mrs. Powell to examine an album containing approximately 50 pictures of Negro males. She did so, but did not identify any of them as the picture of the robber. The defendant's picture was not contained in this album. Detective Overby then handed her another group of photographs, which she examined. She did not identify any of these as a photograph of the robber and the defendant's picture was not contained in that group. Detective Overby then handed her a third group of three photographs. One of these Mrs. Powell identified as that of a man who had

been in the store on another occasion but who was not the robber, and then she identified the third picture in this group as a picture of the man who had robbed and shot her. This was a photograph of the defendant. At no time did Detective Overby tell Mrs. Powell that a photograph of a suspect was included in any of the groups of photographs he requested her to examine.

The following day Detective Roop of the Durham Police Force showed Mrs. Powell six photographs, including the last three shown her by Detective Overby. Again, she picked the defendant's picture as that of the man who had robbed and shot her, and she again picked the photograph of the other man whom she had previously seen in the store but who was not the robber. These photographs of the defendant and the other man were introduced in evidence without objection.

Mrs. Powell further testified that she attended the preliminary hearing for the defendant in the District Court and there saw and recognized him. The defendant at that time also recognized Mrs. Powell and smirked at her. At no time had her picture appeared in any newspaper.

Mrs. Powell further testified that she is absolutely certain that if she had not been shown the photograph she could, nevertheless, have identified the defendant in court.

On cross-examination the following dialogue occurred:

"MR. BIRCHER: (Defendant's counsel): Mrs. Powell, after the robbery had you read anything in the newspaper about this case?

MRS. POWELL: No sir.

MR. BIRCHER: Nothing whatsoever?

MRS. POWELL: I was in the hospital for a while.

MR. BIRCHER: After you got out did you read anything about it?

MRS. POWELL: About the shooting at Hardee's I did.

DEFENDANT MOVES TO STRIKE.

COURT: Members of the jury, don't consider that. Motion allowed."

Thereupon, in the absence of the jury, the defendant's counsel moved for a mistrial on the ground that the witness had

just mentioned "another armed robbery for which the defendant had already been tried and convicted and was sentenced to a hundred years which was reported on the front page of all the Durham newspapers, on all the radio and television, and that would highly prejudice the jury." This motion was denied. Thereupon, the jury returned to the courtroom and the court instructed the jury:

> "Members of the jury, don't consider the last statement the witness made in response to the Defendant's question about something that may have happened at Hardee's. Erase it from your mind and do not consider it. It has nothing to do with this case whatsoever."

Over objection, the court, upon motion of the District Attorney, directed the defendant to stand in front of the jury box and place the orange stocking mask over his head and face with a large hole therein being over the defendant's mouth, where Mrs. Powell testified this hole appeared when the stocking mask was worn at the time of the robbery by the man who robbed and shot her. Mrs. Powell testified that at the time of the trial the hole in the stocking mask was larger than it had been on the night of the robbery, the stocking being, otherwise, in the same condition.

The only assignments of error are to the overruling of the above mentioned motion for mistrial and to the action of the court in requiring the defendant to place over his head and face the orange stocking mask and to stand before the jury while so wearing it.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, and Jack Cozort, Associate Attorney, for the State.

Richard Bircher for defendant.

LAKE, Justice.

[1] There was no error in requiring the defendant to stand before the jury and place the orange stocking mask over his head and face in the way Mrs. Powell had testified it was worn by the man who robbed and shot her. By cross-examination of Mrs. Powell, the defendant had attempted to cast doubt upon her ability to identify the defendant as the robber so masked. The court thus permitted the jury to see the defendant as Mrs.

Powell had testified she saw the robber. Obviously, the experiment convinced the jury that the mask was not sufficient to obscure the features of the robber so as to prevent subsequent identification.

The defendant concedes that *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966), leads to the conclusion that this action of the court did not violate the defendant's constitutional protection against self-incrimination. He contends that it violates the due process clause of the Fourteenth Amendment. We find no merit in this contention.

In the Schmerber case, the defendant was charged with driving an automobile under the influence of intoxicating liquor and, over his objection, a sample of his blood was extracted by a physician, in a medically proper manner, and the analysis thereof was admitted in evidence to show his intoxication. The defendant contended that the admission of this evidence violated the due process clause of the Fourteenth Amendment, the search and seizure clause of the Fourth Amendment and his privilege against self-incrimination under the Fifth Amendment. The Supreme Court of the United States held that all of these contentions were without merit, saying that the withdrawal of the blood and the use of the analysis thereof in evidence did not offend that "sense of justice" of which the Court spoke in *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). It, therefore, rejected Schmerber's due process argument.

As to the privilege against self-incrimination, the Court said, in the Schmerber case, "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." It then said, "[B]oth federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

In *Holt v. United States,* 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910), the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

> "A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on

and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of psysical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

In *United States v. Turner*, 472 F. 2d 958 (4th Cir. 1973), a defendant charged with bank robbery, which robbery had been photographed while in progress, was required to put on a wig and sun glasses, said to be "similar" to the wig and sun glasses worn by the robber, so that the jury could compare the defendant's appearance with the photographs of the robber. The Court of Appeals held that this action of the trial court did not violate the defendant's right against self-incrimination, the evidence being real or physical, not testimonial or communicative.

In *United States v. Roberts*, 481 F. 2d 892 (5th Cir. 1973), the defendant, charged with a bank robbery, in which one of the participants was wearing a stocking mask over his face, was required by the trial court to place over his face the stocking mask worn during the robbery so as to give a witness an opportunity to testify as to the similarity of his appearance in this condition to the appearance of the masked robber. The Court of Appeals held that in this there was no error, saying that the privilege against self-incrimination afforded by the Fifth Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment, offers no protection against compulsion to put on an item of apparel worn by the person committing the offense in order to facilitate identification.

In *United States v. Murray*, 523 F. 2d 489 (8th Cir. 1975), the defendant was charged with a bank robbery, which robbery was photographed while in progress, and was required to wear before the jury a wig "similar" in style to one in his possession at the time of his arrest and similar to the hair style of a co-defendant at the time of the robbery. The Court of Appeals said, "The trial court properly required the defendant to place the wig on his head to assist the jury in determining whether he

was in fact the person who had been photographed participating in the robbery."

In *LaBlanc v. People,* 160 Colo. 575, 418 P. 2d 888 (1966), the defendant was convicted of burglary and rape. He contended that he was entitled to a new trial because the trial court had required him to put on clothing, found in his car and similar to the description given by the prosecuting witness of the clothing of her assailant, and exhibit himself therein to the jury. The Court held that in this there was no error since "it gave the jury an opportunity to see him as the victim saw him, and had a bearing on the accuracy of his identification."

In 8 Wigmore on Evidence (McNaughton Rev.), § 2265, it is said that the privilege against self-incrimination is not violated by "removing from or placing on a suspect shoes or head coverings or other clothing" or by "requiring a suspect to appear in court, stand, assume a stance, walk or make a particular gesture."

In *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104 (1951), this Court found no error in the admission of testimony of a police officer to the effect that the bare footprint of the defendant taken by the officers was identical with a bloody footprint found at the scene of the crime, the court saying through Justice Ervin, "These [cited] North Carolina cases are in accord with well considered decisions in other jurisdictions to the effect that the constitutional privilege against self-incrimination is not violated by the introduction of evidence of fingerprints to identify the accused, even where the fingerprints of the accused are obtained by coercion."

Thus, the defendant's concession in the present case that to require him to place the stocking mask upon his head and face in the presence of the jury did not violate his constitutional right against self-incrimination was well advised. It is likewise clear that this action of the trial court did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States or the like provision in Article I, § 19, of the Constitution of North Carolina. See *Schmerber v. California, supra.* Nothing in this action offends the "sense of justice." The whole purpose of the experiment was not to identify the defendant as the perpetrator of the crimes charged, but to enable the jury to determine the correctness of his contention that the wearing of this mask by the perpetrator of

the offenses made it impossible for Mrs. Powell to see his features clearly enough to enable her to identify him thereafter. The jury was fully advised as to the nature and extent of the change which had occurred in the condition of the mask since it was worn by the robber. There is no merit in this contention of the defendant.

[2] There is likewise no merit in the contention of the defendant that a mistrial should have been ordered by reason of the statement of Mrs. Powell that she had read something in the newspaper concerning a "shooting at Hardee's." This statement was elicited on cross-examination of this witness by the defendant, in which he persisted after the witness had testified that she had read nothing in the newspaper "about this case." The witness did not state what she had read about "the shooting at Hardee's." The trial court immediately instructed the jury not to consider this statement of the witness and instructed the jury that it had "nothing to do with this case whatsoever."

In *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 432, 183 S.E. 2d 652 (1971), we said that the allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. In *State v. Jarrette*, 284 N.C. 625, 646, 202 S.E. 2d 721 (1974), we held there was no error in the denial of a motion for mistrial due to testimony of a State's witness on direct examination which was not responsive to the question propounded by the prosecuting attorney, the statement inferring that the defendant had committed some criminal offense other than that for which he was on trial. We there said: "Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for a mistrial."

Similarly, in *State v. Self*, 280 N.C. 665, 671, 187 S.E. 2d 93 (1972), we said there was no error in the denial of the defendant's motion for mistrial by reason of an allegedly improper question propounded by the prosecuting attorney to the State's witness, which question the defendant contended inferred the commission by the defendant of a criminal offense other than that for which he was on trial. We there said: "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 the present case, the court's instruction to the jury was ample to remove from the jury's consideration any prejudicial inference which might be drawn from the unresponsive answer of the witness to the question propounded by the defendant's counsel.

No error.

STATE OF NORTH CAROLINA v. JOHN ROBERT HAYES, JR.

No. 64

(Filed 7 December 1976)

1. **Criminal Law § 98— waiver of right to be present during trial**

The right of defendant to be present throughout the trial is personal and a defendant may waive the right.

2. **Criminal Law § 98— denial of right to be present at jury selection**

Defendant was denied his right to be present at the jury selection where defendant and his counsel were told by the district attorney that they could leave the courtroom and that they would be given a half day's notice before defendant's case would be called, defendant's trial was begun in his absence after only two hours' notice to his counsel, when defendant arrived the jury had been selected, his peremptory challenges had been expended and he had been deprived of the right to question the jurors, and defendant was then given the opportunity to challenge for cause only those jurors he knew.

3. **Searches and Seizures § 3— confidential informant — contents of affidavit for search warrant**

In order for an affidavit to be sufficient to show probable cause for issuance of a search warrant, (1) the affidavit must contain facts from which the issuing officer can determine that there are reasonable grounds to believe that illegal activity is being carried on or that contraband is present in the place to be searched, and (2) if an unidentified informant has supplied all or a part of the information contained in the affidavit, some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable must be set forth before the issuing officer.

4. **Searches and Seizures § 3— confidential informant — sufficiency of affidavit**

A statement in an affidavit that a confidential informant had been to specified premises in the past few hours and observed mari-

juana being possessed at such location was sufficient to show that contraband (marijuana) was being possessed in the premises to be searched; and a statement in the affidavit that the informant had furnishesd reliable information in the past which had in fact led to the arrest of several persons, together with testimony of the officer-affiant that, acting on information given him by the informant in this case, he searched a named person and found her to be in possession of lottery paraphernalia, was sufficient to show the reliability of the informant.

5. **Searches and Seizures § 3— issuance of search warrant — testimony before magistrate**

Under G.S. 15-26(b) it was not necessary that an affidavit to obtain a search warrant contain all the evidence presented to the issuing officer, and testimony by the affiant could be considered by the issuing officer as bearing upon the credibility of the confidential informant who furnished information to the affiant.

6. **Narcotics § 4— felonious possession of marijuana — analysis of contents of some envelopes — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of whether all nineteen envelopes found in defendant's house contained marijuana, and thus whether defendant was guilty of felonious possession of more than one ounce of marijuana, where an expert witness testified that he had examined and identified marijuana in numerous prior cases and trials; he examined the contents of all the envelopes taken from defendant and the contents of each appeared to be the same; he selected five envelopes at random, all of which, after analysis of the contents, were found to contain marijuana; and the net weight of the contents of all nineteen envelopes was in excess of one ounce.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 29 N.C. App. 356, 224 S.E. 2d 260, which found no error in the trial before *Long, J.*, at the 15 September 1975 Session of FORSYTH Superior Court.

Defendant was tried and convicted upon an indictment, proper in form, for the felonious possession of a controlled substance (marijuana in excess of one ounce) and was sentenced to two and one-half to three years' imprisonment. On appeal, the Court of Appeals found no error.

Defendant filed a petition with this Court for discretionary review of the decision of the Court of Appeals and gave notice of appeal. We denied the Attorney General's motion to dismiss the appeal and allowed the petition for discretionary review.

The State introduced evidence tending to show that on 21 March 1975, at approximately 9:45 p.m., police officers arrived

at defendant's house with a search warrant. After reading the warrant to defendant, the officers entered the house. At this time, defendant removed three envelopes from his pocket and stated, "I guess you want this." One of the officers visually examined the contents of the envelopes and placed defendant under arrest for possession of marijuana. Defendant then led the officers to sixteen additional envelopes which were located in a closet in an upstairs bedroom.

An expert in the field of chemical and microscopic analysis testified that he had analyzed certain portions of the vegetable matter contained in the envelopes seized from defendant. Based on this analysis, he determined that the contents of all the envelopes were marijuana and that the total net weight of all the contents was 56.4 grams—an amount in excess of one ounce.

Defendant offered no evidence.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Ralf F. Haskell for the State.

Herman L. Stephens for defendant appellant.

MOORE, Justice.

On the first day of the 15 September 1975 Session of Forsyth Superior Court, defendant and his counsel were present. They were told by the district attorney that they could leave the courtroom and that they would be given one-half day's notice before their case would be called for trial. Defendant and his counsel then left the courtroom. On 18 September 1975, at approximately 10:30 a.m., the district attorney contacted defendant's counsel and stated that the case would be tried as soon as possible. Defendant's counsel, who was then involved in the trial of another case, arrived in the courtroom at approximately 12:30 p.m. The defendant was not present. The trial judge, over defense counsel's objection, ordered that jury selection begin. After counsel exhausted defendant's six peremptory challenges, the jury was selected and the court recessed for lunch.

Court reconvened at 2:00 p.m. and over defense counsel's objection, a hearing on defendant's motion to suppress was begun. At 2:17 p.m., defendant arrived in the courtroom. At that

time, the trial judge notified defense counsel that he might examine any of the jurors to determine whether any of them recognized defendant and, if so, he would permit an additional challenge for cause if necessary. He did not offer to grant defendant any additional peremptory challenges. Defense counsel then announced that the jury was acceptable to defendant. Defendant assigns as error the selection of the jury in his absence.

In *Lewis v. United States*, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892), the trial judge adopted a procedure for questioning prospective jurors which effectively denied defendant any opportunity to examine or view the prospective jurors in his case prior to the time that he was required to make his challenges. The United States Supreme Court held that this procedure was error. In so holding, the Court stated:

> " . . . Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error. . . . " 146 U.S. at 376, 36 L.Ed. at 1014, 13 S.Ct. at 138.

In *Pointer v. United States*, 151 U.S. 396, 408-09, 38 L.Ed. 208, 214, 14 S.Ct. 410, 414-15 (1894), the Court stated:

> "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . He may, if he chooses, peremptorily challenge 'on his own dislike, without showing any cause;' he may exercise that right without reason or for no reason, arbitrarily and capriciously. [Citations omitted.] Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due adminstration of justice."

[1] It should be noted, however, that the right of defendant to be present is not absolute. Rather, the right to be present is personal and a defendant may waive the right. *See Diaz v.*

United States, 223 U.S. 442, 56 L.Ed. 500, 32 S.Ct. 250 (1912); *United States v. Crutcher,* 405 F. 2d 239 (2d Cir. 1968).

The holdings of this Court are essentially in accord with those of the United States Supreme Court. In *State v. Pope,* 257 N.C. 326, 330, 126 S.E. 2d 126, 129 (1962), we stated:

> "In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right." *See also State v. Hartsfield,* 188 N.C. 357, 124 S.E. 629 (1924); *State v. Craton,* 28 N.C. (6 Ired.) 164 (1845).

In *State v. Perry,* 277 N.C. 174, 177, 176 S.E. 2d 729, 731 (1970), Justice Higgins, speaking for the Court, stated:

> " . . . Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. . . . "

[2] Applying the above stated principles to the facts in this case, we hold that defendant is entitled to a new trial. On the first day of the 15 September session of court, the defendant and his counsel were told by the district attorney that they could leave the courtroom and that they would be given a half day's notice before the case would be called. Instead, defendant's trial commenced, in his absence, after only two hours' notice to his counsel. When defendant arrived, the jury had been selected, his peremptory challenges had been expended and he had been deprived of the right to question the jurors. Further, he was only given the opportunity to challenge for cause those jurors he knew. Thus, defendant faced a jury that he had no part in selecting. Under the circumstances of this case, defendant did not waive his right to be present at the jury selection and was denied a substantial right.

We commend the district attorney for his attempt to accommodate defendant and his counsel by permitting them to leave the courtroom, subject to call on one-half day's notice. However, once he entered into this agreement, we are constrained to hold that defendant and his counsel were entitled to rely on it, and that in selecting the jury in defendant's absence, without the agreed notice, defendant's right to be present at this critical stage in his trial was denied.

Inasmuch as we are awarding defendant a new trial because he was deprived of his right to be present during the selection of the jury, it is not necessary to pass on his contention concerning his absence during the hearing on his motion to suppress. Suffice it to say, he was present while Officer Holman testified on *voir dire* and had ample opportunity to cross-examine the officer. He could also have testified or offered evidence in his own behalf, which he did not do. If he has such evidence, he may offer it at his next trial.

Defendant questions the validity of the search warrant and the supporting affidavit.

In *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), the United States Supreme Court stated the principles to be applied in determining the sufficiency of an affidavit to form a basis for a finding of probable cause to search:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v. United States, supra,* [357 U.S.] at 486; *Johnson v. United States, supra,* [333 U.S.] at 14, or, as in this case, by an unidentified informant." 378 U.S. at 114-15, 12 L.Ed. 2d at 729, 84 S.Ct. at 1514.

See also Spinelli v. United States, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972).

[3] The *Aguilar* and *Spinelli* cases have created a "two-pronged" test for determining whether an affidavit is sufficient to show probable cause. First, the affidavit must contain facts from which the issuing officer could determine that there are reasonable grounds to believe that illegal activity is being carried on or that contraband is present in the place to be searched. Secondly, if an unidentified informant has supplied all or a part of the information contained in the affidavit, some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable must be set forth before the issuing officer.

In the case of *State v. Campbell, supra,* the "first prong" of *Aguilar* was at issue. In *Campbell,* a search warrant was issued upon an affidavit which stated that certain suspects were actively involved in the drug traffic around Campbell College. The affidavit further specified the location of the residence of the suspects and requested a warrant to search the residence. The warrant was issued and, at trial, the fruits of the search were introduced into evidence. This Court held that the issuance of the search warrant was improper. The reason for this holding was that the affidavit did not contain any "underlying facts and circumstances from which the issuing officer could find probable cause existed *to search the premises described.*"

[4] In instant case, the affidavit submitted to obtain the search warrant stated:

> "I have received information from a confidential informer that the narcotic drug marijuana is being kept and stored at 2775 Piedmont Circle. The informer has been to the above location in the past few hours and observed the narcotic drug marijuana being possessed and controlled at the above location. This information was received on the 21 March 1975 [the date on which the warrant was issued]."

This portion of the affidavit is sufficient to establish probable cause that contraband (marijuana) was being possessed in the premises to be searched.

The second issue is whether the affidavit stated sufficient underlying circumstances to show that the informer in this

case was credible or that the information was reliable. The affidavit stated:

> "The informant has furnished information in the past and the same has proven reliable. Information furnished by this informant has led to several arrests, information received from this informant led to the arrest of Miss Elizabeth Furches for the possession of lottery. This case is now pending in Criminal Court."

[5] At the *voir dire* hearing on the motion to suppress, Officer Holman testified that on 21 March 1975, prior to the issuance of the search warrant on that date, he told the issuing officer that acting on the information given him by the informant in this case, he searched Miss Furches and found her to be in possession of lottery paraphernalia. Under G.S. 15-26(b) it was not necessary that the affidavit contain all the evidence presented to the issuing officer. Thus, the testimony of Officer Holman could be considered by the issuing officer as bearing upon the reliability of the informant. As stated in *State v. Spillars, supra,* at 349, 185 S.E. 2d at 886-87:

> "It is not necessary that the affidavit contain all the evidence properly presented to the magistrate. *State v. Elder,* 217 N.C. 111, 6 S.E. 2d 840. G.S. 15-26(b) requires only that the affidavit indicate the basis for the finding of probable cause. We do not interpret this portion of the statute to impose a requirement upon the magistrate to transcribe all the evidence before him supporting probable cause. Such an interpretation would impose an undue and unnecessary burden upon the process of law enforcement."

But see G.S. 15A-245(a) and comments in 10 Wake Forest L. Rev. 369-70 for changes made in the procedure to be followed after 1 July 1975.

[4] The statement in the affidavit that the informant had furnished reliable information in the past which had in fact led to the arrest of several persons and the testimony of Officer Holman are sufficient to show the reliability of the informer. *See State v. Spencer, supra; State v. Spillars, supra. See also People v. Ward,* 508 P. 2d 1257 (Col. 1973), wherein an affidavit stated that informant had given reliable information "on at least two recent past occasions which resulted in narcotics arrests and seizures. . . ." The Colorado Supreme Court held that

this statement was sufficient to show the credibility of the informant.

As stated in *United States v. Ventresca*, 380 U.S. 102, 108, 13 L.Ed. 2d 684, 689, 85 S.Ct. 741, 746 (1965):

> " . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. . . . "

Thus, we hold that the issuing officer had probable cause to issue the search warrant in this case. Accordingly, this assignment is overruled.

[6] Since the issue will arise at defendant's new trial, we address the contention that a nonsuit should have been granted on the charge of felonious possession. At trial, an expert in the field of chemical and microscopic analysis testified that he examined three envelopes which defendant gave to police officers. Upon making a visual determination that the contents of the envelopes were the same material, he analyzed, chemically and microscopically, the contents of one envelope. Likewise, with respect to the sixteen envelopes which were taken from a closet located in defendant's house, the expert visually examined the contents of all sixteen envelopes and determined that the contents were the same. The expert then analyzed, both chemically and microscopically, the contents of four envelopes which he selected at random. On the basis of this analysis, he determined that the contents of all the envelopes were marijuana and that the total net weight of all the contents was 56.4 grams (an amount in excess of one ounce, and in violation of G.S. 90-95(d)(4)).

Defendant contends that only the contents of the envelopes which were chemically and microscopically examined may be used to support his conviction. Thus, since the weight of the contents of the five envelopes actually analyzed was less than one ounce, defendant contends that the State should have been nonsuited on the felonious possession charge under G.S. 90-95(d)(4).

In *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970), defendant was convicted of possession of more than one hundred capsules of a barbiturate in violation of G.S. 90-113.2(5). At trial, an expert in the field of chemical analysis testified that he made a visual examination of all the capsules submitted to him. Upon ascertaining that all the capsules possessed the same physical appearance, the expert analyzed the contents of several randomly selected capsules and found that each contained barbiturates. As in instant case, defendant contended that at most he was guilty of possession of only those capsules which were actually analyzed. This Court disagreed, holding that the issue of whether all the capsules contained barbiturates was a question for the jury and the testimony of the expert was sufficient to withstand a motion for nonsuit on the charge of possession of more than one hundred capsules of a barbiturate.

It is the well settled rule in this jurisdiction that a motion for nonsuit is properly denied if there is any competent evidence to support the allegations in the indictment or warrant, considering the evidence in the light most favorable to the State, and giving the State every reasonable inference deducible therefrom. 4 Strong, N. C. Index 3d, Criminal Law § 106 (1976), and cases cited therein.

In the case at bar, there was sufficient evidence to go to the jury on the question of whether all the envelopes contained marijuana. The expert witness testified that he had examined and identified marijuana in numerous prior cases and trials; that he examined the contents of all the envelopes taken from defendant and that the contents of each appeared to be the same; and that he selected five envelopes at random, all of which, after analysis of the contents, were found to contain marijuana. This evidence was sufficient to submit to the jury on the issue of whether the contents of all the envelopes were marijuana. This assignment is overruled.

For the error committed in selecting the jury in defendant's absence, defendant is entitled to a new trial.

The case is remanded to the Court of Appeals with direction to remand to the Superior Court of Forsyth County for further proceedings in accordance with this opinion.

New trial.

NORTH CAROLINA NATIONAL BANK v. H. L. GILLESPIE, TRADING AS H. L. GILLESPIE'S USED CARS

No. 12

(Filed 7 December 1976)

1. **Rules of Civil Procedure §§ 15, 56— unpleaded defenses raised by evidence — consideration on summary judgment motion**

Unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment; however, it is the better practice to require a formal amendment to the pleadings.

2. **Bills and Notes § 20— action on notes — oral agreement executed contemporaneously with notes — summary judgment improper**

In an action to recover on five demand notes, defendant's evidence establishing the execution of certain notes and security instruments accompanied by a prior or contemporaneous parol agreement as to the mode of payment and the fund from which payment would be made and evidence which tended to show a continued course of dealing pursuant to the parol agreement was admissible at the hearing upon plaintiff's motion for summary judgment; such evidence showed the existence of a conflict as to a material fact thereby rendering summary judgment improper.

3. **Judges § 5— refusal of judge to disqualify himself**

When the trial court found sufficient force in the allegations contained in defendant's motion that the trial judge disqualify himself to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony, and it was not proper for the trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings.

Justice COPELAND did not participate in the consideration or decision of this case.

ON *certiorari* to review the decision of the Court of Appeals, 28 N.C. App. 237, 220 S.E. 2d 862, affirming entry of summary judgment for plaintiff by *Clark, J.*, 19 May 1975 Session of SURRY District Court.

Plaintiff instituted action to recover on five demand notes executed to it by defendant in the aggregate principal sum of $15,113.09. Each of these demand notes was admitted into evidence and each note contained this provision:

> . . . [T]o secure payment of this note and of all other liabilities as hereinafter defined, the undersigned hereby pledge to the said Bank, or its assigns, holders of the

same, the collateral described on the back hereof. It is hereby agreed that upon the non-payment of this note, or of any other of said liabilities, the said Bank, or the holder thereof, may sell the same at public or private sale for cash . . . .

Defendant answered and denied execution of the notes. He also counterclaimed alleging that as a part of the floor-plan arrangement with plaintiff and its predecessor, he was to receive certain rebates commonly known as dealer reserves. He demanded judgment in the sum "of $15,000 to $20,000 or such amounts as the evidence reveals he is entitled to upon his counterclaim."

Plaintiff moved for summary judgment and defendant moved for summary judgment on his counterclaim.

In support of its motion for summary judgment, plaintiff offered the affidavit of G. Thomas Fawcett, Sr., one of its vice-presidents, who stated that he was familiar with defendant's signature and he had compared defendant's signature as it appeared in his verifications of his pleadings in this cause with the signatures of the notes in controversy. In his opinion the signatures on each of the notes in question was that of defendant. Plaintiff or its predecessor had never entered into any agreement to pay rebates to defendant on a floor-plan agreement or on a discount arrangement except through a dealer reserve account accruing from 5% withholding on notes discounted by defendant to the bank. This reserve account was held by the bank to apply to any uncollectable notes discounted by defendant.

Defendant offered the deposition of Mr. D. C. Rector whose testimony disclosed that he had been employed by plaintiff's predecessor all of his adult life and served as its president for twenty years preceding his retirement on 1 January 1966. He had business dealings with defendant prior to his retirement but had no agreement with defendant concerning rebates when accounts were paid off. There was a reserve account for delinquent discounted notes. The depositions of Roger Inman, Jr., one of plaintiff's vice-presidents and Lowell Thomas, the bank's City Executive tended to corroborate Mr. Rector.

Defendant offered his affidavit in which he stated that for a period of from twelve to fifteen years he had been engaged

in a course of dealings with plaintiff and its predecessor which was initiated through an agreement with Mr. D. C. Rector. He "floor planned" automobiles, discounted customer notes with the bank and executed the notes and security agreements required by the bank. Defendant averred that he had an oral agreement with the bank through its president Mr. D. C. Rector which supplemented the notes and security instruments signed by him. We quote portions of defendant's affidavit:

> I further had an agreement that I would receive one (1%) percent add-on dealer reserve after all contracts which I had floor-planned and customer sales of which I had endorsed to the First National Bank of Mount Airy were paid out. That this business relationship has continued, and that I still have outstanding contracts which have not been paid out by my customers in the First National Bank of Mount Airy, which has recently been purchased by the North Carolina National Bank . . . .
>
> . . . I also had an oral agreement with D. C. Rector that no demand for payment would be made until after the bank's remedies under the floor-plan agreement and other security instruments, which I was required to sign by the bank, had been exhausted. I further had an agreement and understanding that the cars floor-planned would stand good for the debt to the extent of their fair market value at the time any request was made by the bank for the payment of the notes. . . . I had an agreement with D. C. Rector that before demand would be made upon the notes without an opportunity to either pay the interest or renew the notes that the dealer reserve would be used to pay off the notes.
>
> . . . I never made a request for the dealer reserve since my business relationship with the First National Bank of Mount Airy was continuing in the same manner that it had been continuing for 12 to 15 years.

Defendant admitted execution of the notes sued upon, but averred that the notes were made pursuant to the oral agreement.

The trial judge entered summary judgment for plaintiff and denied defendant's motion for summary judgment on his counterclaim. Defendant's counterclaim action was retained for

trial. Although not a part of the judgment, the trial judge verbally ordered that "the judgment is not to be entered on the judgment docket until a final determination of all issues are made."

Folger & Folger, by Larry Bowman, for plaintiff.

Franklin Smith for defendant.

BRANCH, Justice.

The threshold question presented by this appeal is whether defendant could demonstrate the existence of a genuine issue as to a material fact by raising an unpleaded defense by his evidence opposing plaintiff's motion for summary judgment.

Nowhere in his answer did defendant assert the defenses raised by his affidavits filed in opposition to the motion for summary judgment.

Earlier cases took the view that evidence offered at a hearing on a motion for summary judgment must be supported by allegations in the pleadings. *Cudahy Packing Co. v. U. S.*, 37 F. Supp. 563. The later cases hold that, in light of the policy favoring liberality in the amendment of the pleadings, "[e]ither the answer should be deemed amended to conform to the proof offered by the affidavits or a formal amendment permitted, the affidavits considered, and the motion for summary judgment decided under the usual rule pertaining to the adjudication of summary judgment motions." 6 Moore's Federal Practice ¶ 56.11[3] (2d Ed. 1976). *See Rossiter v. Vogel*, 134 F. 2d 908; *Bergren v. Davis*, 287 F. Supp. 52. Chapter 1A, Rules of Civil Procedure.

[1] We hold that unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment. However, we think in such cases it is the better practice to require a formal amendment to the pleadings.

[2] The primary question presented by this appeal is whether defendant's evidence in support of his defenses was admissible at the hearing upon plaintiff's motion for summary judgment.

Plaintiff's evidence and defendant's admissions establish that defendant executed the five notes upon which this action rests, thereby establishing a *prima facie* case. Plaintiff contends

that the evidence which defendant offered in opposition to its motion for summary judgment was barred by the parol evidence rule and that without such evidence there exists no material issue of fact for trial.

The recent case of *Borden, Inc. v. Brower,* 284 N.C. 54, 199 S.E. 2d 414, considered the identical question presented by this case. There, the Court extensively reviewed the decisions and commentaries which have considered the North Carolina parol evidence rule and its many exceptions. In *Borden,* plaintiff brought action to recover on a renewal promissory note. Plaintiff moved for summary judgment supporting its motion by portions of a deposition of defendant in which defendant admitted the execution of the note in suit and admitted the plaintiff's records reflected that in 1969 defendant owed plaintiff $11,970. Defendant offered affidavits to the effect that contemporaneously with the signing of the original note, defendant and plaintiff's agent agreed verbally that the note would reflect amounts represented by two customers' notes for bookkeeping purposes only, but that defendant would not be liable for these amounts. The amount of the two customer notes was reflected in each renewal note given to plaintiff by defendant including the note sued upon. Holding that evidence of the parol agreement was admissible and reversing the lower court's grant of summary judgment, this Court, speaking through Justice Moore, in part, stated:

> Affidavits filed in opposition to a motion for summary judgment "shall set forth such facts as would be admissible in evidence." G.S. 1A-1, Rule 56(e). If the pleadings, affidavits, and deposition offered by defendant do not set forth facts that would be admissible in evidence because of the parol evidence rule, then such evidence was properly stricken, and since there remained no genuine issue as to any material fact, the court correctly rendered summary judgment for plaintiff. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).
>
> The parol evidence rule in North Carolina was stated by Chief Justice Stacy in *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606 (1936), as follows:
>
> > "It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made

before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. [Citing numerous cases.] . . .

"On the other hand, there are a number of seeming exceptions, more apparent than real perhaps, as well established as the rule itself. *Roebuck v. Carson,* 196 N.C., 672, 146 S.E., 708. . . ."

Chief Justice Stacy then sets out eight exceptions to the rule, citing numerous North Carolina cases for each exception. The third exception is that the parol evidence rule is not violated:

"[B]y showing mode of payment and discharge as contemplated by the parties, other than that specified in the instrument. *Bank v. Rosenstein,* 207 N.C., 529, 177 S.E., 643; *Kindler v. Trust Co.,* 204 N.C., 198, 167 S.E., 811; *Wilson v. Allsbrook,* 203 N.C., 498, 166 S.E., 313; *Stockton v. Lenoir,* 198 N.C., 148, 150 S.E., 886; *Bank v. Winslow,* 193 N.C., 470, 137 S.E., 320."

The sixth exception is:

"[B]y showing the whole of a contract, only a part of which is in writing, provided the contract is not one required by law to be in writing and the unwritten part does not conflict with the written. *Dawson v. Wright, supra* [208 N.C., 418, 181 S.E., 264]; *Henderson v. Forrest,* 184 N.C., 230, 114 S.E. 391; *Evans v. Freeman,* 142 N.C., 61, 54 S.E., 847."

* * *

Promissory notes are not generally subject to the parol evidence rule to the same extent as other contracts. Parties drawing such instruments tend to follow a rather definitely standardized form. If collateral terms and conditions had been agreed upon, they may be omitted from the note itself to insure its negotiability. Accordingly, it is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parol evidence as between the original parties may well be admissible so far as it is not inconsistent with the express terms of the note. See 3 Corbin on Contracts § 587, at 510 (1960); 2 Stansbury's N. C. Evidence, Brandis Rev. § 256 (1973); Dalzell, Twenty-five

Years of Parol Evidence in North Carolina, 33 N.C.L. Rev. at 432-33 (1955).

* * *

This action is between the original parties to the note. When such an instrument is in the hands of a holder other than a holder in due course, this Court has permitted variance of its express terms by showing that it was to be enforced only on the happening of certain conditions, or only to the extent necessary to accomplish a certain purpose, or that it was payable only out of a certain fund, or that it was given as evidence of an advancement, or that it might be discharged by a method of payment or performance different from that stated in the writing. *Insurance Co. v. Morehead, supra,* and above cited cases. . . .

The effect of a course of dealings between the same parties was considered by this Court in *Worth Co. v. Feed Co.*, 172 N.C. 335, 90 S.E. 295. Headnote #4 of that decision accurately states its pertinent holding. We quote:

Where a bank takes a negotiable paper by indorsement from its depositor, who had always sufficient funds there to protect its payment, and gives him credit for the amount, with the right to check on it, the transaction is evidence that the bank purchased for value; and when the evidence is conflicting as to an agreement between them that the bank should charge the item back upon *nonpayment,* it is for the jury to determine the intent of the parties, upon which they may *consider the course of dealings,* the rate of discount, the state of the account, and other relevant circumstances. [Emphasis ours.]

The Court of Appeals reasoned that *Borden* was inapplicable to the facts of this case because *Borden* was concerned with renewal notes. We do not agree. In *Borden,* there was an agreement contemporaneous with the execution of the original note. Thereafter, there was a course of dealings in which renewal notes were executed in reliance upon the oral agreement. Here, according to defendant, notes and security agreements were originally executed by him to plaintiff's predecessor contemporaneously with an oral agreement. Thereafter, new notes and security agreements were executed in a course of dealings pursuant to the oral agreement. We are unable to find a viable distinction between the execution of the renewal notes in *Borden*

and the execution of notes in instant case pursuant to an established course of dealings.

A motion for summary judgment shall be allowed only when the evidence reveals no genuine issue as to any material fact and when the moving party is entitled to a judgment as a matter of law. An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action. Summary judgment should be used cautiously and the burden of clearly establishing lack of a triable issue is on the moving party. The moving party's papers must be carefully scrutinized and those of the opposing party must be regarded with indulgence. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897; *Kessing v. Mortgage Corp.* 278 N.C. 523, 180 S.E. 2d 823.

Defendant's evidence, when taken in the light most favorable to him, establishes the execution of certain notes and security instruments accompanied by a prior or contemporaneous parol agreement as to the mode of payment and the fund from which it would be paid. The evidence tending to show a continued course of dealings pursuant to this oral agreement was sufficient to have affected the result of the action, thereby creating a conflict between plaintiff's evidence and defendant's evidence as to a material fact. Thus, a jury question was presented and the trial judge erred when he granted plaintiff's motion for summary judgment.

[3] Finally, defendant contends that the trial judge erred by failing to disqualify himself from hearing this cause.

On 19 May 1975, the date set for the hearing of the motions for summary judgment, defendant filed his unverified motion in the cause asking that Judge Clark disqualify himself on the ground that the judge was biased and prejudiced toward defendant because: (1) There had been an unfriendly termination of attorney-client relationship between Judge Clark and defendant's family, (2) Judge Clark had prosecuted defendant in a criminal action while the judge was serving as solicitor of the Mount Airy Recorder's Court, (3) Judge Clark had money on deposit with plaintiff and enjoyed friendly relations with some of plaintiff's employees.

The only thing before Judge Clark in support of defendant's motion was the unverified motion in the cause. There was no evidence in contradition.

In the present posture of this case, we need not consider this question at length. We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings. *Ponder v. Davis,* 233 N.C. 699, 65 S.E. 2d 356.

In this connection, we think the language found in *Kentucky Journal Publishing Co. v. Gaines,* 139 Ky. 747, 110 S.W. 268, quoted in *Ponder v. Davis, supra,* warrants repeating:

> . . . "It is but the utterance of a legal platitude to say that it is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon two things are absolutely essential; an impartial jury and an unbiased judge. But we go further, and say that it is also important that every man should know that he has had a fair and impartial trial; or, at least, that he should have no just ground for the suspicion that he has not had such a trial."

For the reasons stated, the decision of the Court of Appeals is reversed. This cause is remanded to that court with directions that it be returned to the District Court of Surry County with order that the judgment granting summary judgment be vacated and that there be a trial by jury of all issues raised by the pleadings and evidence.

Reversed and remanded.

Justice COPELAND did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. EDITH SHOEMAKER PHILYAW

No. 7

(Filed 7 December 1976)

1. **Criminal Law § 10— accessory before the fact — proof required**

In order to sustain a conviction for accessory before the fact, it must be shown that (1) the defendant counseled, procured, commanded or encouraged the principal to commit the crime, (2) defendant was not present when the crime was committed, and (3) the principal committed the crime.

2. **Criminal Law § 10; Homicide § 12— indictment for murder — trial as accessory before the fact**

Defendant was properly tried as an accessory before the fact to murder upon an indictment for first degree murder since accessory before the fact is a lesser included offense of the principal crime.

3. **Bill of Discovery § 6; Criminal Law § 80— discovery in criminal cases — former statute — truck occupied by deceased**

The trial court did not err in failing to require the district attorney to furnish the "truck occupied by the deceased" for defendant's examination pursuant to defendant's motion under former G.S. 15-155.4 that the district attorney make available to her all physical evidence in the State's possession related to the crime since the statute contemplated discovery of exhibits and experts to be used at trial, and deceased's truck was not a trial exhibit.

4. **Criminal Law §§ 73, 89— motion to suppress testimony as hearsay — testimony admissible for corroboration**

In this prosecution for accessory before the fact to murder, the trial court did not err in failing to hold a hearing on defendant's pretrial motion to suppress as hearsay statements made by two perpetrators of the murder to a deputy sheriff implicating defendant since the statements were offered only for corroboration and did not, as a matter of law, violate the hearsay rule, and therefore no legal basis for the motion appeared on the face of the motion. G.S. 15A-977(c).

5. **Criminal Law § 10; Homicide § 21— accessory before the fact to murder — principal not yet convicted**

The trial court properly submitted to the jury the issue of defendant's guilt of accessory before the fact to murder, although at the time of the trial one of the principals had not been convicted of murder, where the court instructed the jury that the State was required to prove beyond a reasonable doubt that such principal had committed the murder before the jury could convict defendant as an accessory before the fact, and substantial evidence was introduced at trial from which the jury could find that such principal was guilty of murder.

DEFENDANT appeals from judgment of *Grist, J.*, 17 November 1975, Criminal Session, McDOWELL Superior Court.

On indictment, proper in form, defendant was charged in Caldwell County with the murder of Herman Lee Philyaw. Upon motion of the defendant, consented to by the district attorney, the case was transferred to McDowell County Superior Court for trial. At the conclusion of the State's evidence, defendant moved to dismiss the charge of first degree murder. The court allowed the motion but ruled that the evidence supported a charge of the lesser included offense of accessory before the fact. On this charge, defendant was found guilty and sentenced to life imprisonment under the mandatory provisions of G.S. 14-6.

The evidence for the State tended to show the following:

Herman Lee Philyaw, the husband of the defendant, was shot and killed from ambush early on the morning of 7 May 1975. The deceased was driving to work in a pickup truck on a private road accompanied by his son, David Lee Philyaw, and another passenger. It was "dusky dark" and the truck headlights were on. Just before reaching the highway they observed some brush across the dirt road. As the passenger started to get out of the truck to remove the brush, a loud explosion occurred inside the truck. Herman Lee Philyaw slumped over the seat bleeding from the head. The truck began rolling and as David Lee Philyaw grabbed the steering wheel, he recognized Bobby Burns with a rifle in his hand running along the road. David steered the truck so as to pin Burns against a bank, took Burns' rifle away from him and beat him with it. David then went to a house nearby where defendant had been living with her parents since her separation from her husband. David reported to his mother and her parents that Herman Lee Philyaw had been shot. An ambulance was called but Herman Lee Philyaw died shortly thereafter from the head wound.

The evidence disclosed that the defendant and the deceased had been married 29 years and had a number of children. At one time Bobby Burns, age 27, had lived with them. The defendant, age 44, and Bobby Burns were seeing each other at the time of the murder. She had talked of divorcing Herman Lee Philyaw or getting him recommitted to Broughton Hospital, where he had formerly been treated.

Mrs. Philyaw, Bobby Burns, and Isiah Hood were employed at Harper's Furniture Factory. At the plant, defendant had discussed with Isiah Hood the possibility of getting someone to

kill her husband. Shortly thereafter, she gave Bobby Burns $500.00 in cash in an envelope to deliver to Isiah Hood. Later she furnished Isiah Hood $500.00 more for the same purpose. Isiah Hood contacted his uncle, Bobby Hood, to kill defendant's husband.

On the afternoon before the ambush killing, Paula Philyaw Triplett, daughter of the defendant, received a telephone call from her mother. Paula was living with her father at that time. The defendant inquired about her grandchildren and, among other things, asked Paula twice if her father would be going by himself "out in the truck the next morning." Paula told her mother that her father would be alone when he went to work.

The next morning, Isiah Hood accompanied by his uncle, Bobby Hood, picked up Bobby Burns. Burns brought a sawed-off .22 caliber rifle which he had recently purchased and Bobby Hood carried a sawed-off shotgun. When they arrived at the ambush site, they placed brush on the private road, Bobby Hood positioned himself behind a tree, and Bobby Burns stood close by. As the deceased stopped the pickup truck for the brush, Bobby Hood fired the sawed-off shotgun striking the deceased in the head. Bobby Burns said he ran causing his sawed-off rifle to discharge "accidently." Isiah Hood was waiting in the car and when he heard the shots, drove away.

Isiah Hood and Bobby Burns had both pled guilty earlier to second degree murder under a plea-bargain arrangement in which, for testifying against the defendant, they were to receive sentences not in excess of 60 years.

Other evidence indicated that the defendant had borrowed $500.00 from a lady in Durham shortly before the cash was delivered to Bobby Burns for Isiah Hood.

The defendant offered evidence tending to show the following:

She was not involved in the murder and did not ask her daughter the afternoon before the killing whether her estranged husband would be driving alone the next morning. She explained one of the $500.00 payments by saying that it was made because of a threat on her life, but denied the other payment. She also denied having a love affair with Bobby Burns and indicated that she regarded him as her son. Additional corroborative evi-

dence was offered on behalf of the defendant. Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis for the State.

Fate J. Beal and Beverly T. Beal for defendant appellant.

COPELAND, Justice.

Counsel for defendant, without waiving his other assignments of error, stressed in oral argument that the trial court erred in allowing defendant to be tried as an accessory before the fact to murder upon an indictment for first degree murder. We believe that Judge Grist was correct in permitting the defendant to be tried as an accessory before the fact.

At common law an accessory before the fact could only be convicted when tried at the same time as the principal, or after trial and conviction of the principal. *State v. Jones,* 101 N.C. 719, 8 S.E. 147 (1888). In enacting G.S. 14-5, North Carolina recognized accessory before the fact as a substantive felony, making it no longer necessary to first convict the principal in order to convict an accessory. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688 (1967).

G.S. 14-5 provides in pertinent part as follows:

> "If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

[1] Proof of three elements is necessary to sustain a conviction for accessory before the fact. It must be shown (1) that the defendant counseled, procured, commanded, or encouraged the principal to commit the crime, (2) that he was not present

when the crime was committed, and (3) that the principal committed the crime. *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775 (1969); *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 (1961). Ample evidence was presented at trial from which the jury could find defendant guilty beyond a reasonable doubt of this offense.

[2] The fact that defendant was indicted for first degree murder did not preclude her conviction as an accessory before the fact. Upon trial of an indictment, a defendant may always be convicted of the crime charged therein or a lesser degree of the same crime. *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961), and our Court has held that accessory before the fact is a lesser included offense of the principal crime. *State v. Branch, supra; State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961); *See* Note, 41 N. C. L. Rev. 118 (1962).

Recently, in *State v. Hunter,* 290 N.C. 556, 227 S.E. 2d 535 (1976), the defendant was indicted for murder in the first degree. At the close of the State's evidence, the trial court dismissed the murder charge and submitted the case to the jury on the lesser included offense of accessory before the fact. The procedure followed in *Hunter* was identical to that followed in the instant case. We adhere to our former opinions on this subject and overrule this assignment of error.

Under Assignments of Error Nos. 2, 11, 14, 31, 32, 34, and 35, defendant contends that the trial court erred in its rulings on defendant's discovery motions.

[3] On 2 July 1975, counsel for the defendant filed, pursuant to G.S. 15-155.4, a broad discovery motion to require the district attorney to make available to the defendant, among other things, all physical evidence in the State's possession related to the crime. Defendant complains because the physical evidence, specifically the "truck occupied by the deceased," was not supplied for her examination.

G.S. 15-155.4, the applicable law then in effect, provided in relevant part:

> "In all criminal cases before the superior court, the superior court judge . . . shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused

> or his counsel any specifically identified *exhibits to be used in the trial* of the case sufficiently in advance of the trial to permit the accused to prepare his defense; and such judge shall for good cause shown and regardless of any objection of the solicitor or other counsel for the State, direct that the accused or his counsel be permitted to examine . . . *any expert witnesses to be offered by the State in the trial* of the case regarding the proposed testimony of such expert witnesses." N. C. Sess. Laws, ch. 1064, § 1 (1967) (repealed effective 1 September 1975). [Emphasis added.]

There is no common law right to discovery in a criminal action, *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972), and defendant's request for discovery did not fall within the limited statutory discovery right provided in G.S. 15-155.4. That statute contemplated discovery of exhibits and experts to be used at trial. We have held that the purpose of the statute was "to enable a defendant to guard against surprise documents and surprise expert witnesses." *State v. Davis, supra,* 282 N.C. at 111, 191 S.E. 2d at 667; *State v. Peele,* 281 N.C. 253, 258, 188 S.E. 2d 326, 330 (1972); *see State v. Tatum,* 291 N.C. 73, 229 S.E. 2d 562 (1976), decided this day; *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Macon,* 276 N.C. 466, 173 S.E. 2d 286 (1970). The deceased's truck was not a trial exhibit.

Defendant admits that she was furnished a copy of the SBI laboratory report, a list of witnesses which the State intended to call in the case, an autopsy report, and a set of photographs of physical evidence, including photographs of the truck, which were to be introduced at trial. The defendant has obtained from the district attorney all that she was entitled to under G.S. 15-155.4. This assignment of error is without merit and overruled.

[4] Under Assignment of Error No. 30, defendant asserts that the trial court erred in failing to hold a hearing on defendant's motions for suppression of evidence. The record discloses that defense counsel filed a pretrial motion to suppress statements made by either Bobby Burns or Isiah Hood to officers of any law enforcement agency on the ground that any statements of Bobby Burns or Isiah Hood, "to the extent that they implicate defendant Philyaw, would be hearsay and not admissible . . ."

At trial the district attorney called as a witness, Detective Captain Jim Beane of the Sheriff's Department, who had previously interviewed Bobby Burns and Isiah Hood. Defense counsel objected generally to what each of these witnesses told Captain Beane. Thereupon, the court properly instructed the jury that Captain Beane's testimony was being received for the purpose of corroborating the testimony of Bobby Burns and Isiah Hood, both of whom had already testified. At the request of counsel, the court further instructed the jury that this testimony was not to be considered as substantive evidence. The court gave an elaborate instruction as to corroborative evidence, fully complying with the law on this subject. 1 Stansbury's N. C. Evidence, § 52 (Brandis Rev. 1973). At the conclusion of Captain Beane's testimony, counsel for the defendant moved to strike the entire testimony in order to "protect our rights."

The sole reason given by defense counsel for his pretrial motion to suppress was the hearsay nature of statements made by Bobby Burns and Isiah Hood to Captain Beane. G.S. 15A-977(c) provides that a judge may summarily deny a motion to suppress evidence made before a trial if "[t]he motion does not allege a legal basis for the motion; or [if] . . . [t]he affidavit does not as a matter of law support the ground alleged." Defense counsel submitted no supporting affidavit and on the face of the motion, no legal basis for the motion appeared. The evidence was offered for the purpose of corroboration only and was not, as a matter of law, a violation of the hearsay rule. 1 Stansbury's N. C. Evidence, §§ 51, 52 (Brandis Rev. 1973).

It is unnecessary for us to consider whether the trial judge should have held a suppression hearing based on defendant's motions at trial. Defense counsel never made a written or oral suppression motion at trial but rather objected generally to Captain Beane's testimony and moved only to strike it. *See* G.S. 15A-977(a) and (e). Defendant's contentions are devoid of merit and overruled.

[5] Under Assignment of Error No. 38, defendant maintains that the trial court should have directed a verdict of not guilty because the guilt of one of the principals, Bobby Hood, was not shown beyond a reasonable doubt. It is true that at the time of this trial Bobby Hood had not been convicted of murder. However, the trial judge instructed the jury that the State must prove beyond a reasonable doubt that the principal, Bobby

Hood, had committed the crime of murder before they, the jury, could convict the defendant of accessory before the fact to murder. Substantial evidence was introduced at trial from which the jury could find that Bobby Hood was guilty of murder beyond a reasonable doubt. Upon proper instruction, the jury implicitly found that Bobby Hood had committed the murder. Incidentally, it was admitted by counsel for the defendant during argument that Bobby Hood was later convicted of first degree murder. This assignment lacks merit and is overruled.

The defendant's brief has other assignments of error as follows: Nos. 4, 15, 16, 17, 33, 39, 40 and 41. We have examined all of these and find no merit in any of them. In addition, due to the serious nature of the crime for which defendant has been convicted, we have searched the record for errors other than those assigned and have found none prejudicial to the defendant.

In the trial we find

No error.

STATE OF NORTH CAROLINA v. GEORGE LEE REDFERN

No. 116

(Filed 7 December 1976)

1. **Homicide § 6— involuntary manslaughter defined**

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission.

2. **Criminal Law § 115— necessity for charging on lesser-included offense**

The trial judge must instruct the jury as to a lesser-included offense of the crime charged when there is evidence from which the jury could find that defendant committed the lesser offense; however, when all the evidence tends to show that the accused committed the crime charged and there is no evidence of guilt of a lesser-included offense, the court correctly refuses to charge on the unsupported lesser offense.

3. **Homicide § 30— second degree murder case — failure to charge on involuntary manslaughter**

The trial court in a prosecution for second degree murder did not err in failing to charge on the lesser-included offense of involuntary

manslaughter where all the evidence, including defendant's own testimony, showed that deceased was fatally wounded when defendant intentionally discharged his pistol under circumstances naturally dangerous to human life, although defendant testified that he did not intend to hit deceased when he shot.

APPEAL by defendant from *Albright, J.*, at the 21 April 1976 Session of CABARRUS Superior Court.

Defendant was charged in a bill of indictment with first-degree murder. The State elected to proceed on the lesser-included offense of second-degree murder.

The State's evidence tended to show that on the night of 17 January 1976 three persons, including Charles McMillian, were seated in the kitchen of defendant's home. Defendant, who was in the bedroom, turned off all the lights in the house for a brief moment. When defendant returned to the kitchen, McMillian asked him why he had turned off the lights. Defendant responded, "This is my goddam house," and thereupon shot McMillian with a .38 caliber pistol. McMillian was unarmed and had not threatened defendant. McMillian died as a result of the single bullet wound inflicted by defendant's pistol.

Defendant testified that McMillian had engaged in a fight with one of the visitors in his home and he had repeatedly asked McMillian to leave the premises. After an ensuing argument, defendant went to his bedroom and obtained his pistol. Upon his return to the kitchen McMillian started toward him with his hands in his pockets. Defendant fired three warning shots into the door while McMillian was about six feet from him. The fourth shot, which he also intended as a warning shot, struck and killed McMillian. McMillian was about three or four feet from defendant when the fatal shot was fired.

The trial judge charged the jury as to the possible verdicts of guilty of second-degree murder, guilty of voluntary manslaughter, or not guilty. Upon a verdict of guilty of second-degree murder, defendant was sentenced to life imprisonment.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

R. Wayne Pickett, attorney for defendant appellant.

BRANCH, Justice.

Defendant's sole assignment of error attacks the failure of the trial court to charge the jury on the lesser-included offense of involuntary manslaughter.

[1] Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407.

[2] It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129; *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27. However, when all the evidence tends to show that the accused committed the crime with which he is charged and there is no evidence of guilt of a lesser-included offense, the court correctly refuses to charge on the unsupported lesser offense. *State v. Harris,* 290 N.C. 681, 228 S.E. 2d 437; *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393. "The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

In this case defendant testified as follows:

> . . . I shot in the door three times and told him to go home. I went to sling the pistol up again and hit him up there. I fired four shots. . . . When I fired this fourth shot I was aiming in the loft. I didn't intend to hit Mr. McMillian with the fourth shot.

Defendant contends that this evidence would have sustained a verdict of guilty of involuntary manslaughter.

In *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889, Justice Parker (later Chief Justice), speaking for this Court, stated:

> It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, *in the absence of intent to discharge the weapon,* or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. *S. v. Vines,* 93 N.C. 493, 53 Am.

Rep. 466; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913; *S. v. Stitt,* 146 N.C. 643, 61 S.E. 566; *S. v. Bryant,* 180 N.C. 690, 104 S.E. 369; *S. v. Hovis, supra;* 26 Am. Jur., Homicide, sec. 212; 40 C.J.S., Homicide, sec. 59. [Emphasis ours.]

The controlling facts in instant case are remarkably similar to those in *State v. Ward, supra.* In *Ward* Justice Moore, speaking for the Court, stated:

> . . . Clearly the evidence did not justify a charge on involuntary manslaughter. Defendant makes no contention that the gun was discharged accidentally. On the contrary she testified, "I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedrooms and in the living room. *And that's when I fired.* But I didn't want to kill him. . . . " (Emphasis added.) By her own statement defendant intentionally discharged the gun under circumstances naturally dangerous to human life.

See also State v. Gordon, 241 N.C. 356, 85 S.E. 2d 322.

[3] Here all the evidence, including defendant's own testimony, shows that deceased was fatally wounded when defendant intentionally discharged his pistol under circumstances naturally dangerous to human life. There was no evidence of an accidental discharge of the weapon. Thus, the trial judge did not commit error in failing to charge on the lesser-included offense of involuntary manslaughter since there was no evidence to support such a verdict.

No error.

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

BEASLEY-KELSO ASSOCIATES v. TENNEY

No. 86 PC.

Case below: 30 N.C. App. 708.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1976.

CONSTRUCTION CO. v. COAN

No. 94 PC.

Case below: 30 N.C. App. 731.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 December 1976.

GUTHRIE v. RAY

No. 79 PC.

Case below: 31 N.C. App. 142.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 December 1976.

HOMES, INC. v. GAITHER

No. 105 PC.

Case below: 31 N.C. App. 118.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 December 1976.

MAZZUCCO v. BOARD OF MEDICAL EXAMINERS

No. 104 PC.

Case below: 31 N.C. App. 47.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 December 1976. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 7 December 1976.

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

METAL TREATING CORP. v. REALTY CO.

No. 81 PC.

Case below: 30 N.C. App. 620.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 December 1976.

MORTGAGE CORP. v. COBLE, SEC. OF REVENUE

No. 106 PC.

Case below: 31 N.C. App. 243.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 December 1976.

STAFFORD v. FOOD WORLD

No. 95 PC.

Case below: 31 N.C. App. 213.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 December 1976.

STATE v. ANDERSON

No. 99 PC.

Case below: 31 N.C. App. 113.

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

STATE v. CAMPBELL

No. 73 PC.

Case below: 30 N.C. App. 652.

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

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

STATE v. DRIGGERS

No. 82 PC.

Case below: 31 N.C. App. 156.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1976. Appeal dismissed ex mero motu.

STATE v. FREEDLE

No. 11 PC.

Case below: 30 N.C. App. 118.

Petition by defendant to rehear denial of petition for discretionary review under G.S. 7A-31 (reported 290 N.C. 779) denied 7 December 1976.

STATE v. HINES

No. 87 PC.

Case below: 30 N.C. App. 751.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1976.

STATE v. PURYEAR

No. 76 PC.

Case below: 30 N.C. App. 719.

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

STATE v. STANLEY

No. 92 PC.

Case below: 31 N.C. App. 109.

Petition by State for discretionary review under G.S. 7A-31 denied 7 December 1976.

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

STATE v. UNDERWOOD

No. 93 PC.

Case below: 31 N.C. App. 156.

Petition by State for discretionary review under G.S. 7A-31 denied 7 December 1976.

WILLIAMS v. MULLEN

No. 89 PC.

Case below: 31 N.C. App. 41.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 December 1976 only for limited purpose of determining entitlement to $2000 bond issued in 1966.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER AND LIGHT COMPANY v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 39

(Filed 21 December 1976)

1. **Utilities Commission § 6— meaning of "rate"**

The word "rate" used in the Public Utilities Act refers not only to the monetary amount which each customer must ultimately pay but also to the published method or schedule by which that amount is figured.

2. **Utilities Commission § 6— changes in rate methods or schedules — changes in amount paid by customer — procedures**

While changes in the methods or schedules for determining what a customer must ultimately pay must be accomplished according to procedures outlined in the Public Utilities Act, changes in the ultimate monetary amount which each customer pays periodically need not be.

3. **Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — no change of rates without hearing**

The use of a fossil fuel adjustment clause does not permit published rates of a utility to be changed from month to month without a new rate filing, notice or hearing in violation of provisions of the Public Utilities Act since it is the fuel clause, a formula for figuring certain monetary additions to or subtractions from a customer's bill, not the ultimate amount so figured, which constitutes that part of the utility's published schedule subject to the provisions of the Public Utilities Act.

4. **Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — no isolation of one cost element**

The fossil fuel adjustment clause did not isolate only one element of cost without considering all other elements and without considering whether the formula, when used with the regular rate schedule, produces total rates which are just and reasonable as required by G.S. 62-131(a) since the clause was approved, not as an isolated event, but as an adjunct, or rider, to the utility's general rate schedules in which all elements of cost were duly considered.

5. **Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — rate of return — assumption**

In considering whether a fossil fuel adjustment clause would ever, in fact, operate to increase a utility's rate of return, the Utilities Commission was entitled to act on the normal assumption in rate cases generally, there being no evidence to the contrary, that other costs of the utility would not decline but would probably increase or at least remain fairly constant.

6. Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — historical test period concept

The use of a fossil fuel adjustment clause did not violate the historical test period concept embodied in former G.S. 62-133(c), although the Utilities Commission considered evidence and made findings based thereon that there had been a dramatic increase in the cost of fossil fuel both within the test period and extending for some time beyond it, since the Commission did not fix revenues to cover this increased expense but resorted to the fuel adjustment clause as a device which, operating flexibly, would increase the revenues or decrease them as a function of the cost of fossil fuel to the utility.

7. Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — no abdication of rate making powers

The Utilities Commission did not abdicate its rate making powers by permitting use of a fossil fuel adjustment clause since the Commission provided for its continued monitoring of the operation of the clause.

8. Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — validity

The Utilities Commission acted within its statutory authority in permitting an electric utility to utilize a fossil fuel adjustment clause as an adjunct, or rider, to its regular rate schedule.

9. Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — monitoring of performance

The evidence was sufficient to support a finding by the Utilities Commission that its system of monitoring the operation of a fossil fuel adjustment clause will insure that the utility acts in accordance with sound management practices in its negotiations and will protect rate payers from the utility's recovering more than its operating expenses.

10. Utilities Commission § 6— interim rate change — refusal to suspend change

The Utilities Commission may permit rate schedule changes applied for by a utility to be placed into effect on an interim basis by refusing to exercise its power to suspend the change applied for or, having exercised it, by determining before the hearing to rescind the suspension in whole or in part. If the Commission does not suspend the rate change, it automatically goes into effect at the expiration of the 30 days' notice period provided for in G.S. 62-134(a).

11. Utilities Commission § 6— rate change — placing in effect after six months

Under G.S. 62-135, even if the Utilities Commission has timely suspended a rate change applied for by a utility, the utility may nevertheless place the rate change into effect upon the expiration of six months after the date such rates would have become effective, if not so suspended, by giving the statutory notice subject to certain provisos and subject to the utility's filing a surety bond or undertaking approved by the Commission conditioned upon a refund with interest of all rates finally determined to be excessive.

12. Utilities Commission § 6— allowing rate applied for to become immediately effective

Under G.S. 62-134(a) the Utilities Commission may by affirmative order *allow* applied for rate changes to become immediately effective conditionally or unconditionally.

13. Electricity § 3; Utilities Commission § 6— interim fossil fuel adjustment clause — ex parte order — statutory authority

The Utilities Commission acted within the authority granted it by G.S. 62-134(a) when it entered an *ex parte* order allowing a fuel adjustment clause sought by a utility to be placed in effect on an interim basis pending further hearing and final determination and when it entered a second interim order effectuating *ab initio* the utility's earlier proffered undertaking for refund.

14. Electricity § 3; Utilities Commission § 6— interim fossil fuel adjustment clause — ex parte order — due process

Utilities Commission's *ex parte* order allowing a fuel adjustment clause sought by a utility to be placed in effect on an interim basis did not violate the Law of the Land provision, N. C. Constitution, Art. I, § 19, or the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution since due process rights of interested parties were protected by the subsequent hearings, the utility's refund undertaking, and the right of an interested party to challenge the rate change under G.S. 62-132.

Justice LAKE dissenting.

APPEAL by the Attorney General, Intervenor, pursuant to General Statute 7A-30(2) and (3) from a decision by a majority of a panel of the Court of Appeals. The Court of Appeals' opinion by *Parker, J.*, concurred in by *Clark, J.*, was filed May 5, 1976, and is reported at 29 N.C. App. 258, 224 S.E. 2d 219. *Martin, J.*, dissented.

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General, and Jesse C. Brake, Associate Attorney, for Intervenor Appellant.

William E. Graham, Jr., Vice President & General Counsel, Carolina Power & Light Company, and Joyner & Howison, by Robert C. Howison, Jr., for Carolina Power & Light Company, Appellee.

Edward B. Hipp, General Counsel, and Wilson B. Partin, Jr., Assistant Commission Attorney, for the Utilities Commission, Appellee.

EXUM, Justice.

In conjunction with a pending application for a general rate increase filed October 29, 1973, the utility on January 25, 1974, applied to the Commission for approval of the utility's use as an adjunct, or rider, to its regular rate schedules a fuel adjustment clause. On February 5, 1974, the Commission on the basis of the utility's application and before hearing entered an *ex parte* order permitting the utility to use the fuel adjustment clause on an interim basis pending a hearing and final determination. The Commission, after full hearing, entered on December 19, 1974, its order finally approving the use of the clause in principle and approving further all revenues collected under it on bills rendered through September 30, 1974. This order provided for continued monitoring of the utility's application of the clause to all bills rendered after September 30, 1974. The Attorney General, having intervened under General Statute 114-2(8) on behalf of the using and consuming public, appealed to the North Carolina Court of Appeals assigning errors to the Commission's orders of February 5, 1974, and December 19, 1974, respectively. A majority of the Court of Appeals' panel hearing the matter affirmed the Commission.

On the Attorney General's further appeal to this Court two principal questions are presented for decision: Did the Utilities Commission exceed its statutory authority by permitting, after notice and full hearing, the utility to utilize a fuel adjustment clause as an adjunct, or rider, to its regular rate schedule? If not, did the Commission exceed its statutory authority by entering its *ex parte* order authorizing the utility to incorporate such a device on an interim basis pending a hearing and final determination? We hold that both questions are properly answered in the negative and affirm the decision of the Court of Appeals.

The fuel adjustment clause, when used as an adjunct to the utility's regular rate schedule, permits the utility to add to its regular charges to customers an amount which represents, in effect, any given customer's share of the amount by which the utility's fossil fuel cost, i.e., cost for coal, gas, and oil used to generate electricity, exceeds during a given current period its cost pre-established for an historical base period. The utility must also give a credit to customers under the terms of the fuel clause if the current cost of fuel falls below its cost during the

base period. The "clause" itself is nothing more than a relatively simple mathematical formula by which the utility computes the additional charges or credits.

Under the formula in question in this case the utility figures its total cost for fossil fuel actually burned for one month. The month used is the second preceding month to that for which the customer is being billed. The utility then figures what its cost for fossil fuel actually burned would have been during this second preceding month had it paid for the fuel at base period prices by multiplying the pre-determined base cost stated in terms of dollars per kilowatt hour by the total kilowatt hours generated by its fossil fuel plants during this second preceding month. The second figure is substracted from the first and the difference is divided by the utility's total kilowatt hour sales in the second preceding month. The result, after an adjustment for applicable state gross receipts taxes, is a factor stated in terms of dollars per kilowatt hour. This factor is then applied to each customer's bill by multiplying it by the number of kilowatt hours used by that customer *in the month for which he is being billed.* The result is either an added charge or a credit to that customer's bill.

The formula by which the factor is figured may be stated mathematically in this form:

$$F = \frac{E - (.00513 \times G)}{S} \times \frac{1}{1 - T}.$$

"F" is the factor. "E" is the burned fossil fuel cost for the second preceding month to the month on which the current bill is figured. "G" represents the total number of kilowatt hours generated by the utility's fossil fuel plants in the second preceding month which is multiplied by the base cost stated in terms of dollars per kilowatt hour. "S" represents the utility's total kilowatt hour sales in the second preceding month. "T" is the applicable state gross receipts tax rate.

A full statement of the facts by which these issues are presented is: On October 29, 1973, the utility applied for a general rate increase of approximately $48,394,744 or approximately 21 percent overall. It also asked for an interim rate increase of approximately $25,052,209 or approximately 11 percent overall pending final determination and subject to the utility's undertaking for refund. It suggested that a larger interim rate

increase than requested "would be justified because of currently sharply rising fossil fuel prices, which undoubtedly will . . . prevent the Company from realizing the previously authorized rate of return of 12% that the interim increase is designed to produce on the historic test period ended June 30, 1973," and alleged that the interim increase actually requested was, therefore, "absolutely essential . . . . " While the utility's application was based on figures derived from a test period ending June 30, 1973, it suggested that a more appropriate end of test period would be December 31, 1973. On November 9, 1973, the Commission suspended the proposed increases and advanced the test period to the year ending December 31, 1973.

After several interventions including that of the Attorney General were allowed, hearings on the request for the interim rate increase were held on December 19 and 20, 1973. On January 25, 1974, the Commission, by order, allowed an interim increase of $12,675,745 or 5.94 percent. In this order the Commission relied in part upon increases in fuel cost. In reducing the interim increase from that sought by the utility, however, the Commission found that the utility had used "actual test year fuel costs instead of properly annualized end of test year fuel cost." By utilizing an end of test year fuel cost and removing a $69,945,960 investment from the test year rate base which the utility had included, the Commission found that an interim increase of only 5.94 percent was proper. The interim increase was to become effective on bills rendered after February 25, 1974, for service rendered after January 25, 1974. The interim rate increase was made subject to the utility's undertaking for refund which was approved by the Commission.

On January 25, 1974, the same day upon which the Commission entered its order permitting the interim increase, the utility applied for approval of the fuel adjustment clause as above described to be effective on bills rendered on and after March 1, 1974. Attached to this application was the utility's undertaking for refund with interest of all amounts collected under the fuel clause which may later be found to exceed rates finally determined to be just and reasonable. This application recited pendency of the application for an ultimate and interim general rate increase, hearings on the latter, and that an order was "being awaited." The application further alleged in summary: Earnings had declined dramatically during the last calendar year. In the *request* for an interim rate increase no increase in

the cost of fossil fuel over its cost during the test year ending June 30, 1973, was taken into account. Fuel cost, in the meantime, had skyrocketed to unprecedented extremes and further increases during 1974 were expected. Fossil fuel cost was by far the greatest operating expense of the utility having accounted for 57 percent of this expense during 1973. If the company was to continue to have reasonable earnings and provide adequate service, it must be permitted to recover its rapidly rising fuel cost in addition to receiving the ultimate and interim general rate increase already requested. It asked that a base cost of fossil fuel be used which reflected the utility's cost during the twelve months period ending on June 30, 1973. The base cost suggested by the utility was $.00481 per kilowatt hour, which it said was "the actual cost of fossil fuel burned in CP&L's plants in the twelve months' period which ended on June 30, 1973, and reflects a heat rate of 9,899 BTU's."

To this application the utility attached affidavits which explained the operation of the fuel clause and which attested to the recent dramatic rise in fuel costs. By affidavit a vice president of the utility testified to estimates that the cost of fossil fuel actually burned for 1974 would increase 55 percent over similar cost during the test peried; that coal on the spot market had gone from $8.50 per ton in August, 1973, to over $25.00 per ton in January, 1974; and that oil prices were up 100 percent since October, 1973.

On February 5, 1974, the Commission on the basis of the utility's application and documents attached thereto found and concluded essentially that the fossil fuel market was unstable and likely to remain so for some future time; that the utility could not absorb the rapid increases in its fuel cost being currently experienced without impairment of its ability to provide adequate and reasonably priced electric service; that the fuel clause proposed was designed to return to the utility only its increased expenditures for fossil fuel and would not result in an increase in the rate of return previously approved by the Commission; and that "good cause" had been shown for immediate implementation of the fuel clause. The Commission, however, found that the proper base cost should be determined by calculating the utility's fuel cost for the month of June, 1973, and using the average heat rate for fossil fuel generation during the test period. It calculated this as $.5178 per million BTU's which when multiplied by the average test year heat

rate of 9899 BTU's per kilowatt hour resulted in a base cost of $.00513 per kilowatt hour. The Commission thereupon entered its *ex parte* order which provided in part:

> "That effective on service rendered on and after February 6, 1974, with respect to fossil fuel burned on and after December 1, 1973, the Applicant, Carolina Power and Light Company, is authorized and permitted to put into effect a fossil fuel cost adjustment clause of the type attached to its application as Exhibit B, Rider No. 32, altered to reflect a base cost of $.00513/KWH instead of the requested base cost of $.00481/KWH."

It ordered further that: (1) the utility report to the Commission on a monthly basis the amount of the fuel cost adjustment and the factors and computations used in its derivation and (2) the fuel clause application be consolidated with the utility's already pending application for a general rate increase for "further review and final disposition of a fuel cost clause as a part of the consideration of all rates of CP&L."

On February 22, 1974, the utility filed application for an additional general interim rate increase of 5.06 percent (the difference between the 11 percent interim increase sought initially and the 5.94 percent which the Commission initially allowed) alleging:

> "Even with the interim 5.94% and fuel clause adjustment, the earnings per share, return on equity and coverage of fixed charges will continue to decline rapidly through June, 1974, and thereafter without rate relief, seriously jeopardizing the financial stability of the Company and in particular, threatening its ability to market successfully $125,000,000 First Mortgage Bonds in May, 1974, after coverage has fallen below 2 times at the end of April. These sharply reduced comparative figures are shown below:
>
> "With ONLY the 5.94% interim and fossil fuel adjustment clause:

	April	*May*	*June*
1. Earnings Per Share 12 months ended	$2.15	$2.00	$1.91
2. Return on End of Period Equity	8.70%	8.15%	8.07%

3. Coverage of Fixed Charges	1.98X	1.89X	1.83X

"With 5.94% interim and fossil fuel adjustment clause, AND AN ADDITIONAL 5.06% INTERIM EFFECTIVE ON SERVICE RENDERED BEGINNING MARCH 1:

	April	*May*	*June*
1. Earnings Per Share 12 months ended	$2.18	$2.06	$1.99
2. Return on End of Period Equity	8.81%	8.36%	8.40%
3. Coverage of Fixed Charges	2.00X	1.91X	1.87X"

On March 4, 1974, the Attorney General filed a "Notice of Appeal" to the Commission's February 5, 1974, interim order together with certain exceptions thereto. Simultaneously he also moved that the Commission *either* postpone the effective date of the order pending judicial review or the Commission's own investigation and hearing *or* modify the order to require an undertaking for refund pending final determination. The Commission, on March 13, 1975, after noting that the utility had filed with its application an undertaking for refund, allowed the motion to provide for an undertaking for refund and approved the utility's undertaking already filed. The Attorney General's appeal was dismissed on motion of the Commission by the Court of Appeals, by an unreported order, Court of Appeals No. 7410UC539; and an appeal from this order and an application for further review thereof by this Court were dismissed and denied, respectively, in an unreported order to which Lake, J., dissented. Supreme Court No. 75, Fall Term 1974. For reported decisions dismissing similar appeals from interim fuel clause orders in cases involving Duke Power Co., and Virginia Electric and Power Co., see, respectively, *Morgan, Attorney General v. Power Co.*, 22 N.C. App. 497, 206 S.E. 2d 507 (1974), *appeal dismissed and cert. denied*, 285 N.C. 759, 209 S.E. 2d 282 (1974) (Lake, J., dissenting), and *Morgan, Attorney General v. Power Co.*, 22 N.C. App. 300, 206 S.E. 2d 338 (1974), *appeal dismissed and cert. denied*, 285 N.C. 758, 209 S.E. 2d 282 (1974) (Lake, J., dissenting).

On April 1, 1974, after notice and hearing, the Commission found facts, concluded that good cause for permitting the additional interim increase existed, and ordered an additional interim increase of 5.06 percent to be "effective for service ren-

dered on and after April 1, 1974," subject to the utility's undertaking for refund.

Whether the fuel clause should be finally approved came on before the Commission for full hearing beginning July 9, 1974, and was heard together with the utility's application for a general rate increase. Seven witnesses testified regarding the appropriateness of using a fuel clause. Four were offered by the utility, one by the North Carolina Textile Manufacturers Association, Inc., an intervenor at that stage of the proceeding, and two by the Commission itself.

The testimony of the witnesses for the utility tended to show the following: Approximately 73 percent of the utility's generating capacity at the end of 1973 came from plants that burned fossil fuel. The oil and coal markets, marked by price increases of unprecedented frequency and magnitude, were described as "chaotic." The cost of the utility's spot purchases (purchases not under contract) of coal between November, 1973, and March, 1974, increased 143.7 percent. The price of oil rose from $2.96 per barrel in January, 1973, to $5.73 per barrel by the year's end. In January, 1973, the utility's total fossil fuel cost was 47.8 cents per million BTU. In March, 1974, this cost had increased to 78.25 cents per million BTU. Each one cent increase in the cost of fossil fuel per million BTU translates to a two million dollar increase in overall fuel cost. The fuel clause proposed is based on differences in the cost per kilowatt hour of fossil fuel actually burned rather than on the price paid by the company for its fuel in gross. Thus changes in total efficiency of the utility's fossil fuel generating plants, or the utility's heat rate (the number of BTU's required to produce a kilowatt hour of current), are automatically reflected in the clause.

The Commission's staff engineers testified regarding the relative advantages and disadvantages of the fuel clause. The upshot of their testimony was that this type of fuel clause, which accounts for operating efficiency, accompanied by appropriate monitoring of its application by the Commission would eliminate most, if not all, of the disadvantages. Overall they felt it an appropriate device to use in the rate making process under the facts presented.

The witness offered by the North Carolina Textile Manufacturers Association did not contest the appropriateness of

the fuel clause in principle. His opinion was, rather, that the utility should not be permitted to pass on to its customers *100 percent* of its increased fuel cost. He urged that the clause should be adjusted so that only 90 percent of the increase would be recovered. He conceded, however, that if the evidence demonstrated that the utility had exercised sound business judgment in purchasing fuel, 100 percent recovery of its increased fuel cost would be appropriate. In this connection all of the testimony tended to show that the utility had done as well or better than any other utility in purchasing fuel at the cheapest prices available.

On November 4, 1974, the Attorney General filed a complaint in which he alleged that the utility's coal purchasing procedures and policies were marred by poor judgment. He asked the Commission to institute formal proceedings to investigate these procedures and policies which had been in effect since January 1, 1974. This complaint had been preceded by a conference, held on the Commission's own motion, between the Commission and its staff relative to increasing the Commission's surveillance of the fuel purchasing practices of Duke Power Co., Virginia Electric Power Co., and CP&L, all of whom were then utilizing fuel adjustment clauses. Because of these events, the Commission on November 27, 1974, ordered, *inter alia,* that the fuel clause application be severed for further consideration and monitoring from the general rate increase application.

On December 19, 1974, the Commission entered its order finally approving the fuel clause in principle. It found facts, in summary, as follows: The largest single item of expense for the utility in 1973 was fossil fuel used for electric generation. The average "burned" price of coal (the principal fuel consumed) increased from 46.79 cents per million BTU in January, 1973, to 92.5 cents per million BTU in June, 1974. Oil increased from 49.16 cents per million BTU in January, 1973, to 176.84 cents per million BTU in March, 1974. Total burned fossil fuel costs of the utility increased from 47.8 cents per million BTU in January, 1973, to 78.25 cents per million BTU in March, 1974. These increases cannot be recovered under the utility's regular rate schedules without further deterioration of earnings before general rate cases can be filed and ultimately determined unless an automatic adjustment for them is permitted. The utility had been unable to earn the return on its common equity found by the Commission to be fair and reason-

able largely because of the sharp rise in the cost of fossil fuel. One hundred ninety-six privately owned electric utilities in forty-three states had fuel adjustment clauses in operation in their rate schedules. The reasonable base cost for the utility's fuel clause was $.00513 calculated with the same figures and method used in the interim order. The fuel clause is a reasonable method by which the utility can recover part of its reasonable operating expenses.

There was no exception to any of these findings of fact by any intervenor.

The Commission then concluded that it was compelled to allow the utility to recoup the large increases in fossil fuel cost in a "just and reasonably expeditious and orderly manner, for to do otherwise would imperil [the utility's] ability to operate and provide service." It further concluded that: (1) a fuel clause should be made a part of the general rate schedules to be fixed by the Commission pursuant to General Statute 62-133; (2) inasmuch as General Statute 62-133(b)(5) requires rates to be fixed that will enable the utility to earn in addition to reasonable operating expenses a rate of return which produces for it a fair profit, the Commission should determine the reasonableness of the utility's operating expenses so that the fuel clause would not increase the utility's rate of return but would merely slow attrition of the rate of return; (3) it would fix a rate of return and determine the reasonableness of the utility's operating expenses in the general rate case which had been by order separated from the fuel clause case for purposes of decision and further monitoring; (4) its system of monitoring the operation of the fuel clause would insure that the utility applied sound management practices in its purchases of fossil fuel.

The Attorney General excepted to each of these conclusions.

Upon these findings and conclusions the Commission ordered that: (1) the fuel clause which had been earlier approved on an interim basis be finally approved; (2) all revenues collected under it through September 30, 1974, were approved; (3) the undertaking for refund for all revenues collected through September 30, 1974, was discharged; (4) a further hearing would be held on January 30, 1975, in which the application of the clause and the fossil fuel purchasing procedures and policies of the utility would again be reviewed. The utility was ordered to continue to file with the Commission monthly re-

ports showing the utility's computations under the fuel clause and the utility's periodic purchases of and prices paid for fossil fuel.

On January 6, 1975, the Commission entered its final order in the general rate case which approved the entire increase applied for by the utility including all interim increases already allowed. In this final order fixing the general rate schedules of the utility, the Commission used the same base cost of fossil fuel, $.00513 per kilowatt hour, as it used in the fuel clause.

I

In his exceptions and assignments of error to the December 19, 1974, order the Attorney General contends essentially that notwithstanding the economic advisability of a fossil fuel adjustment clause and the demonstrated need of the utility for the economic relief which the clause would provide, the Commission simply had no statutory authority to use the clause as a rate making device for these reasons: (1) The clause permits published rates to be changed automatically from month to month without notice, filing of new rate schedules, investigation or hearing by the Commission as required by provisions of the Public Utilities Act. (2) The clause isolates only one element of cost without considering all other elements and without considering whether the formula, when used with the regular rate schedule, produces total rates which are just and reasonable as required by General Statute 62-131(a). (3) The Clause violates the historical test period concept embodied in General Statute 62-133(c) before it was amended by 1973 Session Laws, Chapter 1041. (4) Use of the formula amounts to an unlawful abdication of the Commission's statutory rate making powers to private business enterprise and parties not under the control of the Commission.

We do not find the reasons advanced by the Attorney General persuasive. Neither do we find in the applicable provisions of the Public Utilities Act anything which prohibits the use of this fossil fuel adjustment clause in the context of the factual circumstances which the utility and the Commission faced in this case. Rather we discern in the Act provisions which when properly interpreted authorize, at least by implication and analogy, such a device. Our conclusions are supported by our cases and those from other jurisdictions.

[1-3] We first examine the reasons, set out above, advanced by the Attorney General for rejecting use of the fuel clause. While the clause does permit monetary additions to the monthly bills of customers without a new rate filing, notice, or hearing, it clearly does not permit any change in the utility's published *schedule of rates.* The clause itself when approved becomes part of the published schedule. " 'Rate' means every compensation, charge, fare, tariff, *schedule,* toll . . . demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any *rules, regulations, practices* or *contracts affecting* any such compensation, charge, fare, tariff, schedule, toll, rental or classification." G.S. 62-3(24). (Emphasis added.) Thus the word "rate" used in the Public Utilities Act refers not only to the monetary amount which each customer must ultimately pay but also to the published method or schedule by which that amount is figured. Changes in these methods or schedules must be accomplished according to the procedures outlined in the Public Utilities Act. Changes in the ultimate monetary amount which each customer pays periodically need not be. It is, therefore, the fuel clause, a formula for figuring certain monetary additions or subtractions to a customer's bill, not the ultimate amount so figured which constitutes that part of the utility's published schedule subject to the provisions of the Public Utilities Act.

> "The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money." *City of Norfolk v. Virginia Electric and Power Co.,* 197 Va. 505, 516, 90 S.E. 2d 140, 148 (1955).

[4] While the clause does indeed isolate for special treatment only one element of the utility's cost, it was here approved *only as an adjunct, or rider, to the utility's other general rate schedules which the Commission had simultaneously under consideration.* The Commission approved the clause not as an isolated event but as a rider to general rate schedules in which all elements of cost were duly considered. The regular rate schedule finally approved by the Commission is designed to recover the

utility's fuel expense only at the same base cost used in the fuel clause. Fuel cost in excess of the base cost will be recovered only through the fuel clause rider.

[5] It is theoretically true, of course, that use of the fuel clause during a period when the utility is experiencing reduced costs in other areas may "automatically" increase the utility's approved overall rate of return. Such an event is always a possibility even without a fuel clause. The possibility exists not because of the fuel clause but because rate schedules are established essentially on the basis of known past experience and estimates of what will probably occur in the future. Any time the Commission overestimates future costs, the utility will earn more than its approved rate of return, all else remaining equal, so long as the schedules remain unchanged. Here the Commission, while approving the fuel clause, expressly recognized that it would have to base the utility's other rate schedules on a level of operating expenses such that the fuel clause "will not increase CP&L's rate of return, but will merely slow attrition of the rate of return" in the general rate increase aspect of this case. Apparently it proceeded to do so in its general rate order entered January 6, 1975. In considering whether the fuel clause would ever, in fact, operate to increase the utility's rate of return, the Commission was entitled to act on the normal assumption in rate cases generally, there being no evidence to the contrary, that other costs of the utility would not decline but would probably increase or at least remain fairly constant. *Cf. Utilities Commission v. Morgan, Attorney General, supra,* 278 N.C. 235, 179 S.E. 2d 419 (holding that the Commission, in fixing rates, may consider general inflationary trends). In the unlikely event that other costs of the utility should decline, the Commission, either on its own motion or that of another interested party, has plenary authority to intervene and make corrections in the utility's rate schedules including, if circumstances should require it, the abrogation of the fuel clause. G.S. 62-130(d); 62-136(a). There was testimony, largely uncontradicted, that the Commission regularly monitors the rates of return of each utility and that with this monitoring process the danger of an increase in the rate of return set by the Commission "is minimized almost beyond consideration." This Court speaking through Justice Lake, recognized in *Utilities Commission v. Morgan, Attorney General,* 278 N.C. 235, 239, 179 S.E. 2d 419, 421 (1971), that "[i]t is impossible to fix rates which will give the utility each day a fair return, and no more,

upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the person served, is to fix rates on the basis of a substantial period of time. Otherwise, rate hearings and adjustments would be a perpetual process."

[6] The Attorney General argues further that "[u]nder the historical test period concept which was in effect for the purposes of the present case [before the 1973 amendment, 1973 Session Laws, Chapter 1041], changes in operating expenses occurring outside the test period could not be made the basis of adjustments to the revenue requirement for rate making purposes. *Utilities Commission v. Virginia Electric and Power Co.*, 285 N.C. 398, 416, 206 S.E. 2d 283 (1974)." Apparently the Attorney General is arguing that the Commission must assume the utility's operating expenses will remain the same as they were during the test period in setting rates for some future period. This is not the law. Rate schedules are set with an eye no less toward the future than to the past. General Statutes 62-133(b)(2), (b)(3) and (c) contemplate that the Commission will consider "probable future revenues and expenses" in setting rates for the future. "Obviously, conditions do not remain static." *Utilities Commission v. Morgan, Attorney General,* 278 N.C. 235, 237, 179 S.E. 2d 419, 420 (1971). The company's experience during the test period regarding revenues produced and operating expenses incurred "is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate *pro forma* adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period . . . . " *Utilities Commission v. City of Durham,* 282 N.C. 308, 320, 193 S.E. 2d 95, 104 (1972). "Rate making is, of necessity, a matter of estimate and prediction since rates are set for the future." *Id.* at 321, 193 S.E. 2d at 104. Estimates regarding probable future revenues and expenses, however, must be based upon the utility's plant and equipment actually in operation at the end of the test period. G.S. 62-133(c); *Utilities Commission v. Morgan, Attorney General,* 277 N.C. 255, 273, 177 S.E. 2d 405 (1970), *affirmed on rehearing,* 278 N.C. 235, 179 S.E. 2d 419 (1971).

The Commission in its interim order on February 5, 1974, did consider dramatic increases in the price of fossil fuel which had occurred from sometime in 1973 to January, 1974. The test

year as set by the Commission ended December 31, 1973. As a basis for its final order entered December 19, 1974, the Commission again apparently considered increases in the price of fossil fuel from sometime in 1973 to March and June, 1974. Its findings were, in part, based on the cost of fossil fuel in March and June, 1974. There was no objection to this evidence and no exception noted to these findings.

We do not believe, furthermore, that the historical test period concept precluded the Commission from considering this kind of evidence. This Court did hold in *Utilities Commission v. Power Company*, 285 N.C. 398, 417, 206 S.E. 2d 283, 297 (1974), relied on by the Attorney General, that it was not error for the Commission to refuse to consider salary, wage, and federal social security tax increases known in the test period to be forthcoming but not taking effect until after the end of the test period, saying,

> "Adjustments for post test period increases in certain categories of expense may well give a distorted picture of the need for revenue since post test period experience in other categories of expense is not known and the possibility of offsetting adjustments is not precluded. As a practical matter, there must be a cutoff date for the making of adjustments."

We do not construe this holding to have precluded the Commission here even under the historical test period concept in effect at the time, from considering any post test period changes in expenses or revenues in trying to set future rates. General Statute 62-133(d) expressly authorizes the Commission to consider "all other material facts of record that will enable it to determine what are reasonable and just rates." This Court held in *Utilities Commission v. Morgan, Attorney General*, 278 N.C. 235, 238-39, 179 S.E. 2d 419, 421 (1971), that the Commission could take into account the future effect of inflation by fixing rates "slightly in excess of that which is necessary to meet the . . . test of reasonableness." We need not now, in any event, explore fully the implications of this Court's decision in *Utilities Commission v. Power Co., supra.* The Legislature in 1975 amended the historical test period concept by substituting in lieu of the second sentence of General Statute 62-133(c) the following:

> "The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed

> to become effective but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues, or the value of the public utility's property used and useful in providing the service rendered to the public within this State which is based upon circumstances and events occurring up to the time the hearing is closed." 1975 Session Laws, Chapter 184.

This amendment became effective on April 30, 1975, but was not to affect pending litigation.

Suffice it to say that the thrust of the evidence offered and considered by the Commission and the Commission's findings based thereon was that there had been a dramatic increase in the cost of fossil fuel both within the test period and extending for some time beyond it. The Commission did not fix revenues to cover this increased expense. Rather it resorted to the fuel adjustment clause as a device which, operating flexibly, would increase the revenues or decrease them as a function of the cost of fossil fuel to the utility. Thus even if our holding in *Utilities Commission v. Power Company, supra,* is interpreted to mean that under the traditional historical test period concept increases in post test period expenses may not be considered by the Commission in fixing revenues needed to cover them, the case is nevertheless readily distinguishable in principle.

[7] We also reject the Attorney General's assertion that the Commission has abdicated its rate making powers by permitting use of the fuel clause. By the very terms of the order permitting its use the Commission provided for its continuing monitoring of the operation of the clause. Both the interim and the final order required the utility to report to the Commission monthly "the amount of the fuel cost adjustment and the factors and computations used in its derivation" on a form prescribed by the Commission and appended to its order. In its final order approving the clause in principle, the Commission provided for continuing investigation (including another hearing scheduled at that time for January, 1975) "into the application of the clause and the fossil fuel purchasing procedures and policies of CP&L to the extent that they affect the fossil fuel adjustment factors applied to bills rendered after September 30, 1974." This provision of the order was in part a response of the Commission to a complaint filed by the Attorney General in November,

1974, alleging poor judgment in the utility's purchasing procedures and policies. As we have already indicated the Public Utilities Act empowers the Commission on its own motion or that of any interested party, including the Attorney General, to investigate the rates of the utility at any time and to alter them if it finds them to be "unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law." G.S. 62-136(a).

[8] Clearly there is nothing in the Public Utilities Act which expressly prohibits the use of a fossil fuel adjustment clause. We believe the Act contains provisions broad enough to authorize the Commission to permit such a device under the circumstances of this case. The ultimate duty of the Commission is to fix rate schedules which are "just and reasonable." G.S. 62-130. In performing its duty the Commission must follow General Statute 62-133 upon which this Court has expounded many times. While the Commission is limited, particularly by subsection (b), to a consideration of certain ultimate facts, it may consider many other evidentiary facts relevant thereto which may not be specifically listed in this section. Subsection (d) expressly empowers the Commission to "consider all other material facts of record that will enable it to determine what are reasonable and just rates." We held, for example, in *Utilities Commission v. Morgan, Attorney General, supra*, 277 N.C. 255, 177 S.E. 2d 405, that one such material fact the Commission may consider is serious inadequacy of service provided by the utility.

> " 'The right to consider "all other facts" is not a grant to roam at large in an unfenced field. The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in G.S. 62-124 [now 62-133]. However, it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record to the end the utility may have them reviewed by the courts.' " *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E. 2d 457, 460 (1962).

The facts and findings based thereon upon which the Commission concluded that the fuel clause was a permissible adjunct to the utility's regular rate schedules are fully set out in this

record. The Commission, cognizant of its primary duty to fix just and reasonable rates, found upon uncontradicted evidence that the only way it could perform this duty under the facts was to permit use of the fuel clause.

Use of the fuel clause as an adjunct, or rider, to rate schedules has long been a practice of the Utilities Commission. While the question of its statutory legitimacy has never been squarely presented to this Court, we have had occasion to consider other questions involving the Commission's use of the clause and have, implicitly at least, approved it in principle as a rate making device. *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962); *Utilities Commission v. Light Co.* and *Utilities Commission v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253 (1959); *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519 (1955).

According to the evidence some 42 states in addition to North Carolina use such clauses in their utility rate making schemes. The fuel clauses have been uniformly approved by courts which have considered them. In *Montana Consumer Council v. Public Service Commission*, 541 P. 2d 770, 775 (Montana 1975), the Montana Supreme Court, construing statutes similar to ours, said:

> "A majority of states in which the question has been presented has upheld the validity of similar provisions in utility rate orders variously designated as 'automatic adjustment clauses', 'escalator clauses', 'purchased gas adjustment clauses', and 'pass through' procedures. These decisions have been made under a wide variety of state utility laws, divers kinds of clauses and procedures, and particular circumstances. Examples of decisions upholding their validity: *City of Norfolk v. Virginia Electric and Power Company* (1955), 197 Va. 505, 90 S.E. 2d 140; *City of Chicago v. Illinois Commerce Commission* (1958), 13 Ill. 2d 607, 150 N.E. 2d 776; *United Gas Corp. v. Mississippi Public Service Commission*, (1961), 240 Miss. 405, 127 So. 2d 404; *City of El Dorado v. Arkansas Public Service Commission* (1962), 235 Ark. 812, 362 S.W. 2d 680; *Maestas v. New Mexico Public Service Commission* (1973), 85 N.M., 571, 514 P. 2d 847, which includes a compilation of decisions approving the use of such clauses.

"In our view the underlying justification for the use of 'automatic adjustment clauses' and procedures lies in the realities of the market place. As the cost of purchased gas and royalty expense of the utility rise or fall, a corresponding increase or decrease in the prices charged its customers must occur. Otherwise the utility will either be driven out of business or it will reap windfall profits. Today, in a period of rapid increases in costs of these items to the utility, the former consideration is paramount; at another time, the situation may be reversed and the latter may be the principal concern. Automatic adjustment clauses and procedures are simply a means whereby rapid fluctuations in these costs to the utility can be reflected in equally rapid and corresponding changes in prices charged the utility's customers."

In *Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities,* 335 N.E. 2d 341, 343-46 (Mass. 1975) reason and authority were collected and the Supreme Judicial Court said:

"Fuel adjustment clauses have appeared in electric utility rate schedules in this country for many years. A need for them was felt during the first World War and they have been with us ever since, although the wisdom of their use has been regularly a subject of controversy. Such a clause provides typically for the fluctuation upward or downward of the rates charged to customers reflecting, in accordance with formula, changes from a defined base in the cost to the company of the fuel used by it to generate power. It is a 'pass-through' provision operating in terms of a mathematical formula.

. . . .

"Rate proceedings have been notoriously slow as well as expensive. In times of inflation, dependence on lumbering rate proceedings to accommodate the rates to rapidly increasing costs would threaten utilities with unrecoverable expenditures destructive of reasonable returns. Therefore the demand arose to build into the rates, provisions by which increases in certain costs to the utilities (and, to be fair, decreases as well) would in accordance with formula be automatically passed on to the consumers as fluctuations of the charges to them, without the burden and expense to

utilities—which would ultimately fall upon consumers—of instituting and carrying out separate rate proceedings to justify the varying charges. Automatic adjustment made particular appeal where the utility had only minimal bargaining power about the particular items of cost (e.g., a gas company purchasing natural gas from a supplier whose rates were fixed by the Federal Power Commission), or where the State regulatory agency believed it could keep a close watch on the particular costs (e.g., an electric company purchasing coal or oil to generate power, the purchase contracts being under continual effective scrutiny by the State agency). See *Chicago v. Illinois Commerce Commn.*, 13 Ill. 2d 607, 614-616, 150 N.E. 2d 776 (1958); *Re Providence Gas Co.*, 88 P.U.R. 3d 430, 433-434 (R.I. Pub. Util. Commn. 1971).

. . . .

"Lastly, we observe that authority in other States is consistent with and supports the basic position that fluctuations of charges to consumers under a cost adjustment clause are not, in the characteristic legislative pattern, changes in the schedule of rates invoking rate proceedings with any incident hearings. See *Chicago v. Illinois Commerce Commn., supra; United Gas Corp. v. Mississippi Pub. Serv. Commn.*, 240 Miss. 405, 127 So. 2d 404 (1961); *Akron v. Public Util. Commn. of Ohio*, 5 Ohio St. 2d 237, 215 N.E. 2d 266 (1966); *Norfolk v. Virginia Elec. & Power Co.*, 197 Va. 505, 90 S.E. 2d 140 (1955); *Re Brooklyn Borough Gas Co.*, 100 P. U. R. (N. S.) 271 (1953) (N. Y. Pub. Serv. Commn.); *Complaint of Trustees of Villages of Saugerties and Ellenville*, N. Y. Pub. Serv. Commn., Op. No. 75-5, March 21, 1975. But cf. *In re Petition of Allied Power & Light Co.*, 132 Vt. 354, 321 A. 2d 7 (1974)."

Despite the statement in *Montana Consumer Council v. Public Service Commission, supra,* that "a majority of states" have approved fuel clauses, we have not found a case, nor has one been cited to us in which a court has disapproved the use of the clause in principle.

Finally, we note that on January 6, 1975, the Commission, by its final order on the general rate increase application, approved all interim rate increases theretofore collected by the utility as being fair and reasonable and the entire general

rate increase sought by the utility, noting in the order the effect of the fossil fuel clause, earlier approved, as resulting "in increases or decreases on the basic rate varying with fossil fuel costs" and using as the cost of fossil fuel the same base cost, i.e., $.00513 per KWH, that it approved for use in the fuel clause. There was no appeal which challenged the Commission's approval of the final rate increases. The only appeal was by the Executive Agencies of the United States which challenged a certain change in rate classification and which was decided adversely to the appellant. *Utilities Comm. v. Edmisten, Attorney General,* 291 N.C. 424, 230 S.E. 2d 647 (1976).

II

[9] Through other assignments of error carried forward in his brief the Attorney General contends the Commission's conclusion that its "system of monitoring the operation of the fossil fuel clause will insure that CP&L acts in accordance with sound management practices in its negotiations, as well as protect the rate payers [from the utility's] recovering more . . . than its reasonable operating expenses" is not supported by any findings of fact which, in turn, are supported by evidence. This statement in the Commission's order is really a finding of fact itself rather than a conclusion of law. The question raised is whether this finding is supported by competent evidence in the record. We believe it is. The Commission's witness, Andrew W. Williams, chief of the Commission's electrical section, testified that the "monthly monitoring of fuel costs and . . . fuel adjustment factors, similar to the monitoring program currently being conducted during the interim operation of the clause, keeps the Commission aware of current fuel prices and their effects on the retail rates subject to fuel clause adjustment. A program of this type helps eliminate" the objections that such a clause may abrogate the prerogative of Commission regulation and that operation of the clause may result in the utility's earning more than its determined fair rate of return. While on cross-examination this witness admitted that the monitoring procedures could be improved if additional personnel were available, his testimony when taken as a whole was sufficient to support this finding by the Commission.

III

[13] By his exceptions and assignments of error to the Commission's interim order of February 5, 1974, the Attorney Gen-

eral contends that the Commission was without authority to place the fuel clause in effect *ex parte* upon the utility's application on an interim basis pending further hearing and final determination.

There is no merit in this contention. General Statutes 62-134 and 62-135 clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. There are three ways by which this may occur.

[10] One is that the Commission may refuse to exercise its power to suspend the change applied for or, having exercised it, may before the hearing determine to rescind the suspension in whole or in part. We agree with the decision of the Court of Appeals in *Utilities Commission v. Morgan, Attorney General,* 16 N.C. App. 445, 192 S.E. 2d 842 (1972) and this reasoning which supported it, *Id.* at 451, 192 S.E. 2d at 846:

> "While [G.S. 62-134(b)] gives the Commission authority to suspend changes in rates subject to the time limitation imposed, clearly it does not *require* that it do so. The language is permissive, not mandatory. Further, nothing in the statute indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard so as thereafter to be precluded from withdrawing or modifying the suspension. The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. Implicit within the authority granting discretion of whether and for how long to suspend, is the discretion to cancel or modify a suspension once it has been made, and nothing in the language of the statute suggests that the Legislature intended that the Commission could exercise the discretionary authority granted it only if it did so on an all-or-nothing, once-and-for-all basis."

If the Commission does not suspend the rate change applied for it automatically goes into effect at the expiration of the 30 days' notice period provided for in G.S. 62-134(a). *Utilities Commission v. Morgan, Attorney General, supra; see also Antioch Milling Co. v. Public Service Co. of North Ill.,* 4 Ill. 2d 200, 123 N.E. 2d 302 (1954); *State v. Department of Transportation of Washington,* 33 Wash. 2d 448, 206 P. 2d 456 (1949);

Baker v. Pa. Public Utility Commission, 14 Pa. Commw. Ct. 245, 322 A. 2d 735 (1974). Construing Section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d) (1970), which is almost identical to G.S. 62-134(a), the United States Court of Appeals for the District of Columbia, relying on *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958), said:

> "The Supreme Court has interpreted this language to create not only a *minimum notice period* for the utility's customers and the Commission, but also a *maximum waiting period for the filing utility* . . . . Thirty days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power." *Indiana & Michigan Electric Co. v. Federal Power Commission,* 502 F. 2d 336, 341 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 946 (1975).

[11] Another way for rate changes to become effective without a hearing by and order of the Commission is provided for in G.S. 62-135. Under this section, even if the Commission has timely suspended the rate change, the utility may nevertheless place the rate change into effect "upon the expiration of six months after the date when such rate or rates would have become effective, if not so suspended" by giving the statutory notice subject to certain statutory provisos and subject to the utility's filing a surety bond or undertaking approved by the Commission conditioned upon a refund with interest of all rates finally determined to be excessive. This section was enacted "for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper." *Utilities Comm. v. Power Co.,* 285 N.C. 398, 407, 206 S.E. 2d 283, 291 (1974).

[12] The third way is for the Commission to exercise its prerogatives under G.S. 62-134(a). This section clearly authorizes the Commission by an affirmative order to "allow" applied for rate changes to go into effect even before the expiration of the thirty days' notice period "under such conditions as it may prescribe." The power to prescribe conditions, like the power to suspend rate changes, includes the power to refrain from pre-

scribing them. Thus the Commission by its affirmative order may *allow* applied for rate changes to become immediately effective conditionally or unconditionally.

[13] In the case before us the Commission, finding "good cause" to do so, properly exercised the prerogatives granted it by G.S. 62-134(a) when it entered its first interim order on February 5, 1974, and its second interim order effectuating *ab initio* the utility's earlier proffered undertaking for refund.

It is important to note that whenever rate changes are *allowed* to go into effect by the Commission under any of the three methods described it is not, generally, nor should it be the end of the rate making proceeding. Article 7 of the Public Utilities Act, G.S. 62-130, et seq., gives the Commission plenary authority to act upon rate changes which it simply allows to become effective: "The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility." G.S. 62-130(d). All rates are required to be "just and reasonable." G.S. 62-131(a).

There is moreover in Article 7 a clear statutory dichotomy between rates which are *made, fixed* or *established* by the Commission on the one hand and those which are simply *permitted* or *allowed* to go into effect at the instance of the utility on the other. Rates which are *established* by the Commission, that is after full hearing, findings, conclusions, and a formal order *(see* G.S. 62-81 for the required procedure for general rate cases or proceedings for "an increase in rates") "shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable." G.S. 62-132. Rates which the Commission simply allows to go into effect by any of the three methods described are subject to being challenged by interested parties or the Commission itself and after a "hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission *may*" order refund pursuant to the provisions of G.S. 62-132. (Emphasis supplied.)

IV

[14] We now consider the Attorney General's final contention that the Commission's interim order of February 5, 1974, entered *ex parte,* even if it complied with statutory mandates, violates our Law of the Land provision, North Carolina Constitution, Article I, § 19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. His argument is that these constitutional provisions require due notice to and an opportunity for interested parties to be heard before any general rate change can become effective.

This argument is most easily answered by noting that the order complained of was not an order by which the Commission *made, fixed,* or *established* a rate schedule change, but rather one by which it "authorized and permitted" or in statutory language, "allowed" a rate change sought by the utility to go into effect, pending further hearings and final determination and subject to the utility's undertaking for a refund. In addition to the protection afforded by subsequent hearings and the utility's refund undertaking, any interested party seeking to challenge the rate change would also have been entitled to the benefits of G.S. 62-132 to which we have just referred. The amounts permitted to be collected under the fuel clause by this interim order, had a G.S. 62-132 proceeding been instituted, would have been considered rate charges by the utility "different from those . . . established [and] deemed unjust and unreasonable." If after hearing under this section the Commission had found them to be "unjust, unreasonable, discriminatory or preferential," it could have ordered a refund even absent the utility's agreement to provide one. Whatever procedural rights due process afforded interested parties were thus fully protected. *Holt v. Yonce,* 370 F. Supp. 374 (D.S.C. 1973), *affirmed per curiam,* 415 U.S. 969 (1974); *Sellers v. Iowa Power & Light Co.,* 372 F. Supp. 1169 (S.D. Iowa 1974); *Baker v. Pa. Public Utility Commission, supra; Hartford Consumer Activist Assoc. v. Hausman,* 381 F. Supp. 1275 (D. Conn. 1974).

The decision of the Court of Appeals is

Affirmed.

Justice LAKE dissenting.

On January 25, 1974, Carolina Power and Light Company (CP&L) had pending before the Utilities Commission a gen-

eral rate case in which it sought a substantial increase in its basic schedules of rates for electric service. On that date, CP&L filed a new application, out of which this appeal arises, seeking Commission approval of its addition to each of its basic rate schedules of a fossil fuel adjustment clause (the fuel clause). The Commission, without notice or hearing, permitted this to be done on an interim basis, consolidated the two proceedings for the purpose of hearing and, several months later, conducted such consolidated hearing.

After such hearing, the Commission re-separated the two proceedings for the purpose of decision and entered separate orders therein. In the first matter (dealing with basic rate schedules), the Commission issued an order allowing the requested rate increases, thus fixing CP&L's basic rate schedules at levels which the Commission deemed adequate to enable CP&L to earn a fair rate of return on the fair value of its properties used and useful in rendering electric service (the rate base). That order is not before us on this appeal. Consequently, for purposes of this appeal, it must be assumed that those basic rate schedules, there approved, would enable CP&L to earn a fair rate of return under conditions prevailing at the time of that order. G.S. 62-132.

Substantially simultaneously (a few days earlier), the Commission entered, in the fuel clause proceeding, the order before us on this appeal permitting CP&L to add to each basic rate schedule a fuel clause.

The final order so permitting the fuel clause to be inserted in the basic rate schedules affirmed the interim fuel clause increases already made but did not further increase the basic rates of CP&L instantaneously. Thus, for the then immediate present, it left the basic rates approved in the order first above mentioned in effect, these, by hypothesis, permitting CP&L to earn a fair return on its rate base under then prevailing conditions.

What the fuel clause did was to give CP&L permission, *in advance and without further hearing,* to increase those basic rates, month after month *ad infinitum,* in each subsequent month in which CP&L's cost of fuel per Kwh exceeded a Commission determined base cost of fuel per Kwh, which it has done every month since the order was issued, the amount

of such excess, and so of the resulting rate increase, varying month by month.

The basic economic fallacy in using the automatic fuel clause technique to increase, month after month, the rate per Kwh charged the consumers of electric power lies in the unwarranted assumption (asserted by CP&L and accepted by the Commission) that, since each month's rate increase, per Kwh, equals the utility's additional cost of fuel per Kwh, the utility's rate of return on its rate base remains constant and, by hypothesis, fair. The legal fallacy in this method of granting rate increases is that it is not within the Commission's statutory authority, the only authority the Commission has.

By hypothesis, the basic rate schedules of CP&L, as fixed by the Commission's order first above mentioned, as of the date fixed, were sufficient to yield a fair rate of return on the utility's rate base, and no more. G.S. 62-132. This condition will continue indefinitely, so long as the utility's total expenses per Kwh, its total Kwh sales and its cost of capital (a fair rate of return) all remain constant. This condition will also continue indefinitely so long as all of these remain constant except one item of expense (e.g., fuel) and variations therein are precisely balanced by variations in the rate per Kwh charged the consumers of electric power. The theory of the fuel clause is that this latter situation is a reality. That is the economic fallacy in the fuel clause method of rate making.

The whole thrust of CP&L's evidence in support of its application for substantial increases in its basic rate schedules (now before us in another appeal on an unrelated question in Case No. 47, Fall Term 1976) is that it has sustained and for a long time to come anticipates a steady and substantial growth in the demands upon it for electric power and, therefore, must build extensive additions to its utility plant, expecially its generating facilities. Thus, as of the time the fuel clause was put into its rate schedules, its Kwh sales were not, and were not expected to remain, constant, or even relatively so. Obviously, as Kwh sales increase, so does the total expenditure for fuel, but the fuel clause increases the rate per Kwh sold only in the amount that fuel cost per Kwh increases, so an increase in generation of power does not, per se, cause a fuel clause rate increase. However, the record shows, by testimony of CP&L's president, that fuel cost is only 57% of "operating

and maintenance" expense. That is, almost an equal portion of "operating and maintenance" expense is composed of other items, including salaries and wages, and materials and supplies other than fuel. While common experience, known as of the date the fuel clause was approved, would lead to the expectation that wage levels would also rise and the then expected addition to the utility plant of huge new nuclear generating facilities would necessitate some additions to operating personnel, nothing in the record before us shows or suggests that the company's expenditures, in months following the approval of the fuel clause, for wages, salaries, and materials and supplies other than fuel would not decline per Kwh sold, or that these expenses have not actually declined per Kwh sold.

Depreciation expense is separate and apart from the "operating and maintenance" expense of which fuel cost is 57%. So is tax expense. Thus, CP&L's expense for fuel is far less than half of its total expenses, both in gross and per Kwh.

The record shows CP&L, at the time these orders were issued, contemplated (and it has since made and still contemplates) huge investments of capital for the construction of additional nuclear generating plants. The fuel clause reflects the effect of nuclear generation upon the cost of fuel per Kwh, but it ignores all other effects of CP&L's progressive switching from fossil fuel generation to nuclear generation upon CP&L's total expenses per Kwh. Obviously, this switch to nuclear generation means much more property to be taxed and depreciated and many more dollars in the annual or monthly charge to depreciation expense. But, these new plants will increase tremendously the kilowatt hours sold. Otherwise, there would be no point in building them for they are not intended to be immediate replacements of existing plants. Will the depreciation expense per Kwh be constant in future months? Has it been during the life of the fuel clause? That is highly improbable. Will it be, or has it been, greater or less than the depreciation expense per Kwh taken into account by the Commission in its order setting the basic rate schedules? No one can tell from the record before us. Will nuclear plants depreciate at the same rate per year or per month as steam plants? The record before us does not answer this question.

A well managed electric utility, such as CP&L, steadily improves its efficiency and generates and sells more and more Kwh per employee and per employee hour. Thus, wage rates

and total dollar expense for wages may go up while wage costs per Kwh declines. Even greatly increased executive salaries may be less per Kwh sold. Depreciation charges may rise spectacularly in total dollars while depreciation charges per Kwh sold decline. So it is with property tax expense, maintenance expense, and expense for materials and supplies other than fuel.

The fuel clause approved by the Commission permits CP&L to raise its rates, month after month, by looking solely at the rising cost of fuel per Kwh and utterly ignoring what has happened to the substantially larger (in the aggregate) expenses per Kwh for depreciation, taxes, wages, salaries, and materials and supplies other than fuel.

In the present context total dollar variations and variations percent are not useful data. What is needed is a computation of wage and salary expense, depreciation expense, tax expense and miscellaneous expense per Kwh sold, so as to reduce these expense items and the fuel expense item to a common denominator. Then, and only then, can the Commission, or the reviewing court, determine whether an increase in fuel cost per Kwh has been offset, *in whole or in part,* by decreases in other costs per Kwh. If such offset has occurred, *in whole or in part,* the fuel clause increase produces an increase in the utility's rate of return, which, by hypothesis, is made adequate by the basic rate schedules.

This total picture has not been shown in the present record and, obviously, the fuel clause does not require it to be developed and taken into account before month by month rate increases are made on account of an increase in fuel cost per Kwh. No one can determine from the present record, and no one can determine from data required to trigger future rate increases under the fuel clause, whether in any given month there has been a decline in wage expense per Kwh sold, or in depreciation expense per Kwh sold, to offset, *in whole or in part,* the increase in fuel expense. It is entirely possible, for aught that appears in the record before us or aught that the fuel clause requires to be taken into account in any month, that wage, salary, depreciation, tax, maintenance, materials and supplies expenses per Kwh sold may, in the aggregate, have declined even more than fuel expense per Kwh sold has risen.

My dissent is not on the ground that CP&L, month after month, during the life of the fuel clause pursuant to the Com-

mission's order, has not needed a rate increase in the amount computed pursuant to the fuel clause. It may be that, were the missing data, above mentioned, shown, an even greater rate increase would be or would have been appropriate. My dissent is on the ground that the evidence in this record does not show, and the data required to trigger a rate increase under the fuel clause will not show, such need for a rate increase in any month for the reason that it is utterly impossible for the Commission, or this Court, to determine from this record, or from such data as is required under the fuel clause, whether the month by month increase in CP&L's expense for fuel per Kwh sold has been offset, *in whole or in part,* by a decrease in other expenses per Kwh sold.

If, in any given month of the life of the fuel clause there has been such offsetting decrease, *in whole or in part,* in other items of expense, then the increase in electric service rates in that month, pursuant to the fuel clause, necessarily raised CP&L's rate of return above that found proper by the Commission when it fixed the basic rate schedules, from which determination no appeal was taken by CP&L. Such rate increase would, in my view, be clearly in excess of the Commission's statutory authority. The Commission has no other authority and this Court can, of course, give the Commission no authority. *Utilities Commission v. Merchandising Co.,* 288 N.C. 715, 722, 220 S.E. 2d 304 (1975); *Electric Service v. City of Rocky Mount,* 285 N.C. 135, 203 S.E. 2d 838 (1974); *Utilities Commission v. Telephone Co.,* 281 N.C. 318, 336, 189 S.E. 2d 705 (1972); *Utilities Commission v. R. R.,* 268 N.C. 242, 245, 150 S.E. 2d 386 (1966); *Utilities Commission v. Motor Lines,* 240 N.C. 166, 81 S.E. 2d 404 (1954).

What the Commission has done is this: (1) It fixed basic rate schedules which, as of that date, were sufficient to yield to a well managed utility a fair rate of return on the fair value of its properties used and useful in supplying electric services; (2) it has said to CP&L, "From now on into the indefinite future, without further hearing, you may raise these rates in any month in which your fuel expense per Kwh sold is greater than it is now, irrespective of what happens to all your other expenses per Kwh sold." This second part of its order (actually two separate orders) is, in my view, a clear violation of the statutes prescribing the manner in which rate increases may be authorized.

Clearly, the fuel clause proceeding was a general rate case, for the fuel clause applies to every rate schedule the company has. G.S. 62-137; *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 567, 126 S.E. 2d 325 (1962); *Utilities Commission v. Light Co.*, and *Utilities Commission v. Carolinas Committee*, 250 N.C. 421, 430, 109 S.E. 2d 253 (1959). The fuel clause authorizes, prospectively, an indefinite series of general rate increases month after month, with no hearing, no finding of need and no evidence whatever as to anything but one single item of expense.

It may well be that rate making by formula is preferable, more efficient and fairer both to the utility and to the public, than is the long, laborious, expensive, inexact and dilatory procedure prescribed by Chapter 62 of the General Statutes. If so, both fairness and efficiency would surely require that the formula include determination of the other items of utility expense by Kwh—depreciation, maintenance, wages and salary, materials and supplies, taxes and miscellaneous—along with fuel expense. It would seem entirely feasible to determine all these expenses per Kwh, month by month, by relatively simple, speedy, inexpensive and reasonably accurate accounting techniques, leaving the rate base and the fair rate of return thereon for much less frequent determination by the Commission in the now customary way prescribed in G.S. 62-133. Obviously, there is no constitutional barrier to this type of short-term rate change when the utility whose rates are being fixed does not object thereto. Accuracy in computation and application of expense data to the month in which service is rendered could be had by deferring the billing of the customer until a few days after the end of the month in which the service is rendered. Such a rate making formula may well furnish more protection to the rate-paying public than does a friendly, drowsy watch dog bound by the red tape of an obscure statute.

This, however, is for the Legislature. Defects in the existing statute causing long, tedious, expensive and inexact proceedings do not authorize the Commission, or a reviewing court, to rewrite or ignore the statutory requirements for making general changes in utility rates. The words of Justice Barnhill, later Chief Justice, speaking for this Court concerning the predecessor to the present G.S. 62-133 in *Utilities Commission v. State*

and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 344, 80 S.E. 2d 133 (1954), are presently appropriate. He said:

> "This statute has been characterized as an 'old, rambling and misty statutory declaration of the matters to be taken into account by the commission . . .' 12 N.C. L. (Review) 298. Be that as it may, it is the law in this State and will continue to be the law until amended, revised, or repealed by the Legislature. We have no intention to shut our eyes to its provisions or to circumvent the clear import of its language."

The statutes, in my view, clearly forbid general rate making by expense formula (even one which takes into account all elements of expense). When the Commission oversteps its authority it is the duty of the reviewing court to set aside its order, even though the order may seem to reach a result reasonable per se. G.S. 62-94(b)(2).

Each major electric utility serving North Carolina has collected from its customers within the past three years many millions of dollars pursuant to its fuel clause, all such clauses being structured as is that applied by CP&L. In my opinion, these collections have been unlawfully made. To require them now to be refunded would very likely be a severe financial jolt to the respective companies. They have, however, had the use of these huge sums, for periods up to nearly three years, without interest, in a time of unprecedentedly high interest rates and it is not the fault of the rate-payers or of the Attorney General that these unlawful collections have snowballed into such huge amounts.

Immediately, upon the issuance of each of the orders of the Commission initiating the fuel clauses, the then Attorney General, on behalf of the consumers of power, sought judicial determination of their lawfulness, pointing out the danger to the utility in delayed judicial review. The Court of Appeals, upon the respective motions of the utilities involved, refused to consider the merits of the orders, saying the appeals were premature. See: *Morgan, Attorney General v. Virginia Electric and Power Co.*, 22 N.C. App. 300, 206 S.E. 2d 338 (1974); *Morgan, Attorney General v. Duke Power Co.*, 22 N.C. App. 497, 206 S.E. 2d 507 (1974). In those cases this Court denied certiorari and dismissed appeals to it. 285 N.C. 758 (1974). The dismissal of the then appeal in the present matter does not appear to

have been reported in the reports of the Court of Appeals. This Court, having denied certiorari in the Vepco and Duke cases, certiorari was denied in the present matter.

G.S. 62-134(e) has no application to this case, it having been enacted subsequent to the order of the Commission to which this appeal relates. G.S. 62-133(b) prescribes in detail the procedure which the Commission must follow in fixing rates in a general rate case such as this. The Commission quite obviously did not even purport to follow this statute in the matter of the month by month fuel clause increases. Its order approving the fuel clause is, therefore, clearly in excess of its authority and, consequently, is a nullity conferring upon CP&L no right whatever to collect any rate in excess of those prescribed in its basic rate schedules approved by the Commission. It is true that the fuel clause was finally approved by the Commission following a hearing in which the fuel clause matter was consolidated with a previously pending application for an increase in basic rate schedules. Assuming that hearing and findings made upon the evidence received thereat were adequate to support the Commission's order as to those basic rate schedules, which reflected the then level of fuel expense per Kwh, the order authorizing further, month by month, general rate increases, pursuant to the fuel clause, in what was then the future, was not in accord with G.S. 62-133(b) since those further general rate increases were to take effect, and did take effect, with no further hearing such as G.S. 62-133(b) requires.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL, AND GREAT LAKES CARBON CORPORATION, INC., INTERVENORS

No. 131

(Filed 21 December 1976)

1. **Electricity § 3; Utilities Commission § 6— fossil fuel adjustment clause — validity**

The Utilities Commission acted within its statutory authority in permitting an electric utility to utilize a fossil fuel adjustment clause as an adjunct, or rider, to its regular rate schedule.

2. **Electricity § 3; Utilities Commission § 6— interim coal adjustment clause — ex parte order**

The Utilities Commission had statutory authority to issue an ex parte order permitting a coal clause to go into effect on an interim basis without prior notice and hearing.

3. **Appeal and Error § 16; Utilities Commission § 9— interim order found nonappealable — later modification of order**

Where it was ultimately determined by an appellate court that an interim order entered by the Utilities Commission was not appealable, the Commission had authority later to modify such order.

4. **Utilities Commission § 6— modification of interim order — validity immaterial**

The validity of the Utilities Commission's modification of an interim coal clause order to require collections under the coal clause to be made subject to the utility's undertaking for refund was immaterial where no refunds were ever found to be due.

5. **Electricity § 3; Utilities Commission § 6— application for coal adjustment clause — approval of fossil fuel clause**

The Utilities Commission had authority finally to authorize and approve a fossil fuel adjustment clause when the utility had applied only for a coal adjustment clause since the Commission is not limited by the utility's application in the entry of its final order based on evidence adduced at the hearings.

Justice LAKE did not participate in the consideration or decision of this case.

APPEAL by the Attorney General and Great Lakes Carbon Corporation, Inc., Intervenors, pursuant to General Statute 7A-30(2) and (3) from a decision by a majority of a panel of the Court of Appeals. The Court of Appeals' opinion by *Hedrick, J.*, concurred in by *Britt, J.*, was filed August 6, 1975, and is reported at 26 N.C. App. 662, 217 S.E. 2d 201. *Martin, J.*, dissented. This case was docketed and argued as No. 61 at the Fall Term 1975.

Rufus L. Edmisten, Attorney General, by I. Beverly Lake, Jr., Deputy Attorney General, for Intervenor Appellant Attorney General of North Carolina.

Byrd, Byrd, Ervin & Blanton, P.A., by Robert B. Byrd, for Intervenor Appellant Great Lakes Carbon Corporation, Inc.

Steve C. Griffith, Jr., George M. Thorpe, and Kennedy, Covington, Lobdell & Hickman by Clarence W. Walker and John M. Murchison, Jr., for Appellee Duke Power Company.

Edward B. Hipp, Commission Attorney, and John R. Molm, Associate Commission Attorney, for Appellee North Carolina Utilities Commission.

Hovis, Hunter & Eller by Thomas R. Eller, Jr., for amicus curiae *North Carolina Textile Manufacturers Association, Inc.*

EXUM, Justice.

The material facts in this case are almost identical to those in our decision filed this date in No. 39, Fall Term 1976, *Utilities Commission v. Edmisten, Attorney General,* 291 N.C. 327, 230 S.E. 2d 651 (the "CP&L case"), and the legal questions presented are essentially the same. The appealing intervenors challenged first in the Court of Appeals both interim and final orders of the Utilities Commission permitting the utility to use as an adjunct, or rider, to its regular rate schedules a fuel adjustment clause. The Court of Appeals affirmed the Utilities Commission and the intervenors bring their challenge to us.

The facts are fully set out in the Court of Appeals' opinion and will not be repeated at length here. They may be briefly summarized as follows: The utility, Duke Power Company, having pending before the Commission an application for a general rate increase, filed on November 30, 1973, an application for permission to use a coal adjustment clause, identical in operation to the fossil fuel adjustment clause described in the CP&L case except that it applied only to the utility's coal purchases. In its application, supported by factual data pointing to the dramatic and frequent increases in the cost of coal, the utility sought permission to use the coal clause on bills rendered on and after January 1, 1974, with respect to coal burned on and after November 1, 1973. After allowing, for good cause shown, interim rate increases in the general rate case, the Commission on December 19, 1973, entered, also upon good cause shown, an *ex parte* order permitting the utility to place into effect pending "further review and final disposition" the coal cost adjustment clause "on bills rendered on and after January 19, 1974 for service rendered on and after December 19, 1973 with respect to coal burned on and after November 1, 1973 . . . . " In this *ex parte* order the Commission consolidated further proceedings regarding the coal clause question with the proceedings in the general rate case. The Attorney General, intervenor, filed exceptions and notice of appeal to this *ex parte* order. This appeal

was ultimately dismissed on the ground that the *ex parte* order was interlocutory in nature and not a final order from which an appeal could be taken. *Morgan, Attorney General v. Power Co.*, 22 N.C. App. 497, 206 S.E. 2d 507 (1974), *cert. denied and appeal dismissed*, 285 N.C. 759, 209 S.E. 2d 282 (1974) (Lake, J., dissenting).

Simultaneously with the filing of his notice of appeal, the Attorney General moved the Commission to postpone the effective date of its *ex parte* order pending judicial review or further investigation, and also moved that the Commission either rescind this order or modify it to provide for an undertaking for refund.

While the appeal was pending, the Commission initially denied all motions of the Attorney General. Later, on April 16, 1974, on its own motion, the Commission, referring to similar action by it in the CP&L case and a similar case involving Virginia Electric and Power Company, modified its December 19, 1973, order so as to provide that all monies collected thereunder be subject to an undertaking for refund. The utility, in its initial application for the coal clause, had requested that it be put into effect on an interim basis subject to refund.

Thereafter, between May 28 and July 23, 1974, full public hearings on the utility's general rate increase application and its application for permission to use the coal clause were held. The evidence in support of the coal clause was very like that adduced in the CP&L case. After these hearings, the Commission on September 10, 1974, finding *inter alia*, that the utility had "reasonably and justly implemented" the coal adjustment clause approved all monies collected and to be collected pending a final order and rescinded the refund provisions with regard to these monies.

On October 10, 1974, the Commission issued its final order regarding the coal adjustment clause in which it made full findings of fact and conclusions of law similar to those it made in the CP&L case. This order: (1) approved a *fossil fuel* adjustment clause identical in operation to the one approved in the CP&L case; (2) provided that the *coal* adjustment clause would remain in effect until November 1, 1974; (3) required the utility to file monthly the information upon which it calculated the adjustments on monthly billings; and (4) denied the Attorney General's motion to reconsider and rescind its September 10,

1974, order approving revenues collected under the coal adjustment clause.

The Attorney General and Great Lakes Carbon Corporation, Inc., intervenors, complain first, that the procedures used by the Commission in implementing the coal, and ultimately the fuel, adjustment clauses were illegal and contrary to the procedures required in the Public Utilities Act and, second, that it was beyond the statutory authority of the Commission to permit use of such rate making devices.

[1] In support of their second contention the intervenors rely on the same arguments relied on by the Attorney General in the CP&L case. We have fully considered and rejected these arguments in that case. We do so here.

[2] With regard to the procedures used by the Commission in this case the intervenors contend first, that the Commission had no statutory authority to issue an *ex parte* order permitting the coal clause to go into effect on an interim basis without prior notice and hearing. We have fully considered and rejected this contention in the CP&L case. We do so here.

[3, 4] The intervenors next contend that the Commission had no authority to enter further orders in the matter while their appeal from the first order entered December 19, 1973, was pending. The intervenors rely on the general rule that an appeal takes the case out of the jurisdiction of the tribunal from which the appeal is taken and this tribunal is, pending appeal, *functus officio*. There are, of course, recognized exceptions to this rule. *See Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). One of these is that an attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction. *Bizzell v. Bizzell*, 247 N.C. 590, 602-603, 101 S.E. 2d 668, 677, *cert. denied*, 358 U.S. 888 (1958); *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879 (1957). In this case it was ultimately determined that the Commission's order of December 19, 1973, was not appealable. *Morgan, Attorney General v. Power Co., supra*. Therefore the Commission was not deprived of authority later to modify this order. The only modification complained of, furthermore, was that requiring collections under the coal clause to be made subject to the utility's undertaking for refund. No refunds were ever found to be due. This modification was not required as a prerequisite to the validity of the initial *ex parte* order.

G.S. 62-134(a); *Utilities Commission v. Edmisten, Attorney General,* (the "CP&L case"), *ante,* 291 N.C. 327, 230 S.E. 2d 651 (1976). Whether, therefore, the modification was valid is immaterial.

[5] The intervenors further contend that the Commission was without authority finally to authorize and approve a fossil fuel adjustment clause when the utility had applied only for a coal adjustment clause. This contention is without merit. The Commission has plenary authority to modify an application by a utility when its modification is based on competent evidence, findings and conclusions showing it to be just and reasonable. The primary duty of the Commission is to "make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction." G.S. 62-130(a). In doing this the Commission is empowered to "change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility." G.S. 62-130(d). The Commission is not limited by the utility's application in the entry of its final order based on evidence adduced at the hearings.

For the reasons stated and those contained in our decision in the CP&L case, the decision of the Court of Appeals is

Affirmed.

Justice LAKE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. IVEY SWEEZY, JR.

No. 56

(Filed 21 December 1976)

1. Constitutional Law § 32— refusal to remove counsel without hearing — no error

The trial court in a first degree burglary case did not err in refusing, without a hearing, to remove defendant's counsel and appoint two "black lawyers" in their stead, since no irreconcilable conflict or breakdown in communication between defendant and his counsel was demonstrated; defendant merely stated that he felt that his counsel were not going to represent him properly without pointing

to any act or omission indicating incompetence or lack of diligence on the part of his counsel; and the record showed no disagreement between defendant and his counsel as to trial tactics.

2. Criminal Law § 66— pretrial photographic identification — admissibility of in-court identification

Evidence in a first degree burglary case was sufficient to support the trial court's finding that there was nothing in a pretrial photographic examination of pictures, including that of defendant, by the prosecuting witness which was likely to give rise to any misidentification where such evidence tended to show that the witness was shown eight photographs two days after the burglary, two of which were of defendant; the witness immediately picked out the pictures of defendant as depicting the man who entered her house; and the officer who showed the photographs to the victim made no suggestions to the witness as to which pictures she should pick out.

3. Constitutional Law § 32; Criminal Law § 66— lineup — right to counsel — admissibility of in-court identification

An accused is entitled to counsel during an in-custody lineup and when counsel is not provided, (1) testimony of witnesses that they identified accused in the lineup is inadmissible and (2) an in-court identification of an accused by a lineup witness is inadmissible unless it is first shown by clear and convincing evidence on *voir dire* that the in-court identification is not tainted by the illegal lineup.

4. Criminal Law § 66— lineup — no finding as to propriety — in-court identification properly allowed

Though the trial court in a first degree burglary case should have made findings as to whether a lineup involving defendant was unnecessarily suggestive and conducive to irreparable misidentification, it was not error for the court to allow an in-court identification of defendant by the prosecuting witness where there was ample clear and convincing evidence that such identification was based on the witness's observation of defendant at the crime scene.

5. Constitutional Law § 32— defendant in custody on separate charge — presence in lineup — no right to counsel

Where defendant at the time of a challenged lineup was in custody on a charge of larceny of an automobile which had no connection with the burglary charge under consideration, the lineup was made up of other inmates of the jail and one employee of the law enforcement center, and an officer asked the group if any of them wanted a lawyer but there was no reply, defendant's right to counsel had not attached.

6. Jury § 7— juror with opinion on guilt — challenge for cause — denial proper

The trial court did not err in denying defendant's challenge for cause of a juror who stated that he had formed an opinion as to defendant's guilt or innocence from items he had read but that he could render a fair verdict based solely on the evidence presented and the charge of the court.

7. **Constitutional Law § 31; Criminal Law § 98— disruptive behavior of defendant — removal from courtroom — no denial of right to confrontation**

Defendant was not deprived of his rights to a fair trial and to confront the witnesses against him by his removal from the courtroom during the course of the trial, since defendant's removal came after numerous abusive and profane outbursts by him, warnings by the judge that continued interruptions would require his removal, exercise by the judge of his contempt powers in an effort to control defendant, and instructions by the judge that defendant could return to the courtroom as soon as he decided to conduct himself in a proper manner.

8. **Burglary and Unlawful Breakings § 5— first degree burglary — breaking — sufficiency of evidence**

Evidence in a first degree burglary case was sufficient to show a breaking where the prosecuting witness testified that the door in which she saw the burglar standing had not been locked but had been closed "all the way," the witness having closed the door herself.

9. **Burglary and Unlawful Breakings § 5— first degree burglary — entry without permission — sufficiency of evidence**

Evidence in a first degree burglary case was sufficient to support a reasonable inference by the jury that a man seen by the prosecuting witness entering her house did so without the permission of the occupants where such evidence tended to show that the prosecuting witness was surprised to see someone entering her house at 11:45 p.m., the prosecuting witness began to retreat into her home and scream for her husband when she was confronted with the intruder, and the police were summoned.

10. **Burglary and Unlawful Breakings § 5— first degree burglary — intent to commit larceny — sufficiency of evidence**

Evidence in a first degree burglary case was sufficient to show defendant's intent to commit larceny at the time he broke and entered a home where such evidence tended to show that defendant had partially entered the enclosed porch of the home, he had a ladies' stocking covering his right hand and arm, and, when confronted by an occupant of the house, he motioned her to keep quiet but fled when she began to scream.

11. **Constitutional Law § 36; Burglary and Unlawful Breakings § 8— first degree burglary — life imprisonment — no cruel and unusual punishment**

Imposition of a life sentence upon a conviction for first degree burglary does not constitute cruel and unusual punishment.

APPEAL by defendant from *Friday, J.*, 26 January 1976 Session of CLEVELAND Superior Court.

Defendant was charged with the crime of first-degree burglary.

The State offered evidence which tended to show that on 7 September 1975, at about 11:45 p.m., Connie Elmore Grigg of the Lawndale Section of Cleveland County, North Carolina, saw defendant standing partially in and partially out of the door leading from the outside into her enclosed side porch. She had closed but had failed to lock this door. Defendant, who had a ladies' stocking on his right hand and arm, motioned for the witness to come to him. She began to scream and defendant left.

Defendant, by his own testimony and that of several other witnesses, offered evidence tending to show that he was in Hickory, North Carolina, at the time the crime was allegedly committed.

The jury returned a verdict of guilty of first-degree burglary and defendant appealed from judgment imposing a sentence of life imprisonment.

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

Michael K. Hodnett, Assistant Public Defender, for the defendant appellant.

BRANCH, Justice.

[1] Defendant contends that he was denied a fair trial because the trial judge, without giving him a hearing, denied his request that his attorneys be removed. Defendant was represented by the Office of the Public Defender and Mr. Fred A. Flowers of the Shelby Bar, who was appointed by the court to assist in the defense.

The record reveals the following pertinent exchanges:

DEFENDANT: I want me another lawyer. I feel like Mr. Hodnett and them are not going to represent me properly.

COURT: You sit down. You have an attorney.

DEFENDANT: I feel like he's not going to represent me properly.

COURT: Do you hear me? You have two fine attorneys there and they are representing you properly and I better not hear any more of those outbursts. You continue this

and I'm going to gag you. I'm giving you fair warning. You continue the outbursts in the presence of this Court and I'm going to have you gagged, do you understand that? Let the record so show.

DEFENDANT: I know my constitutional rights and my right to speak for myself.

* * *

COURT: Any further witnesses?

MR. HODNETT: Yes, sir. We call Mr. Sweezy.

DEFENDANT: Don't put that man on the stand.

(Mr. Flowers and Mr. Hodnett and Mr. Morris approach the bench for discussion off the record.)

COURT: Let the record show that at the conclusion of the examination, direct examination and cross, of the defendant's voir dire witness number one, both counsel for the defendant approached the bench as they properly should have done and advised the Court that the defendant has made a motion that they be removed as trial counsel in this case. Let the record further show that this Court is of the opinion that both counsel are doing a very credible job in his defense; that we are now in the trial; that this is a very serious felony; that the defendant needs counsel; and the Court will DENY his motion to remove them as counsel. All right, any further evidence on the voir dire?

* * *

DEFENDANT: Judge, Your Honor, I'd like to have two black lawyers. I feel like these counsel are not going to represent me properly.

COURT: Please sit down, Mr. Sweezy.

DEFENDANT: Could I have two black lawyers?

COURT: Would you please sit down, Mr. Sweezy.

DEFENDANT: My name is Ivey.

COURT: Ladies and gentlemen of the jury, could I ask you to step in the jury room a minute, please.

JURY EXITS THE COURTROOM.

COURT: Mr. Sweezy, I'm informing you that proper decorum in the courtroom does not permit this type of action on your part. Should you do this one more time, I'm going to exclude you from the courtroom again. All right, Mr. Sheriff, let the jury come back in.

* * *

COURT: Do you want to testify or do you not, Mr. Sweezy? You will answer this Court. Do you want to testify or do you not want to testify? You will answer me yes or no.

DEFENDANT: I fired Hodnett and Flowers here.

Unquestionably it is the right of an indigent defendant to have competent counsel appointed to represent him at his trial. *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792; *State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174. An accused has the right to conduct his own defense without counsel but he does not have the right to have the attorney of his choice appointed by the court. *State v. Robinson, supra.* Neither does the right to competent court-appointed counsel include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services. *United States v. Young,* 482 F. 2d 993; *State v. Robinson, supra; State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667.

In *United States v. Young, supra,* defendant contended that he was deprived of effective assistance of counsel. He expressed suspicion that his counsel had communicated confidential defense matters to the prosecutor. The trial judge summarily rejected this suggestion on the basis of his long-standing knowledge of counsel's professional conduct. Defendant then posed a more general objection by stating: "Well, Your Honor, I am not trying to tell you that you don't know Mr. Young. [Defendant's counsel] I feel that he won't represent me." Holding that the trial judge's failure to appoint another attorney for the defendant without conducting a hearing was not reversible error, the Fifth Circuit Court of Appeals stated:

> . . . Unless a Sixth Amendment violation is shown, whether to appoint a different lawyer for an indigent criminal defendant who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound dis-

cretion of the district court. The Second Circuit has recently summarized the applicable principles:

> In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict. *Brown v. Craven,* 424 F. 2d 1166 (9th Cir. 1970); *United States v. Grow,* 394 F. 2d 182, 209 (4th Cir.), cert. denied, 393 U.S. 840, 89 S.Ct. 118, 21 L.Ed. 2d 111 (1968); *United States v. Gutterman,* 147 F. 2d 540 (2d Cir. 1945). If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right. *Brown v. Craven, supra.* In the absence of a conflict which presents such a Sixth Amendment problem, the trial court has discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion.

United States v. Calabro, 2d Cir. 1972, 467 F. 2d 973, 986. *See also United States v. Sexton, supra; United States v. Morrissey,* 2d Cir. 1972, 461 F. 2d 666; *Brown v. Craven,* 9th Cir. 1970, 424 F. 2d 1166; *Bowman v. United States,* 5th Cir. 1969, 409 F. 2d 225, cert. denied, 398 U.S. 967, 90 S.Ct. 2183, 26 L.Ed. 2d 552, reh. denied, 400 U.S. 912, 91 S.Ct. 128, 27 L.Ed. 2d 152; *United States v. Grow,* 4th Cir. 1968, 394 F. 2d 182, 209, cert. denied, 393 U.S. 840, 89 S.Ct. 118, 21 L.Ed. 2d 111; *United States v. Gutterman,* 2d Cir. 1945, 147 F. 2d 540; *United States v. Mitchell,* 2d Cir. 1943, 138 F. 2d 831.

It would have been the better practice for the trial judge to have excused the jury and allowed defendant to state his reasons for desiring other counsel. If no good reason was shown requiring the removal of counsel, then the court should have determined whether the defendant actually desired to conduct his own defense.

Even so, this record does not reflect a substantial claim that defendant has been denied effective assistance of counsel. No irreconcilable conflict or breakdown in communication between defendant and his counsel has been demonstrated. Defendant merely stated that he *felt* that his counsel were not *going* to represent him properly without pointing to any act or omission indicating incompetency or lack of diligence on the part of his counsel. Neither does the record show any disagreement between defendant and his counsel as to trial tactics. Defendant did not request that he be allowed to represent himself, but only indicated a desire that his counsel be replaced "by two black lawyers." Defendant's courtroom behavior gave the trial judge every right "to suspect the bona fides of the defendant." Although there was no formal hearing on defendant's request, the record makes it crystal clear that defendant did not stand on formalities but made his wishes and opinions known frequently and vociferously. We, therefore, find no reversible error in the trial judge's refusal, without a hearing, to remove defendant's counsel and appoint two "black lawyers" in their stead.

Defendant assigns as error the trial judge's denial of his motion to suppress the identification testimony of the witness Connie Elmore Grigg. He argues that an illegal lineup and an impermissibly suggestive photographic procedure irreparably tainted the in-court identification.

The trial judge conducted a *voir dire* hearing at which he heard evidence as to the pretrial photographic identification and as to the lineup. On *voir dire,* Mrs. Grigg, in substance, testified that on the night of 7 September 1973, at about 11:45 p.m., she went into her dining room to pick up some bills. Her bathroom opened to an enclosed side porch and the door to the lighted bathroom was open. The dining room was lighted by a chandelier which was about nine feet from the outside door leading to the enclosed side porch. She was about four feet from the entry from the side porch into her dining room when she first observed defendant. He had on blue pants, a blue short-sleeved shirt, and was wearing a ladies' stocking up to his elbow on his right arm. He appeared to be about five feet seven or eight inches tall and weighed approximately 175 pounds. Defendant was partially on the porch and he had his right hand on the door knob. He began to motion her to come to him with his right arm. She screamed and defendant began to shake his head

"for me to hush screaming and doing his mouth like he was saying s-h-h-h and shaking his head no and he was also frowning." Defendant then left. The door was closed but not locked prior to the time that she first observed defendant. She positively identified defendant as the man she saw in her home on the night of 7 September 1973. She stated that "there is good light out on the side porch when you have the dining room light on."

Mrs. Grigg further testified that two days after the burglary, Officer Costner brought eight photographs to her place of employment. At his request, she looked at these photographs and found that there were two pictures of defendant in the group. She immediately picked out the two pictures of defendant as depicting the man who entered her house on the night of 7 September 1973. She did not look at the back of any of the photographs. It was shown that one of defendant's pictures contained the writing "North Carolina Prison Department, Raleigh." Two of the pictures (other than pictures of defendant) contained the writing "Cleveland County Sheriff's Department." Another contained the words "Mecklenburg County" on its face. All the pictures were in approximately the same condition and defendant did not appear to be wearing prison clothes. Mrs. Grigg stated that the officer made no suggestion to her concerning the photographs. The record contains the following pertinent exchanges:

> Q. You're telling the Court the lineup did not make you feel any more positive you had the right person?
>
> A. Okay, I picked the same person out of the pictures that was in the lineup, not because he was one in the pictures, because he is the man that was in my home; and I was even more positive after I went to the lineup that it was the same person that was in my home.
>
> * * *
>
> Q. And the fact that you picked him out of the photographs, that made you feel more positive and more sure, did it not? Not from anything said about it, but the fact you were able to pick him out of the pictures?
>
> A. Not from picking him out of the pictures because that was the man.

Defendant's father, Ivey Sweezy, Sr., testified on *voir dire* that he took Ivey, Jr., to Hickory on the night of 7 September 1973 at about 8:00 or 9:00. Defendant did not own and never wore short-sleeved shirts. He pointed to a large scar on defendant's face which he had carried since childhood. In her description of defendant, the prosecuting witness did not mention a scar.

[2] We first consider the effect of the pretrial photographic procedures. In this connection, at the conclusion of the *voir dire*, the court found and concluded:

> The Court finds from the prosecuting witness' testimony that she did not turn these photographs over. Also, the Court finds that the officer made no suggestions whatsoever to her about what photographs she should pick out; that the photographs were merely handed to her with the request that she examine them and see if she could identify the man who allegedly committed the burglary in her home; that the prosecuting witness then opened the envelope and examined the photographs on the face and that she immediately picked out the defendant in this action. That the photograph which she picked out was that of Sweezy and has been marked as Exhibit No. 3.
>
> * * *
>
> The Court finds there was nothing suggestive in this photographic identification procedure which was likely to give rise to any misidentification and that it was properly carried out and that under the Sixth Amendment, the defendant was not entitled to counsel at this stage; that it is not a critical stage.
>
> The Court therefore concludes there was nothing suggestive at all in the photographic identification which is likely to give rise to misidentification.

The use of photographs for the purpose of identifying an accused is an approved procedure and convictions based on an in-court eyewitness identification tainted by a pretrial identification by photographs will be set aside on that ground only if the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967; *State v. Tuggle,* 284

N.C. 515, 201 S.E. 2d 884; *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49.

There was ample evidence in this record to support the trial judge's finding that there was nothing in the photographic examination "which was likely to give rise to any misidentification." We are, therefore, bound by this finding. *State v. Tuggle, supra; State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634.

[3, 4] We next consider the effect of the challenged lineup. It is well settled that an accused is entitled to counsel during an in-custody lineup and when counsel is not provided, (1) testimony of witnesses that they identified accused in the lineup is inadmissible and (2) an in-court identification of an accused by a lineup witness is inadmissible unless it is first shown by clear and convincing evidence on *voir dire* that the in-court identification is not tainted by the illegal lineup. *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581, *cert. denied,* 396 U.S. 934, 24 L.Ed. 2d 232, 90 S.Ct. 275. An accused's right to counsel attaches only at or after the time adversary judicial proceedings have been instituted against him by formal charge, preliminary hearing, indictment or arraignment. *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877; *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10. Nevertheless, the due process clause forbids a lineup which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967. Here, the trial judge found that the lineup was illegal because defendant was not warned of his constitutional rights at a critical stage of the prosecution. We assume that the trial judge referred to defendant's right to have counsel present at the lineup proceeding when he made this finding. He made no finding of fact as to whether the lineup was so suggestive and conducive to irreparable mistaken identification as to be illegal.

[5] At the time of the challenged lineup defendant was in custody on a charge of larceny of an automobile which had no connection with the burglary charge now before us. Defendant was placed in the lineup with other inmates of the jail and one employee of the law enforcement center. Officer Barbee asked the group if any of them wanted a lawyer and there was no

reply. Under these circumstances, defendant's right to counsel had not attached. However, the trial judge should have made findings as to whether the lineup was unnecessarily suggestive and conducive to irreparable misidentification.

Before making his ruling admitting the identification testimony into evidence, the trial judge found:

> Therefore, the Court finds that the State has established by clear and convincing proof that the in-court identification of this defendant by the prosecuting witness was on independent origin based on the observation by this witness of the defendant at the scene of this alleged burglary on the night in question and that there is nothing impermissibly suggestive about it.

The evidence shows that the witness, Connie Elmore Grigg, had ample opportunity to observe defendant in a well-lighted area of her home while standing within eight feet from him. She gave a description of defendant, the clothing he wore, the motions he made, and his facial expressions. She stated that the light was shining on his face and that she identified defendant because "he is the man that was in my home." Even had the lineup been illegal, and had the pretrial photographic procedures been impermissibly suggestive, there was ample clear and convincing evidence that the in-court identification was of independent origin. Thus, the trial judge correctly denied defendant's motion to suppress the identification testimony of the witness Connie Elmore Grigg.

[6] Defendant contends that the trial court erred in denying his challenge for cause of juror Ned Smith.

In the course of his *voir dire* examination juror Ned Smith revealed that he was the general manager of the Shelby Daily Star, the local daily newspaper. He stated that he had become "knowledgeable" about this case from a number of items he had read, and that he had formed an opinion as to defendant's guilt or innocence. Thereupon the following exchange occurred:

> MR. HODNETT: Challenge Mr. Smith for cause.
>
> COURT: Mr. Smith, you informed both the Solicitor and the defense attorney that you could disabuse your mind of everything you heard and start with a fresh mind—wash

out all you have heard out of your mind and receive the evidence in this case and enter a fair verdict on that evidence?

MR. SMITH: Yes, I feel I'm capable of that.

COURT: And you realize what you heard was not under oath?

MR. SMITH: Absolutely.

COURT: I'm going to DENY the motion.

* * *

MR. HODNETT: Do you feel like when the Judge instructs you as to the evidence and as to the law, that you can put aside everything that you heard outside this courtroom and just use what you heard in this courtroom and what His Honor has to tell you to form your verdict in this case?

MR. SMITH: I think I could.

MR. HODNETT: We renew the motion as to Mr. Smith for cause—as to the breaking and entering and having formed an opinion in the case.

COURT: Motion DENIED. The juror said he would base his verdict on what happened in the courtroom.

State v. DeGraffenreid, 224 N.C. 517, 31 S.E. 2d 523, is a case strikingly similar on its facts to the present one. There the juror, Pattishall, admitted that he had formed an opinion adverse to the defendant as a result of several articles he had read in the local newspaper. He stated that it would require evidence to remove this preconceived opinion from his mind. Upon questioning by the court, the juror further stated that he could render a fair and impartial verdict based solely on the evidence presented and the charge of the court. In upholding the trial court's denial of the challenge for cause, this Court, through Chief Justice Stacy, said:

> First, in respect to the challenge to the juror Pattishall, it is observed that while he had formed some opinion adverse to the defendant, he further stated he could render a fair and impartial verdict entirely in accordance with the law and the evidence, uninfluenced by any previously

formed opinion. This suffices to support the court's finding of indifferency. . . .

It is provided by G.S., 9-14, that the judge "shall decide all questions as to the competency of jurors," and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law.

Accord: State v. Dixon, 215 N.C. 438, 2 S.E. 2d 371; *State v. Bailey,* 179 N.C. 724, 102 S.E. 406.

In instant case juror Smith stated that he could render a fair verdict based solely on the evidence presented and the charge of the court, uninfluenced by his previously formed opinion. We find no error of law or abuse of discretion in the trial judge's ruling denying defendant's challenge for cause.

[7] Defendant next argues that his removal from the courtroom during the course of the trial deprived him of his rights to a fair trial and to confront the witnesses against him.

In addition to defendant's constant demands that new counsel be appointed to represent him, he interrupted the trial proceedings with numerous abusive and profane outbursts. The following exchanges are indicative of the course of conduct which defendant pursued throughout the trial:

DEFENDANT [interrupting the testimony of his brother]: Did you tell them you're my son?

COURT: Ladies and gentlemen of the jury, I'm sorry, but I'm going to have to ask you to step into the jury room a minute.

JURY EXITS THE COURTROOM.

DEFENDANT: What you trying to do, boy? I don't go for that damn s—. The world is coming to an end, Your Honor.

COURT: Sheriff, take him out.

DEFENDANT: God-a-mighty.

COURT: Take him out.

* * *

(Defendant gets up out of the witness chair.)

COURT: Just a minute, Mr. Sweezy. Be seated there. Sit him down there.

(Deputies seat defendant in witness chair.)

DEFENDANT: I don't have to say nothing.

MR. HODNETT: You don't want to say anything else? Your Honor, if he wants to come down.

COURT: The State has to have an opportunity to cross examine him.

CROSS EXAMINATION by Mr. Morris:

Q. What have you been tried and convicted of, Mr. Sweezy?

(No response)

COURT: You will answer that question, Mr. Sweezy.

(No response)

COURT: I again instruct you to answer the Solicitor's question.

A. We want facts. I take the Fifth Amendment on that, because we want the facts.

COURT: Ladies and gentlemen, will you step in the jury room, please.

JURY EXITS THE COURTROOM.

DEFENDANT: May I step down?

COURT: No, you may not. I find this defendant is again in direct contempt of this Court for refusal to answer the Court's order. This is the third time, now, I find you in contempt. Now, are you going to answer the Solicitor's questions or not? Tell me right now.

(No response)

COURT: Did you hear me? I said for you to answer me.

DEFENDANT: I don't have to answer no questions.

COURT: All right, I again adjudge you to be in contempt of Court for the fourth time. Mr. Solicitor, do you desire to examine this man any further?

MR. MORRIS: No, sir.

COURT: Let him step down, Sheriff. Let the jury come back in.

DEFENDANT: I know you're trying to kill me in prison and all that. Trying to railroad me.

COURT: Remove him from the courtroom, Mr. Sheriff. Take the defendant out of the courtroom.

Defendant also broke in on the testimony of other witnesses, accusing one of lying and instructing another to step down before he had completed his testimony. He totally ignored the court's repeated admonitions. At one point, defendant disrupted the trial by turning and facing away from the proceedings. He continually talked back to the judge, addressing him in such disrespectful terms as "boy," "Fred," and "hypocrite." He accused the trial judge of conducting a "kangroo court." Defendant's unruly and disruptive behavior interrupted the proceedings thirteen times and caused the trial judge to have him removed from the courtroom on six different occasions.

It is the right of an accused in every criminal prosecution to be present at each stage of his trial. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126. However, that right may be lost by the consent or misconduct of the defendant. *Snyder v. Massachusetts*, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330; *State v. O'Neal*, 197 N.C. 548, 149 S.E. 860.

In *Illinois v. Allen*, 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057, the United States Supreme Court considered the precise question now before this Court: "[W]hether an accused can claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." The Supreme Court, speaking through Justice Black, held that removal of a defendant is a constitutionally permissible measure when his conduct is such as to impede the due administration of justice:

> . . . [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on

with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Here the trial judge exercised considerable forebearance in light of defendant's repeated, abusive outbursts. He expressly warned defendant that his continued interruptions would require his removal. Defendant was so warned on four occasions before he was removed from the courtroom for the first time. The trial judge exercised his contempt powers four times in attempts to control defendant's behavior so that he could remain present throughout the trial. Even in removing defendant from the courtroom, the trial judge attempted to mitigate the adverse consequences of defendant's absence from the trial. On each occasion the judge excused the jury before having defendant removed in order to prevent any possible prejudice to defendant. He specifically informed defendant that he could return to the courtroom as soon as he decided to conduct himself in a proper manner. Upon request, the trial judge placed defendant in an adjoining room where he could confer with counsel during the trial.

It is apparent that the trial judge took every precaution to protect the rights of defendant. When defendant continued to disrupt the proceedings he waived his right to be present at his trial. His removal was an appropriate and necessary measure

to preserve the dignity of the judicial process and to promote the efficient administration of justice.

We hold that the trial judge acted properly in removing defendant from the courtroom. Defendant's Assignments of Error Nos. 5, 9 and 19 are overruled.

By his Assignments of Error Nos. 11 and 20 defendant attacks the trial judge's denial of his motions for judgment as of nonsuit.

On a motion testing the sufficiency of the evidence to go to the jury, the evidence must be considered in the light most favorable to the State and every reasonable inference drawn in favor of the State. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156. When so viewed, if there is any competent evidence to support every essential element of the crime charged, the trial judge must overrule the motion and submit the case to the jury. *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506; *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686.

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. G.S. 14-51; *State v. Bell, supra.*

[8] Defendant first argues that there was insufficient evidence to show a "breaking." It is well established that the mere pushing or pulling open of an unlocked door constitutes a breaking. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269; *State v. McAfee,* 247 N.C. 98, 100 S.E. 2d 249. Here Connie Elmore Grigg testified as follows: "The door was not locked, because I had just come back from the shop at 10:00. The door was closed all the way. I shut the door myself. It's not possible that it was open, I closed the door." This was sufficient evidence of a breaking.

[9] Next defendant contends that there was no evidence showing that the entry into the Griggs' house was unlawful, *i.e.,* made without the permission of the occupants. Certainly there was evidence from which such an inference could be drawn. Mrs. Grigg testified as to her surprise in seeing someone entering her enclosed porch at that time of the night. When confronted with this intruder, she began to retreat into her home and to scream for her husband. The police were summoned immediately. This is hardly the type of reception given to an invited guest

in one's home. This evidence is sufficient to support a reasonable inference by the jury that the man seen entering the Grigg house did so without the permission of the occupants.

[10] Finally defendant asserts that there was no proof of an intent to commit larceny at the time of the breaking and entering. In *State v. McBryde,* 97 N.C. 393, 1 S.E. 925, this Court addressed the question of the quantum of proof required to show an intent to commit larceny:

> . . . The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

See also State v. Accor and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583.

Here there was evidence showing that defendant had partially entered the enclosed porch of the Grigg home. He had a ladies' stocking covering his right hand and arm. When confronted by Mrs. Grigg, he motioned to her to keep quiet and when she began to scream, he fled. Under the requirements of *McBryde* the State has adduced sufficient evidence of an intent to commit larceny at the time of the breaking and entering to repel defendant's motions for nonsuit.

We hold that the trial judge properly submitted the case to the jury. These assignments of error are, therefore, overruled.

[11] Finally, defendant argues that the imposition of the life sentence in this case constituted cruel and unusual punishment.

G.S. 14-52, in part, provides that "any person convicted of the crime of burglary in the first degree shall be imprisoned for life in the State's prison."

This Court has consistently held that when punishment does not exceed the limits fixed by statute, it cannot be classified as

cruel and unusual in a constitutional sense. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, *cert. denied,* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599; *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570. However, in *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978, the United States Supreme Court held that North Carolina's mandatory death sentence violated the Eighth and Fourteenth Amendments. In so holding the Court, *inter alia,* stated:

> . . . "The North Carolina Statute provides no standards to guide the jury in determining which murderers shall live and which shall die." . . .
>
> * * *
>
> . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> . . . While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles,* 356 U.S. at 100, 2 L.Ed. 2d 630, 78 S.Ct. 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Defendant relies on this language from *Woodson* to support his position. He argues that the provisions of G.S. 14-52 require a trial judge to arbitrarily impose a life sentence without exercising any discretion or considering the individual facts of each case.

The fallacy in defendant's position is that throughout the opinion in *Woodson* the Court made it clear that the decision

related only to cases in which the death penalty was imposed. We quote from that opinion:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

We find nothing in *Woodson* or any of the other cases cited by defendant which convinces us that a mandatory life sentence violates any provision of our Federal or State Constitutions. In this jurisdiction the rule is that when a sentence of imprisonment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in the constitutional sense.

We have carefully examined this entire record and find no error justifying that the verdict or judgment be disturbed.

No error.

IN THE MATTER OF THE ESTATE OF PAUL CHESTER ADAMEE, DECEASED

No. 136

(Filed 21 December 1976)

1. **Husband and Wife § 12— separation agreement — resumption of marital relation — agreement rescinded**

A separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation.

2. **Husband and Wife § 12— separation agreement — subsequent cohabitation in marital home — agreement rescinded**

When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary meaning of that phrase, and, irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinds their separation agreement insofar as it has not been executed; further, a subsequent separation will not revive the agreement.

3. Executors and Administrators § 5; Husband and Wife § 12— separation agreement — revocation by reconciliation — marital relations resumed as matter of law — qualification of wife as administratrix

In a proceeding by a wife for issuance of letters of administration following the death of her husband, the evidence showed that the parties resumed marital relations as a matter of law where the evidence tended to show that, after the execution of a separation agreement and consent judgment between husband and wife, the wife returned to the marital home which she and her husband shared before the separation; thereafter the commissioners named in the consent judgment to sell the couple's joint property for division were instructed not to do so; the husband paid the wife's attorney for representing her in the litigation between them; and from the time the wife returned to the marital home until her husband's death, the husband and wife lived continuously in their marital residence. Therefore, the trial court correctly denied the motion of the husband's brother and sisters for summary judgment, but erred in refusing to affirm the clerk's order that the wife was entitled to qualify as administratrix of the estate of her husband and share in his estate as his widow without prejudice by reason of the separation agreement and consent judgment.

4. Clerks of Court § 3; Courts § 5— probate matters — no concurrent jurisdiction of clerk and superior court judge

G.S. 7A-241, as interpreted by the Supreme Court, (1) reemphasizes the fact that the district courts have no jurisdiction of probate matters, and (2) except in those instances where the clerk is disqualified to act, it vests probate jurisdiction in the superior courts to be exercised originally by the clerks as *ex officio* judges of probate in the manner specified in the applicable statutes; therefore, the Court of Appeals erred in holding that the effect of G.S. 7A-240 and G.S. 7A-241 was to take from the superior court clerk "exclusive original jurisdiction of probate matters, to vest in the Clerks and the Superior Court concurrent jurisdiction of probate matters, and to provide for appeals from the Clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the Clerks."

ON petition for discretionary review of the decision of the Court of Appeals reported in 28 N.C. App. 229, 221 S.E. 2d 370 (1976), affirming the judgment of *Braswell, J.*, entered at the 14 April 1975 Civil Session of the Superior Court of ALAMANCE, docketed and argued as Case No. 88 at the Spring Term 1976.

This proceeding was begun on 5 November 1974 when Raye T. Adamee (Mrs. Adamee) applied for letters of administration on the death of her husband, Paul Chester Adamee (Adamee), who died intestate on 20 August 1974. He was survived by his widow, the appellant, Mrs. Adamee, and by three

sisters and a brother, the appellees. He left no children or lineal descendants.

On 18 November 1974, Jacob Henry Adamee, Violet Adamee Inge, and Winifred Adamee Mitchell, three of appellees, filed an "objection and complaint" to Mrs. Adamee's application for letters of administration. In this pleading they: (1) denied Mrs. Adamee's right to administer or to take any portion of the estate of Adamee on the ground that, in a deed of separation and consent judgment which she and Adamee had executed on 20 December 1973, she had waived her right to administer upon his estate and to share in it; (2) alleged that this deed of separation and consent judgment had not been nullified or superseded and was in full force and effect at the time of Adamee's death; and (3) prayed that Adamee's brother, Jacob Henry Adamee, be appointed his administrator and that judgment be entered declaring Mrs. Adamee not entitled to share in her husband's estate.

In Mrs. Adamee's "response and answer" to the "objection and complaint" she alleged that, after the execution of the separation agreement and consent judgment of 20 December 1973, she and Adamee were reconciled and had resumed their marital relation; that they were living together as husband and wife at the time of his death; and that she is the person entitled to administer his estate.

In a hearing before the clerk of the superior court on 2 December 1974 the parties offered evidence, none of which appears in the record on appeal. "Upon consideration of the evidence and the legal authorities submitted," the clerk entered an order in which he found as a fact, after executing the separation agreement and consent judgment of 20 December 1973, "Paul Chester Adamee and Raye T. Adamee were reconciled and resumed their marital relations and were living together as husband and wife immediately prior to and at the time of the death of Paul Chester Adamee." He concluded and adjudged that by the resumption of marital relations the parties had nullified the separation agreement and consent judgment and that Mrs. Adamee was entitled to administer Adamee's estate and to share in it.

Below the clerk's signature on the foregoing order appears the following entry:

"In open court the petitioners give notice of appeal to the General Court of Justice, Superior Court Division, and request a Jury trial on all issues of fact. All further notice waived.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be and is hereby transferred to the Civil Issue Docket for hearing.

"This the 2nd day of December, 1974.

/s/ LOUISE B. WILSON
Clerk of Superior Court"

On 29 January 1975, the brother and sisters of Adamee filed a motion for summary judgment in their favor on the ground that "even if all the allegations contained in the response and answer of Raye T. Adamee were true, such allegations do not revoke, cancel or terminate" the separation agreement and consent judgment.

On 30 January 1975 Mrs. Adamee filed an affidavit and response to the motion for summary judgment in which she again alleged a reconciliation which revoked the separation agreement and consent judgment.

On 3 February 1975 appellees filed exceptions to the specific findings of fact and conclusions of law contained in the clerk's order of 2 December 1974 concerning the alleged reconciliation of Adamee and Mrs. Adamee and her right to share in his estate.

On 6 March 1975 Kathleen Estelle Sumner, the third sister of Adamee, filed an objection to the appointment of Mrs. Adamee as administratrix and adopted the pleadings of her brother and sisters filed earlier. Mrs. Adamee answered, again alleging the reconciliation of the parties had voided the separation agreement and consent judgment of 20 December 1973. The appeal from the clerk came on for hearing at the 14 April 1975 Session of Alamance Superior Court before Judge Braswell, who advised counsel that he would hear the motion for summary judgment and other procedural arguments "'all rolled up into one." The appellees thereupon submitted affidavits which tended to show that, although Mrs. Adamee returned to the marital home in January 1974, she did so only as a matter

of economic convenience and with no intention to resume marital relations with her husband, that no reconciliation had, in fact occurred; that Adamee had told several people that although his wife had returned home they occupied separate bedrooms and "nothing had changed"; that a week before his death Adamee had employed a private detective with whom he had discussed his "marital problems."

Mrs. Adamee submitted affidavits tending to show that a reconciliation and resumption of marital relations had occurred early in 1974 when she returned to the marital home; that thereafter they occupied one bedroom and one bed; that in March 1974 Adamee paid to her attorney the balance she owed him for representing her in the suit against Adamee; that the respective attorneys for Adamee and Mrs. Adamee, who had been appointed commissioners in the consent judgment to sell the parties' jointly owned property at public auction and divide the proceeds equally between them were instructed that the parties no longer desired a sale, and no sale was made; that Adamee told friends he and his wife had worked out their problems and were planning an early retirement in order to open an antique shop in Alabama; that the month before his death Adamee had instructed a friend in Alabama to proceed with attempts to purchase a certain piece of property for himself and wife jointly; that they had had problems but they had been settled.

After the court had heard the affidavits, counsel for Mrs. Adamee called her as a witness in her own behalf. Whereupon Judge Braswell declared the evidence closed, and Mrs. Adamee did not testify. The court heard the argument of counsel and entered an order in which he recited the procedural history of this cause and ruled as follows: (1) Appellees' exceptions to the clerk's order of 2 December 1974, not having been filed until 3 February 1975, came too late to be considered and are dismissed. (2) The appellees' motion for summary judgment is denied. (3) The evidence raises a material issue of fact. While "this trial court now believes it is empowered to uphold the action of the Clerk by order of December 2, 1974, . . . in order that it may be seen . . . [to] do substantial justice to its citizens, . . . IT IS ORDERED that there shall be a jury trial upon the one issue: 'Did the late Paul Chester Adamee and his wife Raye T. Adamee become reconciled and renew their marital relations after December 20, 1973?' "

Upon Mrs. Adamee's appeal, the Court of Appeals affirmed the order of Judge Braswell, and we allowed her petition for discretionary review.

Spencer B. Ennis and Latham, Wood & Cooper for petitioner appellees.

Long, Ridge & Long by Paul H. Ridge and Daniel H. Monroe, Jr., for Raye T. Adamee, respondent appellant.

SHARP, Chief Justice.

[1] It is well settled in our law that a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation. *Tilley v. Tilley*, 268 N.C. 630, 151 S.E. 2d 592 (1966); *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E. 2d 459 (1963); *Jones v. Lewis*, 243 N.C. 259, 90 S.E. 2d 547 (1955); 2 Lee, Family Law, § 200, p. 418 (1963). As Justice Brogden noted in *State v. Gossett*, 203 N.C. 641, 643, 166 S.E. 754, 755 (1932), the heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and when a husband and wife enter into a deed of separation the policy of the law is that they are to live separate. Therefore, they void the separation agreement if they re-establish a matrimonial home.

The same public policy which will not permit spouses to continue to live together in the same home—holding themselves out to the public as husband and wife—to sue each other for an absolute divorce on the ground of separation or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. Whether used in a separation agreement or a divorce statute, the words "live separate and apart" have the same meaning. The cessation of cohabitation which provides grounds for divorce and the resumption of cohabitation which will abrogate a separation agreement are defined in the same terms.

Separation as grounds for a divorce "implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under G.S. 50-5(4), or G.S. 50-6, separation may not be predicated

upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase. This was the holding in *Dudley v. Dudley,* 225 N.C. 83, in an opinion written for the Court by *Justice Denny.* Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties." *Young v. Young,* 225 N.C. 340, 344, 34 S.E. 2d 154, 157 (1945).

In *Dudley v. Dudley,* 225 N.C. 83, 86, 33 S.E. 2d 489, 491 (1945), Justice Denny (later Chief Justice), said: "The overwhelming weight of authority as to what is meant by living 'separate and apart,' is in accord with the view expressed in 17 Am. Jur., sec. 162, p. 232 as follows: . . . 'what the law makes a ground for divorce is the living separately and apart of the husband and wife continuously for a certain number of years. This separation implies something more than a discontinuance of sexual relations, whether the discontinuance is occasioned by the refusal of the wife to continue them or not. It implies the living apart for such period in such manner that those in the neighborhood may see that the husband and wife are not living together.' (Citations omitted.)

"Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members, and when a husband and wife live in the same house and hold themselves out to the world as man and wife, a divorce will not be granted on the ground of separation, when the only evidence of such separation must, in the language of the Supreme Court of Louisiana (in the case of *Hava v. Chavigny,* 147 La. 331, 84 So. 892) 'be sought behind the closed doors of the matrimonial domicile.' Our statute contemplates the living separately and apart from each other, the complete cessation of cohabitation."

[2] We hold that when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife "in the ordinary acceptation of the descriptive phrase." Irrespective of whether they have resumed sexual

relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. *See Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672 (1951).

[3] All the evidence offered by appellees in support of their motion for summary judgment and by appellants in opposition to it, tends to show that after the execution of the separation agreement and consent judgment on 20 December 1973, Mrs. Adamee returned to the marital home which she and Adamee had occupied prior to the separation; that thereafter the commissioners named in the consent judgment to sell the couple's joint property for division were instructed not to do so; that Adamee paid Mrs. Adamee's attorney for representing her in the litigation between them; and that from January 1974 until Adamee's death on 20 August 1974, he and Mrs. Adamee lived together continuously in their marital residence. Therefore, no issue arose for either judge or jury to decide as to their resumption of marital relations. As a matter of law they had done so.

It follows that Judge Braswell correctly denied appellees' motion for summary judgment but that he erred in refusing to affirm the clerk's order that Mrs. Adamee is entitled to qualify as administratrix of the estate of Adamee and share in his estate as his widow without prejudice by reason of the separation agreement and consent judgment of 20 December 1973. It also follows that the Court of Appeals erred when it affirmed Judge Braswell's judgment.

In its consideration of this case the Court of Appeals began with the assumption that the appeal involved a disputed fact, that is, whether a reconciliation and resumption of marital relations had actually occurred between Adamee and Mrs. Adamee. We, however, have viewed and decided the case as presenting a question of law arising upon undisputed facts.

Having posed the case as it did, the Court of Appeals recognized that our decision in *In re Estate of Lowther,* 271 N.C. 345, 156 S.E. 2d 693 (1967) would control the disposition of the appeal and require a reversal of Judge Braswell's judgment unless subsequently enacted statutes had changed the law upon which *Lowther* was based. The Court of Appeals then held that the Judicial Department Act of 1965 had indeed rendered *Lowth*er no longer authoritative for the proposition it decided.

This holding, with which we do not agree, requires us to examine and compare the applicable statutes as they existed before and after *Lowther.*

In *Lowther,* upon petition of the children of the decedent, on 23 September 1966, the clerk of the superior court, acting under G.S. 28-32 (1966), removed the administratrix (whom he had appointed in 1964) upon his finding that she was not the widow of the decedent. Without challenging that finding by an exception, the administratrix gave notice of appeal to the presiding judge. After a hearing, on 27 December 1966 the judge ordered the cause transferred to the civil issue docket for a determination of the issue by a jury. Upon petitioners' appeal, this Court held (1) that when no exceptions are taken to the specific findings of fact upon which the clerk removes an administrator, an appeal presents only the question whether the facts found support the judgment; (2) that as to any finding of fact properly challenged by an exception, the judge will hear the matter *de novo* and either affirm, reverse, or modify that finding; and (3) if the judge deems it advisable, he may submit the issue to a jury. Upon appeal we reversed the judgment of the superior court and directed the clerk's order of removal reinstated.

In the present case the Court of Appeals has held that the effect of the repeal of G.S. 2-1 (1969) and the enactment of G.S. 7A-240 and G.S. 7A-241 (1969) was "to take from the Clerk exclusive original jurisdiction of probate matters, to vest in the Clerk and the Superior Court concurrent jurisdiction of probate matters, and to provide for appeals from the Clerk directly to the judges of superior court, bypassing the district courts, on all such matters heard originally before the Clerks." *In re Adamee,* 28 N.C. App. at 234, 221 S.E. 2d at 373-74. The conclusion was that, upon appeal, appellees were entitled to have the judge hear and determine all matters in controversy as if the case was originally before him; that the judge, "in the exercise of his inherent powers" had the right to submit the one issue involved to the jury. The Court directed, however, that "[i]f, in this case, the Superior Court finds error in the order of the Clerk relative to the granting of letters of administration, it will not appoint a personal representative but must remand the cause to the Clerk for this purpose consistent with the decision of the Superior Court; the assignment of original authority of probate matters to the Clerk in G.S.

28A-2-1 is supported by, and not contravened by, G.S. 7A-241." *Id.* at 236, 221 S.E. 2d at 375.

Lowther originated in the second judicial district and was decided 20 September 1967. At that time the "Judicial Department Act of 1965," ch. 310, N. C. Sess. Laws (1965), codified as N. C. Gen. Stats., Ch. 7A, was not applicable in the second judicial district. *See* G.S. 7A-131 and G.S. 7A-252 (1969). However, on 7 December 1970, N. C. Gen. Stats., Ch. 7A finally became applicable in every judicial district of the State.

G.S. 7A-240 provides in pertinent part that *except for* "proceedings in probate and the administration of decedents' estates," the original civil jurisdiction vested in the trial divisions of the General Court of Justice is vested concurrently in each such division. This section excludes any jurisdiction of probate and estate matters in the district courts.

By G.S. 7A-241 "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate *according to the practice and procedure provided by law.*" (Emphasis added.)

[4] As we interpret G.S. 7A-241 it (1) re-emphasizes the fact that the district courts have no jurisdiction of probate matters, and (2) except in those instances where the clerk is disqualified to act, it vests probate jurisdiction in the superior courts to be exercised originally by the clerks as ex officio judges of probate in the manner specified in the applicable statutes. These statutes, to which reference will be made later, clearly give the clerk exclusive original probate jurisdiction. In such matters, appeals from the clerk "lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matter of law or legal inference in accordance with the procedure provided in Chapter 1 of the General Statutes." G.S. 7A-251 (1969).

At the time of its enactment, G.S. 2-1 (formerly N. C. Code, sec. 102 (1883)) "abolished the office of probate judge and transferred the duties which the Clerks had previously performed as judges of probate to them as clerks of the Superior Court." Although this section abolished the office of probate judge *eo nomine,* "the special probate powers and duties of

the clerk continued distinct and separate from their general duties as clerk of the courts to which they belong." *In re Estate of Lowther, supra* at 348, 156 S.E. 2d at 696.

At the time of its repeal as of 1 October 1971, G.S. 2-1 had already been superseded by N. C. Gen. Stats. Ch. 7A. The title of the repealing act, N. C. Sess. Laws, Ch. 363, sec. 11 (1971), is self-explanatory: "An Act to Repeal Various Obsolete Sections of General Statutes Chapter 2 (Clerk of the Superior Court), and to Revise the Remaining Sections and Transfer them to Chapter 7A (The Judicial Department)." Just as the special probate powers and duties of the clerks continued after the enactment of G.S. 2-1 so did they continue after its repeal. Under G.S. 7A-241 the clerk of superior court, "as ex officio judges of probate," continues to exercise probate jurisdiction "according to the practice and procedure provided by law"; and in doing so, he continues to act as "a judicial officer of the superior court division, and not as a separate court." G.S. 7A-40 (1969). This is the view expressed by Professor Dickson Phillips in 1 McIntosh, North Carolina Practice and Procedure, § 196 (Supp. 1970) wherein he said:

"Under the Judicial Department Act of 1965, creating and structuring the General Court of Justice, the Clerk of Superior Court retains his pre-existing judicial powers in matters of probate and administration, guardianship, special proceedings, and in matters of pleading and practice, as a judicial officer of the unified Court."

When G.S. 7A-241 was enacted in 1965 its reference to "the practice and procedure provided by law" was a reference to N. C. Gen. Stats. Ch. 28, which remained applicable to the estates of all decedents dying on or before 1 October 1975. After that date the reference in G.S. 7A-241 was to N. C. Gen. Stats. Ch. 28A. *See* N. C. Sess. Laws, Ch. 1329, sec. 5 (1973) as amended by N. C. Sess. Laws, Ch. 118 (1975).

Prior to its repeal G.S. 28-1 (1966) gave a clerk of superior court jurisdiction within his county to take proof of wills and to grant letters testamentary and letters of administration in cases of intestacy where the decedent was domiciled in his county; a nonresident with assets in the county; a nonresident having assets in the State who died in the county; and a nonresident party to litigation pending in the county. G.S.

28-1 was carried forward in N. C. Gen. Stats., Ch. 28A as two sections, G.S. 28A-2-1 and G.S. 28A-3-1 (Cum. Supp. 1975).

Section 28A-2-1 provides: "The clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, the following: (1) probate of wills; (2) granting of letters testamentary and of administration, or other proper letters of authority for the administration of estates." G.S. 28A-3-1 designates the proper county, the "venue for probate of a will and for all proceedings relating to the administration of the estate of a decedent."

Pertinent here is the comment of Professor Wiggins in the 1976 pocket supplement to his treatise on *1 Wills and Administration of Estates* in North Carolina, § 115: "Article 2, sections 28A-2-1 through 28A-2-3 of Chapter 28, as did the former law, vests in the clerk of superior court exclusive jurisdiction of the probate of wills, administration, settlement and distribution of the decedents' estates, the granting of letters, testamentary and of administration, or other letters of authority. Unlike the former law, the jurisdiction of the clerk is no longer limited by such considerations as where the decedent died, left property or was domiciled. To expedite the handling of the matters, the assistant clerk is given rather broad powers of jurisdiction."

Under G.S. 28-1 and G.S. 31-12 (1966), the former law, if the clerk had either a direct or an indirect beneficial interest in the probate of a will or the administration of an estate or trust, the law divested him of jurisdiction and vested jurisdiction in either the judge of superior court, or under certain circumstances, the clerk of superior court of any adjoining county. Section 28A-2-3 (Cum. Supp. 1974) provides that, if the clerk has an interest in an estate or trust under his jurisdiction, the senior resident superior court judge is vested with exclusive original jurisdiction of the estate or trust. *See* Wiggins and Myers, *Jurisdiction for Probate of Wills and Administration of Estates of Decedents,* 11 Wake Forest L. Rev. 7 (1975).

The right of interested persons to contest the appointment of a decedent's personal representative and the procedure for doing so under the former law remains substantially unchanged under the present law. *See* G.S. 28-30, G.S. 28-32 (1966) and G.S. 28A-6-4 (Cum. Supp. 1976).

The Court of Appeals, after noting that "G.S. 28A-2-1 in substance vests in the Clerk 'jurisdiction' of the named probate matters without vesting concurrent jurisdiction in the superior court," added, "But we find that the jurisdiction statutes in Chapter 7A are controlling"; that G.S. 28A-2-1 assigns original authority to the Clerk but "was not intended to change the vesting of concurrent jurisdiction in the Clerk and the Superior Court under G.S. 7A-241." *In re Adamee, supra* at 235, 221 S.E. 2d at 374.

The Court of Appeals has misconstrued G.S. 7A-241. This section does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, have allocated the jurisdiction between the clerk and the judge. By G.S. 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act. G.S. 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court.

G.S. 7A-251 provides for appeals from the clerk: "In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference in accordance with the procedure provided in Chapter 1 of the General Statutes."

The Court of Appeals' directive to the superior court—that in the event it found error in the clerk's ruling with reference to Mrs. Adamee's right to administer and to share in the estate of her husband, it would not appoint a personal representative, "but must remand the case to the clerk for that purpose"—appears to be inconsistent with its "finding" that the clerk and the superior court have concurrent jurisdiction in probate matters. "Courts of concurrent jurisdiction are courts of equal dignity as to the matters concurrently cognizable, neither

having supervisory power over process from the other, and . . . the one first exercising such jurisdiction acquires control to the exclusion of the other." 21 C.J.S. *Courts* § 488 (1940).

Finally, we note that G.S. 7A-251, which provides for appeals from the clerk to the judge, directs that they be taken in accordance with the procedure provided in Chapter 1 of the General Statutes. The applicable statutes were in effect at the time of the decision in *In re Estate of Lowther* and are discussed in the opinion in that case. These statutes are still in effect.

For the reasons stated, the decision of the Court of Appeals affirming the judgment of the superior court is reversed. The Court of Appeals will remand the cause to the superior court with instructions that it affirm the order of the clerk.

Reversed and remanded.

STATE OF NORTH CAROLINA v. HERMAN LEROY RIDDICK, JR.

No. 16

(Filed 21 December 1976)

1. **Searches and Seizures § 3— affidavit for search warrant — meaning of probable cause**

Within the meaning of the Fourth Amendment and G.S. 15-25(a), now G.S. 15A-243 to 245, probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

2. **Searches and Seizures § 3— affidavit for search warrant — sufficiency**

An affidavit for a search warrant contained a sufficient recital of facts and underlying circumstances to constitute probable cause for issuance of a warrant to search the home in which defendant lived where the affidavit detailed the presence of tracks made by tennis shoes with a diamond tread leading from a murder victim's residence to a point near defendant's premises, specified reasons for searching those premises for tennis shoes with a diamond tread, for the possible murder weapon, and for loot stolen from the victim's home, and gave reasons why such evidence might be found in the home occupied by defendant.

3. **Searches and Seizures § 1— seizure of items in plain view**

Where a lawfully issued search warrant authorized officers to search premises occupied by defendant's parents and cousin, and while

searching the cousin's room the officers saw, through an open doorway, a pair of tennis shoes similar to those described in the warrant and later determined to belong to defendant, the officers lawfully seized the tennis shoes since an item is lawfully seized if the officer is at a place where he has a legal right to be and the item seized is in plain view.

4. **Searches and Seizures § 4— warrant to search for tennis shoes — seizure of three pairs**

Where a warrant authorized officers to search a home for tennis shoes with a diamond tread, officers were not required to terminate the search once one pair of tennis shoes was seized, and when the officers discovered three pairs of shoes fitting the description in the warrant, it was lawful to seize all three pairs. G.S. 15-25.

5. **Searches and Seizures § 2— validity of consent to search**

There is no merit in defendant's contention that his consent to a second search of his residence was invalid because officers advised him they had seized the wrong clothing initially and his "consent" for an additional search was only acquiesence and thus not free and voluntary where the record shows that defendant told the officers they had seized the wrong clothes—not the other way around, and defendant himself suggested that the officers exchange the clothing then in their possession for the clothing he said he was actually wearing on the day of the crime.

6. **Criminal Law § 76— admissibility of confession — necessity for voir dire**

When the admissibility of an in-custody confession is challenged, the trial judge must conduct a *voir dire* to determine whether the requirements of the *Miranda* decision have been met and whether the confession was in fact voluntarily made.

7. **Criminal Law § 76— admissibility of confession — voir dire — necessity for findings of fact**

If there is a material conflict in the evidence on *voir dire* to determine the admissibility of a confession, the trial judge must make findings of fact to resolve the conflict; if there is no conflict in the evidence on *voir dire*, or if there is a conflict in evidence which is immaterial and has no effect on the admissibility of the confession, it is not error to admit the confession without findings, although it is the better practice to make findings.

8. **Criminal Law § 75— officer's expression of opinion — no resumption of interrogation**

An officer's expression of opinion that defendant knew something about the crime and was not telling the truth did not constitute a resumption of interrogation within the meaning of the *Miranda* decision.

9. **Criminal Law § 75— statements after assertion of right to remain silent — no continued interrogation**

There was no continued interrogation of defendant in violation of the *Miranda* rules after defendant stated he would not answer fur-

ther questions and wanted to consult a lawyer, and statements made by defendant after he asserted his right to remain silent were admissible in evidence, where the evidence on *voir dire*, including testimony by defendant, showed that his right to cut off questioning was promptly honored when asserted, and that defendant simply reflected upon the incredibility of the original story he told officers in light of the evidence against him, decided to change his statement to make it more plausible, and invited the officers to listen while he related his revised version.

10. Criminal Law § 34— position of victim's body and derangement of clothing — admissibility

Evidence in a murder case that deceased was found with her dress above her knees and that her undergarments were torn did not show the commission of another criminal offense (rape) where other evidence showed deceased had not been sexually assaulted; furthermore, such evidence was admissible as proof of circumstances so connected in point of time and place with the murder itself that proof of one necessarily involved proof of the other.

11. Criminal Law § 99— questions by trial judge — no expression of opinion

The trial court in a homicide case did not express an opinion in violation of G.S. 1-180 in asking questions to clarify and promote a proper understanding of the testimony of the witnesses.

12. Criminal Law § 166— abandonment of assignments of error

Assignments of error not discussed in the brief are deemed abandoned under Rule 28(a) of the Rules of Appellate Procedure.

13. Constitutional Law § 36; Homicide § 31— substitution of life imprisonment for death penalty

Sentence of life imprisonment is substituted for the death penalty imposed for first degree murder.

DEFENDANT appeals from judgment of *Cohoon, J.*, 10 November 1975 Session, PASQUOTANK Superior Court.

Defendant was tried upon a bill of indictment charging him with the first degree murder of Bertha Pritchard Dozier on 26 June 1975 in Pasquotank County. He was ably represented at trial by C. Glenn Austin, court-appointed counsel. Subsequent to defendant's conviction Frank W. Ballance, Jr., was retained as private counsel to perfect this appeal, and appointed counsel was released by the court.

On 26 June 1975 at approximately 1:45 p.m. Mrs. Bertha Pritchard Dozier, sixty-nine years of age, was found on the dining room floor of her son's home where she lived, facing upward, her head in a pool of blood, her skull crushed, two

gashes about four inches long on her right forehead and her clothing in disarray, exposing the lower body. Following an extensive investigation the defendant, Herman Leroy Riddick, Jr., was arrested, indicted, and bound over for trial.

Prior to trial defendant moved to suppress certain items of evidence allegedly obtained by an unlawful search and seizure and to suppress certain oral statements allegedly made by him after he had told the officers he did not want to answer any more questions and would like to talk to an attorney. In a pretrial *voir dire* hearing upon that motion, SBI Agent Jack Brinson testified that upon discovery of the body officers were called to the premises to conduct an investigation. Fresh tracks made by tennis shoes were found leading from the victim's residence to a point 100 yards from the home of H. Leroy Riddick and wife Velma Riddick, parents of defendant, with whom defendant and his wife lived. Defendant's cousin Anthony Riddick also lived there. Anthony, the original suspect in this case, had been seen wearing tennis shoes with a tread pattern similar to the tracks. A search warrant was obtained authorizing the officers to search the Riddick premises for an ax, a pair of tennis shoes with diamond tread, clothing with blood splatters, a lady's brown wallet or any papers connected with the deceased, and to search the person of Anthony Riddick for fingerprints, hair sample, blood sample and scrapings from beneath the fingernails.

The search was conducted on 27 June 1975, the day following the murder of Mrs. Dozier. Three pairs of tennis shoes were seized—one from Anthony Riddick, one from defendant and one from defendant's brother Carlos Riddick. During this search SBI Agent Brinson, in defendant's presence, seized a blue T-shirt which he had reason to believe had been worn by the murderer. Defendant said it belonged to his sister and shortly thereafter delivered to the officers a pair of blue bell-bottom dungarees, and a blue zip-up type of knit shirt which he said he was wearing on the date of the murder.

SBI Agent Brinson first interrogated defendant on 27 June 1975 at the sheriff's office in Elizabeth City. After he had been fully warned of his constitutional rights as required by the *Miranda* decision, defendant waived his right to silence and agreed to answer questions without the presence of a lawyer. Defendant's testimony at this time tended to show that he did

not go in or near the Dozier residence on the day in question. With respect to his clothing, he stated that he had worn a pair of bell-bottom dungarees with the seat split, a blue zip-up shirt and the pair of tennis shoes the officers had seized in the search.

SBI Agent Brinson testified he next saw defendant on 2 July 1975 when Officer Wise brought him to the sheriff's office to take his picture and fingerprints. Although defendant had previously been advised of his constitutional rights he was again given the *Miranda* warnings in full and stated that he understood his rights. With those rights in mind, defendant stated that he wished to answer questions without the presence of a lawyer. He was then interrogated for approximately one hour during which he gave substantially the same detailed account of his activities on 26 June 1975 as he had given in his previous statement. After being shown a torn blue T-shirt tending to establish his presence at the scene of the crime, defendant made a different statement which, though still exculpatory, indicated that he had been inside the Dozier residence on the day in question. It is to the admission of this statement that defendant objects. The circumstances surrounding the defendant's decision to make the second statement will be developed in the body of the opinion.

At the end of the *voir dire* the trial judge entered the following order:

> "At the end of the voir dire conducted prior to the trial of the case, the voir dire heard on November 6, 1975, at which time both the State and the defendant offered evidence as to the extrajudicial statements of the defendant, and as to certain personal property which the State would propose to offer in evidence, the said property being a pair of tennis shoes, and a light blue shirt, the defendant objecting to the admission of the extrajudicial statements, and the two items of personal property, on the grounds that there was no proper search warrant issued under which the tennis shoes were found, and that the statement made by the defendant, which the State proposes to offer in evidence, was made as the fruit of an illegal search, and that objecting to the offering of the introduction of the

blue shirt on the grounds that it was the fruit of an illegal search, the Court finds the following facts:

(1) That the affidavit on which the search warrant was issued states facts sufficient upon which the magistrate could find probable cause upon which to issue a search warrant, and that the search warrant was validly issued;

(2) The Court finds further that in the course of the search of the premises of Herman Leroy Riddick, Velma Riddick, and Anthony Riddick, described in the search warrant, Officer Jack D. Brinson, an agent with the SBI, while in one part of the house saw through the open door into the room which the defendant contends was under his control, and while looking through the door, SBI Agent Brinson saw a pair of tennis shoes which he took as evidence; that there was no need for a search warrant to search the room of the defendant in view of the fact that SBI Agent Brinson was in a place where he had a right to be as a result of the search warrant, and the tennis shoes were in his plain view at that time;

(3) The Court finds further that the search warrant was validly issued to search the entire premises, and that the fact that the defendant contends that he had chosen one room of the house does not give him any standing to object to the search of the room.

The Court has therefore concluded that the tennis shoes are admissible in evidence.

The Court further finds that upon the questioning of the defendant by Agent Brinson and Agent W. E. Godley, both of whom are agents of the SBI, the defendant was fully warned of his right to have an attorney before he made a statement, and of his right to remain silent; that the defendant freely, voluntarily and understandingly waived his right to have an attorney, and waived his right to remain silent, and that any statements he made on that day are admissible in evidence against him.

The Court further finds that at the time of the interrogation of the defendant on July 2, 1975, by SBI Agent Brinson, and SBI Agent O. L. Wise, both of whom are agents of the SBI, the defendant was again fully warned

of his right to remain silent, and of his right to have an attorney before he made any statement, and that the defendant freely, voluntarily and understandingly waived his right to remain silent, and his right to have counsel, and that any statements he made at that time may be offered into evidence in this case.

The Court finds further that on July 27, 1975, Mr. Brinson and Mr. Wise, agents of the SBI, accompanied the defendant to the residence of his parents, where he was living at that time, and after being on the premises as a result of the search warrant previously issued that they were invited by the defendant to come on the premises, and that the blue shirt which was in plain view of Agent Brinson while he was on the premises, and which was found at that time, is admissible in evidence.

The defendant's Motion to Suppress these items of evidence is DENIED."

At defendant's trial which commenced on 10 November 1975 SBI Agent Brinson was examined before the jury and testified substantially in accord with the evidence he had given on *voir dire*. Defendant's tennis shoes, blue T-shirt, and incriminating statements to the officers were admitted over objection.

The testimony of FBI Agent Mark Gass, Jr., before the jury corroborates the evidence given by SBI Agent Brinson.

The State offered medical evidence tending to show that Mrs. Dozier died about the noon hour on 26 June 1975 from a depressed skull fracture with laceration of the brain substance. The medical witnesses were of the unanimous opinion that Mrs. Dozier died almost instantaneously with the infliction of the blow that fractured the skull and that she could not thereafter have made any purposeful movement, *i.e.*, attempted to move her head or body or reach for an object.

Defendant offered no evidence. He was convicted of murder in the first degree and sentenced to death. His appeal to this Court assigns errors discussed in the opinion.

Rufus L. Edmisten, Attorney General; John M. Silverstein, Special Deputy Attorney General, for the State of North Carolina.

Frank W. Ballance, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Was the search warrant in this case issued upon a showing of probable cause to search the described premises? If so, the search warrant was validly issued; otherwise not. *State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177 (1973); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). Defendant contends no probable cause was shown in the affidavit upon which the warrant was issued and the court therefore erred in admitting the fruits of the search. This constitutes his first assignment of error.

[1] Within the meaning of the Fourth Amendment and G.S. 15-25(a), now G.S. 15A-243 to 245, probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Campbell, supra.* Thus, the affidavit upon which a search warrant is issued is sufficient if it "supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

[2] Here, the affidavit in question detailed the presence of tracks made by tennis shoes with a diamond tread leading from the victim's residence to a point near the Riddick premises. It specified reasons for searching those premises for tennis shoes with a diamond tread, for the possible murder weapon, for loot stolen from the victim's home, and gave reasons why such evidence might be found in the Riddick household. We hold the affidavit contains a sufficient recital of facts and underlying circumstances to constitute probable cause for issuance of the search warrant.

In the alternative, defendant argues that the search warrant, even if validly issued, did not cover the room occupied by him and his wife. Thus he contends the seizure of his shoes and clothing was illegal. For the reasons which follow, this contention has no merit.

[3, 4] The lawfully issued search warrant authorized the officers to search the premises occupied by Anthony Riddick, H.

Leroy Riddick and Velma Riddick. While searching Anthony's room the officers saw, through an open doorway, a pair of tennis shoes similar to those described in the warrant and later determined to belong to defendant. Seizure of these shoes was lawful. "[A]n item is lawfully seized even though it is not listed in the warrant if the officer is at a place where he has a legal right to be and if the item seized is in plain view." *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). *Accord, Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974). Nor were the officers required to terminate the search once the tennis shoes of Anthony Riddick were seized. When the officers discovered three pairs of shoes, each of which fit the description in the warrant, it was lawful to seize all three pairs. G.S. 15-25 (Cum. Supp. 1974).

Defendant further argues that even if the search and seizure was constitutionally permissible, it was illegal under the new rules of criminal procedure, particularly G.S. 15A-253. It suffices to say that these rules were effective 1 September 1975 and thus are not applicable to this search which took place prior to that date. Even so, were the new rules applicable, the search and seizure here in question did not violate them.

[5] Defendant's final contention under his first assignment of error is that his alleged consent to a search on the afternoon of June 27 was invalid because the officers advised him they had seized the wrong clothing initially and his "consent" for an additional search was in reality only acquiescence and thus not free and voluntary. This contention has no merit because it finds no support in the record. The record discloses that defendant told the officers they had seized the wrong clothes—not the other way around, and defendant himself suggested that the officers exchange the clothing then in their possession for the clothing he said he was actually wearing on June 26. Under those circumstances, the officers returned to the Riddick home and, with defendant's free and voluntary consent, joined him in searching for a pair of bell-bottom dungarees and a blue zip-up shirt he said he was wearing on June 26. It was during that search that the officers saw the blue T-shirt on the washstand with a torn place in the front of it similar in size and shape to a blue scrap of material that had been found on the dining room floor where Mrs. Dozier's body was discovered. Moreover, the testimony of defendant's mother confirms and corroborates

the testimony of the officers that defendant freely consented to the search he now seeks to question. There is no merit in defendant's first assignment of error.

Defendant's second assignment is grounded on his contention that the court erred by admitting over objection his extrajudicial incriminating statement made to SBI Agents Brinson and Wise on July 2 after he had exercised his right to remain silent and to have an attorney present.

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), lays down the ground rules governing the admissibility of statements obtained from an accused during custodial police interrogation. These rules prescribe that the suspect must be advised (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation; (4) that if he is an indigent a lawyer will be appointed to represent him; and (5) that if he at any time prior to or during questioning indicates that he wishes to stop answering questions or to consult with an attorney before speaking further, the interrogation must cease. The totality of circumstances under which the statement is made should be considered in passing upon its competency, *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620 (1965); and the statement is rendered incompetent by circumstances indicating coercion or involuntary action. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619 (1964).

[6, 7] When the admissibility of an in-custody confession is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met and whether the confession was in fact voluntarily made. The general rule is that the trial judge, at the close of the *voir dire* hearing, *should* make findings of fact to show the bases of his ruling. *See State v. Silver,* 286 N.C. 709, 213 S.E. 2d 247 (1975); *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969). If there is a *material* conflict in the evidence on *voir dire* he *must* do so in order to resolve the conflict. *State v. Smith,* 278 N.C. 36, 178 S.E. 2d 597 (1970). If there is no conflict in the evidence on *voir dire,* it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. *State v. Biggs,* 289 N.C. 522, 223 S.E. 2d 371 (1976);

State v. Simmons, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). In that event the necessary findings are implied from the admission of the confession into evidence. *State v. Whitley,* 288 N.C. 106, 215 S.E. 2d 568 (1975). If there is a conflict in the evidence which is *immaterial* and has no effect on the admissibility of the confession, it is not error to admit the confession without findings because the purpose of specific findings of fact is to show, for the benefit of the appellate court on review, the factual bases of the trial court's determination of admissibility. *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569 (1966); *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1966). Thus, where a conflict in the evidence is immaterial and does not affect the admissibility of the challenged statement, findings are not required, although, again, it is always the better practice to make findings.

The question now before us is whether the evidence on *voir dire,* considered in its totality, shows a violation of the *Miranda* rules by continued interrogation of defendant after 10:10 a.m. when he stated he would not answer any more questions and wanted to consult a lawyer. For the reasons which follow, we hold that it does not.

The record discloses that on 27 June 1975 and twice on 2 July 1975 defendant was fully advised of his constitutional rights as required by *Miranda.* On each occasion defendant stated that he understood his rights and, having them in mind, wished to answer the questions without a lawyer present.

When interrogated on June 27 defendant gave a detailed statement of his activities on June 26, the day Mrs. Dozier was murdered. In that narrative he stated he had worn a pair of bell-bottom dungarees, a blue zip-up shirt, and the pair of tennis shoes the officers had seized. He said he did not go in or near the Dozier house but was rabbit hunting with his dogs in the field behind the Dozier residence where the tennis shoe tracks were found.

When first interrogated on July 2 defendant substantially repeated his previous statement concerning his dress and activities on June 26. When the officers informed defendant that several witnesses said he was wearing a blue T-shirt on the day of the murder and exhibited the torn garment to him, defendant said he did not want to answer any more questions

and wanted to talk to an attorney. The interrogation thereupon ended at 10:10 a.m. SBI Agents Brinson and Wise and defendant left the interrogation room on the second floor of the courthouse and went to the sheriff's office on the first floor. There defendant called his mother, then one of the officers looked up the number for him and he telephoned the office of Attorney Glenn Austin and learned Mr. Austin was in Camden County. A phone call to Camden County by SBI Agent Wise disclosed that Mr. Austin had left to return to his office in Elizabeth City.

Defendant contends the officers continued to interrogate him while he waited in the sheriff's office for an opportunity to talk with lawyer Austin and after he had exercised his right to remain silent at 10:10 a.m. that morning. Defendant's voir dire testimony is to the effect that during the interval of time involved, *i.e.*, from 10:10 a.m. to approximately 10:45 a.m., he was permitted to and did make various telephone calls and was assisted by the officers in his attempt to locate Attorney Austin; that Agent Brinson said he believed defendant knew something about it and wasn't telling the truth and that Agent Wise said substantially the same thing; that, in fact, he had not been telling the truth and told the two officers he wanted to tell them the truth; that "[w]hen I told them I wanted to tell the truth, it was because I wanted to get it off my mind. It was my decision to do that."

[8, 9] Defendant's own evidence does not support his contention that the officers continued to interrogate him after he exercised his right to remain silent at 10:10 a.m. Assuming *arguendo* that his *voir dire* testimony is true, we do not construe an officer's expression of opinion that defendant knew something about it and was not telling the truth as a resumption of interrogation within the meaning of *Miranda*. And defendant's testimony demonstrates that he was not mistreated or otherwise coerced. His testimony shows that his right to cut off questioning was promptly honored when asserted at 10:10 a.m. It also shows that *he* himself decided to talk further and asked the officers to resume talks with him so he could tell them the truth and get it off his mind. According to defendant, *it was his decision to do that.* Thus the total picture indicates neither coercion nor involuntary speech. It was not error to admit defendant's statement upon Judge Webb's finding that, after being fully warned of his rights, "the defendant freely, voluntarily and understandingly waived his right to remain silent, and

his right to have counsel, and that any statements he made at that time may be offered into evidence in this case." The *Miranda* rule that in-custody interrogation of a defendant must cease when the defendant indicates he wishes to remain silent, or wishes to consult counsel, or both, does not bar a subsequent statement by a defendant who, after having been fully advised of his constitutional rights, freely and voluntarily waives his right to remain silent and his right to counsel and invites the officer to resume talks with him. *Michigan v. Mosley,* 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975); *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820 (1971); *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968).

So it is here. The record supports the conclusion that rather than continued interrogation during the thirty-five minute interval in question, defendant simply reflected upon the incredibility of his original story in light of the evidence against him, decided to change his statement to make it more plausible, and invited the officers to listen while he related his revised version. Defendant's second assignment of error is overruled.

[10] Defendant contends the trial court committed prejudicial error by allowing the State to elicit evidence over objection that the deceased was found with her dress above her knees and that her undergarments were torn, the implication being that she had been sexually molested when there was no evidence of sexual assault. Defendant argues that this evidence tending to show the commission of another criminal offense (rape) inflamed the jury against him and constitutes reversible error.

It suffices to say that the evidence shows Mrs. Dozier had not been sexually assaulted. Thus the challenged evidence does not show the commission of another criminal offense. Furthermore, the position of the victim's body when discovered and the derangement of her clothing at that time are simply circumstances which are so connected in point of time and place with the murder itself that proof of one necessarily involves proof of the other. The evidence was properly admitted. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). *See also State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546 (1971) (in armed robbery case, evidence of stabbing after money taken was part of single transaction); *State v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590 (1945) (threats against taxi driver in defendant's efforts to escape); *State v. Mitchell,* 193 N.C. 796, 138 S.E. 166

(1927) (fight with third person immediately after homicide). Defendant's third assignment is overruled.

[11] Defendant's fourth assignment is based on thirty-nine exceptions wherein defendant contends the trial judge violated G.S. 1-180 by expressing an opinion on the facts of the case. We have patiently examined each exception and find no basis whatsoever for defendant's contention. These exceptions relate to the judge's attempt to clarify testimony, to the action of the court in sustaining objections, to stipulations as to expert witnesses, to testimony that was favorable to defendant, and to clarifications of names, dates and locations. None have any merit. It is entirely proper, and often necessary, that the trial judge ask questions to clarify and promote a proper understanding of the testimony of the witnesses. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968). In so doing, the able trial judge in this case expressed no opinion in violation of G.S. 1-180. This assignment is overruled.

[12] Defendant's fifth and sixth assignments of error are not discussed in his brief and are deemed abandoned under Rule 28(a) of the Rules of Appellate Procedure, 287 N.C. 671 at 741.

Defendant's seventh and eighth assignments of error challenge the legality of the judgment imposing the death penalty. For the reasons which follow the challenge is sustained.

[13] In *Woodson v. North Carolina*, ... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (decided 2 July 1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, by authority of the provisions of the 1973 Session Laws, Chapter 1201, Section 7 (1974 Session), a sentence of life imprisonment is substituted in lieu of the death penalty in this case. We deem further discussion of these assignments unnecessary.

Our examination of the entire record discloses no error affecting the validity of the verdict returned by the jury. The trial and verdict must therefore be upheld. To the end that a sentence of life imprisonment may be substituted in lieu of the death sentence heretofore imposed, the case is remanded to the Superior Court of Pasquotank 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 said 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.

STATE OF NORTH CAROLINA v. GREGORY A. COUSIN

No. 51

(Filed 21 December 1976)

1. **Homicide § 20; Criminal Law § 83— felony murder — recovery of pistol attributed to defendant's wife — admissibility**

The trial court in a felony murder prosecution did not err in allowing into evidence the pistol used in the murder and testimony of the owner of the pistol which incriminated defendant, though officers first learned about the pistol and its whereabouts from defendant's wife, since G.S. 8-57 providing that no spouse shall be compellable to disclose any confidential communication made by one to the other during their marriage is an evidentiary rule and applies to a spouse testifying or to the admission of a statement by a spouse into evidence.

2. **Homicide § 16— felony murder — dying declarations of victim — admissibility**

The trial court in a felony murder prosecution did not err in allowing into evidence dying declarations made by one of the victims, since the evidence tended to show that at the time the remarks in question were made, the victim was in great pain, he was writhing about on the floor and crying for help, and he was experiencing difficulty breathing and was bleeding from gunshot wounds in the head and stomach; moreover, statements of the victim made immediately after the shooting were admissible as spontaneous utterances.

3. **Criminal Law § 91— motion for continuance — denial proper**

The trial court did not abuse its discretion in denying defendant's motion for continuance to allow him to prepare for an in-court identification of his co-defendant who was tried in a separate trial.

4. **Homicide § 21— convenience store employee — felony murder — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for felony murder where it tended to show that two people were

found fatally injured in the storeroom of a convenience store; a sum of money had been taken from the floor safe of the store; defendant was seen leaving the store in a yellow Maverick automobile just prior to discovery of the injured persons; one of the victims told witnesses that "two black dudes" were responsible; defendant owned a yellow Maverick automobile with the same license plate number as the car seen leaving the scene; defendant had possession of a gun during the time of the robbery which later proved to be the murder weapon; and one State's witness testified concerning an admission by defendant that he robbed the convenience store.

5. **Homicide §§ 12, 31— homicide statute providing for death penalty — death penalty invalidated — indictment and trial under statute proper**

Though the U. S. Supreme Court invalidated the death penalty provisions of G.S. 14-17 under which defendant was indicted, convicted and sentenced to death, there was no error in failing to dismiss the indictments against defendant, since the Supreme Court could substitute life imprisonment for the death penalty.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgment of *Herring, J.*, entered at the 19 January 1976 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. The death sentence was imposed for the murder convictions and, as was proper, judgment was arrested for the armed robbery conviction because the murder indictments were tried on the theory of felony murder.

The evidence for the State tended to show the following:

Deceased Larry Lovett left for work around 6 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 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 head for the Maverick. Janice Whitten and Clarence Hilliard later identified the defendant as this man.

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 get in the passenger side of the Maverick. Janice Whitten later identified this man as the co-defendant, Bobby Bowden.

Janice Whitten walked into the store and noticed no clerks in sight and that it was very quiet. She waited awhile 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 that he was hurt in "My head and my gut . . . it just happened. Didn't you see them?" By this time Clarence Hilliard was in the storeroom asking Larry Lovett what happened. Larry replied, "It just happened. Didn't you see them 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.

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 Janice Whitten was unable to identify the defendant; in fact, she identified another individual. Clarence Hilliard, however, did select the defendant.

Sometime before 7 August 1975, Martha Ann Mack and her boyfriend, Rodney Harris, had gone with the defendant and Bobby Bowden in defendant'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 defendant's yellow Maverick.

On the evening of 7 August 1975, the defendant and Bobby Bowden 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, the defendant told Martha Ann Mack in the presence of Bobby Bowden that they were responsible for the Seven-Eleven robbery and murders. She questioned his statement so defendant suggested that she listen to the 11 p.m. news which appeared on television shortly thereafter, and this was done.

The defendant and Bobby Bowden were arrested at defendant's trailer in the early morning hours of 12 August 1975. As a result of information provided by Alice Cousin, the defendant's wife, officers were able to secure the pistol from Martha Ann Mack's trailer the same morning.

In December of 1975, Janice Whitten reported to the police the license plate number of the yellow Maverick seen at the Seven-Eleven Store. She testified that she remembered the numbers of the plate because she got in the habit, when she lived in Ohio, of memorizing plate numbers to use in playing the "numbers" game. The letters on the plate, HJW, she recalled because they included her initials and Clarence Hilliard's last initial. The license number described by Janice Whitten matched the license number of a Maverick automobile in defendant's yard on the night of his arrest.

Defendant's evidence tended to show:

City-County identification records and photographs of the men who appeared in the 12 August 1975 lineup with defendant revealed that their complexions ranged from medium to dark. However, defendant's own complexion in the photograph on file

appeared to be medium rather than light, and defendant's witness admitted that the photographs of individuals varied depending on the development process.

When recalled to the stand, Clarence Hilliard testified that he remembered the license plate on the Maverick being dirty. He recollected Janice Whitten's mentioning the letters of the license plate shortly after the robbery but had no further conversations with her about the license number. Hilliard confirmed that Janice Whitten got her ideas for betting from numbers she observed on license plates.

The defendant did not testify in his own behalf.

The co-defendant, Bobby Bowden, was tried and convicted of the same offenses at the 15 December 1975 Criminal Session, Cumberland County Superior Court. On appeal of that case to our Court, we found No Error. *State v. Bowden,* 290 N.C. 702, 228 S.E. 2d 414 (1976).

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.

E. Lynn Johnson for defendant appellant.

COPELAND, Justice.

[1] Under Assignment of Error No. 4, defendant contends the trial court erred in denying defendant's motion to suppress the pistol belonging to Martha Ann Mack and her testimony. Defendant argues that this evidence was obtained directly through a disclosure by defendant's wife of a confidential communication and was thus inadmissible under G.S. 8-57.

In the course of their investigation, officers learned that Bowden and the defendant may have been involved in the murder-robbery and that they had a gun in their possession. Based on this lead, they arrested Bowden and the defendant at defendant's trailer. Alice Cousin, defendant's wife, was present at the time and was questioned concerning the whereabouts of the gun. At first she refused to tell them anything, but later she directed them to Martha Ann Mack's trailer where they procured the gun and learned from Martha Ann Mack that the defendant had acknowledged to her his involvement in the

crime. Defendant claims his wife knew of the gun's location as a result of a confidential communication during their marriage.

G.S. 8-57 (Cum. Supp. 1975) 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. . . . No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action."

Defendant apparently relies on the "fruit of the poisonous tree doctrine" in contending that the gun and Martha Ann Mack's testimony were inadmissible. His argument, which attempts to graft a Fourth Amendment search and seizure doctrine to G.S. 8-57, is novel but we believe not warranted by the language of our statute. G.S. 8-57 is an evidentiary rule and applies to a spouse testifying or to the admission of a statement by a spouse into evidence. *See* 1 Stansbury's N. C. Evidence, §§ 59, 60 (Brandis Rev. 1973); Comment, *A Survey of the North Carolina Law of Relational Privilege,* 50 N. C. L. Rev. 630, 635 (1972). In the present case, Alice Cousin, never testified nor was any statement by her admitted into evidence. This assignment of error is overruled.

[2] Under Assignments of Error Nos. 15, 16, 17, 24, 26 and 30, defendant maintains the court erred in admitting into evidence statements made by Larry Lovett before he died. 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 purpose that they might have been admissible had the deceased sur-

vived 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 profusely from his head and stomach, and having difficulty speaking. The record further reveals that Larry Lovett was aware of his substantial injury. Over objection, Janice Whitten testified that when she saw Larry Lovett on the floor of the storeroom he told her he had been shot in "My head and my gut." This testimony was clearly admissible as a spontaneous utterance. *State v. Bowden, supra; State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); 1 Stansbury's N. C. Evidence, § 164 (Brandis Rev. 1973). Defendant also objected to the admission of Larry Lovett's question to Clarence Hilliard, "Didn't you see them two black dudes?", and his statement to Deputy Sheriff Baker that "two black dudes did it."

In *State v. Bowden, supra,* we said:

"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. [Citation omitted.] 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 that 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. [Citation omitted.]" *State v. Bowden, supra,* at 712, 228 S.E. 2d at 421 (1976).

The evidence shows that when Larry Lovett made the remarks in question, he was in great pain, "writhing" about on the floor, crying "Help me, please," experiencing difficulty speaking and bleeding from multiple gunshot wounds of the head and stomach regions. The 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 that 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, as we noted in *Bowden,* the statement by Lovett to Hilliard implicating "two black dudes" is admissible as a spontaneous utterance. *State v. Bowden, supra* at 713, 228 S.E. 2d at 421 (1976). These assignments of error are without merit and overruled.

In Assignments of Error Nos. 18 and 20, defendant claims the trial court erred in permitting the in-court identification of co-defendant Bobby Bowden by witness Janice Whitten. In the earlier trial of co-defendant Bowden, defendant Cousin was similarly permitted to be identified. In that case the constitutionality of the in-court identification of a co-defendant in a defendant's separate trial was challenged and the procedure found to be permissible. For the reasons stated in *Bowden,* these assignments of error are overruled. *State v. Bowden, supra* at 710-11, 228 S.E. 2d at 419-20 (1976).

[3] In Assignment of Error No. 19, defendant asserts the court erred in denying his motion for a continuance to allow him to prepare for the in-court identification of Bobby Bowden. Defendant contends the presence of co-defendant Bowden in the courtroom for the purpose of identification was "totally unexpected" and therefore he needed time to develop impeachment evidence.

A motion for continuance being addressed to the sound discretion of the trial judge, the denial of such a motion is not reviewable absent an abuse of discretion. *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975). This rule obtains unless the motion is based on a right guaranteed by the federal or state

constitution. In such a case, the question presented is one of law and not of discretion and the decision of the lower court is reviewable. *State v. Miller, supra.*

No constitutional question is here presented. Defendant was not deprived of effective representation by counsel. From the time of counsel's appointment four months before trial up to final argument in this Court, defendant was zealously and ably defended. "[T]he fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel." *Avery v. Alabama,* 308 U.S. 444, 84 L.Ed. 2d 377, 60 S.Ct. 321 (1940).

As noted in *Bowden, supra,* the appearance in the courtroom of a co-defendant for the purpose of identification is neither a "legal surprise or impropriety." From the record it appears that the defendant had ample opportunity and that he availed himself of the opportunity on cross-examination and in his rebuttal to impeach witness Whitten's identification of the co-defendant. No abuse of discretion nor infringement of a constitutional right having been shown, this assignment of error is overruled.

[4] In Assignments of Error Nos. 61, 62, 64 and 65, defendant challenges the court's refusal to dismiss the case at the close of the State's evidence and at the close of all the evidence, as well as the court's charges on armed robbery and felony murder. All of these assignments are based on defendant's contention that the State failed to prove an armed robbery had taken place. We do not understand defendant to contend that the instructions on armed robbery or felony-murder were in any way deficient, only that they should not have been given. We construe these assignments as argument by defendant that a motion for nonsuit should have been granted on the charges of armed robbery and felony-murder.

On this motion for nonsuit, the question for our determination is whether there is substantial evidence of each essential element of armed robbery and of defendant's being the perpetrator. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). 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. *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).

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 in a yellow Maverick automobile just prior to the discovery of the injured persons; (4) Lovett told two witnesses that "two black dudes" were responsible; (5) Defendant owned a yellow Maverick automobile with the same license plate number as the car seen leaving the scene; (6) Defendant had possession of a gun during the time of the robbery which later proved to be the murder weapon. Besides these circumstantial facts, the State introduced the damaging testimony of Martha Ann Mack who recounted defendant's admission that he robbed the Seven-Eleven Store. There was sufficient evidence of the elements of armed robbery and of defendant's role as perpetrator and no error in either the submission of the jury instructions or in the denial of defendant's various motions.

Substantially the same argument was advanced in *State v. Bowden, supra,* and there we held that a motion for nonsuit was properly overruled. We are led to the same conclusion based on the nearly identical evidence presented in this case.

Defendant assigns as Errors Nos. 7-14 statements admitted into evidence which he alleges were rank hearsay. We have reviewed the record. Certain of the challenged statements were not clearly hearsay either because the witness appeared to be testifying from his personal knowledge or because the statement was not offered to prove the matter asserted but for some other nonhearsay purpose. Other statements, though hearsay, were admissible under recognized exceptions to the hearsay rule.

We choose, however, to decide these assignments on a simpler, common ground. Assuming *arguendo* that all these statements were technically incompetent hearsay, we find that they did not prejudice the defendant and that their admission could not have affected the result. *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. den.,* 414 U.S. 1160, 39 L.Ed. 2d 112, 94 S.Ct. 920 (1974); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Error, if any there be, was harmless and these assignments are overruled.

[5] Finally, defendant contends that the indictments should have been dismissed because the death penalty is unconstitutional. 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. However, there was no error in failing to dismiss the indictments because this Court may substitute life imprisonment for the death penalty by authority of the provisions of 1973 Sess. Laws, c. 1201 § 7 (1974 Session).

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.

Due to the serious nature of this case, 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 EX REL. UTILITIES COMMISSION AND CAROLINA POWER AND LIGHT COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL; EXECUTIVE AGENCIES OF UNITED STATES OF AMERICA; THE NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; AND BALL CORPORATION, INTERVENORS, PROTESTANTS

No. 47

(Filed 21 December 1976)

1. **Utilities Commission § 6— change in public utility rates**

The consumer has no vested right in existing public utility rates, and the Utilities Commission may change the rates as circumstances dictate.

2. **Utilities Commission § 6— application of same rates to different customers**

Where substantial differences in services or conditions do exist, unreasonable application of the same rates to different public utility customers may be discriminatory and thus improper.

3. **Utilities Commission § 6— burden of showing rate discrimination**

The burden of showing the impropriety of rates established by the Utilities Commission lies with the party alleging such discrimination.

4. **Utilities Commission § 6— utility rates — presumption of reasonableness**

The rates fixed by the Utilities Commission are deemed just and reasonable; however, this does not preclude an appellant from showing on appeal, if it can, that the Commission's order is not supported by competent, material and substantial evidence.

5. **Electricity § 3; Utilities Commission § 6— elimination of customer classifications**

There was sufficient competent evidence to support an order of the Utilities Commission eliminating textile mill, high load factor and military service schedules for electricity and placing customers formerly in those schedules in a general service classification.

6. **Utilities Commission § 9— electric power rates — disproportionate rates of return for different classifications — question not reviewable**

Contention that the Utilities Commission ered in entering an order allowing rates of return for electric service from a low of 2.702 percent (rural farm) to a high of 13.276 percent (municipal pumping) in that they are unreasonably disproportionate to the average rate of return of 10.115 percent will not be reviewed by the appellate court where neither of the users cited to show the two extremes is a party to the appeal and appellant concedes it is paying only its fair share.

7. Electricity § 3; Utilities Commission § 6— cost-of-service study — data from another state

The Utilities Commission did not err in relying on a power company's cost-of-service study based on system-wide retail data in both North Carolina and South Carolina where there was ample evidence that data underlying the system-wide cost-of-service study was representative of the company's operating conditions in North Carolina.

APPEAL by Executive Agencies of United States of America from decision of the Court of Appeals, 29 N.C. App. 428, 225 S.E. 2d 101 (1976), affirming order of the Utilities Commission entered 6 January 1975 in Docket E-2, Sub 229.

Carolina Power and Light Company (CP&L) commenced this general rate case on 29 October 1973 by filing with the North Carolina Utilities Commission (Commission) an application for authority to increase its retail rates for electricity sold in North Carolina by approximately 21 percent, effective 1 December 1973. The proposed rate increases were not across-the-board but varied among the various customer classes. The application stated that the rates for many large users were to be increased more than the average, due in large part to the distribution of higher fuel costs. This application also included CP&L's request for an 11 percent interim rate increase, and the Commission authorized an interim increase of 5.94 percent, after notice and public hearing, by order dated 25 January 1974. CP&L moved for permission to place into effect the remainder of the requested 11 percent interim increase and, after notice and public hearing, the Commission, on 1 April 1974, authorized the additional interim increase of 5.06 percent to be placed into effect subject to refund.

Acting under the provisions of G.S. 62-135 CP&L gave notice on 10 May 1974 of its intention to place into effect rate increases up to 20 percent, and on 16 May 1974 the Commission approved CP&L's undertaking for a refund, as provided by G.S. 62-135(c). The 20 percent increase was placed into effect by CP&L effective 1 June 1974.

In addition to applying for an increase in rates, CP&L proposed in its 29 October 1973 application a change in its rate structure to eliminate certain previously established customer classification schedules. Among the schedules it proposed to eliminate were the Textile Mill Schedule (TM), the High Load Factor Schedule (HLF), and the Military Service Schedule (MS).

Customers formerly in these schedules were placed in a general service classification designated Schedule G-3.

After public hearings were held and numerous witnesses heard, and after briefs of the parties were filed, the Commission entered a final order on 6 January 1975 containing its findings of fact and conclusions of law, approving the increased rates sought by CP&L. This order also approved the rate schedules essentially as sought by CP&L with only slight downward adjustments in the schedules affecting low-usage residential customers.

The elimination of the TM, the HLF, and the MS classifications resulted in rate increases somewhat greater than the 21 percent overall increase for customers who were formerly in those classifications. The intervenors, North Carolina Textile Manufacturers Association, Ball Corporation, and Executive Agencies of United States of America, previously classified in the TM, HLF, and MS schedules respectively, took exception to the elimination of those classifications and appealed to the Court of Appeals contending the Commission had committed reversible error in that portion of its 6 January 1975 order which approved the elimination of those customer classifications. The Court of Appeals affirmed the order of the Commission with Martin, J., dissenting. From that decision, *only* Executive Agencies of United States of America appealed to the Supreme Court. Errors assigned will be discussed in the opinion.

Edward B. Hipp, General Counsel, and Wilson B. Partin, Jr., Assistant Commission Attorney, for North Carolina Utilities Commission, plaintiff appellee.

R. C. Howison, Jr. and William E. Graham, Jr. for Carolina Power & Light Company, plaintiff appellee.

Thomas P. McNamara, United States Attorney, by Christine A. Witcover, Assistant United States Attorney; R. C. Hudson for Executive Agencies of the United States of America, defendant appellant.

HUSKINS, Justice.

In its first assignment of error appellant challenges the decision of the Commission to consolidate the Military Service classification (MS) with other classes into the new G-3 schedule.

Appellant concedes, and we agree, that it is not presently hurt by the reclassification with respect to the increased rates which it will be required to pay. As noted, the Utilities Commission has adopted a reclassification program designed (1) to bring customer rates into closer alignment with costs of providing service and (2) to simplify existing schedules. The Commission's recent cost-of-service analysis indicates that, under the current rate structure, some service classes are paying a higher proportion of the cost of service than other classes. Thus there is an inter-class cross subsidation resulting in price discrimination. Although this effect originated in historically sound policy, considerable testimony before the Commission suggests that the underlying reasons are no longer compelling. Thus the Commission sought to correct these inequities by more closely aligning the rate of return from each class with that of the system average.

It is true that in moving toward this goal the rates of some groups, including appellant, were raised more, proportionately, than others. The net effect of this increase, however, was to bring CP&L's rate of return for services furnished appellant more in line with that of the system average, in this case 10.215 percent as compared to an overall rate of return of 10.115 percent. As one witness noted, "[y]ou can't make rates much closer than that." Clearly, appellant is not presently aggrieved by the rate schedule as presently applied.

Appellant, however, contends that it will likely be aggrieved in the future by virtue of its joinder with the Textile Mill class (TM-1) and the High Load Factor class (HLF) into the new G-3 classification. It argues that it should not be combined with the other groups because it has service or use characteristics which are incompatible with those groups. For example, it has a different average load factor, minimum demand, and service voltage than the other groups. Appellant further contends that because of these different use characteristics it may, *in the future*, bear a disproportionate share of the costs within the G-3 classification. That is, it may be aggrieved by intra-class subsidation should it be combined into a rate class with dissimilar groups.

Discussion of this contention requires us first to outline the legal framework within which the Commission ordered the reclassification.

[1] The Utilities Commission is vested generally with the power to regulate utilities and their rates. G.S. 62-2. A rate is defined as "every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service, product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification." G.S. 62-3. All rates must be just and reasonable. G.S. 62-130 and G.S. 62-131. The consumer has no vested right in existing rates, *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519 (1955), and the Commission may change the rates as circumstances dictate. G.S. 62-130.

[2] This authority is not unbridled. "There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service." *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). *See Utilities Commission v. Municipal Corporations, supra.* It follows that where substantial differences in services or conditions *do exist,* unreasonable application of the *same* rates may be discriminatory and thus improper.

[3, 4] The burden of showing the impropriety of rates established by the Commission lies with the party alleging such discrimination. *See Utilities Commission v. Light Co.* and *Utilities Commission v. Carolinas Committee,* 250 N.C. 421, 109 S.E. 2d 253 (1959). The rates fixed by the Commission are deemed just and reasonable. G.S. 62-132. The Legislature has reiterated this determination by providing that upon "any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." G.S. 62-94(e). *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966); *Utilities Commission v. Coach Co.* and *Utilities Commission v. Greyhound Corp.*, 260 N.C. 43, 132 S.E. 2d 249 (1963); *Utilities Commission v. R. R.*, 249 N.C. 477, 106 S.E. 2d 681 (1959); *Utilities Commission v. Casey,* 245 N.C. 297, 96 S.E. 2d 8 (1957).

This does not preclude appellant from showing on appeal, if it can, that the order is not supported by competent, material and substantial evidence. *Utilities Commission v. Coach Co.,*

261 N.C. 384, 134 S.E. 2d 689 (1964); *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780 (1953). After careful review of this record, however, we hold that the appellant has not carried this burden.

It is apparent that in devising the rate structure the Commission was faced with conflicting goals. One goal was the *elimination of all cross subsidation.* It is likely that under the combined class arrangement, as adopted by the Commission, some intra-class cross subsidation may occur. In a rate-making scheme based on *cost of service to classes,* the fewer classes there are, the more likely it is that such cross subsidation will arise. Conversely, a large number of classes reduces the likelihood. Carried to an extreme, costs will be most accurately allocated where each customer is a class by himself and his rates are based on the cost of service to him. By this method a customer living miles from a power station would pay more than a resident living next to a transmission facility. Such a scheme is patently unworkable at the present time. It conflicts with a second goal of rate-making: *simplification of the rate structure.* Several witnesses testified to the need for simplification. It was noted that North Carolina has considerably more rate classes than most other areas. In fact, the rate experts recommended that the schedule be further reduced to only three classes.

[5] Thus it is apparent that a balance must be struck between the two objectives. This the Commission did in its order of 6 January 1975. We recognize that appellant has lodged strong and cogent objections to the resolution adopted by the Commission, but it is not the function of this Court to select among permissible determinations. That we might have weighed the factors differently is not sufficient to allow us to reverse or modify the order. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). There must be a showing by appellant that the evidence on which the order is based is insufficient to support that order. G.S. 62-94(b)(5). Appellant has made no such showing. Hence, this assignment is overruled.

[6] In its second assignment of error appellant contends that the Commission erred in entering an order allowing rates of return from a low of 2.702 percent (rural farm, RF) to a high of 13.276 percent (municipal pumping, MP-1) in that they are unreasonably disproportionate to the average rate of return, *i.e.*, 10.115 percent. Neither of the users cited to show the two

extremes are parties to this appeal. CP&L's rate of return from appellant under the new schedule would be 10.215 percent which is, as noted at the outset, reasonably close to the average rate. It is clear that appellant is not prejudiced by these alleged unreasonable variations. It is paying only its fair share, a fact which is conceded. Therefore, we do not review this assignment.

[7] Finally, appellant contends that the Cost-of-Service-Study upon which the Commission based its order was incompetent. The thrust of appellant's argument is that the study by CP&L was based on system-wide retail data in North and South Carolina when it should have been based solely on data compiled within the North Carolina jurisdictional area to which the Commission's schedule will apply.

It is true that if the system-wide study significantly varied from results which would be produced by a study based solely on North Carolina data, it would be incompetent. North Carolina rates may not be structured by external system usage. *See Corporation Com. v. Mfg. Co.*, 185 N.C. 17, 116 S.E. 178 (1923). Such action is outside the intended scope of the Commission's authority. G.S. 62-2.

On the record presented here, however, there is ample evidence that data underlying the system-wide cost-of-service studies was representative of the company's operating conditions in North Carolina. Among other factors, we note that 82 percent of all retail system customers are located in North Carolina and that 81 percent of all retail KWHs are sold to customers in this state. With regard to the particular interests of the appellant, we note that seven of CP&L's eight military customers system-wide are located in North Carolina. Based on this and other testimony, we find that the Commission's reliance on data supplied by the contested study was reasonable and that the resulting rates were structured from data representative of CP&L's intrastate experience. Accordingly, this contention is without merit.

Careful review of the entire record compels the conclusion that there is competent evidence to support that portion of the Commission's order of 6 January 1975 which approved the elimination of the Textile Mill Schedule (TM), the High Load Factor Schedule (HLF), and the Military Service Schedule (MS), and the moving of customers in the eliminated schedules into a general service classification, designated Schedule G-3.

The well-reasoned decision of the Court of Appeals with respect to the questions raised on appeal to this Court by Executive Agencies of United States of America must therefore be upheld.

Affirmed.

STATE OF NORTH CAROLINA v. WALTER LEE MILEY

No. 71

(Filed 21 December 1976)

1. **Criminal Law § 76— understanding of constitutional rights — voluntariness of statement**

Evidence was sufficient to support findings by the trial court and such findings were sufficient to support the court's conclusion that defendant was advised of his constitutional rights, no threats or promises or coercion of any sort were used, and statements made by defendant were made freely, voluntarily and understandingly.

2. **Criminal Law § 75— confession — voluntariness — no jury issue**

The law in N. C. does not require that the issue of voluntariness of a confession be submitted to the jury.

3. **Homicide § 20— photographs — bloody shirt — admissibility for limited purpose**

The trial court in a homicide prosecution did not err in the admission under limiting instructions of four photographs of deceased's body, nor did it err in the admission of a bloody shirt worn by deceased at the time of the fatal shooting.

4. **Criminal Law § 79— statements of co-conspirator — admissibility**

Testimony of a State's witness concerning statements by a homicide victim's wife was admissible as that of a co-conspirator where the evidence tended to show that the witness was present when defendant was employed to commit the murder in question, and during the planning of the murder; and the witness gave defendant $100 from the victim's wife in partial payment for the murder.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 1 March 1976 Session of FORSYTH Superior Court. Defendant was tried upon an indictment, proper in form, for the murder of Nathaniel Hairston. He was convicted of second degree murder and sentenced to life imprisonment.

The State introduced evidence tending to show that during the evening hours of 11 November 1975, Irene Hairston offered

defendant $1500 (payable when the life insurance proceeds on the victim's life were disbursed) to kill her husband, Nathaniel Hairston. Defendant agreed to perform the task and was paid either $100 or $200. Mrs. Hairston gave defendant a loaded shotgun and he then sat in the Hairstons' front yard waiting for Mr. Hairston to return from work.

At approximately 1:00 a.m. on 12 November 1975, Mr. Hairston returned from work. Defendant failed to fire at Mr. Hairston as he walked from his car into his house. Several minutes later, defendant, shotgun in hand, walked to the back of the house where he saw Mr. Hairston's shadow through a window. Defendant opened the back door of the house and shot Mr. Hairston in the chest. Mr. Hairston died as a result of the injuries received by the shot.

Defendant testified in his own behalf. His testimony is essentially the same as that offered by the State. However, defendant stated that he had very little recollection of the events of the evening because he had been smoking marijuana and drinking beer. He further stated that he went to the back door of the Hairston house and placed the shotgun on the brick steps leading up to the back door. Defendant testified that some of the bricks were loose and that he slipped on the steps. As he slipped, he felt the gun discharge. After the gun discharged, he fled the scene. He stated that at no time did he see Mr. Hairston.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Ralf F. Haskell for the State.

Donald M. Voncannon for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the trial court erred in finding that defendant's statement to B. J. Grindstaff of the Forsyth County Sheriff's Department was voluntarily given and that the defendant knowingly waived the right to have an attorney present at the time of making his statement. Defendant does not allege that he was not advised of his constitutional rights and in fact concedes he was. Rather, he argues that he did not fully understand his rights as presented to him because of his age, background and limited education. Defendant fur-

ther argues that after stating he wanted an attorney present, he was induced to make an incriminating statement.

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), laid down the rules governing the admissibility of statements obtained from an accused during custodial police interrogations. When the admissibility of an in-custody confession is challenged, the trial judge must conduct a *voir dire* hearing to determine whether the requirements of *Miranda* have been met and whether the confession was voluntarily and understandingly made. If there is a material conflict in the evidence on *voir dire,* the trial judge must resolve the conflict and find the facts upon which he bases his ruling. Because the trial judge is able to observe the demeanor of the witnesses during their testimony and weigh their credibility, his findings are conclusive on appeal, if supported by the evidence. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Smith,* 278 N.C. 36, 178 S.E. 2d 597, *cert. den.,* 403 U.S. 934 (1971). The fact that defendant was youthful and that he made the challenged statements in the presence of police officers does not render the statements inadmissible, in the absence of mistreatment or coercion by the officers. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970).

At the *voir dire* hearing held on the admissibility of defendant's statement, Officers Grindstaff and Stover of the Forsyth County Sheriff's Department testified on behalf of the State. Officer Grindstaff stated that on 3 December 1975 he advised defendant of his "Miranda rights" by the use of questions taken from a printed form. As he advised defendant of each right, the officer would place a "yes" or "no" answer at the end of the question contained on the form. Defendant's responses to these questions showed that he understood his right to remain silent; that he had the right to stop answering questions at any time; and that he understood that any statement he made could be used against him in court. When asked by Grindstaff if he wanted an attorney present before he answered any questions, defendant's response on the printed form was "Yes." Officer Grindstaff testified that defendant then stated that he was willing to answer questions and would like to have an attorney appointed later. Defendant then replied "No" to the question of whether he wanted a lawyer present during questioning. Grindstaff further stated that he explained the waiver of rights form

to defendant and that defendant signed the form. Defendant then made a statement which implicated him in the murder of Mr. Hairston.

Officer Stover testified that on 5 December 1975 he saw defendant and Officer Grindstaff at Forsyth Memorial Hospital. At this time, Grindstaff asked defendant to initial a change on the printed form dealing with the "Miranda rights." This change was to correct a mistake which Grindstaff had made, and consisted of scratching through the "Yes" response given to the question of whether defendant wanted an attorney present prior to any questioning and substituting a "No, but I would like one appointed later" response. Stover testified that defendant indicated that he had made such a response to Grindstaff, but refused to initial the change because he had been told by his attorney not to do so.

Defendant testified that he recalled signing the waiver of rights form. He stated that Officer Grindstaff "did not really encourage me to go ahead and make a statement," and that defendant did not really think that he needed a lawyer. Further, defendant stated that "After I signed the form, I said I would make a statement and have a lawyer appointed later."

Upon the evidence outlined above and other testimony tending to show that no coercion, promises or threats were made to defendant, the trial judge made findings of fact which amply supported his conclusion that:

> " . . . [T]he defendant was advised of his rights in accordance with the MIRANDA decision; that no threats or promises were made to the defendant to influence him to make any statements and that the statements given to Officer Grindstaff at approximately 10:00 AM on December 3, 1975, were freely, voluntarily, and understandingly made and that any statement the defendant made in response to said interrogation is admissible in the trial of this case."

Any conflict in the evidence was resolved by the trial judge's findings of fact, and his ruling will not be disturbed on appeal. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. den.,* 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967). This assignment is overruled.

[2] In connection with the issue of defendant's statement to the police, defendant contends that the trial court should have

submitted the question of voluntariness to the jury. Counsel for defendant, citing *State v. Hill,* 276 N.C. 1, 170 S.E. 2d 885 (1969), concedes that the present law in North Carolina does not require the issue of voluntariness of the confession to be submitted to the jury, but requests that this Court reconsider its position on this question. In *State v. Hill, supra,* at 14-15, 170 S.E. 2d at 894, Justice Higgins, speaking for the Court, said:

> "Defense counsel also argue that the voluntariness of the confession should have been one of the issues submitted to the trial jury. Under North Carolina procedure, voluntariness is a preliminary question to be passed on by the trial judge in the absence of the jury. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. This procedure, we think, is approved by the Supreme Court of the United States. In *Jackson v. Denno,* 378 U.S. 368 (Footnote 19), the Court uses this language: ' . . . (T)he states are free to allocate functions between the judge and the jury as they see fit.' "

We see no reason to change this well established rule and refrain from doing so in this case.

[3] By his next assignment of error, defendant submits that the trial court erred in admitting into evidence, under instructions limiting their use to the purpose of illustrating the witnesses' testimony, four photographs depicting the body of the victim. Defendant also submits that the court committed error in admitting into evidence the shirt worn by the victim at the time of his death.

Defendant entered a plea of not guilty, thereby requiring the State to meet its burden of proving its entire case beyond a reasonable doubt. It was an essential part of the State's theory that the victim was shot by the defendant in the chest with a shotgun from outside, as the victim was walking toward the back entrance of his house. Each of the exhibits introduced illustrated the testimony of the State's witnesses concerning the location of the deceased's body when found and the location of the fatal wound.

In *State v. Cutshall,* 278 N.C. 334, 347-48, 180 S.E. 2d 745, 753-54 (1971), this Court stated:

> "Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony. [Citations omitted.]
>
> * * *
>
> "It is not error to permit clothing of a victim or other articles to be introduced into evidence which bear stains or appear corroborative of the theory of the State's case, or which 'enable the jury to realize more completely the cogency and force of the testimony of the witness.' [Citations omitted.]"

The court therefore did not err in the admission of these photographs under limiting instructions or in admitting the shirt worn by deceased at the time of the fatal shooting. *State v. Cutshall, supra; State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). *See also* 1 Stansbury, N. C. Evidence § 34 (Brandis rev. 1973).

[4] Defendant also alleges that the trial court erred in admitting the testimony of Sharon Fay Mills Wilson regarding statements made in her presence by Irene Hairston to defendant. These statements by Mrs. Hairston related to the plan by which Mr. Hairston would be murdered and to a payment of money to defendant for performing the murder.

In *State v. Conrad,* 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969), this Court stated:

> "The general rule is that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. [Citations omitted.] Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2)

> the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. [Citations omitted.]"

See also State v. Branch, 288 N.C. 514, 220 S.E. 2d 495 (1975); 2 Stansbury, N. C. Evidence § 173 (Brandis rev. 1973). A criminal conspiracy has been defined as "the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means." *State v. Goldberg,* 261 N.C. 181, 202, 134 S.E. 2d 334, 348 (1964). *See also State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969); 3 Strong, N. C. Index 3d, Conspiracy § 3 (1976).

Applying the above stated principles to the case at bar, the testimony of Sharon Fay Mills Wilson was admissible as that of a co-conspirator. Ms. Wilson was present when defendant was employed to commit the murder, and during the planning of the murder. She gave defendant $100 from Mrs. Hairston in partial payment for the murder. This was sufficient to establish a *prima facie* case of conspiracy for the purpose of introducing the testimony of the co-conspirators.

In his brief, defendant concedes that a *prima facie* case of conspiracy was shown and that the statements were admissible under present North Carolina law. He contends, however, that we should reexamine our rule which permits the statements of one co-conspirator to be used against another co-conspirator. In the light of *State v. Conrad, supra,* and its analysis of both the law of this jurisdiction and the pertinent United States Supreme Court cases, we see no need to reexamine our position.

Defendant finally contends that his motion for nonsuit should have been granted; or that after verdict, his motion to set aside the verdict as being against the greater weight of the evidence should have been granted. Defendant's counsel concedes that there was sufficient evidence introduced at trial to repel these motions. We agree with defendant's counsel that there was ample evidence to submit the case to the jury, and see no need to review the facts or the law on this point.

An examination of the entire record discloses that defendant received a fair trial, free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. FREDDIE SMITH

No. 43

(Filed 21 December 1976)

1. **Criminal Law § 78— admission or stipulation by defendant — element of crime — validity**

Nothing in the State or Federal Constitutions nor in our case law prevents the defendant himself from making a judicial admission or stipulation to an undisputed fact, albeit the fact is essential to the State's case.

2. **Constitutional Law § 29; Criminal Law §§ 78, 141— admission of prior convictions — constitutionality of statute**

The statute permitting a defendant to admit a previous conviction required to be charged by the State in a special pleading or separate count when such conviction is an element of the offense affecting punishment, G.S. 15A-928, does not deprive the defendant of his right to a jury trial since the statute merely allows a defendant, by judicially admitting his prior convictions, to preclude the State from adducing evidence of them and to require the judge to submit the case to the jury without reference to them as if previous convictions were not an element of the offense.

3. **Criminal Law § 141— prior conviction as element of offense — purpose of proof — instructions**

Where the defendant denies a previous conviction which constitutes an element of the offense affecting punishment, the State must prove this element of the offense charged beyond a reasonable doubt, but when such evidence is introduced it is relevant only to the issue whether defendant has previously been convicted of an offense identical to the offense charged, and the judge must charge the jury that they shall not consider such a prior conviction in passing upon his guilt or innocence of the primary charge.

ON petition for discretionary review under G.S. 7A-31(b)(2). Appeal by State from *Judge Perry Martin,* 3 May 1976 Criminal Session of the Superior Court of LENOIR.

On 30 November 1975 defendant, Freddie Smith, was charged in a uniform traffic citation with driving under the influence of intoxicating liquor in violation of G.S. 20-138(a), his fourth offense. The citation incorporated a detailed statement of his previous three convictions for the same offense. Upon his trial in the District Court on 6 January 1976, defendant pled not guilty and was found guilty as charged. From a sentence of imprisonment he appealed to the Superior Court. When defendant gave notice of appeal, as required by G.S. 15A-928(d) for *de novo* trial in the Superior Court, the District

Attorney filed "superseding statements" of the charges, separately alleging the substantive offense of operating a motor vehicle on the public highway while under the influence of intoxicating liquor and the facts of defendant's prior convictions for violations of G.S. 20-138(a).

Upon his arraignment at the 3 May 1976 Criminal Session of the Superior Court, prior to entering his plea to the charges against him, defendant moved to quash "the entire statement of charges on the grounds that the statutes under which the statement is drawn, [G.S. 15A-928] . . . is unconstitutional, [and] deprives the defendant, Freddie Smith, of his right to trial by jury. . . . " Whereupon, Judge Martin summarily entered judgment "that the defendant's motion to quash the statement of charges is allowed for that the statutory scheme allowing such a two-count statement of charges when a multiple offense of driving under the influence is charged is unconstitutional under the U. S. and North Carolina Constitutions."

From this judgment the State appealed, and we allowed its petition for certification to this Court for initial appellate review under G.S. 7A-31(b)(2).

Attorney General Rufus L. Edmisten; Associate Attorney Jack Cozort for the State.

Turner and Harrison for defendant-appellee.

SHARP, Chief Justice.

Section (a) of G.S. 15A-928 (1975 Replacement) provides, *inter alia:* "When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter," an indictment or information charging the higher offense may not allege the previous conviction.

Section (b) requires that an indictment or information charging "the higher offense" referred to in (a) "be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the solicitor's option" this special pleading "may be incorporated in the principal indictment as a separate count." (This section limits the State's use of this special pleading as provided in Section (c).)

Section (c) allows the defendant, at the time of his arraignment and in the absence of the jury, to choose whether he will contest the issue of his prior conviction or convictions. If he admits the alleged previous conviction, Section (c) (1) requires the judge to submit the issue of his guilt of the principal charge to the jury without reference to such previous conviction and as if it were not an element of the offense. If the defendant denies the previous conviction or remains silent, Section (c) (2) permits the State to "prove that element of the offense charged before the jury as part of its case."

Section (d) provides that in trials *de novo* in the superior court upon an appeal from the district court, when the fact of a previous conviction is an element of the offense affecting punishment, "the State must replace the pleading in the case with superseding statements of charges separately alleging the substantive offense and the fact of any prior conviction, in accordance with the provisions of this section relating to indictments and informations." Jury trials in the superior court on such appeals must be held in accordance with the provisions of sections (b) and (c).

The defendant attacks the constitutionality of G.S. 15A-928 on the ground it violates N. C. Const. art. I, § 24 in that "it permits the question of the defendant's guilt of mutiple offenses to be determined without submission of the entire case to the jury." His premise is as follows: An accused cannot waive a trial by jury as long as his plea remains not guilty. "Therefore, as long as the plea is not guilty, the defendant cannot waive the jury trial as to any element of the crime charged. *State v. Camby*, 209 N.C. 50." Since G.S. 15A-928(c) permits a defendant to admit the previous convictions charged in the State's special pleading or separate count, it "clearly permits a defendant to waive a portion of his jury trial." Thus, the statute is unconstitutional.

[1] Defendant's syllogism is devoid of merit. The case of *State v. Camby*, 209 N.C. 50, 182 S.E. 715 (1935) does not support the proposition for which defendant cites it. *Camby* holds that when the defendant in a criminal prosecution in the superior court enters a plea of not guilty he cannot waive his constitutional right to a jury trial *and have the judge hear and determine his guilt or innocence;* that as long as his plea is not guilty the determinative facts cannot be referred to *the*

judge even by defendant's consent—they must be found by the jury. This pronouncement remains the law today. *See State v. Norman*, 276 N.C. 75, 170 S.E. 2d 923 (1969); *Still v. Muse*, 219 N.C. 226, 13 S.E. 2d 229 (1941). However, nothing in the State or Federal Constitutions nor in our case law prevents the defendant himself from making a judicial admission or stipulating to an undisputed fact, albeit the fact is essential to the State's case.

The rule is succinctly stated in *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971), a case in which the defendant, who was indicted for murder, judicially admitted the cause of the deceased's death. In writing the Court's opinion, Justice Huskins said with reference to the defendant's admission, "This is sufficient to remove the cause of death from contention and constitutes an admission that the head wound inflicted by defendant was fatal. . . . A stipulation of fact is an adequate substitute for proof in both criminal and civil cases. *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). 'Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact. In short the subject matter of the admission ceases to be an issue in the case. . . . ' Stansbury, North Carolina Evidence (2d Ed. 1963), § 166." *Id.* at 686, 178 S.E. 2d at 480. *See State v. Mitchell*, 283 N.C. 462, 469, 196 S.E. 2d 736, 740 (1973).

The case of *State v. Powell*, cited in the foregoing excerpt from *State v. McWilliams*, was a prosecution for the second offense of operating a motor vehicle upon the public highway while under the influence of intoxicating liquors. In *Powell*, the Court said: "Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment or warrant for a subsequent offense must allege the prior conviction or convictions, and *in the absence of judicial admission by defendant* the question as to whether or not there was a former conviction is for the jury, and not for the court." (Emphasis added.) 254 N.C. at 233, 118 S.E. 2d at 619. In such a case the law is clear that the defendant may stipulate the previous convictions charged against him.

[2, 3] The effect of G.S. 15A-928(c) is not to deprive the defendant of a jury trial. It merely allows defendant, by judicially

admitting his prior convictions, to preclude the State from adducing evidence of them and to require the judge to submit the case to the jury without reference to them and as if previous convictions were not an element of the offense. Where the State's allegation of a prior conviction or convictions is true, the benefit to the defendant of this provision is obvious. Where the defendant denies the previous conviction the State must prove this element of the offense charged beyond a reasonable doubt. *See* G.S. 15A-924(6)(d). When such evidence is introduced it is relevant only to the issue whether defendant has previously been convicted of an offense identical to the substantive offense charged, and the judge must charge the jury that they shall not consider such a prior conviction in passing upon his guilt or innocence of the primary charge. *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606, 87 S.Ct. 648 (1967).

For the reasons stated we hold that G.S. 15A-928 is immune to the attack which defendant makes upon it. Accordingly the judgment of Judge Perry Martin is

Reversed.

STATE OF NORTH CAROLINA v. LEWIS WILLIAMS

No. 65

(Filed 21 December 1976)

1. **Criminal Law §§ 23, 91— plea arrangement — rejection prior to arraignment — no continuance as matter of right**

Defendant was not entitled to a continuance as a matter of right when the trial judge rejected his negotiated plea offered prior to arraignment on the ground that the punishment therein provided was too little in view of the pending offenses. G.S. 15A-1023.

2. **Criminal Law §§ 23, 91— rejection of plea arrangement by court — continuance — when defendant is entitled to**

When the trial judge rejects a negotiated plea arrangement pursuant to G.S. 15A-1023 before actual arraignment of defendant and before the introduction of evidence, a defendant is not entitled to a continuance as a matter of right; however, where the trial court, pursuant to G.S. 15A-1024, does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed, a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.

3. Forgery § 2— forging payee's endorsement on check — no party actually defrauded — sufficiency of evidence of forgery

Though an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded or that any act be done other than the fraudulent making or altering of the instrument; therefore, the State's evidence in this forgery prosecution to the effect that defendant, without the payee's authorization or consent, endorsed the payee's name to the check and negotiated the check was sufficient to repel defendant's motion for judgument as of nonsuit.

ON *certiorari* to review the decision of the Court of Appeals, 29 N.C. App. 408, 224 S.E. 2d 265, finding error in the trial before *Friday, J.*, at the 8 September 1975 Session of GASTON Superior Court.

Defendant was charged with the felonies of forgery and uttering a forged check.

On 10 September 1975, defendant and his counsel entered into a negotiated plea arrangement with the district attorney. On that day defendant, through his counsel, waived reading of indictments in the following pending cases: Indictment 75CR1111—uttering; 75CR1110—uttering; 75CR1109—uttering and forgery; 75CR983—uttering and forgery; 75CR7340—uttering and forgery. After defendant had waived reading of the above bills of indictment, the district attorney informed the court that a plea had been negotiated. The court inquired if the State was aware that the pending charges involved punishment of up to eighty years. The paper writing contained the negotiated plea was handed to the court and upon inquiry by the court, it was disclosed that defendant was subject to a probationary judgment which carried a suspended sentence of imprisonment of eighteen months. Judge Friday then stated that, in view of the possible punishment, he could not go along with the terms of the negotiated plea arrangement. Defendant, through his counsel, thereupon withdrew the plea and orally requested a continuance. Without ruling on the request for continuance, Judge Friday said, "I believe it is automatic under the new statute, isn't it?". On 11 September 1975 defendant filed a written motion for a continuance which the trial judge denied. Defendant excepted to this ruling. Defendant was then arraigned and he entered a plea of not guilty.

The State's evidence tended to show that defendant had in his possession a check in the amount of $171, drawn to the order of his brother, Woodrow Williams. Without his brother's consent,

he endorsed the name Woodrow Williams on the check and presented it for cash on 1 February 1975 to William Macon Lawrence, the proprietor of the Dallas Supermarket. Mr. Lawrence, who had known defendant for twenty-three years, saw him endorse the check by signing the name Woodrow Williams. Mr. Lawrence cashed the check and after defendant left, Mr. Lawrence's wife asked, "that is not Woodrow Williams, is it?". Mr. Lawrence replied in the negative and called defendant from his automobile to endorse the check in his name. When defendant returned, he endorsed the check "George Williams." Mr. Lawrence never presented the check for payment.

Defendant offered no evidence.

The jury returned verdicts of guilty on both charges. Defendant appealed from judgment imposing a sentence of imprisonment for not less than four years nor more than seven years on the charge of forgery and a sentence of imprisonment for a period of three years on the charge of uttering a forged check. The latter sentence was suspended and defendant was placed on probation.

Attorney General Edmisten, by Associate Attorney Henry H. Burgwyn, for the State.

Don H. Bumgardner for defendant.

BRANCH, Justice.

[1] Defendant contends that he was entitled to a continuance as a matter of right when the trial judge rejected his negotiated plea on the ground that the punishment therein provided was too little in view of the pending offenses.

G.S. 15A-1023, in pertinent part, provides:

> (a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the solicitor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.
>
> (b) Before accepting a plea pursuant to a plea arrangement in which the solicitor has agreed to recommend a particular sentence, the judge must advise the parties

whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. A decision by the judge disapproving a plea arrangement is not subject to appeal.

The official commentary at this point contains the following language:

> . . . If the judge refuses to go along, the parties can either renegotiate or the defendant may withdraw his plea and secure a continuance as a matter of right. See § 15A-1024.

G.S. 15A-1024 provides:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

When the district attorney and defense counsel presented their proposed plea arrangement to the trial judge, he rejected it and stated his reasons therefor. Although the record does not affirmatively show that the trial judge "advised the defendant personally that neither the State nor the defendant is bound by the rejected arrangement," his action in permitting defendant to withdraw his plea was equivalent to the giving of such advice. Defendant does not contend that he was not afforded an opportunity to modify the plea arrangement or that he needed additional time to prepare for trial. His position is that G.S. 15A-1023 and G.S. 15A-1024 must be construed together so as to entitle him to a continuance as a matter of right.

It is a cardinal rule of statutory construction that the intent of the legislature controls the interpretation of statutes. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22; *Lockwood v. McCaskill,* 261 N.C. 754, 136 S.E. 2d 67. It is also well settled that statutes dealing with the same subject matter

must be construed *in pari materia* and harmonized to give effect to each other. *Utilities Commission v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663; *Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19. Yet, when the language of a statute is clear and unambiguous there is no room for judicial construction and the court must give the statute its plain and definite meaning without superimposing provisions or limitations not contained within the statute. *State v. Camp*, 286 N.C. 143, 209 S.E. 2d 754; *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643.

§ 350.5(4) of the A.L.I. Model Code of Pre-Arraignment Procedure is nearly identical to our G.S. 15A-1023(b). In Part III—Commentary of the Model Code, at page 624, we find the following comment:

> If the parties do not reach a new agreement after the judge rejects the first one, and the case then proceeds to trial, the trial should be had wherever feasible before a different judge so as to eliminate any possible prejudice.

§ 350.6 of the Model Code is the counterpart of our G.S. 15A-1024 except for the striking difference that it does not contain the following language: "Upon withdrawal, the defendant is entitled to a continuance until the next session of court."

[2] Although we are not bound by these commentaries, we have no quarrel with the conclusions therein contained. The legislature might well have enacted a statute providing for a continuance as a matter of right when the trial judge rejects a plea arrangement at any stage of the proceedings. This the legislature did not do. Instead the legislature enacted two separate and distinct statutes on the same day. The unambiguous language of G.S. 15A-1023(b) makes it clear that its provisions are activated when the trial judge rejects a negotiated plea arrangement *before* actual arraignment of defendant and *before* the introduction of evidence. *This statute does not provide for a continuance as a matter of right.*

The equally unambiguous language of 15A-1024 discloses that this statute applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. *Under the express provisions of this*

statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.

There is no conflict in the language of the statutes requiring that they be harmonized or construed. Rather, it clearly appears that the legislature intended that these separate statutes be independent and apply to entirely different, carefully delineated factual situations. Under these circumstances, it is not within our power to interpolate the right to a continuance into the provisions of G.S. 15A-1023(b).

The provisions of G.S. 15A-1023(b) govern the facual situation presented by this appeal and, therefore, the defendant was not entitled to a continuance as a matter of right. Having so decided, we also hold that there has been no showing of abuse in the trial judge's discretionary ruling on defendant's motion to continue. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526.

[3] Finally, we find no merit in defendant's argument that the trial judge erred by denying his motion for judgment as of nonsuit. Defendant takes the position that since the witness Lawrence knew that defendant endorsed the wrong name on the check there was no evidence of fraud.

An intent to defraud is an essential element of forgery. However, it is not essential that any person be actually defrauded or that any act be done other than the fraudulent making or altering of the instrument. *State v. Hall,* 108 N.C. 776, 13 S.E. 189.

Here the State's evidence to the effect that defendant, without the payee's authorization or consent, endorsed the payee's name to the check and negotiated the check was sufficient to repel defendant's motion for judgment as of nonsuit. *See State v. Coleman,* 253 N.C. 799, 117 S.E. 2d 742.

The decision of the Court of Appeals is

Reversed.

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

ARTIS v. WOLFE

No. 110 PC.

Case below: 31 N.C. App. 227.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 21 December 1976.

FORESTER v. MARLER

No. 100 PC.

Case below: 31 N.C. App. 84.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

HACKETT v. HACKETT

No. 4 PC.

Case below: 31 N.C. App. 217.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

HARGROVE v. PLUMBING AND HEATING SERVICE

No. 102 PC

Case below: 31 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 denied 21 December 1976.

HIGHWAY COMM. v. ROSE

No. 90 PC.

Case below: 31 N.C. App. 28.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

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

STATE v. ARTIS

No. 117 PC.

Case below: 31 N.C. App. 193.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

STATE v. BRAUN

No. 108 PC.

Case below: 31 N.C. App. 101.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 December 1976.

STATE v. FREEMAN

No. 85 PC.

Case below: 31 N.C. App. 93.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

STATE v. GWALTNEY

No. 115 PC.

Case below: 31 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 December 1976.

STATE v. MILLER

No. 103 PC.

Case below: 31 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

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

STATE v. O'CONNOR

No. 3 PC.

Case below: 31 N.C. App. 518.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 January 1977.

STATE v. WILLIAMS

No. 97 PC.

Case below: 31 N.C. App. 111.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 December 1976.

STEVENSON v. DEPT. OF INSURANCE

No. 111 PC.

Case below: 31 N.C. App. 299.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 21 December 1976.

WOODS v. INSURANCE CO.

No. 96 PC.

Case below: 31 N.C. App. 156.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 21 December 1976.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND DUKE POWER COMPANY, APPLICANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 145

(Filed 31 January 1977)

1. **Utilities Commission § 6— fixing rates — exercise of legislative function**

The Utilities Commission is a creation of the Legislature and, in fixing rates to be charged by public utilities, exercises the legislative function.

2. **Utilities Commission § 6— fixing rates — authority of Commission**

The Utilities Commission has no authority except that given to it by statute; *a fortiori*, the Commission has no authority to permit that which is forbidden by statute or to extend a previously granted rate increase which the statute has declared terminated.

3. **Statutes § 5— unambiguous statute — construction**

When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.

4. **Electricity § 3; Utilities Commission § 6— statutory termination of fuel clause — extension of clause by Utilities Commission**

The statute authorizing the Utilities Commission to fix reasonable and just rates for public utility service, G.S. 62-3(24), did not permit the Commission to extend its previously authorized rate increases "based solely upon the increased cost of fuel" beyond 1 September 1975, the date provided by G.S. 62-134(e) for the full termination of such fuel adjustment charges.

5. **Electricity § 3; Utilities Commission § 6— statutory termination of fuel clause — validity**

The termination of the fuel clause rate increases by G.S. 62-134(e) was not unjust or a "penalty" since the statute authorized the Utilities Commission, after hearing, to incorporate into the basic rates of a utility, chargeable on and after 1 September 1975, an increase determined by the then cost of coal.

6. **Electricity § 3; Utilities Commission § 6— statutory termination of fuel clause — surcharge to recover past coal expenses**

The purpose of the Fuel Adjustment Clause was not the "recovery" of past excess expenditures for fuel but was to provide a measure of the reasonably anticipated cost of coal used in generating the kwh to which the factor was to be applied; therefore, when the Fuel Adjustment Clause was terminated by G.S. 62-134(e) on 1 September 1975, there was no accumulation of money due the power companies under the Fuel Adjustment Clause in addition to that collectible through the companies' regular bills for services in prior

months, and an order thereafter entered by the Utilities Commission permitting a power company to impose a surcharge for the recovery of the excess cost of fossil fuel burned during the two months immediately preceding the termination of the Fuel Adjustment Clause was in excess of the Commission's authority and without justification either in law or in the name of fair play.

Justice COPELAND dissenting.

Chief Justice SHARP and Justice MOORE join in the dissent.

APPEAL by the Attorney General from the decision of the Court of Appeals, reported in 30 N.C. App. 459, 227 S.E. 2d 593, which affirmed an order of the North Carolina Utilities Commission, hereinafter called the Commission, Judge Martin dissenting.

The order from which the present appeal is taken was issued 27 August 1975. The portions of it pertinent to this appeal are:

"1. That effective on bills rendered on and after September 1, 1975, Duke Power Company is hereby authorized to adjust its basic retail electric rates by the addition thereto of 0.4181¢/KWH based solely on increased fuel costs pursuant to North Carolina G.S. 62-134(e).

* * *

"4. That effective on bills rendered on and after September 1, 1975, Duke Power Company is hereby authorized to apply a temporary surcharge designed to recover the unbilled revenues accrued as of August 31, 1975 at [sic] a result of the lag in the old fuel adjustment clause on its North Carolina retail jurisdictional service. The surcharge should be designed on a ¢/KWH basis to recover the total deferral plus associated gross receipts taxes over a period of approximately twelve (12) months. The surcharge shall begin on September 1, 1975 and be terminated when the actual unbilled revenue total attributable to North Carolina retail jurisdictional service is recovered."

The appeal of the Attorney General relates only to the surcharge purportedly authorized by paragraph 4 of the Commission's order, above quoted.

The following history of the Fuel Adjustment Clause, derived from the record before this Court in Case No. 131, Fall

Term 1976, in which the validity of that clause was in question, will be helpful to an understanding of the present appeal.

On 21 June 1973, the Commission issued its order in a general rate case, substantially increasing Duke's basic retail rates and setting them at levels which the Commission then found would enable Duke to earn a fair share on the fair value of its properties used and useful in rendering electric service to the public. The rate schedules then so fixed contained no fuel adjustment clause.

Within a few weeks thereafter, Duke applied to the Commission for a further increase in its basic retail rates designed to produce annually $60,000,000 in additional revenues. This application was set for hearing and the proposed new rates were suspended pending such hearing. This application was based upon statistical data reflecting Duke's revenues and operating costs in a 12 months' test period ending 31 July 1973.

On 30 October 1973, the Commission issued its order allowing Duke to put into effect, pending such hearing, an interim increase in its basic retail rates designed to produce annually $28,000,000 in revenues over and above those designed to be produced by the rates which had been fixed in the order of 21 June 1973. This interim increase was made "effective on bills rendered on metered service on and after November 15, 1973, for service rendered after October 15, 1973." The stated basis for this order was that the rate increase which had been granted on 21 June 1973 was not sufficient to enable Duke to attract capital for its contemplated expansion of its plant.

On 30 November 1973, while its above mentioned application for the $60,000,000 rate increase was awaiting hearing, Duke filed with the Commission, simultaneously, two more separate applications or requests for rate adjustments. The first of these was a motion, in the then pending proceeding for "Additional Interim Rate Relief," this being a request for authority to put into effect immediately, without waiting for a hearing, further increases in rates totaling $10,519,000 per year, which increase Duke asserted was necessary to offset the sharp increase in the cost of coal which had occurred since the end of the test year used in the then pending general rate case (31 July 1973). The second application, so filed by Duke on 30 November 1973, was an application for authority to adjust all of its retail rate schedules by adding thereto an automatic coal

cost adjustment clause "to become effective on bills rendered on and after January 1, 1974, with respect to coal burned on and after November 1, 1973."

In response to these two applications, so filed on 30 November 1973, without notice or hearing, the Commission issued on 19 December 1973 two separate orders. The first such order, after stating that the cost of coal burned by Duke in October 1973, had substantially increased since 31 July 1973 (the end of the test period in the then pending general rate case), authorized Duke, pending a final hearing by the Commission, to put into effect "on bills rendered on and after January 19, 1974 for service rendered on and after December 19, 1973," a further interim increase in its basic rates designed to produce additional revenues of $7,900,000 per year, the Commission having found that Duke, in its application for "Additional Interim Rate Relief," had miscalculated the effect upon it of increases in fuel costs since 31 July 1973.

The second of the orders issued simultaneously on 19 December 1973 provided:

> "1. That effective on bills rendered on and after January 19, 1974 for service rendered on and after December 19, 1973 with respect to coal burned on and after November 1, 1973, the Applicant, Duke Power Company, is authorized and permitted to put into effect the coal cost adjustment clause attached to its application as Exhibit B."

The effect of the Coal Cost Adjustment Clause was to add to the customer's bill for service for each month, beginning with bills rendered on and after 19 January 1974 (for services on and after 19 December 1973), over and above the bill computed on the basic rate as so increased by the interim orders above mentioned, an additional charge measured by the excess of the cost per kilowatt hour of coal burned in Duke's generating stations, during the second month preceding the current billing month, over and above the base cost of coal per kilowatt hour generated in Duke's generating stations during such second preceding month, this being computed pursuant to the following formula:

$$\text{"a} = \frac{(b-c)e \times 100\text{"}}{d}$$

(In this formula "a" is the amount of the adjustment to the current bill, in cents, per kilowatt hour; "b" is the

total cost, in dollars, of the coal burned in Duke's coal fired generating stations during the second month preceding the current billing month; "c" is the base cost of coal, in dollars, which is computed by multiplying by $.004745 the net kilowatt hours generated in Duke's coal fired generating stations during the second month preceding the current billing month; "d" is the total kilowatt hours sold during the second month preceding the current billing month; "e" is an adjustment for revenue-related taxes (1.0638).)

Thus, pursuant to the two orders simultaneously issued 19 December 1973, a bill rendered to a customer of Duke on 19 January 1974 for electric service rendered to him on and after 19 December 1973 was computed as follows:

(1) The basic charge was computed by multiplying the number of kilowatt hours of energy used by the customer, from 19 December through 18 January, by the basic rates fixed by the Commission in its order issued 21 June 1973, increased by the two interim orders of 30 October 1973 and 19 December 1973 (these increases being 8.0 per cent and 2.25 per cent, respectively).

(2) The coal cost adjustment charge was computed in this way: Determine, in dollars, the total cost of coal burned in Duke's coal fired generating stations during November 1973; from this subtract the base cost of such coal (computed by multiplying $.004745 by the net kilowatt hours of energy generated in Duke's coal fired generating stations during November 1973); multiply the remainder so obtained by 100 times 1.0638; and divide the product so obtained by the total kilowatt hours of energy (from all generating sources) sold in November 1973. The number of kilowatt hours used by the customer in the month beginning 19 December 1973 was then multiplied by this coal clause factor so computed.

(3) The customer's January 1974 bill consisted of the sum of (1) plus (2).

Month after month, bills were similarly computed. That is, the coal clause addition to a 19 February bill was computed by using Duke's December 1973 experience rather than that of November 1973, and the coal clause addition to a 19 March

1974 bill was computed by using Duke's January 1974 experience, and so on.

After some months, the matter was set for a hearing by the Commission and, following such hearing, the Commission, on 10 October 1974, issued its order reaffirming its approval of the Coal Cost Adjustment Clause (the order of 19 December 1973) and providing that such clause would remain in effect until 1 November 1974, on which date a "Fossil Fuel Adjustment Clause" would take effect. The Fossil Fuel Adjustment Clause, so approved and put into effect, was exactly like the former Coal Cost Adjustment Clause, except that it related to all types of fossil fuel and the factor used in computing the base cost of fossil fuel was fixed at $.005037 rather than the figure ($.004745) used in the former Coal Cost Adjustment Clause.

Thus, under the Commission's order of 10 October 1974, the fuel increment in the bill of a customer billed 1 November 1974 was not computed on the basis of Duke's coal experience in September 1974, as it would have been under the order of 19 December 1973, but was computed on the basis of Duke's fossil fuel experience in September 1974.

On 9 May 1975, the General Assembly enacted Chapter 243 of the Session Laws of 1975, which added to G.S. 62-134 a new subsection (e) providing:

> "(e) * * * *All monthly fuel adjustment rate increases* based solely upon the increased cost of fuel, as to each public utility, as presently approved by the Commission *shall fully terminate* effective September 1, 1975, except that the same shall be earlier terminated as to each such public utility upon the effective date of any final order of the Commission under this section * * * . " (Emphasis added.)

The application of Duke for approval of the original Coal Cost Adjustment Clause, filed 30 November 1973, stated:

> "[I]t is of the utmost importance to Duke that the Coal Clause be approved and that it be permitted to become effective at the earliest possible date. The protection to Duke's already inadequate rate of return that the Coal Clause would afford is critical in view of alarming indications that the availability and price of coal is [sic] rapidly coming under substantial pressures. * * *

"Considering Duke's weakened financial condition, *the prospects* for dramatic increases in the cost of coal *in the immediate future* present for Duke an alarming situation which must be faced immediately, Duke is simply not in a position financially to absorb the devastating impact that sharp increases in fuel costs *would have* on its earnings.

There are numerous indications that Duke *will be* faced with spiraling coal prices *in the very near future.*

* * *

"Duke must be able to attract investor funds in competition with many others. * * * Most of these other utilities * * * already have fuel cost adjustment clauses in their rate structures. * * * Investors and investor advisors are acutely aware of the beneficial effect of fuel cost adjustments * * * on the stability of a utility's earnings * * * . For this reason Duke's common stock and other securities * * * are and will be at a distinct competitive disadvantage in securities markets without the protection of a coal cost adjustment clause." (Emphasis added.)

In the Commission's order of 19 December 1973 allowing the interim increase in Duke's basic rates (i.e., apart from the coal clause increment), the Commission concluded:

"(3) The Commission concludes that the difference in the costs of fossil fuel burned in October, 1973, and burned in July, 1973 in $/KWH should be multiplied by the number of kilowatt hours * * * sold to metered North Carolina retail customers to give the revenues needed to offset the increased costs of fossil fuel. * * * The Commission is of the opinion that *this amount of relief is adequate* and justified *to recover the unusual increase in the cost of coal since the end of the test period.*" (Emphasis added.)

The Commission consolidated for hearing, and ultimately heard together, Duke's application for a $60,000,000 increase in its basic rates (in which proceeding the two interim rate increases above mentioned were ordered) and Duke's application for the addition of the Coal Cost Adjustment Clause. At that hearing witnesses for Duke testified:

Mr. Frazer: "The price of coal *is expected to rise* by 36% during 1974 causing an annual increase in expense of

$65 million dollars [sic]. Without the ability to recover those increased costs as quickly as possible, the earnings of the Company would drop to a dangerous level. * * * ." (Emphasis added.)

Mr. Hatley: "Since the charge or credit adjustment factor the Clause uses is determined by the cost of the coal burned two months in the past, i.e., the charge or credit applied to January bills is determined by the cost of coal burned in November, it was necessary to use the actual costs of coal burned in October 1973 as the base cost to meet the desired effects. * * *

"Duke desired the effect of a clause to be minimal or inoperative during the initial billing month. *Duke had such a design because we had at the same time asked for an interim increase simultaneously with the coal clause, and it was just our desire that the coal clause be near inoperative at the time it went into effect.*" (Emphasis added.)

Mr. Parker: "As to the advisability of Duke's having an automatic coal cost adjustment clause in its rate schedules, it is my opinion, and that of Duke's management, that such an adjustment clause is not only advisable, but absolutely necessary, *if we are to procure the coal necessary* to enable us to meet our service responsibility to our customers." (Emphasis added.)

Mr. Horn: "By the end of November 1973, there were numerous indications that Duke would be faced with spiraling coal prices in the very near future. * * * (Emphasis added.)

"Duke simply was not in a position financially to absorb the tremendous impact that sharp increases in fuel costs *would have* on its earnings." (Emphasis added.)

The following facts appear from the record before the Commission in the proceeding from which this appeal arises:

Duke filed its application on 29 June 1975, subsequent to the enactment of G.S. 62-134(e), supra, asking two things: (1) that the Commission adjust upward Duke's basic rates, previously fixed separate and apart from the Fossil Fuel Adjustment Clause and, therefore, based upon the cost of coal as it was

prior to the adoption of the Coal Cost Adjustment Clause in 1973; and (2) authority to make an additional surcharge for the recovery of an amount equal to the cost of fossil fuel burned in July and August 1973 less the base cost of such fuel (i.e., b — c in the fuel clause formula for those two months).

The Commission granted the application in both respects. This appeal relates only to the second aspect of its order, the surcharge. The first aspect of the order had the effect of shifting into the basic rates the accumulated increases previously made under the fuel adjustment clauses, thus making these increases permanent, insofar as anything relating to rates for utility service is permanent. Thus a customer billed September 1, for service rendered in August, would, apart from any surcharge, pay at a rate reflecting the full cost of coal burned in serving him.

In its application in the present case, Duke stated:

> "Since G.S. 62-134(e) provides for the termination of the fuel clause, it is essential that Duke's basic rate schedules be changed to reflect the current cost of fossil fuel. * * * *The adjustment will permit the recovery by Duke of costs for fossil fuel based upon the current level of costs* and to the extent the level of costs decreases or increases in the future, future applications will seek to have rates adjusted to reflect such changes. * * * [At the hearing evidence was introduced to bring the "current cost" of fuel forward from the date of the application to the time of the hearing.] * * * Upon the entry of an order by the Commission in this docket pursuant to Duke's present Application filed under G.S. 62-134(e), Duke's fuel clause will terminate. At the time of such termination, Duke will have recorded on its books revenues for two months, but such revenues will be unbilled and uncollected. * * * These costs * * * will be accrued but not collected by Duke unless recoverable under an order of the Commission." (Emphasis added.)

At the hearing Mr. William Stimart, Treasurer of Duke, testified:

> *"This application seeks to incorporate into the Company's basic rates the level of fossil fuel cost the Company has been recovering through the fossil fuel clause* * * *

which terminates under the provisions of the new statute. * * *

"At the point in time that G.S. 62-134(e) terminates the present fossil fuel clause, there will be recorded on the Company's books two months of unrecovered fuel costs; which unless specifically provided for by the Commission in response to this application would forever be lost to the Company. * * *

"As to whether we would be collecting, let us say in August, for actual costs of fuel in June, under either the new or the present, I think the rule is changed, I think under the present fuel cost it is fair to say that the Commission's order that we have had in the interpretation that you are right, that we would collect in August, I think *under the new rules and regulations, that we would collect in August and* [*sic*] *estimate for August costs, not June costs.* * * *

"See, we have wiped out under the new procedure the mechanics of an automatic lag and automatically collecting 'X' months forward that cost which we incurred previously. And to use August is a bad month, we ought to speak to September. *In September we will collect whatever the Commission says is aceptable level of fuel.* They don't identify that as June's cost or they may use June mathematically to determine what they think September is going to be. But, we will collect in September, we will not be subject to refund, if we undercollect, in relationship to the actual, that is tough. If it turns out that we have undercollected for that month of September, I understand that we can make an application that says, look, we undercollected in September, we want to make sure come the next month we are able to collect, we are able to collect from the customers what we now know is the proper level of fuel costs. And similarly if we found we overcollected, I believe under the rule we are under some compulsion to file an application to do something about that.

"As to whether under the operation of the rule we would reduce the customers' future fuel cost expense because the September costs were actually less than that charged, I don't like to identify with the month of September, you are right in saying, look the fuel cost has gone

down, so now, we now have a new experience factor so that lowers the level of fuel cost that you are collecting from the customer, so when we have the September experience and we find that out in November *we are not going to tell the customers we are adjusting the November bill because of what we billed them in September, but because we now know or have experienced a new level of fuel cost, which is lower than what we had been collecting from them, it is just like almost a rate case in itself. We file a new rate case, we start collecting rates now. We don't go back and we don't get to go back and collect from the customer in 1974 when we found out we did not collect enough from him.*" (Emphasis added.)

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General.

Edward B. Hipp, Commission Attorney, by Wilson B. Partin, Jr., Assistant Commission Attorney, for North Carolina Utilities Commission.

Steve C. Griffith, Jr., General Counsel; George W. Ferguson, Jr., Deputy General Counsel; Kennedy, Covington, Lobdell & Hickman by John M. Murchison, Jr., for Duke Power Company.

LAKE, Justice.

This case is a companion to No. 143, *State ex rel. Utilities Commission and Virginia Electric & Power Company v. Edmisten, Attorney General,* and No. 144, *State ex rel. Utilities Commission and Carolina Power & Light Co. v. Edmisten, Attorney General.* The three cases were argued together and, as the Court of Appeals observed in affirming the orders of the Utilities Commission, while in the three cases there are variations in dates, and the amounts involved and other inconsequential matters, the legal questions are the same. The briefs of the parties in the several cases so show. They have been considered together and all arguments made and authorities cited in the several briefs have been taken into consideration in this decision.

In Case No. 39, *State ex rel. Utilities Commission and Carolina Power & Light Co. v. Edmisten, Attorney General,* 291 N.C. 327, 230 S.E. 2d 651, decided 21 December 1976, this Court sustained the validity of the fuel adjustment clauses which the

Commission authorized Duke, CP&L and Vepco to put into effect in late 1973 and early 1974. The present cases are an aftermath of those clauses which were terminated, as of 1 September 1975, by the enactment of G.S. 62-134(e) in the spring of 1975.

G.S. 62-134(e) provides: "*All* monthly fuel adjustment rate increases based solely upon the increased cost of fuel, as to each public utility, as presently approved by the Commission shall *fully terminate* effective September 1, 1975 * * * ." (Emphasis added.)

G.S. 62-134(e) also provides that, upon application by a public utility, the Commission, solely on the basis of the increased cost of fuel used in the generation of electric power, may authorize such utility to increase its rates.

Pursuant to this statute, the three electric utility companies applied to the Commission for authority to increase their basic rates for electric power and, in addition, to put into effect a temporary surcharge. The Commission, in the case of each company, did two things: (1) It authorized the utility to increase its basic rates, chargeable for electric power billed on and after 1 September 1975 (i.e., generated and sold on and after 1 August 1975), to reflect (i.e., to pass on to the users of power) the full cost of fossil fuel used in generating such power, such cost being computed on the basis of the then most recent available data; (2) it ordered the utility to put into effect a further charge to its customers, to be spread over a period of 10 months, sufficient in the aggregate to yield to the company the full expense (over and above the previously established base price of fuel) incurred by it for fossil fuel burned in July and August 1975 in the generation of electric power. Only this surcharge is involved in the present appeal.

Had there been no surcharge whatever, the increase in the utility's basic rates so allowed by the Commission would have produced for the utility in September 1975 (that is, from October bills for September service) the same, or substantially the same, revenue which that company would have derived under the old Fossil Fuel Adjustment Clause had it not been terminated by the Legislature. This is shown by the testimony of Mr. Behrends, Vice President of Carolina Power & Light Company, and the testimony of Mr. Stimart, Treasurer of Duke Power Company, who testified as witnesses for their respective

companies before the Commission in the hearings in the present cases.

Mr. Behrends testified:

> "Now, insofar as the customer is concerned * * * there will be no practical difference to him as of September 1, whether or not there is a fuel adjustment clause. He will have a charge that includes the fuel cost, he will certainly have a bill that includes the fuel costs as precisely as administration and nature of this proceeding will permit it to be. * * * At the present time we have filed to do what the statute requires, to obtain a base rate which best reflects our current level of fossil fuel expense."

Mr. Stimart testified:

> "This application seeks to incorporate into the company's basic rates the level of fossil fuel cost the company has been recovering through the fossil fuel clause * * * which terminates under the provisions of the new statute. * * * In September we will collect whatever the Commission says is acceptable level of fuel."

Thus, the surcharge here in question enables the utility, in addition to collecting from its customers in September 1975, and subsequent months, the entire amount which it would have collected had the fuel clause remained in force, to collect also an aggregate for the three companies of approximately $36,000,000 on account of coal burned in July and August 1975.

Some time after the original Fuel Adjustment Clause was put into effect, each company put into effect accounting practices with reference to its expenses for fuel and revenues collectible under that clause. These varied from company to company. Apparently, Duke's procedure was to enter upon its books, in the month in which the fuel was burned, what it designated thereon as "unbilled revenues," these being the amounts it estimated would be received by it pursuant to the Fuel Adjustment Clause. CP&L's practice appears to have been to deter the entry of coal expense to the month in which it billed its customers for the electricity generated by the fuel so burned. These accounting practices were subsequently approved by the Commission. Thus, they were proper accounting practices for purposes such as determining net income for tax purposes and making reports of net income to stockholders and investment

services. Although these were proper accounting practices, they could not create a liability upon the company's customers or establish the company's right to recover from its customers the amounts so entered. Duke concedes this in its brief, stating: "Duke in no way asserts that its entitlement to recover its unbilled revenues involved in this appeal arises because of the accounting practices approved by the Commission."

The companies say in their briefs that, by reason of the termination of the Fuel Adjustment Clause rate increases by G.S. 62-134(e), they could not "recover" such "unbilled revenues" or "deferred expenses" shown on their books as of September 1, 1975, unless the Commission took action authorizing them to do so. That is, the companies concede that G.S. 62-134(e), standing alone, would deprive the companies of any right to collect from users of power that which the surcharge here in question permits them to charge and collect. The companies do not challenge the constitutionality of this termination by the Legislature of the Fuel Adjustment Clause. This they could not have done successfully without a showing that the rates left in effect by the Legislature deprived them of a fair return upon their properties used and useful in rendering service to the public. No such showing was made or undertaken by the companies in these cases. They rely entirely upon the order of the Commission allowing the surcharge.

[1, 2] The Commission is a creation of the Legislature and, in fixing rates to be charged by public utilities, exercises the legislative function. It has no authority except that given to it by statute. *Utilities Commission v. Merchandising Co.*, 288 N.C. 715, 722, 220 S.E. 2d 304 (1975); *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972); *Utilities Commission v. R. R.*, 268 N.C. 242, 245, 150 S.E. 2d 386 (1966); *Utilities Commission v. Motor Lines*, 240 N.C. 166, 81 S.E. 2d 404 (1954). *A fortiori*, the Commission has no authority to permit that which is forbidden by statute or to extend a previously granted rate increase which the statute has declared terminated. In its brief in this Court the Utilities Commission states:

> "The termination of the old fuel clause on September 1, 1975, pursuant to G.S. 62-134(e), prevented the recovery of Duke's July and August fuel expenses through the nor-

mal operation of the fuel clause. The Commission's Order of August 27, 1975, permitted Duke to recover through the surcharge these two months costs actually incurred. In so deciding the Commission was squarely faced with the interpretation of G.S. 62-134(e). Clearly the statute terminated the old fuel clause effective September 1, 1975. The question remained as to whether Duke could recover the fuel expenses which were incurred in July and August, 1975 and which were recoverable under the old fuel clause. *The Commisison decided* that the Legislature did not intend to penalize Duke by denying it recovery of its July and August, 1975, fuel expenses actually incurred." (Emphasis added.)

[3] When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973); *Utilities Commission v. Membership Corp.,* 275 N.C. 250, 166 S.E. 2d 663 (1969); *Colonial Pipeline v. Clayton,* 275 N.C. 215, 166 S.E. 2d 671 (1969); *Valentine v. Gill,* 223 N.C. 396, 27 S.E. 2d 3 (1943); *In re Poindexter's Estate,* 221 N.C. 246, 20 S.E. 2d 49, 140 A.L.R. 1138 (1942); *Morris v. Chevrolet Co.,* 217 N.C. 428, 8 S.E. 2d 484, 128 A.L.R. 132 (1940); *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90 (1938). It is difficult to imagine language clearer than this provision of G.S. 62-134(e): "*All* monthly fuel adjustment increases based solely upon the increased cost of fuel, as to each public utility, as presently approved by the Commission shall *fully terminate* effective September 1, 1975." (Emphasis added.)

[4] The contention of the companies and the Commission that other provisions of Chapter 62 of the General Statutes, including G.S. 62-3(24) authorizing the Commission to fix reasonable and just rates for public utility service, permit the Commission to extend its previously authorized rate increases "based solely upon the increased cost of fuel" beyond 1 September 1975 is utterly without merit. It is well established that when there are two statutes, one dealing specifically with the matter in issue and the other being in general terms which, nothing else appearing, would include the matter in question, the specific statute controls. *State v. Baldwin,* 205 N.C. 174, 170 S.E. 645 (1933); *Young v. Davis,* 182 N.C. 200, 108 S.E. 630 (1921); *Bramham v. Durham,* 171 N.C. 196, 88 S.E. 347 (1916). G.S. 62-134(e)

deals specifically with the continuation of previously granted rate increases based solely on the increased cost of fuel. The Commission's "decision" that the Legislature, in enacting this statute, did not intend to deny the utility "recovery of its July and August 1975 fuel expenses actually incurred" is not an interpretation of the statute but a nullification of it, which is beyond the authority of the Commission. The wisdom and fairness of the Legislature's determination, clearly expressed, may not be reviewed by the Commission, or even by the courts in the absence of a constitutional question, which is not presented on this appeal.

[5] There is, however, no basis for declaring the legislative termination of the fuel clause rate increases unjust or, in the language of the Commission's brief, a "penalty." G.S. 62-134(e) did not roll back electric power rates. On the contrary, it authorized the Commission, after hearing, to incorporate into the basic rates of the utility, chargeable on and after 1 September 1975, an increase determined by the then cost of coal. As above noted, the testimony of officials of the companies shows that is precisely what the Commission did, separate and apart from the surcharge here in question. The "decision" of the Commission to permit the companies, in addition, to collect, by surcharge, the amount they would have collected under the Fuel Adjustment Clause in September 1975, simply flies in the face of the statute.

[6] The theory of the companies, and of the Commission, upon this appeal is that in the months of July and August the companies incurred an actual expense for fuel burned in the generation of electric power, as shown on their respective books, and this amount they had a right to collect in September and thereafter, notwithstanding the termination of the fuel clause rate increases, for the reason that this accumulation resulted from a lag between the incurring of the expense and the collection from the customers of bills for service. That is, the companies contend, and the Commission acquiesces, that the purpose of the Fuel Adjustment Clause was to enable the company to recover expenses incurred by it prior to the month in which service was rendered and, therefore, prior to the month in which the customer was billed for such service. The contention of the Attorney General is that the Fuel Adjustment Clause had no such purpose but was a device to charge the customers for the expense of coal burned in serving them during the month for

which the bill is rendered. That is, the Attorney General contends that the Fuel Adjustment Clause uses the company's experienced fuel costs, in the month preceding that in which the electricity is consumed, only as a measure of the cost of fuel used in generating the power for which the bill is rendered.

To resolve this question, we must go back to December 1973 when the Fuel Adjustment Clause was first authorized. For the reasons hereinafter set forth, we conclude that, as of 1 September 1975, there was no accumulation of money due the companies under the Fuel Adjustment Clause in addition to that collectible through the companies' regular bills for service in prior months.

Duke (and the other companies similarly) speaks of a 60 day lag, inherent in the Fuel Adjustment Clause, in Duke's recovery of its fuel expense. There was no such regulatory lag. Duke applied to the Commission on 30 November 1973 for two things: (1) An interim increase in its basic rates because of the rise in the price of coal experienced by Duke after 31 July 1973, the end of the orthodox 12 months test period used in Duke's then pending general rate case; (2) a clause permitting further monthly increases in rates if and when further increases in the cost of coal occurred. The Commission granted both petitions, the Fuel Adjustment Clause authorized by it being the identical clause for which the company petitioned.

On 19 December 1973, less than three weeks after the petition was filed by Duke, the Commission put the Fuel Adjustment Clause into effect. The clause became effective upon every kilowatt hour sold on the day the order was issued and thereafter. To be sure, the money was not collected from the customer until the customer was billed one month later, pursuant to Duke's normal billing practice. That is, the first fuel adjustment clause rate increase took effect 19 days after Duke applied for it and the revenues resulting therefrom were received by the company in its due course of billing for service rendered. From time immemorial, electric power companies in this State have billed their customers for electric service at the end of the use month, instead of collecting in advance by the use of coin operated meters or some other billing device. Thus, this so-called lag is the result of the company's own sound business practice and is not something inherent in the Fuel Adjustment Clause.

Each month, during the life of the Fuel Adjustment Clause, the rate increase authorized thereby was applied to every kilowatt hour sold in that month and was billed and collected in the usual way at the end of the use month. Thus, there could be no collectible accumulation of fuel expense at the end of the life of the Fuel Adjustment Clause unless there was, at its inception, a right to collect for then past fuel expense. We think it clear that it was not the intent of the fuel clause applied for by Duke on 30 November 1973 to charge December users of power so as to permit the recovery by Duke of coal expense incurred in November, but the intent was to use the November experience, the most recently available data, as a measure of the December fuel expense recoverable from December users of power. Had the Legislature, immediately after the Commission put the Fuel Adjustment Clause into effect, enacted G.S. 62-134(e) so as to terminate the Fuel Adjustment Clause on 1 January 1974, we think it inconceivable that serious consideration would have been given to a contention that the utility was entitled to a surcharge on 1974 users to recover fuel expense incurred by Duke in November 1973, the month before the Fuel Adjustment Clause was even applied for by Duke.

The Attorney General argues that such a surcharge would be retroactive rate making, which, as all of the parties agree, would be improper. *Utilities Commission v. City of Durham*, 282 N.C. 308, 318, 193 S.E. 2d 95 (1972); *Utilities Commission v. Morgan*, 277 N.C. 255, 267, 177 S.E. 2d 405 (1970). We agree with the argument of the companies, and of the Commission, that this contention of the Attorney General is not technically correct. Technically, retroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use. The surcharge here in question (and the hypothetical surcharge in 1974 above mentioned) is a charge to customers for power used after the surcharge took effect and, therefore, is not, technically, retroactive rate making. This, however, does not deprive the Attorney General's attack upon the surcharge of validity.

The basic theory of utility rate making, pursuant to G.S. 62-133, is that rates should be fixed at a level which will recover the cost of the service to which the rate is applied, plus a fair return to the utility. A utility company may not properly be denied the right to charge such a rate, for the present use

of its service, for the reason that, in a preceding month, the utility earned an excessive rate of return due to the fact that an expense which it was expected to incur in such previous month did not materialize. For example, rates for use of a utility's service are set at a level which will enable the company to pay, among other items, its anticipated tax expense. If, by virtue of some change in the tax law, it develops that the company did not incur the anticipated expense, for the payment of which it collected revenues in prior months, its rates for present and future service may not be cut, on that account, below what it otherwise would be entitled to charge for the present or future service. Likewise, a failure of the utility, in a previous period, to earn the anticipated return over and above its then expenses does not authorize it to charge its present customers a rate higher than reasonable for present service in order to compensate for the past deficit. Prospective rate making to recover unexpected past expense, or to refund expected past expense which did not materialize, is as improper as is retroactive rate making. *Los Angeles Gas & Electric Corp. v. Railroad Commission of California,* 289 U.S. 287, 313, 53 S.Ct. 637, 77 L.Ed. 1180 (1933); *Bd. of Public Utility Comrs. v. New York Telephone Co.,* 271 U.S. 23, 31, 46 S.Ct. 363, 70 L.Ed. 808 (1926); *Bluefield Waterworks & Improvement Co. v. Public Service Commission of W. Va.,* 262 U.S. 679, 694, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); *Mississippi Public Service Commission v. Home Telephone Co.,* 236 Miss. 444, 110 So. 2d 618 (1959); *New Jersey Power & Light Co. v. State Dept. of Public Utilities,* 15 N.J. 82, 104 A 2d 1 (1954); *Wisconsin Telephone Co. v. Public Service Commission,* 232 Wis. 274, 287 N.W. 122 (1939), cert. den., 309 U.S. 657, 60 S.Ct. 514, 84 L.Ed. 1006. In a carefully reasoned and well documented opinion by Chief Justice Vanderbilt in *New Jersey Power & Light Co. v. State Dept. of Public Utilities, supra,* the New Jersey Court overruled its earlier decision in *Hackensack Water Co. v. Board of Public Utility Commissioners,* 98 N.J.L. 41, 119 A. 84, 100 N.J.L. 177, 124 A. 925 (1924). In that earlier decision, the Court had held a public utility is entitled to recoup deficits in operations by a temporary surcharge added to its regular rates. In reversing this ruling the Court, speaking through Chief Justice Vanderbilt, said: "To do this would be adding a further charge to rates that are already just and reasonable, *which is beyond the Board's powers.*" (Emphasis added.) In *Mississippi Public Service Commission v. Home Telephone Co.,*

supra, the Court said, "It is generally held that neither losses sustained nor profits gained by a public utility in the past may be taken into account in fixing rates to be charged in the future," citing 73 C.J.S., Public Utilities, § 25(d). In *Wisconsin Telephone Co. v. Public Service Commission, supra,* the Court said, "As already pointed out, the cases hold that in establishing a rate for the future, and in the absence of statutory authority therefor, the Commission may not amortize or make a rate sufficiently low to recapture the excesses."

Such rate making throws the burden of such past expense upon different customers who use the service for different purposes than did the customers for whose service the expense was incurred. For example, the surcharge here in question requires Duke's customers in the winter months to pay more than they otherwise should pay for their service because of the cost of coal burned in July and August in supplying electricity for air conditioning.

The companies and the Commission contend that there is nothing improper in amortizing expenses actually incurred in a past period so as to spread them over a future period of service. They refer, in support of this argument, to the practice of so amortizing the expenses of a rate case and to depreciation allowances. These are easily distinguishable from expense incurred for coal burned in a past period. Of course, the full amount of an expenditure for an addition to plant, which will be used in rendering service over a long period of time, is not, and should not be, charged to the customers who use the service in the month of such expenditure, but is spread over the anticipated life of the equipment. This is but a recognition of the above mentioned principle that the users in each period should be charged with the cost of service attributable to that period. So it is with the expense of a general rate case. That expense relates to service rendered throughout the anicipated life of the rates established in that proceeding and should be, and is, amortized so that the entire expense does not fall upon the users of the service in the month in which the expense is actually incurred.

The cost of coal burned in generating power has, however, no relation whatever to service in any subsequent month. Thus, it, like wage expense, should be borne by the users of the service in the month in which the expense was incurred and may not

properly be amortized so as to make subsequent users pay part of this burden. So to cast upon subsequent users the expense of serving prior users is discrimination forbidden by G.S. 62-140. Thus, even if, as of 30 November 1973, when it applied for permission to use a fuel adjustment clause, Duke could have shown that in November 1973 its rates were not sufficient to recover the full cost of coal burned in generating electricity in November 1973, Duke would have established no vested right to collect its unanticipated November 1973 fuel cost either from its November customers, which would be retroactive rate making, or from its subsequent customers for whose service the coal was not burned. There is no inherent injustice in this for had Duke, in November 1973, been relieved from some anticipated expense, such as taxes, its November 1973 customers would not have been entitled to a refund and its December 1973 customers would not have been entitled to have their rates reduced below the amount necessary to enable Duke to recover its December costs plus a fair return.

It must be remembered that on December 19, 1973, the Commission did two things: (1) It increased Duke's basic rates because Duke's coal expense since 31 July 1973 had risen unexpectedly; (2) it authorized a fuel adjustment clause. The Commission found that the increase in the basic rates was adequate to cover the increase in Duke's coal cost since 31 July 1973. That increase in the basic rates was, however, prospective in operation. It has never been suggested that thereby the Commission intended to, or could have, given Duke the right to go back and charge its August, September, October and November customers additional amounts to recoup its unexpected cost of coal incurred in those months, nor has it been suggested that the Commission, in addition to the prospective increase in the basic rates, could have also imposed a surcharge in December 1973 requiring December and subsequent users of power, after paying Duke the cost of serving them plus a fair return, to pay still more in order to enable Duke to "recover" its unanticipated coal expenses incurred from 31 July 1973 to November 1973.

That action, on 19 December 1973, increasing the basic rates because of past experience with coal costs, was simply the orthodox use of a test period; that is, a use of the company's experience in the past (the test period, extended) as a guide to, or measure of, what its expenses would be in the future.

See: *Utilities Commission v. Morgan,* 278 N.C. 235, 236, 179 S.E. 2d 419 (1971).

The purpose of the simultaneously authorized Fuel Adjustment Clause was not to recover the November portion of that past unexpected expense but to guard against the then feared future changes in the price of coal. This clause was designed to give the utility relief from possible future rapid fluctuations in the price of coal without the regulatory lag and the expense incident to repeated general rate cases.

This is made clear by Duke's application for permission to establish the fuel clause and by the testimony of its witnesses in support of that application, as above quoted in the Statement of Facts. These clearly show that Duke's November 1973 concern was not with recovery of unanticipated November 1973 coal expense but with the then ominous prospect of further increases in the price of coal, which did in fact materialize.

The Fuel Adjustment Clause was, like the basic rate increase procedure, simply the orthodox use of a test period. Instead of the usual twelve months test period, used in general rate cases with reference to all expense experience of the utility, the Fuel Adjustment Clause used a one month test period with reference to coal expense alone. When approved on 19 December 1973, it applied instantly to all kilowatt hours sold that day. It used the most recently available coal cost data (November experience) to determine the cost of coal per kilowatt hour to be anticipated in December. Like other test period data, this data was used as the most accurate measure of the cost of coal per kwh on 19 December 1973 and throughout that month. Similarly, for kwh sold in January 1974, the coal cost per kwh in December was used, and the change per kwh, if any, was instantly made effective as to every kwh sold in January. It was likewise as to each subsequent month to and including July and August 1975.

There was no deferred accounting of coal expense used by the companies in November 1973. This was an accounting technique developed by the companies and approved by the Commission after the Fuel Adjustment Clause took effect. Its propriety for use in computing the company's tax liability and net income for reporting to its stockholders and investment analysts is not involved in this appeal and nothing herein should be deemed as a suggestion of impropriety in the practice. It does

not, however, support the contention that the Fuel Adjustment Clause was designed to enable Duke to "recover" from December users of power its unexpected cost of coal in November 1973.

Quite obviously, the Fuel Adjustment Clause adopted in December 1973 was not designed to "recover" Duke's November expenditures for coal. The coal factor to be applied in December was computed on the basis of November experience because that was the then best guide to December cost, but it was applied to the kilowatt hours sold in December. Thus, it would, of necessity, produce a different dollar amount from the amount paid out for coal burned in November. Since the kilowatt hour sales of all these electric utilities has steadily expanded, each month's use of the coal clause has actually produced more dollars than was spent for coal in the test month (in Duke's case, the month preceding the month in which the current was used).

For example, let us suppose that, in November 1973, two hundred million kilowatt hours were sold and the excess coal cost was $200,000. On that assumption, the coal clause factor for December would be one mill (disregarding the tax). Let us further suppose that, in December 1973, 250 million kilowatt hours were sold. The fuel clause revenues collected from December service would then be $250,000, or $50,000 more than the November excess coal cost. Let us, on the other hand, suppose that in December 1973 only 150 million kwh were sold. In that event, the coal clause revenue would be $150,000, or $50,000 less than the excess coal cost in November 1973.

The Vepco case makes this even clearer, for Vepco's fuel adjustment clause did not use a single month's experience in computing the fuel clause factor to be applied to kilowatt hours sold thereafter but used a three months' average coal cost per kilowatt hour. Thus, the Vepco case makes it clear that the purpose of the Fuel Adjustment Clause was not "recovery" of past excess expenditures for fuel but was to provide a measure of the reasonably anticipated cost of coal used in generating the kwh to which the factor was to be applied.

On 10 October 1974, the Commission issued a further order which converted the original Coal Adjustment Clause to a Fossil Fuel Adjustment Clause. That order switched from the one clause to the other as of 1 November 1974. There was no sug-

gestion then that a surcharge be made to "recover" the amount then accumulated on the company's books under the original coal clause over and above the rates subsequently to be charged under the Fossil Fuel Clause. Thus, when the Commission terminated the Coal Clause and instituted the Fossil Fuel Clause, neither it nor the companies suggested the propriety of an additional surcharge to recover "unbilled revenues" (or "deferred expenses") accumulated during the life of the original Coal Clause. Likewise, when the Legislature terminated the Fossil Fuel Clause and rates were adjusted so as to enable the company to collect for services billed after 1 September 1975, the full cost of such service plus a fair return, justice does not require an additional surcharge because of expenditures for coal burned in July and August.

For the reasons above set forth, the Commission's order, permitting Duke to impose the surcharge here in question, was in excess of the Commission's authority and without justification either in law or in the name of fair play. The judgment of the Court of Appeals is, therefore, reversed and this matter is remanded to the Court of Appeals for the entry of a judgment by it remanding the matter to the Commission for the entry of an order by the Commission vacating its order authorizing the surcharge and directing Duke to make the appropriate refunds to its customers on account of revenues unlawfully collected from them pursuant to the surcharge.

Reversed and remanded.

Justice COPELAND dissenting.

In my judgment the majority opinion does not conform to the General Assembly's intent in passing G.S. 62-134(e). Neither do I believe that the majority opinion places a proper interpretation upon the rulings of the Utilities Commission in the instant case.

It is well known that the problem here involved stems from the 1973 world-wide energy crisis brought about by tremendous increases in the cost of fossil fuels, most particularly coal, which is used by the utilities for the generation of electricity. On 30 November 1973, Duke Power Company filed with the Commission an application for authority to adjust its retail electric rates by the addition of a coal adjustment clause to be

rendered on monthly bills on and after 1 January 1974. On 19 December 1973, the Commission authorized the requested coal adjustment clause. The Commission's order provided that the clause would not become effective unless and until coal costs increased above the October 1973 level and included the following language:

> "1. That effective on bills rendered on and after January 19, 1974 for service rendered on and after December 19, 1973 *with respect to coal burned on and after November 1, 1973,* the Applicant, Duke Power Company, is authorized and permitted to put into effect the coal cost adjustment clause attached to its application as Exhibit B.
>
> "2. That Duke Power Company will report to the Commission on a monthly basis the amount of the fuel cost adjustment and the factors and computations used in its derivation." (Emphasis supplied.)

By this order I believe the Commission authorized a two-months "lag" in the recovery of increased actual coal costs. A lag was necessary because the actual cost of fuel burned during the month electric service was provided was unknown at the time of the billing. Had the General Assembly not passed G.S. 62-134(e) in 1975, then the "lag" would continue in effect and the utility companies would still be basing their current billing on the fossil fuel excess costs two months previous.

While it is true that Duke does not claim to be entitled to recover its unbilled revenues because its accounting practices were approved by the Commission, the company does claim and contend "that the entries resulting from such accounting practices serve as the device for measuring the amount of fuel costs Duke had a vested assurance of collecting pursuant to its approved rates." Duke Power Company's "right" to recover its unbilled revenues arises from the Commission's approval of the automatic fuel adjustment clause permitting recovery on a deferred basis of these expenses.

Obviously, the Commission recognized the principle of unbilled revenues upon which the utility companies base their claim. In its first order under the new statute, G.S. 62-134(e) the Commission stated as follows: "[A]ccrual accounting for unbilled revenues to reflect the *lag* in recovery of increased fuel costs should be disallowed in the future." (Emphasis supplied.)

It is equally clear that the Commission recognized the unbilled revenue or "lag principle" in its initial order when it provided that the order would apply "with respect to coal burned on and after November 1, 1973 . . . "

Considering the automatic fuel clause adjustment and the temporary surcharge together, it is apparent that the Commission has done nothing more than allow Duke Power Company to collect its actual fuel expenses. The Commission has merely attempted to carry out the mandate of the legislature which requires that the utility earn a fair return. The power companies have operated on the basis that these unbilled revenues were assets that would be collected in two months. The customers have not paid any more than the actual fuel cost and no benefit beyond a reasonable rate of return has accrued to shareholders.

I see nothing wrong with the order providing that the two months of unbilled revenues be spread over a period of twelve months to ease the burden on the rate payers. The amortization is a matter of convenience for the consumer.

By the passage of G.S. 62-134(e), the General Assembly did not intend to penalize the utility companies. The Commission was justified in reaching this conclusion. The majority's treatment of the utilities appears inequitable and does not take into consideration the position the companies were placed in over three years ago. During this period in which the costs of fossil fuel were rapidly rising, the time lag was favorable to the consuming public. In order for the utilities to produce the services which the consuming public requires, we must be equally fair with the utilities in providing revenues to meet emergencies such as the one which precipitated this controversy.

The majority opinion provides for "appropriate refund [by Duke Power Company] to its customers on account of revenues unlawfully collected from them pursuant to the surcharge." This will be an expensive and administratively difficult operation for the utilities involved. The financial benefits to individual members of the consuming public will be quite small in comparison with the burden cast upon the utility companies.

In sum, I feel the Utilities Commission manifested its intent from the beginning that the utilities should eventually

recover all actual fuel cost increases including the two months of excess fuel costs that are involved in this suit. I do not believe the General Assembly ever intended to deprive the companies of these revenues. I agree with Judge Britt of the Court of Appeals that the orders of 19 December 1973 and 10 October 1974 might have been clearer, but a reasonable construction of the orders leads me to conclude that "they were sufficient to accomplish that purpose."

Chief Justice SHARP and Justice MOORE join in this dissent.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 143

(Filed 31 January 1977)

APPEAL by the Attorney General from the judgment of the Court of Appeals, reported in 30 N.C. App. 474, 227 S.E. 2d 602, affirming the order of the North Carolina Utilities Commission, Martin, J., dissenting. Following the enactment of G.S. 62-134(e) terminating, as of 1 September 1975, all monthly fuel adjustment rate increases based upon the increased cost of fuel, pursuant to a fuel cost adjustment clause previously approved by the Commission, the Commission entered an order permitting Virginia Electric and Power Company to impose a surcharge upon users of its service on and after 1 September 1975. The facts with reference to such surcharge, with minor variations not relevant to the determination of this appeal, are set forth in Case No. 145, *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General,* decided this day.

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General.

Edward B. Hipp, Commission Attorney, by Wilson B. Partin, Jr., Assistant Commission Attorney, for North Carolina Utilities Commission.

Joyner & Howison by Robert C. Howison, Jr., Hunton & Williams by Guy T. Tripp III and Edgar M. Roach, Jr., for Virginia Electric and Power Company.

LAKE, Justice.

For the reasons set forth in *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General, supra,* the judgment of the Court of Appeals is reversed and this matter is remanded to that court with direction that it issue its judgment further remanding the matter to the North Carolina Utilities Commission for the entry by the Commission of an order vacating its order authorizing the said surcharge, and directing Virginia Electric and Power Company to refund to the users of its service the revenues collected by it from them pursuant to such surcharge.

Reversed and remanded.

Justice COPELAND dissenting.

For the reasons set forth in my dissent in *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General,* I respectfully dissent.

Chief Justice SHARP and Justice MOORE join in this dissent.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND CAROLINA POWER AND LIGHT COMPANY v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 144

(Filed 31 January 1977)

APPEAL by the Attorney General from the judgment of the Court of Appeals, reported in 30 N.C. App. 475, 227 S.E. 2d 602, affirming the order of the North Carolina Utilities Commission, Martin, J., dissenting. Following the enactment of G.S. 62-134(e) terminating, as of 1 September 1975, all monthly fuel adjustment rate increases based upon the increased cost of fuel, pursuant to a fuel cost adjustment clause previously approved by the Commission, the Commission entered an order permitting Carolina Power & Light Company to impose a surcharge upon users of its service on and after September 1, 1975. The facts with reference to such surcharge, with minor variations not relevant to the determination of this appeal, are set

forth in Case No. 145, *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General,* decided this day.

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General.

Edward B. Hipp, Commission Attorney, by Wilson B. Partin, Jr., Assistant Commission Attorney, for North Carolina Utilities Commission.

Joyner & Howison by Robert C. Howison, Jr., and William E. Graham, Jr., for Carolina Power & Light Company.

LAKE, Justice.

For the reasons set forth in *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General, supra,* the judgment of the Court of Appeals is reversed and this matter is remanded to that court with direction that it issue its judgment further remanding the matter to the North Carolina Utilities Commissions for the entry by the Commission of an order vacating its order authorizing the said surcharge, and directing Carolina Power & Light Company to refund to the users of its service the revenues collected by it from them pursuant to such surcharge.

Reversed and remanded.

Justice COPELAND dissenting.

For the reasons set forth in my dissent in *State ex rel. Utilities Commission and Duke Power Co. v. Edmisten, Attorney General,* I respectfully dissent.

Chief Justice SHARP and Justice MOORE join in this dissent.

STATE OF NORTH CAROLINA v. FREDDIE LEE IRICK, ALIAS WILLIE LEE SMITH

No. 162

(Filed 31 January 1977)

1. **Criminal Law § 92— four charges — consolidation proper**

The trial court did not err in consolidating for trial two charges against defendant for first degree burglary and two charges of assault with a firearm upon a law enforcement officer, since both burglaries and the confrontation with the police occurred within a two hour time span; all the alleged offenses occurred in the same neighborhood; and the evidence indicated a common plan to burglarize homes of the neighborhood and escape by means of a stolen vehicle parked nearby.

2. **Criminal Law § 60— fingerprints — time of impression — question of fact**

The question of whether fingerprints could have been impressed only at the time a crime was committed is a question of fact for the jury and not a question of law to be determined by the court prior to the admission of fingerprint evidence.

3. **Criminal Law § 60— fingerprints — nontestimonial identification — defendant in custody — Criminal Procedure Act provisions inapplicable**

The provisions of Article 14 of Chapter 15A concerning nontestimonial identification do not apply to accused persons in custody, but instead apply only to suspects and accused persons before arrest, and to persons formally charged and arrested who have been released from custody pending trial.

4. **Burglary and Unlawful Breakings § 5— first degree burglary — sufficiency of evidence**

Evidence was sufficient for the jury in a first degree burglary case where it tended to show that defendant's fingerprint was found on the inside frame of a window in the house allegedly broken into; defendant was observed by a police officer coming from the general direction of the burglarized home shortly after the burglary transpired; defendant had in his pocket at the time of his arrest loose bills in the same denominations and total amount as those stolen from the house in question; and defendant attempted to flee from police officers shortly after the burglaries took place.

5. **Criminal Law §§ 51, 99— expert witness — finding of expertise in jury's presence — no expression of opinion**

The trial court did not express an opinion on the credibility of a witness in violation of G.S. 1-180 by determining in the presence of the jury that the witness was an expert in the field of fingerprint comparisons.

6. Criminal Law § 46— flight of defendant — sufficiency of evidence to support instruction

So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, an instruction on flight is properly given, and the fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.

7. Criminal Law § 46— flight of defendant — sufficiency of evidence to support instruction

In a prosecution for burglary, the evidence was sufficient to support an instruction on flight where it tended to show that defendant came from the direction of the burglarized homes shortly after the burglaries took place; he entered and drove off in a vehicle which police knew to be stolen; when defendant was followed by marked yellow patrol cars, he accelerated and turned into a parking lot; when his car became wedged between police cars, he jumped from his car as it was still moving and ran away; when ordered to halt, defendant ignored police officers and continued to run; when officers fired at defendant, he drew a pistol and returned their fire; and defendant was subsequently found hiding in the cab of a dump truck.

8. Criminal Law § 44— tracking by bloodhound — admissibility of evidence

In a prosecution for first degree burglary and assault with a firearm upon a law enforcement officer, the trial court did not err in admitting testimony concerning tracking by a bloodhound where the evidence supported the court's findings that the dog was of proper pedigree, training, and experience; moreover, the fact that the dog was not exposed to an article carrying defendant's scent before the tracking began did not render the tracking suspect, since it was sufficient that the dog was taken to the place where defendant was last observed.

9. Criminal Law § 73— radio dispatches — testimony not hearsay

In a prosecution for first degree burglary and assault with a firearm upon a law enforcement officer, the trial court did not err in allowing an officer to testify concerning radio dispatches made by another officer during events culminating in defendant's arrest, since such testimony was admissible (1) to explain the conduct of two officers in chasing a suspect vehicle which defendant was driving, and (2) as part of the *res gestae.*

10. Criminal Law § 73— testimony as to contents of wallet — no hearsay

In a prosecution for first degree burglary, the trial court did not err in allowing a witness whose home was broken into to testify as to how much money her husband's billfold contained prior to the burglary, since such testimony was not hearsay but was based on the witness's own knowledge.

11. Assault and Battery § 14— assault with firearm upon law officer — sufficiency of evidence

In a prosecution for assault with a firearm upon a law enforcement officer, evidence was sufficient to support the inference that defendant must have known that his pursuers were law enforcement officers who were performing their duty where such evidence tended to show that officers had a stolen vehicle under surveillance; when defendant entered the vehicle and drove it away, officers who were in uniform and who were driving marked, bright yellow police cars gave pursuit; as officers followed the automobile, it accelerated and turned abruptly into a parking lot; the officers tried to block the car and a collision resulted; after the collision defendant jumped from the car and began to run; the officers could see defendant's face and clothes; one of the officers got out of his car and called for defendant to halt; defendant continued to run and the officer fired at him; and the defendant returned fire.

12. Arrest and Bail § 5; Assault and Battery § 5— assault on officer performing duties — excessive force used to arrest — officer not removed from performance of duties

While the use of excessive force in a lawful arrest may subject a law enforcement officer to civil or criminal liability, it does not take the officer outside the performance of his duties for the purposes of G.S. 14-34.2, the statute making it a felony to commit an assault with a firearm upon a law enforcement officer while he is engaged in his duties.

13. Assault and Battery § 16— assault with firearm on officer — failure to submit lesser offenses — no error

In a prosecution for assault with a firearm upon a law enforcement officer where all the evidence tended to show that defendant pulled a gun from his waistband and fired at two officers who were attempting to arrest him for possession of a stolen vehicle, the trial court did not err in failing to instruct on lesser included offenses.

14. Criminal Law §§ 26, 140— two officers assaulted — two prison terms — no error

Defendant's act in firing a gun at two officers constituted two assaults, and the imposition of consecutive prison sentences for the two assault convictions was proper.

15. Burglary and Unlawful Breakings § 8; Criminal Law §§ 102, 138— first degree burglary — mandatory life imprisonment — right to argue to jury

In a prosecution for first degree burglary, the trial court erred in refusing to permit defense counsel to tell the jury in his final argument that the law prescribed mandatory life imprisonment for first degree burglary; but it was not error for the court to fail to inform prospective jurors of the punishment prior to their selection or to fail to advise the jury of the mandatory life sentence in its final charge. G.S. 84-14.

State v. Irick

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgment of *Barbee, S.J.*, entered 19 June 1976 during Schedule "C" Session of MECKLENBURG Superior Court. Defendant's convictions of assault on a law enforcement officer with a firearm were certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) on 25 October 1976.

On indictments, proper in form, defendant was charged with two counts of first degree burglary and two counts of assault on a law enforcement officer with a firearm. He was found not guilty of one count of first degree burglary and guilty as charged as to the remainder. The court imposed the mandatory life sentence for the first degree burglary conviction, a five year sentence to run concurrently with the burglary sentence for one assault conviction and a sentence of five years for the second assault conviction to commence at the expiration of the first assault sentence.

The evidence for the State tended to show the following:

Mrs. Alberta Wood, a resident of a subdivision in Mecklenburg County known as Moore's Park, went to bed about 11:45 p.m. on 6 January 1976 after checking her front and back doors to be sure they were locked. Sometime after midnight, she heard her Irish Setter dog barking. The barking aroused her suspicion because the dog had cancer of the throat and had not barked for a few months. Mrs. Wood found the dog standing in the living room facing the dining room. The dining room window, which had been closed and locked, was wide open. Mrs. Wood slammed it down and locked it. She went through the kitchen and den but found nothing unusual. She called her daughter next door who sent over her boyfriend to assist. Upon further investigation, Mrs. Wood discovered that the back door was unlocked, that some other windows were unlatched, and that a trash can had been moved in the kitchen. The police were called.

Officer Shaw of the Mecklenburg County Police Department received a radio dispatch to proceed to the Wood home on Teresa Avenue. At the time of the call, he was parked several blocks away in a vacant Phillips 66 Service Station lot at the corner of Little Rock Road and Wilkinson Boulevard. As he was leaving that location, he noticed a green Dodge automobile parked on the other side of the Phillips 66 building. This automobile matched the description of a stolen vehicle for which Officer Shaw had been searching several days. He informed

police headquarters and requested the dispatcher to send another car out to identify the suspect vehicle.

Officer Shaw drove to the Wood home and remained there until other officers arrived. He then returned to the Phillips Station where Officer Patton by that time had the green Dodge under surveillance. Officer Shaw stationed himself at a nearby lot where he was soon joined by Officer Bailey. Both of these officers were in uniform and driving marked, bright yellow county police department vehicles.

About 2 a.m. Officer Patton advised Officer Shaw that a subject, coming from behind the Phillips Station, was entering the green Dodge. A few seconds later the suspect vehicle backed up and drove out of the Phillips Station lot with its headlights off. When it reached Little Rock Road the lights came on. Officers Shaw and Bailey gave pursuit. The green Dodge accelerated and turned into the Cloud Nine Lounge parking lot. Officer Bailey followed the suspect car around the building. Officer Shaw drove around the other side of the building to block the vehicle. The green Dodge became wedged between the police cars and collided with both of them.

Before the suspect car stopped moving, the driver jumped out from the passenger side and started running. Officer Shaw jumped from his car and ordered the suspect to halt. When he failed to do so, Officer Shaw fired at him but the driver of the Dodge continued to run. Officer Bailey pursued the suspect. The driver reached in his waistband, pulled out a gun and fired. Officer Bailey returned the fire. The driver ran across the street and disappeared into a used car lot.

When the suspect fired his pistol, Officers Bailey and Shaw were about 20 to 25 feet apart. They observed the weapon pointed in their general direction, saw flashes, and heard three to four shots.

After the suspect disappeared, the officers radioed for assistance. When other units arrived they sealed off the neighborhood. Mr. Overcash arrived with a trained bloodhound by the name of Snoopy. The dog was taken to the area where the suspect was last seen. Snoopy picked up a scent and led the men to a fence bordering the used car lot. The dog appeared to want to go inside the fence. The used car lot was ordered surrounded. The officers heard the sound of metal against metal. A search was made of the vacant trucks in the used car lot.

About 4:14 a.m. the driver of the green Dodge was found in the cab of a dump truck. He had been wounded and was bleeding. The driver, identified as the defendant, was taken into custody and relieved of a .38 caliber pistol. The gun contained four spent shells and one live round. A search of the defendant produced $100 in paper money (three $20's, two $10's, two $5's, and ten $1's). Defendant was taken to the hospital.

At the request of Officer Shaw, Mr. Overcash, the bloodhound handler, took the dog to the Wood house to see if he could pick up a scent. The bloodhound picked up a track under the dining room window and followed it through the Wood's backyard to another backyard a block away. The dog appeared confused at that point so his handler took him around the house. There he regained the scent and led his handler several more blocks, finally stopping at the Phillips 66 Service Station where the green Dodge had first been observed.

In the meanwhile, another strange occurrence had been discovered at the Hipp residence, in Moore's Park, a few blocks from the Wood residence. About 3 a.m. Mrs. Hipp awoke and went to the bathroom. There she noticed a pair of pants on the floor. Thinking that they were her daughter's bluejeans, she paid no attention to them and returned to bed. When she got up at 6 a.m. and saw her husband's wallet lying on a pile of laundry in the bathroom, she realized that the pants she had observed earlier were those of her husband. The night before he had placed them on a chair in the bedroom. The wallet had been in the pants pocket and had contained $60 when they went to bed. The wallet was empty.

Looking further around the bathroom, Mrs. Hipp spotted her change purse lying on a hamper. It was also empty. The night before the purse had been in the pocket of her car coat which had been hanging in the bathroom. Mrs. Hipp remembered having about $45 in the purse before she went out to dinner the previous evening. She recalled that she had spent some of the $45 on her dinner. She reported to the police that approximately $100 had been taken from her and her husband consisting of three $20's, two $10's, two $5's and some $1's.

While waiting for the police to arrive, she went downstairs and found two outside doors open. Both doors had been locked the night before. She discovered a piece of pasteboard, which had covered a broken window in the basement, lying on the

ground outside and a box of kleenex, which had been on the window sill, lying on the floor inside. Later in the morning as she was looking through the house again, she found a dirty dish towel which she had never seen before. In the meantime, a few blocks away, Mrs. Wood had discovered that a dish towel, which belonged to a set of matched towels, was missing from her kitchen.

When the police arrived at the Hipp home about 6:30 a.m., they searched the house and dusted for fingerprints around the window sill. One identifiable print was removed. This latent print matched a fingerprint of defendant's right little finger.

Mrs. Wood reported to the police that her dish towel, which had been hanging on a rack beside the kitchen door, was missing. Mrs. Wood had fed her cat before retiring and remembered wiping her hands on the towel. An officer arrived at her home bringing the dish towel discovered at Mrs. Hipp's house. This towel matched the rest of Mrs. Wood's set, smelled of cat food, and appeared to be Mrs. Wood's missing towel.

The defendant's evidence tended to show the following:

Officer Dennis of the Mecklenburg County Police Department, who investigated the incident at the Wood home, reported that no fingerprints were found on the window sill where the window had been opened, that the window sill was still covered with dust, and that no pry or force marks were found on the window inside or outside. His report indicated that he "[c]ould not believe any entry was gained" and labeled the crime being investigated an "attempted first degree burglary." Officer Dennis admitted on cross-examination that Mrs. Wood told him some facts that would have indicated an entry but which he failed to include in his report.

Officer Mathis of the Mecklenburg County Police Department testified that he conducted the investigation at the Hipp house. According to his report, the Hipps reported missing $100 and Mr. Hipp's plaid sport coat. This coat was never found. The officer's report did not mention the dirty dish towel.

We have found it difficult to ascertain the facts from the 26 pages of the brief submitted by appellant for this purpose. Rule 28(b)(2) of the Rules of Appellate Procedure provides, among other things, 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." (Emphasis added.) Fortunately, the State's brief presented a clear and concise statement of the facts.

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.

William O. Austin for defendant appellant.

COPELAND, Justice.

[1] Prior to trial, the State moved to consolidate the four charges against the defendant for trial (defendant had also been indicted for larceny of an automobile but the State wisely did not request joinder of this offense as it was apparently unconnected). The State's motion was granted. Defendant objected and moved to sever the cases, which motion was denied. Defendant properly renewed his motion for a severance during the trial as required by G.S. 15A-927(a)(2).

In his first assignment of error defendant contests both the consolidation of the cases and the denial of his motion for a severance. We first note that defendant failed to comply fully with Rule 10(c) of the North Carolina Rules of Appellate Procedure in that Exception No. 36 is not grouped under Assignment of Error No. 1 in the record. Nevertheless, we will discuss briefly defendant's contentions.

G.S. 15A-926(a) allows the trial court to consolidate for trial two or more offenses when the offenses "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Consolidation is a discretionary matter with the trial judge. *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974).

As Judge Barbee observed, the State's evidence tended to show connection of these offenses in time, place and circumstance. Both burglaries and the confrontation with the police occurred within a two-hour time span; all the alleged offenses occurred in and around Moore's Park Subdivision in Mecklenburg County. The evidence indicated a common plan to burglar-

ize homes of the neighborhood and escape by means of a stolen vehicle parked nearby.

By statute, the court is required to grant a severance of offenses, whenever it is necessary for "a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b). In deciding on a motion for a severance, the court is instructed to consider, whether, "in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." G.S. 15A-927(b)(2).

No showing has been made that a severance was necessary in this case to insure a fair determination by the jury on each charge. The evidence presented was not unusually complicated or confusing. Judge Barbee clearly and carefully separated the offenses in his instructions. The jury's ability to differentiate between the offenses was evidenced by its verdict of *NOT GUILTY* in 76 CR 2983 (Wood first degree burglary).

For the judge to have put the State to four separate trials would have been unthinkable. Consolidation conserved judicial time and energy and defendant was unharmed by this economy. This assignment of error is without merit and overruled.

[2] In his next assignment of error, defendant challenges the admissibility of the fingerprint comparison. Defendant contends the expert testimony comparing the fingerprint lifted at the Hipp home and defendant's own fingerprint should not have been admitted into evidence until after a showing that the print could only have been impressed at the time the crime was committed. We believe defendant has misconstrued our cases on this subject. The effect of defendant's argument, if adopted, would be to require an absolute showing that defendant was a criminal participant before fingerprint evidence could be admitted. This we have not held nor are we so inclined to hold now.

In *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975), we noted the accuracy and general use of fingerprint evidence for identification purposes. The only limitation this Court has imposed on the admissibility of fingerprint comparisons to prove the identity of the perpetrator of a crime is a requirement that the testimony be given by an expert in fingerprint identification. *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State*

v. Helms, 218 N.C. 592, 12 S.E. 2d 243 (1940); *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935); *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). We have repeatedly said that the testimony of a fingerprint expert is "competent as evidence tending to show that defendant was present when the crime was committed and that he at least participated in its commission." *State v. Tew, supra* at 617, 68 S.E. 2d at 295; *accord, State v. Helms, supra; State v. Huffman, supra; State v. Combs, supra.*

The probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated. *See State v. Miller, supra; State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948); *State v. Combs, supra.* Ordinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury. *State v. Miller, supra; State v. Helms, supra; see State v. Combs, supra.* It is not a question of law to be determined by the court prior to the admission of fingerprint evidence.

[3] Defendant also contends the court erred in admitting the evidence of fingerprint identity because no "nontestimonial identification order" was obtained pursuant to Article 14 of Chapter 15A of the General Statutes (the Criminal Procedure Act) prior to the taking of defendant's fingerprints.

After defendant's arrest, he was taken to the hospital for treatment of his wound. En route to the hospital, Officer Bailey advised him of his *Miranda* rights. While in custody at the hospital, he was fingerprinted by another police officer. No attorney was present at the time and defendant was not specifically informed that he had a right to counsel during the fingerprint identification procedure.

Defendant concedes in his brief that the taking of his fingerprints by police officers does not violate the Fourth or Fifth Amendments of the United States Constitution. Rather, he argues that, absent exigent circumstances, Article 14 of Chapter 15A requires the police to first obtain a judicial order before fingerprints can be taken. G.S. 15A-271 to -282. If such an order is required, defendant maintains, under the same statute, he was entitled to have counsel present during the nontestimonial identification procedure, to be advised of this statutory

right, and to be advised that an attorney would be appointed if he could not afford to retain counsel. G.S. 15A-279(d).

We believe that G.S. 15A-271 *et seq.* was not intended to apply to this defendant. Although G.S. 15A-272 clearly provides that a request for a nontestimonial identification order may be made *after* as well as prior to the arrest of a suspect, several factors lead us to the conclusion that the statute was not aimed at *in custody* defendants.

First, other provisions of the statute are inconsistent with the idea of an in custody accused. The order, outlined in the statute, requires the person named to appear at a designated time and place to submit to nontestimonial identification procedures. G.S.15A-274. This provision makes little sense as applied to one already in custody. G.S. 15A-276 provides for a possible contempt sanction in the event the person named in the order fails to appear, an unnecessary sanction for one already in custody.

The official commentary indicates the statute was designed to give North Carolina law enforcement officials a new procedure for investigating "suspects." Official Commentary, G.S. ch. 15A, art. 14 (1975). G.S. 15A-272 provides that nothing in this article "shall preclude such additional investigative procedures as are otherwise permitted by law." Elsewhere in the Criminal Procedure Act, under Article 23, we find G.S. 15A-502(a)(1) which allows the police to fingerprint a person charged with the commission of a felony or misdemeanor when he has been "[a]rrested or committed to a detention facility."

Construing these statutes so as to achieve a logical relationship and to effectuate apparent legislative intent, we hold that Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused. Defendant in this case admits that he was in custody at the time of the fingerprinting.

The fingerprint evidence was properly admitted and all the assignments of error challenging it are overruled.

[4] In several assignments of error defendant contends the court should have granted his motion for judgment as of nonsuit in the Hipp first degree burglary case.

On a motion for 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. *State v. Bowden,* 290 N.C. 702, 228 S.E. 2d 414 (1976); *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).

The applicable test for determining the sufficiency of the evidence in a case involving circumstantial evidence was stated by Justice Lake, speaking for our Court, in *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967):

> "The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. (Citation omitted.) 'When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.'" (Citation omitted.)

On the other hand, if the evidence raises merely a suspicion or conjecture as to either the commission of the offense, or defendant's identity as perpetrator, the motion for nonsuit should be allowed. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Cutler, supra.*

A key piece of circumstantial evidence in this case was the fingerprint identification. A number of our cases have considered the question of sufficiency of fingerprint evidence in the context of a motion for nonsuit. *See State v. Miller, supra; State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Smith,* 274 N.C. 159, 161 S.E. 2d 449 (1968); *State v. Tew, supra; State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849, *cert. denied,* 338 U.S. 876, 94 L.Ed. 537, 70 S.Ct. 138 (1949); *State v. Minton, supra; State v. Helms, supra.*

If the fingerprint evidence were the only evidence tending to show that the defendant perpetrated the burglary at the Hipp house, we would be hard pressed to hold that there was sufficient evidence to take the case to the jury. Fingerprint evidence, standing alone, is sufficient to withstand a motion for

nonsuit only if there is *"substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." (Emphasis supplied.) *State v. Miller, supra; see State v. Smith, supra; State v. Minton, supra.* What constitutes substantial evidence is a question of law for the court. *State v. Miller, supra.*

Circumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed include statements by the defendant that he had never been on the premises, *e.g., State v. Miller, supra; State v. Phillips,* 15 N.C. App. 74, 189 S.E. 2d 602, *cert. denied,* 281 N.C. 762 (1972) ; statements by prosecuting witnesses that they had never seen the defendant before or given him permission to enter the premises, *e.g., State v. Jackson, supra; State v. Foster, supra;* fingerprints impressed in blood, *e.g., State v. Thomas,* 291 N.C. 687, 231 S.E. 2d 585 (1976) (decided this day) ; *State v. Phillips, supra.*

In the instant case none of the above circumstances were demonstrated. Mrs. Hipp testified only that no one had permission to enter her home *on the night in question.* Admittedly, defendant's print was found on the inside frame of the window from which the tissue box and pasteboard had been removed on the night of the burglary, but other unidentified prints were found on and around the same window. These facts do not constitute "substantial" evidence that the print could have only been impressed at the time of the alleged burglary.

In this case, however, other circumstances tend to show that defendant was the criminal actor. Defendant was observed by a police officer coming from the general direction of the Hipp home shortly after the burglary transpired; defendant had in his pocket at the time of his arrest loose bills in the same denominations and total amount as those stolen from the Hipp house; defendant was tracked by the bloodhound from the Wood home to the place where the stolen vehicle was parked (the dirty kitchen towel linked the Hipp and Wood burglaries), and defendant attempted to flee from police officers shortly after the burglaries took place.

All of these circumstances, taken with the fingerprint identification, when considered in the light most favorable to the State, permit a reasonable inference that defendant was the burglar at the Hipp house. *See State v. Reid, supra; State v.*

Helms, supra. State v. Minton, supra, is distinguishable because evidence in that case showed the defendant was lawfully in the store earlier on the night the crime was committed and may have left fingerprints at that time. The fact that Mrs. Hipp operated a day nursery in the room where the print was found we do not think makes her house a public place but, even assuming that it does, we do not think this circumstance is necessarily determinative. *See State v. Tew, supra* (a case involving a service station burglary in which nonsuit was held inappropriate).

We do not review here the evidence pointing to the conclusion that a burglary occurred at the Hipp home on the night in question, as we do not understand this point to be seriously in contention. The court was correct in denying defendant's motion for nonsuit and leaving the question of his guilt for the jury. This assignment of error is overruled.

[5] Defendant assigns as error the court's statement, in the presence of the jury, finding J. H. Reamy an expert in the field of fingerprint comparisons. Defendant contends the judge expressed an opinion as to the credibility of this witness contrary to G.S. 1-180. He concedes that the law in this jurisdiction does not support his contention, but asks our Court to reverse its previous rulings. *E.g., State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972).

The ruling finding this witness to be an expert in his field could not have been understood by the jury as anything other than a ruling upon the qualification of the witness to testify as to his opinions. The general practice in the courts of this State has never been for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert. *State v. King, supra; State v. Frazier, supra; see* 1 Stansbury's N. C. Evidence, § 133 (Brandis Rev. 1973). We do not think it would serve any useful purpose to change the law to require findings on experts' qualifications to be made outside the presence of the jury and to do so would unnecessarily consume court time. Defendant is not harmed by present practice. We adhere to our former opinions and overrule the assignment of error.

Defendant next argues the court erred in giving an instruction on flight in his charge to the jury on the burglary offenses.

Defendant does not contest the form of the judge's instruction but rather the propriety of giving the instruction on flight when the evidence would support other reasonable inferences. Defendant contends the evidence of the alleged flight is equally consistent with the view that he had no knowledge of and did not participate in the burglaries, especially since defendant was operating a reportedly stolen vehicle at the time.

[6] Defendant's position is not the law in this jurisdiction. So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper. *See State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697 (1973).

In North Carolina evidence of flight does not create a presumption of guilt but is only some evidence of guilt which may be considered with the other facts and circumstances in the case in determining guilt. *State v. Lampkins, supra; State v. Self,* 280 N.C. 665, 187 S.E. 2d 93 (1972); *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963). "The wicked flee when no man pursueth, but the righteous are bold as a lion." Proverbs 28, the first verse. However, proof of flight, standing alone, is never sufficient to establish guilt. *State v. Lampkins, supra; State v. Self, supra; State v. Gaines, supra.*

[7] The evidence disclosed that the defendant came from the direction of the burglarized homes shortly after the burglaries took place. He entered and drove off in a vehicle which the police knew to be stolen. When defendant was followed by marked yellow patrol cars, he accelerated and turned into a parking lot. When his car became wedged between the police cars, he jumped from his car as it was still moving and ran away. When ordered to halt, he ignored police officers and continued to run. When the officers fired at him, he drew a pistol and returned their fire. He was subsequently found hiding in the cab of a dump truck.

One reasonable view of this evidence is that defendant fled from police after committing the burglaries. Competent evidence of flight is subject to explanation by the defendant. *State v. Lampkins, supra.* "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. Lampkins, supra* at 523, 196 S.E. 2d at 698.

The instruction on flight was proper and the assignment of error is overruled.

[8] Defendant maintains the court erred in admitting testimony concerning the tracking by the bloodhound, "Snoopy," because the requirements for admissibility of bloodhound evidence, laid down by Chief Justice Stacy, speaking for our Court in *State v. McLeod,* 196 N.C. 542, 146 S.E. 409 (1929), were not met.

> "It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trial of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification." *State v. McLeod, supra* at 545, 146 S.E. at 411.

The trial judge properly conducted a voir dire examination to determine the dog's "expertise." Testimony by the dog handler revealed that Snoopy was a purebred bloodhound, six years old and in good health; that he had been trained for six to eight months to pursue a human track by a man who trained dogs for the Army, and that the dog had successfully tracked missing and wanted persons at least two dozen times. When the dog's services were not so required, his handler kept him in practice by laying a track and having Snoopy trail the person. Snoopy had participated in fifty to seventy-five such practice runs.

These facts amply supported the trial court's findings as to Snoopy's pedigree, training, and experience—requisites (1), (2) and (3) as set out in *McLeod, supra.* If defendant is concerned that Mr. Overcash's testimony was not entirely based on personal knowledge, in particular the testimony related to

Snoopy's training, he should have objected on the grounds of hearsay.

In a case where the purity of a bloodhound's bloodline was attacked, Justice Sharp (now Chief Justice) noted:

> "In practice, if the dog has been identified as a bloodhound, it has been the *conduct* of the hound and other attendant circumstances, rather than the dog's family tree, which have determined the admissibility of his evidence." *State v. Rowland,* 263 N.C. 353, 359, 139 S.E. 2d 661, 665 (1965). (Emphasis added.)

The same practical approach can be extended to challenges to a bloodhound's formal training where experience has shown him to be reliable. Just as "proof of the pudding is in the eating," proof of the bloodhound is in the tracking. Miguel De Cervantes, *Don Quixote,* Part 1, Book IV, Chapter 10, Page 322. Snoopy's performance record was excellent and within the personal knowledge of the witness.

Defendant also claims that *McLeod's* fourth requisite was not established. In the present case the bloodhound was taken to the spot where defendant was last seen before disappearing into the used car lot. The dog quickly picked up a scent and followed it to the fence surrounding the used truck lot. A police search inside the fence found defendant hiding in a dump truck. Later, Snoopy was taken to the Wood home to see if he could pick up a scent. He followed a track, beginning under the dining room window, which eventually led to the Phillips 66 Station, the spot where defendant climbed into the green Dodge.

Defendant asserts that the tracking was suspect because the dog was not exposed to an article carrying defendant's scent before the tracking began. This is not a required procedure. At the used car lot, it was sufficient to take Snoopy to the place where defendant had last been observed. At the Wood home, the dog necessarily began with a blind scent because, at the time, the police had no suspects in the Wood burglary. Where the guilty party is unknown, it is sufficient if the dog is laid on the trail "at a point where the circumstances tend clearly to show that the guilty party has been . . ." *State v. Norman,* 153 N.C. 591, 593, 68 S.E. 917, 918 (1910).

The dog handler testified that, in good weather, the dog was capable of picking up a scent for up to four hours. On the

evening in question, the dog first picked up a scent at 3 a.m., thus the tracks could not have been made earlier than 11 p.m. Mr. Overcash admitted on voir dire that if someone else had left a trail around the same time as the guilty party he could not say whether the dog tracked the other person or the culprit. Given all the circumstances, including the very late hour, we believe it highly unlikely that the track from the dining room window could have been left by anyone other than the burglar.

The fact that the bloodhound tracking showed a path from the Wood home directly to the Phillips 66 Station while the State's other evidence, the dirty kitchen towel, indicated a detour by way of the Hipp home, does not render the bloodhound evidence inadmissible. Mr. Overcash stated that the dog became confused while on the track and that it was necessary to work the dog around another house in the neighborhood before the dog picked up the scent again and followed it to the service station. The relative locations (as depicted in the aerial photograph) of the house where the dog became confused, the Hipp house, the Wood house and the service station were such that one could reasonably infer the guilty party took a side trip beginning at the house where Snoopy became confused to the Hipp house and back before returning to the service station.

Although Snoopy never bayed the defendant, the bloodhound evidence was competent. To be admissible bloodhound evidence does not have to result in a positive identification. So long as a reasonable inference as to defendant's guilt arises on the facts, the evidence is for the jury.

The assignment of error is overruled.

[9] While Officers Shaw, Bailey and Patton had the green Dodge under surveillance at the Phillips 66 Station, Officer Patton radioed to Officer Shaw that he observed a subject coming from behind the Phillips 66 Station and approaching the suspect vehicle. The next dispatch from Patton to Shaw indicated that the subject was getting into the vehicle (green Dodge). Officer Shaw was permitted to testify to the substance of these dispatches over a general objection by the defendant.

Defendant now contends the testimony was hearsay and consequently his general objection and motion to strike should have been allowed. We believe this testimony was admissible for two reasons.

"If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay."

* * *

"The declarations of one person are frequently admitted to evidence a particular state of mind of another person who heard or read them . . . to explain his subsequent conduct." 1 Stansbury's N. C. Evidence, § 141 (Brandis Rev. 1973) at 467-71.

The officers were positioned on two sides of the Phillips 66 Station. Officer Shaw was located at a place where he could watch the vehicle but could not see the back of the Phillips 66 Station. He testified that, before assuming his position, he radioed Officer Patton to notify him if anyone entered or came close to the vehicle. Officer Patton's dispatches were offered to explain Officers Shaw and Bailey's subsequent conduct in pursuing the suspect vehicle and were admissible for this limited purpose. The statements were not offered to establish the truth of any matter asserted by Officer Patton. *See State v. Black,* 230 N.C. 448, 53 S.E. 2d 443 (1949) ; *State v. Shadding,* 17 N.C. App. 279, 194 S.E. 2d 55, *cert. denied,* 283 N.C. 108 (1973).

The statements are also admissible as part of the *res gestae.* The words of the radio dispatch accompanied and were connected with the series of events culminating in defendant's capture.

"[T]he res gestae phrase is used to describe situations in which words accompany and are connected with the non-verbal conduct or external events, and carries the general idea of something said while something is happening or being done." 1 Stansbury's N. C. Evidence, § 158 (Brandis Rev. 1973). *See State v. Hunt,* 289 N.C. 403, 222 S.E. 2d 234 (1976).

The assignment of error is overruled.

[10] In his next assignment of error, defendant contends the court erred in permitting Mrs. Hipp to testify concerning the contents of her husband's billfold. After a preliminary question

to which the court sustained objection, the following questions and answers appear in the record:

"Q. When you and your husband went to bed the night before state what, if anything, was in your husband's billfold.

"MR. AUSTIN: Objection.

"COURT: Do you know what was in your husband's billfold the night before, did you see what was in it?

"A. Yes.

"COURT: Overruled.

"Q. What was it?

"A. Money.

"Q. Do you know how much money your husband had in his billfold the night before when you went to bed?

"A. $60.00."

This testimony was not hearsay as it affirmatively appears the witness was testifying from her own knowledge. The probative force of the testimony depended on Mrs. Hipp's own competency and credibility. The discrepancies in her testimony, noted by defendant's counsel, went to her credibility. *See* 1 Stansbury's N. C. Evidence, § 138 (Brandis Rev. 1973).

The assignment of error is meritless and overruled.

[11] In several assignments of error, defendant argues that the assault charges should have been nonsuited and that the instructions on assault were erroneous.

G.S. 14-34.2 provides as follows:

"Any person who shall commit an assault with a firearm upon any law enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony . . ."

Defendant contends there was insufficient evidence to show (1) that the defendant knew the police were performing official duties and (2) that the police were in fact performing such duties and thus, his motion for nonsuit should have been allowed.

The State's evidence on these points tends to show the following: A green Dodge had been reported missing from Moore's Park a short time before 6 January and had not been reported as found. Officer Shaw had been on the lookout for the car and was suspicious when he spotted a similar automobile early on the morning of 7 January. Several officers, including Shaw and Bailey, kept the car under surveillance after the car was identified as the stolen vehicle. These policemen were in uniform and driving marked, bright yellow police cars. When a person entered the green Dodge and drove away, Officers Shaw and Bailey gave pursuit. The headlights of the police cars and the green Dodge were on. The street was fairly well lighted. As the officers followed the green Dodge, it accelerated and turned abruptly into a parking lot. Officers Shaw and Bailey tried to block the suspect car in the parking lot. A three-car collision resulted. At the time of the collision, the police and the defendant were about one car width apart. Defendant was sitting in the middle of the front seat, steering with his left hand. After the collision, he jumped from the green Dodge before it stopped moving and began to run. Officer Shaw got out of his patrol car and called to the defendant to halt. He could see defendant's face and clothes, as could Officer Bailey. When defendant continued to run, Officer Shaw fired at him. Officer Bailey pursued the defendant on foot. The defendant pulled a pistol and fired in the general direction of both officers. Officer Bailey returned the fire.

When viewed in the light most favorable to the State, the evidence warrants the inference that defendant could see the officers' cars and their clothing and could hear the instruction to halt, and thus must have known his assailants were police officers in the performance of their duties. These circumstances enumerated above further tend to show that the policemen were in fact in the performance of their duties.

Defendant argues that the officers, in using deadly force to effectuate his arrest, were in excess of their statutory authority outlined in G.S. 15A-401(d)(2), and thus could not be within the performance of their duties as required for a conviction under G.S. 14-34.2. This is an interesting but, we believe, dangerous proposition. It would allow a fleeing accused felon to fire with impunity at police officers who are attempting an otherwise lawful arrest.

Our examination of G.S. 15A-401(d)(2) and prior case law lead us to the conclusion that the statute was designed solely to codify and clarify those situations in which a police officer may use deadly force without fear of incurring criminal or civil liability. *See Perry v. Gibson,* 247 N.C. 212, 100 S.E. 2d 341 (1957); *Sossamon v. Cruse,* 133 N.C. 470, 45 S.E. 757 (1903); G.S. 15A-401(d)(2). *See also* Corbett, *Criminal Process and Arrest under the North Carolina Pretrial Criminal Procedure Act of 1974,* 10 Wake Forest L. Rev. 377, 399, 408, 413 (1974).

[12] We hold that while the use of excessive force in a lawful arrest may subject a law enforcement officer to civil or criminal liability, it does not take the officer outside the performance of his duties for purposes of G.S. 14-34.2. We do not reach the issues of whether Officers Shaw and Bailey used deadly force in this case, and whether, assuming they did, they would be liable for using force in excess of that authorized by the Criminal Procedure Act.

Defendant complains about the trial court's instruction that, "[t]he attempt to arrest a person driving a stolen vehicle is a duty of his [the policeman's] office." Defendant contends this instruction took an issue away from the jury. We do not agree. Under G.S. 14-71 and 14-72 the possession of a vehicle known to be stolen would be a crime. The arrest of a person who the police have probable cause to believe has committed the crime is certainly an official duty of the police. The issue of whether the officers were in the performance of their duties was not withdrawn from the jury's consideration in this case. In order to convict the defendant, the jury had to find that the officers were in fact attempting to arrest the defendant for intentionally driving a stolen vehicle.

[13] Defendant further contends the court's instruction was erroneous because the judge did not charge on any lesser included offenses, specifically, assault by pointing a gun, assault on a law enforcement officer in the performance of his duties, and simple assault. *See* G.S. 14-33(a) and (b), G.S. 14-34.

Defendant's objection is not well taken. The correct rule requires the trial judge to charge on a lesser included offense when and only when there is evidence which would support a conviction of the lesser crime. The presence of such evidence is the determinative factor. *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 (1972); *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235 (1971).

All the evidence tended to show that defendant pulled a gun from his waistband and fired at Officers Shaw and Bailey who were attempting to arrest him for possession of a stolen vehicle. There was no evidence of any lesser offenses. *State v. Thacker,* 281 N.C. 447, 189 N.C. 2d 145 (1972), cited to us by defendant, is distinguishable because the crime charged (assault with a deadly weapon with intent to kill inflicting serious injury) was a specific intent crime. *See State v. Harris,* 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Thacker, supra.*

All assignments of error relating to the motion for nonsuit and the instructions to the jury on the assault charges are overruled.

[14] Defendant maintains that the act of firing the gun four times resulted in only one assault, not two, and that the court erred in imposing consecutive prison sentences for the two assault convictions. Defendant argues that unless the two assault convictions are merged and one judgment imposed, he has received double punishment for the same offense in violation of Article I, Section 19 of the North Carolina Constitution and Articles V and XIV of the United States Constitution, which guard against double jeopardy. The constitutional principle of double jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense. *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873).

The applicable double jeopardy test in this case is the "same evidence test" which asks two questions. First, "[w]hether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment." *State v. Hicks,* 233 N.C. 511, 516, 64 S.E. 2d 871, 875, *cert. denied,* 342 U.S. 831, 96 L.Ed. 629, 72 S.Ct. 56 (1951); *accord, State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972). The answer to this question is determined by an examination of the two indictments. *State v. Hicks, supra.* In the present case, the second indictment does not mention Officer Shaw. Thus, even if all the facts alleged therein were proven, they would not support a conviction for an assault on Officer Shaw.

The second question posed by the "same evidence test" asks "whether the same evidence would support a conviction in each

case" and looks at facts *dehors* the indictments. *State v. Hicks, supra* at 516, 64 S.E. 2d at 875; *accord, State v. Ballard, supra.* Defendant fares no better under this portion of the test. The evidence necessary to show that Officer Shaw was a law enforcement officer performing his duties is not the same evidence as is required to show that Officer Bailey was a law enforcement officer functioning in an official capacity. We hold that defendant's act in firing the gun at two officers constituted two assaults. Imposition of two sentences was proper and the assignment of error is overruled.

[15] Finally, defendant complains (1) that prospective jurors should have been informed of the punishment for first degree burglary prior to their selection; (2) that defense counsel should have been permitted to tell the jury in his final argument that the law prescribed mandatory life imprisonment for first degree burglary, and (3) that the court should have advised the jury of the mandatory life sentence in its final charge. Defense counsel properly moved the court that each of the above be done. The assistant district attorney stated that he had no objection to defendant's motions. Later, counsel for defendant renewed his request, in writing, that the court advise the jury of the penalty. All of these motions were denied.

Defendant relies upon *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (1976). In that case we held it was error for the court to deny defense counsel the opportunity to inform the jury that conviction would necessarily result in imposition of a life sentence. That decision was based on G.S. 84-14, the last sentence of which reads as follows:

> "In jury trials the whole case as well of law as of fact may be argued to the jury." *See State v. Miller,* 75 N.C. 73 (1876).

Justice Exum, in *McMorris, supra,* detailed the history of the problem which now confronts us. He concluded that, "[i]t 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." *State v. McMorris, supra* at 288, 225 S.E. 2d at 554.

McMorris also cited as authority *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974), a capital case in which Justice

Branch outlined the permissible bounds of jury argument as follows:

> "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. (Citations omitted.) He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. (Citations omitted.) Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely." *State v. Britt, supra* at 273, 204 S.E. 2d at 829.

G.S. 15-176.5 specifically provides that counsel in a *capital* case may in his argument to the jury indicate the consequences of a guilty verdict. In addition, G.S. 15-176.4 provides that the court shall, upon request, advise the jury of the death penalty. The legislature has not addressed the issue of the trial court's duty to advise the jury in a non-capital case of the punishment. As indicated by *McMorris,* "[w]hether 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." *State v. McMorris, supra* at 291, 225 S.E. 2d at 556.

Assuming counsel is permitted to tell the jury that the defendant will receive a mandatory life sentence upon conviction, we cannot perceive of any prejudice resulting to the defendant if the trial judge does not repeat the penalty in his final instruction. Thus, the reversible error of Judge Barbee was failing to permit defense counsel to state the mandatory punishment for first degree burglary in his final jury argument. Had this been permitted, no prejudicial error could have resulted from the court's refusal to instruct the jury on the sentence. Our decision today is no reflection on Judge Barbee because the controlling case, *McMorris,* was not filed until three days after he denied defendant's motions.

Defendant fails to suggest any rationale for requiring the trial judge to inform prospective jurors on voir dire of the sentence in a non-capital case. Nor can we conceive of any basis

for such a rule. Judge Barbee correctly denied this motion. See G.S. 15-176.3 for the rule in a capital case.

For the reasons set out above, defendant is entitled to a new trial on the first degree burglary charge. We find no error in the two assault convictions.

In 76CR2984 (burglary)—New trial.

In 76CR2986 (assault on a law enforcement officer with a firearm)—No error.

In 76CR2987 (assault on a law enforcement officer with a firearm)—No error.

STATE OF NORTH CAROLINA v. DAVID BENJAMIN SMITH (ALIAS DAVID BENJAMIN McCULLOUGH) AND BOBBY ORLANDO FOSTER

No. 157

(Filed 31 January 1977)

1. **Homicide § 21— first degree murder of motel employees — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of two defendants for the first degree murders of two motel employees where it tended to show that the bodies of a motel security guard and a manager-trainee were found on the floor of the motel office at 2:45 a.m.; each had been shot several times; the security guard was dead and the manager-trainee died shortly thereafter; $200 from the cash register and the security guard's .32 caliber pistol were missing; a .25 caliber bullet was recovered from the manager-trainee's body and .32 caliber bullets were recovered from both bodies; the .32 caliber bullet recovered from the manager-trainee's body was fired from the security guard's pistol; sometime after 12:30 a.m. on the night of the crimes defendants and a female companion went to the motel; the female companion remained in the car while defendants entered the motel; while defendants were gone, their companion heard two or more sounds like a "blowout or a car backfiring"; defendants went to New York City the next night; a witness saw the security guard's pistol in the possession of one defendant the next night and later saw the pistol in defendants' car on the way to New York; and a New Jersey State Trooper later found the security guard's missing pistol in a car occupied by defendants.

2. **Criminal Law § 104— nonsuit — contradictions in State's evidence**

Contradictions and discrepancies in the State's evidence are matters for the jury and do not warrant nonsuit.

3. **Criminal Law § 87— refreshing recollection of witness**

Under the doctrine of "present recollection refreshed," the witness has a sufficiently clear recollection so that if allowed merely to refresh or stimulate it, he will be able to testify accurately to the controverted facts; thus, the witness finally testifies from his own recollection, and he uses writings, memoranda and other aids for the sole purpose of "jogging" his memory.

4. **Criminal Law § 87— refreshing recollection of witness — preparation of aid**

It is not required that an aid for refreshing the recollection of a witness be prepared by the witness himself or be prepared contemporaneously, or nearly so, with the event.

5. **Criminal Law § 87— refreshing recollection of witness — use of transcript prior to trial**

Use of a transcript to refresh the memory of a witness *prior* to trial was proper.

6. **Criminal Law § 87— present recollection refreshed — admissibility — credibility**

Where the testimony of a witness purports to be from his refreshed memory but is clearly a recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge; however, where there is doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury.

7. **Criminal Law § 87— refreshing memory — transcript of prior testimony — source of testimony**

Where a witness who "refreshed" her memory by looking at a transcript of her testimony at a previous trial stated at one point that the origin of her testimony was "of my own memory" and at another point that "some is to my memory and some isn't," the trial court did not abuse its discretion in refusing to strike the testimony of the witness and in submitting it to the jury for consideration.

8. **Criminal Law § 92— joint trial for murder**

Consolidation for trial of charges against defendants for murder of two motel employees during a robbery was not rendered improper because evidence of one defendant's visit to the motel three days prior to the crime would not have been admissible against the second defendant in a separate trial or because the second defendant offered no evidence and yet was denied the last argument to the jury.

9. Criminal Law § 92— consolidation of charges for trial

Consolidation for trial is generally proper where the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment is competent and admissible on the other.

10. Criminal Law § 92— joint trial — discretion of court

Absent a showing that a joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal.

11. Criminal Law § 87— leading questions

The trial court has discretionary authority to permit leading questions in proper instances, and unless prejudice is shown the discretionary action of the trial court will not be disturbed.

12. Criminal Law § 89— exclusion of impeachment question

The trial court did not err in sustaining the State's objection to defendants' inquiry on cross-examination of a State's witness as to the date the witness had been convicted of an unrelated larceny where the witness's memory for dates was adequately impeached by his later testimony and the excluded question was merely cumulative.

13. Criminal Law §§ 88, 128— cross-examination of defendant — good faith question

The State's question to defendant on cross-examination as to whether a codefendant told defendant, "You didn't have to shoot him," and whether defendant replied, "If I hadn't shot him, he would have shot one of us. He had a gun," was not posed in bad faith, and the court did not err in failing to declare a mistrial because of the question, where the record shows that, based on an extra-judicial statement of a third person, the State had good reason to believe that defendants made the statements embraced in the question.

14. Criminal Law § 162— ruling upon objection

When an objection is made the judge should rule upon it prior to the close of the proponent's case.

15. Criminal Law § 99— failure to rule upon objections — expression of opinion

Sustained and systematic failure to rule upon objections may indicate an opinion by the trial judge in violation of G.S. 1-180.

16. Criminal Law §§ 99, 162— failure to rule upon objection — absence of prejudice

Defendants were not prejudiced by the failure of the trial court on one occasion to rule on an objection during the State's cross-examination of one defendant where the question objected to was proper and nothing suggests an opinion by the court in violation of G.S. 1-180.

17. Criminal Law § 102— jury argument not impeachment of witness and defendants

In this prosecution for two murders committed during a robbery, the district attorney's argument that "The State had to put [a named witness] up. He's a friend of the defendants. He's the kind of person they run around with," did not improperly attempt to impeach both the character of a State's witness and the character of defendants themselves where the record shows that it was the defense on cross-examination who elicited evidence of bad character tending to impeach the witness and that the statement of the district attorney was essentially true.

18. Bill of Discovery § 6— criminal cases — names of State's witnesses

No right of discovery in criminal cases existed at common law, and neither former G.S. 15-155.4 nor G.S. 15A-903 requires the State to furnish the accused with a list of witnesses who are to testify against him.

19. Bill of Discovery § 6; Criminal Law § 87— witnesses not on list furnished defendants

The trial court did not err in permitting two witnesses to give corroborating testimony for the State when their names were not on the list of twenty-one witnesses furnished by the district attorney to defense counsel pursuant to pretrial discovery since the State substantially complied with the court's order to furnish the names and addresses of witnesses, bad faith by the omission of the names was not shown, and defendant suffered no prejudice as a result of the admission of the challenged testimony.

20. Criminal Law § 40— use of previously recorded testimony

The use of previously recorded testimony is authorized if it be shown that: (1) the witness is unavailable; (2) the proceedings at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel.

21. Criminal Law § 40— use of previously recorded testimony — unavailability of witness

A witness was unavailable within the meaning of that requirement for the admission of previously recorded testimony where the witness lived in Florida, was 70 years old, had just had surgery for a breast tumor and an injured foot, and his doctor certified that travel would be detrimental to his health.

22. Criminal Law § 57; Homicide § 20— admissibility of pistol — chain of custody not shown

The evidence in a homicide case was sufficient to identify a .32 caliber pistol and to establish its competency, and the pistol was properly admitted in evidence without the State having shown a chain of custody, where a New Jersey State Trooper testified he seized a

pistol when he arrested defendants and recorded the serial and model numbers of the gun in a written report, these recorded numbers corresponded to the serial and model numbers on a gun sold to the victim and on the gun admitted in evidence, and adequate testimony established that ballistics tests performed by State's witnesses were run on the pistol admitted in evidence.

23. Constitutional Law § 29; Jury § 7— use of peremptory challenges — alleged exclusion of blacks from jury

There is no merit in defendants' contention that they were denied a representative jury by the State's impermissible use of its peremptory challenges to exclude blacks from the jury since the peremptory challenge permits rejection for a real or imagined partiality, and an examination of the prosecutor's reasons for the exercise of his challenges in any given case is not permitted.

24. Constitutional Law § 29; Jury § 7— exclusion of jurors for death penalty views — representative jury

Defendants in a first degree murder case were not denied a representative jury by the exclusion of certain jurors who stated on *voir dire* that they could not convict defendants because the conviction would result in a judgment of death, although the death penalty is now unconstitutional.

25. Jury § 7— excusal of jurors for death penalty views — no interrogation by defense

The trial court properly excused for cause each venireman who made it clear that he could not, under any circumstances, return a verdict of guilty knowing that the mandatory death penalty would be imposed without first giving defendants a chance to "rehabilitate" the venireman by further interrogation.

26. Jury § 5— additional jurors summoned by officer

Defendants have no cause for complaint that two jurors were chosen from additional talismen summoned by an officer when the regularly summoned venire was exhausted where defendants examined and passed the jurors and failed to exhaust their peremptory challenges.

27. Criminal Law § 127— motion in arrest of judgment

Defendants' motion in arrest of judgment was properly denied because the indictments are proper and no fatal defect appears on the face of the record.

28. Criminal Law § 163— question concerning charge not presented

No question concerning the charge to the jury was presented where no portion of the charge was specified as erroneous and no reasons, arguments or citations of authority were contained in the brief as required by Rules 10 and 28, Rules of Appellate Procedure.

29. Constitutional Law § 36; Homicide § 31— substitution of life imprisonment for death penalty

Sentences of life imprisonment are substituted for death penalties imposed by the trial court in these first degree murder cases.

DEFENDANTS appeal from judgments of *Thornburg, J.*, 10 May 1976 Session, MECKLENBURG Superior Court.

The first trial of these defendants on 30 September 1974 resulted in a mistrial. At their second trial, commencing 11 November 1975, defendants were convicted of first degree murder and sentenced to death. They appealed and were awarded a new trial. See *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976).

On 10 May 1976 defendants were again placed on trial. In Case No. 74-CR-1598, defendant David Benjamin Smith, alias David Benjamin McCullough, is charged with the murder of Arthur William Hawkins, and in Case No. 74-CR-1599, said defendant is charged with the murder of Norman Bruce Wagstaff. In Case No. 74-CR-1600, defendant Bobby Orlando Foster is charged with the murder of Norman Bruce Wagstaff, and in Case No. 74-CR-1601, this defendant is charged with the murder of Arthur William Hawkins.

All four bills of indictment allege that the murders occurred in Mecklenburg County on 11 August 1973. The four cases were consolidated for trial.

The State's evidence tends to show that on 15 September 1965 Arthur William Hawkins purchased a .32 caliber Burgo, Model 108 pistol, serial number 112195, from Fox Jewelry and Loan in Jacksonville, Florida. He was employed as a security guard by the Days Inn Motel on Tuckaseegee Road in Charlotte, North Carolina, for about a year prior to his death on 11 August 1973. Norman Bruce Wagstaff was employed at the Days Inn Motel on Tuckaseegee Road as a manager-trainee.

On Friday evening, 10 August 1973, and into the early morning hours of Saturday, 11 August 1973, Arthur William Hawkins and Norman Bruce Wagstaff were on duty and Hawkins had his .32 caliber Burgo pistol in his possession. There was $200 in cash in the cash register. These two employees were alone when last seen around 1 a.m. on the morning of 11 August 1973.

On this same evening, Belinda Harris went to a night spot called the "Right On Lounge" or "Howard's Grill" with her sister and another female companion. Around 12:30 a.m. on the morning of 11 August 1973, she met defendants Smith and Foster in the parking lot at this night spot. She and her sister

accompanied defendants in a black 98 Oldsmobile driven by Foster to another establishment known as "Bill's." Belinda's sister left the party at that point, and Belinda and the two defendants rode around awhile. Smith left the car and Belinda and Foster "drove on a short time" and then met Smith, who was driving a "rather raggely car." Foster and Belinda got into this car with Smith and they went to the Days Inn Motel on Tuckaseegee Road in the "raggely car," ostensibly to pick up a girl. Smith and Foster left Belinda Harris in the car while they entered the motel. While they were gone she heard two or more sounds "like either a blowout or a car backfire." They returned to the "raggely car" shortly thereafter and left the premises. They drove to some point on a major highway with a grass median where all three of them left the "raggely car," walked across the grass median and entered the black 98 Oldsmobile parked there, headed in the opposite direction. They drove to the home of Belinda Harris' mother, picked up Belinda's brother Henry Harris (also known as Henry Peterson), went to an eating establishment and returned around 5 a.m.

About 2:45 a.m. on the morning of 11 August 1973, the bodies of Hawkins and Wagstaff were discovered on the floor behind the counter in the office of the Days Inn Motel on Tuckaseegee Road. Hawkins was dead and Wagstaff died shortly thereafter. Each had been shot several times. Hawkins had no wallet and his .32 caliber Burgo was missing from his holster. The office had been ransacked, chairs turned over, drawers pulled out, papers scattered, a telephone off the hook, the telephone switchboard torn out of the wall, all of the cash missing, and spatters of blood at various places. Three bullets were recovered from the victims: a .32 caliber bullet from Hawkins' body, a .25 caliber bullet from Wagstaff's head and a .32 caliber bullet from Wagstaff's abdomen.

On Sunday night and in the early morning hours of Monday, 13 August 1973, Delton Harris met defendants at a party in Charlotte. Foster had a .38 caliber pistol in his belt during the party and left with this pistol in his possession. Defendants said they were leaving town and going to New York City. Delton Harris asked to ride with them. They went to the apartment of Belinda Harris in Foster's black 98 Oldsmobile. There, while the car was being packed, Delton Harris saw defendant Smith put a .32 caliber 7-shot revolver in a compartment in the rear of the car. Then the two defendants, accompanied by Del-

ton Harris, one Barry Montgomery, Belinda Harris and her two children, left for New York City in Foster's car and arrived there on Monday evening, 13 August 1973.

On 30 August 1973, Trooper Douglas D. Sinopouli of the New Jersey State Police stopped Foster's car on the New Jersey Turnpike. Defendant Smith was also present in the car. The officer observed a gun partially hidden in the front seat. The weapon was seized and defendants were taken into custody. This weapon was identified as the .32 caliber Burgo, 7-shot revolver, serial 112195, model 108, belonging to Hawkins. It was later determined by ballistics tests that the .32 caliber bullet recovered from the abdomen of Wagstaff was fired from this pistol.

Defendant David Benjamin Smith, alias McCullough, testified as a witness in his own behalf. He said Belinda Harris was his girl friend; that he saw her and Bobby Foster and others at the "Right On" night spot around midnight on the night of 10 August 1973, went to "Bill's" in Foster's car, took Belinda home and picked up Henry Harris and then went to Uncle John's Pancake House, arriving there about 1 a.m. on 11 August 1973. While they sat and waited to be served, Henry Harris left and he saw Henry no more that night. He and Foster remained at the pancake house about two and a half hours, then took Belinda home where he spent the remainder of the night with her. Smith denied any participation in the crime and testified that he obtained the .32 caliber Burgo pistol from Henry Harris (Peterson) the night they were packing the car to go to New York.

Defendant Smith offered Henry Harris, also known as Henry Peterson, who testified that he was serving a term for armed robbery in South Carolina. In August 1973 he lived with his mother and his sister Belinda Harris in a house on McDowell Street in Charlotte. After being assured by the presiding judge that the State, having once placed him on trial with defendants Smith and Foster for the murders of Hawkins and Wagstaff and having failed to make a case, could not again try him upon the same charges, Henry Harris testified that after he left Smith and Foster and his sister Belinda at the pancake house on the night of 11 August 1973, he and another man went to the Days Inn Motel on Tuckaseegee Road and killed Hawkins and Wagstaff while robbing the place. He refused to divulge the name of the other man.

Defendant Foster offered no evidence.

The jury convicted defendant Smith of first degree murder of Norman Bruce Wagstaff in Case No. 74-CR-1599 and first degree murder of Arthur William Hawkins in Case No. 74-CR-1598. Smith was sentenced to death in each case.

The jury convicted defendant Foster of first degree murder of Norman Bruce Wagstaff in Case No. 74-CR-1600 and first degree murder of Arthur William Hawkins in Case No. 74-CR-1601. He was sentenced to death in each case.

From judgments pronounced, each defendant appealed to the Supreme Court, assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State of North Carolina.

Bart William Shuster, attorney for defendant appellant Foster, and Shelley Blum, attorney for defendant appellant Smith.

HUSKINS, Justice.

Denial of their motion for judgment of nonsuit constitutes defendants' first assignment of error.

A motion for nonsuit in a criminal case requires the court to consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference fairly deducible therefrom. *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). All the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered when ruling on the motion. *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1966); *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777 (1964). Contradictions and discrepancies are matters for the jury and do not warrant nonsuit. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971). If there is any evidence tending to prove the fact of guilt or which reasonably leads to that conclusion as a logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of the guilt of the accused. So, upon motion for nonsuit the question is whether there is substantial evidence—direct, cir-

cumstantial, or both—to support a finding that the offense charged has been committed and that the accused committed it. *State v. McKinney, supra; State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968).

[1] When measured by these rules, the State's evidence would permit a jury to find the following facts:

1. In August 1973 Arthur William Hawkins was employed by the Days Inn Motel on Tuckaseegee Road in Charlotte as a security guard and Norman Bruce Wagstaff was employed as a manager-trainee.

2. On Friday evening, 10 August 1973, and in the early morning hours of the following day, Hawkins and Wagstaff were working at the motel in the performance of their duties and were last seen alive at about 1 a.m. on the morning of 11 August 1973. There was $200 in cash in the cash register that night. At about 2:45 a.m. that morning Hawkins and Wagstaff were found on the floor in the office. Each had been shot several times. Hawkins was dead and Wagstaff died shortly thereafter. Hawkins had no wallet on his person and his .32 caliber 7-shot Burgo pistol was missing from his holster. The office had been ransacked and all of the cash was missing from the cash register.

3. Belinda Harris was a good friend of defendants Foster and Smith. On 7 August 1973, between 9 and 10 p.m., she and defendant Foster went to the Days Inn Motel on Tuckaseegee Road to take some clothing to her brother Henry Harris (also known as Henry Harris Peterson) who was staying at the motel with one Edna Felder. While there she changed into a bathing suit and went to the swimming pool but discovered it was closed. She was there long enough to observe the surroundings and the location of the motel.

4. At about 12:30 a.m. on 11 August 1973, Belinda Harris met defendants Smith and Foster at the "Right On Lounge" and rode around with them in Foster's car. They later split up for a short period of time, during which Smith obtained a "rather raggely car." Defendants and Belinda then drove in the old car to the Days Inn Motel where she remained in the car while defendants entered the motel, ostensibly to pick up a girl. While they were gone, she heard two or more sounds like a blowout or a car backfiring. Defendants then returned to the

old car, drove it to a point on the highway where they left it, reentered the original black car belonging to Foster and then drove to the house where Belinda's mother lived, picked up Belinda's brother Henry Harris and went to a restaurant to eat, after which they returned to the Belinda Harris home about 4 or 5 a.m.

5. On the evening of 12 August 1973, Delton Harris met defendants at a party in Charlotte. They told him they were going to New York City and agreed to take Delton Harris with them. While the car was being loaded that evening, Delton Harris saw a .32 caliber pistol in the possession of defendant Smith and later saw the same pistol in the pocket of the car on the way to New York. It was the same pistol offered in evidence and identified as the property of Arthur William Hawkins. Defendants, with several other people, left that night, arriving in New York City on Monday evening, 13 August 1973.

6. On 30 August 1973 a New Jersey State Trooper stopped the car occupied by defendants and seized a gun, partially hidden in the front seat, which was subsequently identified as the weapon belonging to Hawkins and as the weapon which fired at least one shot into Wagstaff's body.

This evidence is sufficient to support a finding that the offense of murder in the first degree was committed; that defendants were familiar with the operation and layout of the motel; that they planned and carried out a robbery there on the night of 11 August 1973 and in the course of the robbery Hawkins and Wagstaff were shot and killed; and that defendants fled the State to avoid apprehension. We hold there is ample evidence to carry the case to the jury and to support a verdict of guilty. The motion for nonsuit was properly denied. *See, e.g., State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. McKnight,* 279 N.C. 148, 181 S.E. 2d 415 (1971); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

[2] Our conclusion with respect to the sufficiency of the evidence is unaffected by defendants' contention that some of the State's evidence is contradictory and casts doubt on the credibility of the witnesses. Such contradictions and discrepancies are matters for the jury and do not warrant nonsuit. This assignment of error is overruled.

By their second assignment of error defendants contend the trial judge erred in not striking the entire testimony of

Belinda Harris. The motion to strike is grounded upon certain answers given by her on cross-examination which suggest that part of her testimony was based on her reading, prior to trial, of the transcript of her testimony at a previous trial rather than on her present recollection of events relevant to defendants' guilt or innocence. For the reasons which follow, we hold this assignment to be without merit.

The ability to recall is subject to obvious limitations. Where, as here, defendants are being tried for the second or third time, there is danger that the memories of key witnesses will fade. For this reason certain doctrines have evolved whereby the witness may be aided in his recollections. It is generally accepted that two types of aid are available for a witness: *past recollection recorded* and *present recollection refreshed.* 1 Greenleaf on Evidence § 439(a) (1899). *See Trust Co. v. Benbow,* 131 N.C. 413, 42 S.E. 896 (1902), *rev'd on other grounds,* 135 N.C. 303, 47 S.E. 435 (1904); *State v. Staton,* 114 N.C. 813, 19 S.E. 96 (1894). It is the latter type with which we are presently concerned.

[3] Under this method the witness has a sufficiently clear recollection so that if allowed merely to refresh or stimulate it, he will be able to testify accurately to the controverted facts. Thus the witness finally testifies from his own recollection, Jones on Evidence § 27:4 (1972), and he uses writings, memoranda and other aids for the sole purpose of "jogging" his memory. Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present. 3 Wigmore, Evidence § 758 (Chadbourn rev. 1970); *accord,* 1 Greenleaf on Evidence § 439(c) (1899). We thus turn to the particular situation as disclosed by the record on appeal in this case.

[4] At trial, the direct testimony of Belinda Harris was received without objection. On cross-examination, however, it was revealed that she had "refreshed" her memory by looking at a transcript of her testimony at a previous trial which was prepared and given to her by the State. This conduct on the part of the State was entirely proper. It is not required that the memory aid be prepared by the witness himself. Lord Ellenborough early stated this in *Henry v. Lee,* 2 Chitty 124 (1810),

where he said: "If upon looking at *any* document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, *for it is not the memorandum that is the evidence but the recollection of the witness.*" (Emphasis added.) 3 Wigmore, Evidence § 759 (Chadbourn rev. 1970).

Although some jurisdictions have suggested that the memorandum must be made contemporaneously, or nearly so, with the event, *see Putnam v. United States,* 162 U.S. 687, 40 L.Ed. 1118, 16 S.Ct. 923 (1896) (since distinguished on this point by *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 84 L.Ed. 1129, 60 S.Ct. 811 (1940)); *Palatini v. Sarian,* 15 N.J. Super 34, 83 A. 2d 24 (1951); *Braden Winch Co. v. Surface Equipment Co.,* 196 Okla. 444, 165 P. 2d 640 (1945), there is no clear mandate for such a restriction. Moreover, where the stimulus is prior testimony or depositions, the overwhelming majority permit the recollection of the witness to be refreshed. *See, e.g., United States v. Barrow,* 363 F. 2d 62 (3d Cir. 1966), *cert. denied* 385 U.S. 1001 (1967); *People v. Seiterle,* 65 Cal. 2d 333, 420 P. 2d 217, 54 Cal. Reptr. 745 (1966), *cert. denied* 387 U.S. 912 (1967); *State v. Holmes,* 281 Minn. 294, 161 N.W. 2d 650 (1968); *People v. Ferraro,* 293 N.Y. 51, 55 N.E. 2d 861 (1944); *State v. Peacock,* 236 N.C. 137, 72 S.E. 2d 612 (1952); *State v. Coffey,* 210 N.C. 561, 187 S.E. 754 (1936); *State v. Finley,* 118 N.C. 1161, 24 S.E. 495 (1896); *Hurley v. State,* 46 Ohio St. 320, 21 N.E. 645 (1889).

[5] Nor do we find any problem with the use of a transcript to refresh the memory of a witness *prior* to trial. *Manufacturing Co. v. R. R.,* 222 N.C. 330, 23 S.E. 2d 32 (1942); *State v. Cheek,* 35 N.C. 114 (1851).

Nevertheless, the defendants contend that the testimony should have been stricken because the transcript did not "refresh" her memory but merely provided a script for her to recite at trial. The evidence on this point is contradictory. At one point the witness, when questioned as to the origin of her testimony, stated that it was "[o]f my own memory." At another point she said, "some is to my memory, and some isn't." Such statements raise questions as to the validity of her testimony.

[6] Because of the looser standards involved with present recollection refreshed, it is critical that the actual circumstances

of each case conform to the underlying assumptions of the doctrine. That is, the memorandum must actually "refresh" the memory of the witness and his subsequent testimony must indeed be from his own recollection. Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge. *See United States v. Riccardi,* 174 F. 2d 883 (3d Cir. 1949), *cert. denied* 337 U.S. 941 (1949); *State v. Perelli,* 125 Conn. 321, 5 A. 2d 705 (1939); *accord,* 3 Wigmore, Evidence § 758 (Chadbourn rev. 1970). Where there is doubt as to whether the witness purporting to have a refreshed recollection is indeed testifying from his own recollection, the use of such testimony is dependent upon the credibility of the witness and is a question for the jury. *State v. Perelli,* 128 Conn. 172, 21 A. 2d 389 (1941); *see Wise, Boles & Bowdoin v. Fuller,* 11 Ala. App. 427, 66 So. 827 (1914); *State v. Burns,* 158 Iowa 440, 139 N.W. 1094 (1913); *St. Martin State Bank v. Steffes,* 88 Mont. 85, 290 P. 259 (1930); *State v. Crater,* 230 Or. 513, 370 P. 2d 700 (1962).

[7] Here the trial judge, in his discretion, denied defendants' request to strike the testimony of the witness and submitted it to the jury for consideration. The exercise of that discretion will not be disturbed on appeal absent abuse. See 1 N. C. Index 3d, Appeal and Error § 54, and cases cited. On the record presented here, we find no abuse of discretion in the denial of the defendants' motion to strike all the testimony of Belinda Harris. This assignment is overruled.

[8] Defendants next assign as error the consolidation of the cases for trial. Smith contends he was prejudiced in that the evidence of Foster's visit to the motel three days prior to the date of the crime would not have been admissible against Smith in a separate trial. Foster contends he was prejudiced by the consolidation in that he offered no evidence and yet was denied the last argument to the jury. Neither contention has any merit.

[9, 10] Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial judge. *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975). Consolidation for trial is generally proper where the offenses charged are of the same class and

are so connected in time and place that evidence at trial upon one indictment is competent and admissible on the other. *State v. Taylor,* 289 N.C. 223, 221 S.E. 2d 359 (1976). Absent a showing that a joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). Such prejudice arises most often where the defendants offer antagonistic defenses, *State v. Alford, supra,* or where one defendant has made a confession which is inadmissible against the other. *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968) ; *State v. Fox, supra.* In the present case, consolidation was proper and no abuse of discretion has been shown. Defendants' third assignment of error is overruled.

Defendants contend the trial court erroneously allowed the prosecutor to pose leading questions. For example, Officer O'Brien of the Charlotte Police Department was asked: "Did you notice whether or not the man was wearing any firearms?" Another example: "There was no weapon in the holster." The use of these and similar "leading" questions constitutes defendants' fourth assignment of error.

[11] A leading question is one that suggests the desired answer. Frequently, questions that may be answered by "yes" or "no" are regarded as leading. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 31, and cases there cited. Even so, the trial court has discretionary authority to permit leading questions in proper instances, *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965), and unless prejudice is shown the discretionary action of the trial court will not be disturbed. *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353 (1953). When the testimony is competent and there is no abuse of discretion, defendant's exception will not be sustained. *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975) ; *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974). Here, no abuse of judicial discretion is shown. Some of the questions challenged were not leading; in some, the contested evidence elicited was admitted elsewhere without objection; and in others, the evidence elicited was obviously not prejudicial. Defendants' fourth assignment of error is overruled.

[12] Defendants' fifth assignment is grounded on the contention that the scope of their cross-examination of State's witness Delton Harris was improperly limited by the trial judge. The

record shows that the trial judge sustained an objection by the State to defendants' inquiry as to the date upon which Delton Harris had been convicted for an unrelated larceny. Defendants contend they were entitled to pose the question and elicit an answer for the purpose of impeaching his memory of dates.

It is clear from the record that Delton Harris' memory for dates was adequately impeached by his later testimony. The question under discussion was merely cumulative and its exclusion resulted in no prejudice to defendants. This assignment is overruled.

[13] During the district attorney's cross-examination of defendant Smith, the following exchange occurred:

"Q. I'll ask you if Bobby Foster didn't make a statement to the effect to you—

MR. SHUSTER [Defense Counsel]: Objection.

COURT: Overruled.

DEFENDANTS' EXCEPTION NO. 27.

Q. 'You didn't have to shoot him,' at which point you responded, 'If I hadn't shot him, he would have shot one of us. He had a gun.'

A. I think Robert Davis cleared that for you.

Q. Excuse me?

A. I think Robert Davis cleared that for you, and that's where you got the question from. I think he cleared that for you. I did not say anything to Bobby concerning that, nor did Bobby say anything to me concerning that. I deny that."

Defendants contend that by the question posed over their objection, the State was permitted to place prejudicial material before the jury knowing that it would be denied. Thus they contend that the question was posed in bad faith and that a mistrial should have been granted. Defendants' sixth and eighth assignments of error are grounded on this exchange.

The challenged question does not concern collateral matters, as in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), and *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). Rather, it seeks to elicit direct evidence of the guilt of

the defendants. Therefore, the question was entirely proper if asked in good faith. *See* 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 111. The record on appeal clearly indicates that based on a prior extrajudicial statement by Robert Davis, the State had good reason to believe defendant had made the statements embraced in the question. The voluntary statement of Robert Davis contains the following: "Later Bobby told Benny you didn't have to shoot him. Benny said if I hadn't shot him he would have shot one of us he had a gun to [sic]. One of them said we are going to have to get out of here [be]cause it's getting to [sic] hot. They talked on about leaving Charlotte." Thus the record does not support defendants' contention that the question was asked in bad faith. Moreover, the trial judge instructed the jury that a negative answer to a question which assumes or insinuates a fact not in evidence "is not evidence of any kind." There is no merit in assignments six and eight.

The failure of the trial judge to rule on a certain exception during the State's cross-examination of defendant Smith constitutes appellants' seventh assignment of error.

[14-16] When an objection is made the judge should rule upon it prior to the close of the proponent's case. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 28. Sustained and systematic failure to rule upon objections may indicate an opinion by the trial judge in violation of G.S. 1-180. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). Here, the record reveals only one instance where the trial judge failed to rule upon an objection. Nothing suggests an opinion by the court in violation of G.S. 1-180. Furthermore, the question objected to was proper in all respects. Thus the court's failure to rule upon the particular objection resulted in no prejudice. This assignment is overruled.

[17] Defendants challenge, as impermissible, portions of the prosecution's arguments before the jury. They bring forward two exceptions on appeal, but the record indicates that objection was made at trial only to the first exception. It is the general rule that an impropriety in the argument must be brought to the attention of the trial judge in time for it to be corrected, *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied* 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969), unless the impropriety is so gross that it cannot be corrected, in

which event the court must act *ex mero motu*. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). We find no gross impropriety with respect to the second remark to which no objection was made. So, for purposes of review, we consider only the statement properly objected to. That statement reads as follows: "Delton Harris came along. The State had to put Delton Harris up. He's a friend of the defendants. He's the kind of person they run around with."

Defendants contend the quoted statement attempts to impeach both the character of the State's witness Delton Harris and the character of defendants themselves. The argument is not persuasive. The record does not support the contention that the State is attempting to impeach the testimony of Delton Harris. It is apparent that his testimony was important to the State's case. Rather, the record shows it was the defense on cross-examination of Delton Harris who elicited evidence of bad character tending to impeach him.

Likewise, the contention that the quoted excerpt impermissibly reflected on the character of the defendants is without merit. When the district attorney's argument to the jury is challenged as improper, the argument of defense counsel should be placed in the record on appeal to enable appellate courts to determine whether the challenged argument has been provoked. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976); *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). Here, arguments made by defense counsel concerning the witness Delton Harris are not included in the record; only isolated excerpts from the argument of the district attorney are included. Under these circumstances we are unable to examine the challenged statements of the district attorney in the context in which they were presented to the jury and thus must confine our scrutiny to the face of the arguments presented, assuming such inferences as to the nature of the arguments omitted as are reasonable in light of the facts of this case. *See State v. Smith, supra; State v. Miller, supra.* Having done so, we find no merit in defendants' contention. Furthermore, the record discloses that Delton Harris had known defendants for a month or so, was present with them at a party on the night of 12 August 1973, rode to New York with them in Foster's black 98 Oldsmobile, and was serving time for armed robbery at the time he testified at the trial of this case. We conclude on these facts that the statement of the district attorney was essentially true and the

argument properly permitted. Defendants' ninth assignment is overruled.

[19] In their tenth assignment of error defendants contend the court erred in permitting Craig Plyman and Edna Mae Hawkins to testify as State's witnesses when their names were not on the list of witnesses furnished by the district attorney to defense counsel pursuant to pretrial discovery motion. The testimony of Plyman tended to corroborate what the witness Parrish had said on cross-examination about the number of Days Inn Motels open and in operation in Charlotte on the date of the crime. Mrs. Hawkins, widow of one of the victims, corroborated the previous testimony of Stanley Harris as to the signature of her husband for the purchase of the .32 caliber Burgo pistol from Fox Jewelry and Loan in Jacksonville, Florida. The record discloses that the district attorney furnished defendants the names and addresses of twenty-one witnesses but the names of these two witnesses were not on the list.

[18, 19] No error, prejudicial or otherwise, was committed in permitting these two witnesses to testify. No right of discovery in criminal cases existed at common law. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972). No right to discover the names and addresses of State's witnesses exists by statute in North Carolina. Neither former G.S. 15-155.4 nor G.S. 15A-903 requires the State to furnish the accused with a list of witnesses who are to testify against him. *See State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Macon,* 276 N.C. 466, 173 S.E. 2d 286 (1970). Here, however, the State substantially complied with the order of the court to furnish the names and addresses of the State's witnesses. Where such a list has been furnished and the State subsequently seeks to call a witness not on that list, the court will look to see whether the district attorney acted in bad faith, *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 106 (1975), and whether the defendant was prejudiced thereby. *State v. Carter, supra; State v. Hoffman, supra.* In the case before us bad faith by the omission of the names is not shown. Further, it is clear that defendants have suffered no prejudice as a result of the admission of the challenged testimony.

It is appropriate to note in connection with this assignment that when pretrial discovery legislation was introduced in

the General Assembly, it provided for discovery of names and addresses of witnesses the State intended to call plus their criminal records, but that provision was deleted before the measure was enacted. See Official Commentary following G.S. 15A-903. Furthermore, the phrase "or the name of each additional witness" was inadvertently left in G.S. 15A-907 when the Criminal Procedure Act was enacted in 1973 and, after discovery of the inadvertence, deleted by the General Assembly in 1975. The same inadvertent enactment and subsequent deletion took place with respect to G.S. 15A-910(b) and (c) concerning the furnishing of names and addresses of witnesses. Thus it was never the intention of the General Assembly when it enacted Article 48 of the Criminal Procedure Act to require the district attorney to furnish the names and addresses of witnesses the State intended to call. It follows that trial judges should not encourage, by court order, what the Legislature specifically rejected during consideration of the legislation. Defendants' tenth assignment is overruled.

We next examine the contention that the trial court erred in admitting the previously recorded testimony of Stanley Harris. Defendants' eleventh assignment of error is based on admission of such testimony.

[20] The use of previously recorded testimony is authorized if it be shown that: (1) The witness is unavailable; (2) the proceedings at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 145. *See State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954); *Settee v. Electric Railway,* 171 N.C. 440, 88 S.E. 734 (1916). *Compare State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897 (1967). Here defendants contend the witness Stanley Harris was available but concede that requirements (2) and (3) are met. We examine the record with respect to the availability of the witness.

The witness, if available, must be produced and testify *de novo. State v. Cope, supra.* This requirement is grounded on the right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Mancusi v. Stubbs, 408 U.S. 204, 33 L.Ed. 2d 293, 92 S.Ct. 2308 (1972); *Barber v. Page*, 390 U.S. 719, 20 L.Ed. 2d 255, 88 S.Ct. 1318 (1968). However, the right of confrontation is not denied where the witness has become incapacitated to testify in court by reason of a permanent or indefinite illness. *State v. Prince, supra.*

[21] Here, the State's evidence tends to show that the witness lived in Florida, was 70 years old, had just had surgery for a tumor of the breast and an injured foot, and his doctor certified that travel would be detrimental to his health. We hold this evidence sufficient to support the finding that the witness was unavailable. Compare *Norburn v. Mackie*, 264 N.C. 479, 141 S.E. 2d 877 (1965), a civil case in which previously recorded testimony was admitted where a witness lived more than 100 miles away, was at least 65 years old, had undergone a recent operation, and travel would be detrimental to his health. The previously recorded testimony of the witness Stanley Harris was properly admitted. Defendants' eleventh assignment of error is overruled.

[22] Defendants, in their twelfth assignment of error, contend the court erred in admitting the .32 caliber Burgo pistol into evidence without requiring a complete chain of custody.

We find no merit in this assignment. The New Jersey State Trooper, Sinopouli, testified that he apprehended defendants in August 1973 in New Jersey and, at the time of the arrest, made a written report in which he recorded the serial number and model of the gun, to wit: serial 112195 and model 108. These numbers correspond to the serial and model numbers on the gun sold to the victim Hawkins and on the gun admitted into evidence as State's Exhibit 3. There is adequate testimony establishing that the ballistics tests were run on State's Exhibit 3. This evidence is sufficient to identify the weapon and establish its competency. See *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975), a case with strikingly similar facts. This assignment is overruled.

Defendants' thirteenth assignment, contesting the death penalty, is sustained.

[23] Defendants' fourteenth assignment contests the State's use of its peremptory challenges. Defendants argue that the State impermissibly used its peremptory challenges to exclude

blacks from the jury, thus denying defendants a representative jury. No evidence was offered to support the contention; rather, counsel seems to rely on personal opinions and memories of previous jury trials in Mecklenburg County.

Peremptory challenges allowed each party by G.S. 9-21 are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason. *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969). The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control. *Lewis v. United States,* 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892). In other words, the peremptory challenge permits rejection for a real or imagined partiality, and an examination of the prosecutor's reasons for the exercise of his challenges in any given case is not permitted. *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965). There is no merit in defendants' fourteenth assignment of error and it is therefore overruled.

[24] Defendants' fifteenth assignment relates to the exclusion of certain jurors who stated on voir dire that they could not convict defendants because the conviction would result in a judgment of death. Defendants argue that since the death penalty is now unconstitutional these jurors would have been eligible and that defendants were therefore denied a representative jury.

Suffice it to say that when the jury was selected in this case, the trial judge adhered strictly to the law as prescribed by *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), and *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974). *See State v. Monk,* 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976). There is no merit in this contention.

[25] Even so, defendants further argue that the court erred by refusing defense counsel an opportunity to examine a potential juror who had been challenged by the State on grounds that he could not convict knowing the death penalty would be imposed. Defendants sought, and were denied, an opportunity to

"rehabilitate" the potential juror by further interrogation. This argument is without merit. It is settled law that a challenge for cause should be sustained where the venireman challenged states unmistakably that he would, by reason of the death penalty, automatically vote against conviction without regard to any evidence developed at trial. *Witherspoon v. Illinois, supra; State v. Monk, supra; State v. Carey, supra; State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). Here, the veniremen who were excused for cause made it unmistakably clear that they could not, under any circumstances, return a verdict of guilty knowing the mandatory death penalty would be imposed. Upon challenge, the court properly excused each venireman at that point.

[26] When the regularly summoned venire was exhausted, the court directed an officer to summon additional talismen. This was done and two jurors were examined, passed by both sides, and seated as jurors in the trial of this case. Defendants now contend that these two jurors did not come from a cross-section of the population and the court erred in allowing them to be selected in such fashion. The contention has no merit because the record shows defendants did not exhaust their peremptory challenges. They examined these jurors, passed them, and will not now be heard to complain. No prejudice is shown. *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). *See State v. Boyd,* 287 N.C. 131, 214 S.E. 2d 14 (1975). Defendants' fifteenth assignment of error is overruled.

[27] Defendants' motion in arrest of judgment was properly denied because the indictments are proper and no fatal defect appears on the face of the record. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966).

Defendants' motion to set aside the verdicts is merely formal and requires no discussion. It is addressed to the discretion of the court and refusal to grant it is not reviewable. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960).

[28] Defendants assert the trial court erred in its charge to the jury but no portion of the charge is specified as erroneous and no reasons, arguments or citations of authority are con-

tained in the brief as required by Rules 10 and 28, Rules of Appellate Procedure, 287 N.C. 671. Under the cited rules, no question is presented concerning the charge. Even so, in light of the seriousness of the case, we have reviewed the charge for error and find none.

[29] In *Woodson v. North Carolina*, ... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (decided 2 July 1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendants were indicted, convicted and sentenced to death. Sentences of life imprisonment are therefore substituted in this case in lieu of the death penalty by authority of the provisions of section 7, chapter 1201 of the 1973 Session Laws (1974 Session).

Our examination of the entire record discloses no error affecting the validity of the verdicts returned by the jury. The trial and verdicts must therefore be upheld. To the end that sentences of life imprisonment may be substituted in lieu of the death sentences theretofore imposed, the case is remanded to the Superior Court of Mecklenburg County with directions (1) that the presiding judge, without requiring the presence of defendants, enter judgments imposing life imprisonment for the first degree murders of which defendants have been convicted; and (2) that in accordance with said 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 defendants and their counsel a copy of the judgments and commitments as revised in accordance with this opinion.

No error in the verdicts.

Death sentences vacated.

STATE OF NORTH CAROLINA v. JAMES EDWARD (JIMMY) BRITT

No. 151

(Filed 31 January 1977)

1. Criminal Law § 55— blood alcohol level — no foundation for testimony

The trial court in a first degree murder prosecution did not err in refusing to allow an expert in pathology to testify concerning

the blood alcohol level of the victim, since there was no evidence which would lay a sufficient foundation for such testimony.

2. **Criminal Law § 87; Witnesses § 1— witness not on list furnished defendant — testimony properly allowed**

Defendant was not prejudiced where the trial court allowed a witness whose name was not on a list furnished to defense counsel to testify; and, while it would have been the better practice to question the members of the jury as to any relationship with the witness at the time he was called to testify, defendant was not prejudiced by the omission of such inquiry.

3. **Criminal Law § 89— prior consistent statements — admissibility for corroboration**

Prior consistent statements of a witness are admissible to strengthen his credibility, but such statements are admissible only when they are in fact consistent with the witness's testimony; however, if the previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible.

4. **Criminal Law § 89— corroborating testimony — slight variations**

The trial court in a first degree murder prosecution did not err in allowing into evidence testimony of a corroborating witness, though such testimony was slightly different from that of the original witness.

5. **Criminal Law § 93— order of proof — discretionary matter**

Defendant failed to show abuse of discretion by the trial court in allowing three of the State's witnesses to testify in rebuttal rather than during the State's case in chief.

6. **Criminal Law § 102— district attorney's jury argument — characterization of defendant — no error**

In a first degree murder prosecution, the trial court did not err in allowing the district attorney, after reciting the evidence introduced by the State, to state in his jury argument that defendant was a "cold-blooded, deliberate murderer, regardless of what your decision in this case is," and that defendant was "guilty as sin and I'm asking you to put him out of the shooting business," since it would appear that the district attorney's opinion was based solely upon evidence at the trial from which his inferences and conclusions could legitimately be inferred.

7. **Criminal Law § 102— self-defense — district attorney's jury argument — propriety**

The district attorney in a first degree murder case did not improperly argue self-defense to the jury but instead explained that under the law applicable to the case self-defense was not an issue.

8. **Criminal Law § 87— leading question defined**

A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no; however,

simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response.

9. Criminal Law § 87— 13 year old witness — leading questions proper

The trial court in a first degree murder case did not abuse its discretion in permitting leading questions to be used to elicit testimony from the 13 year old son of the victim who was an eyewitness to the shooting of his father.

10. Constitutional Law § 30— homicide prosecution — loss of knife by State — no denial of due process

In a first degree murder prosecution defendant failed to show how the loss by the State of a knife with which deceased allegedly stabbed defendant amounted to a denial of due process, since at no time during trial did defendant ever raise the issue of the loss of the knife; defendant cross-examined the witnesses who saw the knife on the evening of the murder and could have elicited any desired information from them; and it was unclear of what relevance the knife would have been in the case, since self-defense was not an issue.

11. Constitutional Law § 30; Criminal Law § 102— failure of court to remove district attorney — no denial of due process

Defendant was not denied due process of law by the trial court's failure to remove the district attorney from prosecution of the case, even though the case had been tried three times before with the same district attorney, and the Supreme Court had previously reversed defendant's conviction for overzealous conduct on the part of the district attorney, since there was no showing of misconduct in this trial.

12. Constitutional Law § 34; Criminal Law §§ 26, 128— mistrial upon defendant's motion — double jeopardy plea improper

An order of mistrial in a capital case will not support a plea of former jeopardy if the mistrial is entered upon defendant's motion; therefore, defendant was not subjected to double jeopardy where, in an earlier trial, the presiding judge declared a mistrial based upon two incidents affecting the jury and upon defendant's motion.

13. Constitutional Law § 37; Criminal Law § 26— appeal from conviction — waiver of protection against reprosecution

When a defendant seeks a new trial by appealing his conviction, he waives his protection against reprosecution; therefore, defendant was not subjected to double jeopardy where he appealed twice and was awarded new trials for errors occurring in the earlier trials.

14. Constitutional Law § 30— delay caused by defendant's appeals — no denial of speedy trial

Defendant who was charged with a murder committed on 3 May 1973 was not denied his right to a speedy trial where delays were caused by his appeals, not by any arbitrary or oppressive delay by the prosecution.

15. Criminal Law § 88— cross-examination — limitation proper

The trial court in a first degree murder prosecution did not err in limiting defendant's cross-examination of the victim's son concerning conduct of the victim toward his wife on occasions prior to the homicide when defendant was not present.

16. Constitutional Law § 36; Homicide § 31— first degree murder — life sentence substituted for death penalty

The death sentence imposed in this first degree murder prosecution is vacated and a sentence of life imprisonment is imposed in lieu thereof.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Braswell, J.*, at the 3 May 1976 Session of BLADEN Superior Court.

Defendant was tried and convicted upon an indictment, proper in form, for the first degree murder of Clarence Blackwell committed on 3 May 1973. A sentence of death was imposed.

The State introduced evidence tending to show that several days prior to 3 May 1973, H. L. Wiggins sold defendant a .357 magnum pistol. Thereafter, during the evening of 3 May 1973, defendant approached Deputy Sheriff Carl Herring and offered him $50.00 to put Clarence Blackwell in jail. Mr. Herring refused the offer and defendant stated to him that "he could take care of [Blackwell] if [Deputy Herring] couldn't . . . . "

Decedent's son, David Blackwell, testified that his father and mother were not living together on 3 May 1973. During the evening of 3 May 1973, David was awakened by a noise in the living room of his house. He walked from his bedroom to the living room where he saw his father (the decedent) and defendant fighting. After he watched the fight for approximately five or ten seconds, his father arose and began running toward the front door. At this time, David saw defendant pick up a pistol and shoot his father in the back. His father then went out the front door. David further testified that after defendant fired the shot, defendant picked up a shotgun and left the house.

Decedent's body was found lying face down in his front yard. The location of his feet was approximately eighteen inches from the bottom of the front steps of the house. A .357 magnum pistol containing five live rounds and one spent round was later found inside defendant's house. The pathologist who performed

the autopsy upon decedent's body stated that the bullet entered the lower part of the decedent's back. In his opinion, death was caused by hemorrhage secondary to the bullet wound.

Defendant did not testify, but offered the testimony of several persons. In general, the witnesses' testimony tended to show that they had seen decedent on the evening of 3 May 1973 and that they had seen Mrs. Blackwell's house on that night.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General Archie W. Anders for the State.

William S. McLean for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the trial court erred in failing to allow into evidence the blood alcohol level of the deceased. Defendant admits that the autopsy report and related reports (including a toxicology report) identified by Dr. Marvin Thompson, an expert in pathology, were not offered into evidence at trial by either the State or defendant. Defendant only assigns as error the failure of the court to allow the oral testimony of Dr. Thompson relating to the blood alcohol level of the deceased.

As stated in *Robinson v. Insurance Co.*, 255 N.C. 669, 672, 674, 122 S.E. 2d 801, 803, 804 (1961):

> "[A]s to whether or not a blood alcohol test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field. In other words, a foundation must be laid before this type of evidence is admissible. *S. v. Willard* [241 N.C. 259, 84 S.E. 2d 899 (1954)]. Moreover, it should be made to appear that the blood was taken from the body of the deceased before any extraneous matter had been injected into it. *McGowan v. City of Los Angeles,* 100 Cal. App. 2d 386, 223 P. 2d 862, 21 A.L.R. 2d 1206.

* * *

" . . . '(I)t is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. *Joyner v. Utterback,* 196 Iowa 1040, 195 N.W. 594. As stated in *Rodgers v. Commonwealth,* 197 Va. 527, 90 S.E. 2d 257, 260, "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." ' " *See also State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968).

In performing the autopsy, Dr. Thompson took a sample of deceased's blood and placed it in a container addressed to the State medical examiner's laboratory in Chapel Hill. He then placed the container in a rack to be mailed. He did not know whether it was sent by U.S. mail or, if so, whether it was sent as first, second, or third class mail. He did not perform any tests upon the blood and did not know who had performed the tests or what procedure was used in examining it. He was able only to testify that a few days after placing the blood in the rack to be mailed he received a report with the name of Clarence Blackwell on it stating the result of the laboratory work which detected the presence of ethanol in the blood.

The exclusion of the testimony of Dr. Thompson regarding the result of the laboratory test, under the facts of this case, was proper. There was no evidence that would lay a sufficient foundation for the introduction of Dr. Thompson's testimony, and the documents themselves were not offered into evidence. Further, since there was no evidence tending to show self-defense, we question whether the alcohol content of the victim's blood was material. Since neither the toxicology report nor the autopsy report was offered into evidence, we do not pass upon their admissibility. This assignment is overruled.

[2] When the State called Alvin Mitchell Register to testify, defendant objected on the ground that Register was not included in a witness list furnished to defense counsel during jury *voir dire.* The trial judge overruled this objection and permitted Register to testify. In *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972), we held that in the absence of a statute

requiring it, defendant has no right to a list of the witnesses which the State may call. In this jurisdiction, we have no such statute. In fact, the General Assembly, in the passage of G.S. 15A-903 (which defines certain information which is subject to discovery by a defendant), expressly deleted such a provision from the proposed draft of the statute. *See Thompson, Subchapter IX Pretrial Procedure,* 10 Wake Forest L. Rev. 499, 502-04 (1974). The action of the trial judge in permitting a witness to testify is not reviewable on appeal in the absence of an abuse of discretion. *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972). *See also State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Spaulding,* 288 N.C. 397, 219 S.E. 2d 178 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975).

In instant case, we find no abuse of discretion in the trial judge's ruling which permitted Register to testify. If defendant was unable to proceed, he could have moved for a continuance. *State v. Hoffman, supra.* While it would have been better practice to question the members of the jury as to any relationship with Register at the time he was called to testify, we do not feel that under the facts of this case defendant suffered any prejudice from the omission of this inquiry nor in the admission of the testimony. As was stated in *State v. Hoffman, supra,* at 735, 190 S.E. 2d at 848, "a defendant is not legally prejudiced merely because the State proves its case against him." This assignment is overruled.

[4] Witness Register testified that he had known defendant and Carolyn Blackwell for a number of years and that on several occasions prior to 3 May 1973 defendant had called Carolyn from a telephone located in his place of business. On 3 May 1973, at approximately 3:00 p.m., defendant came to his place of business and again called Carolyn. Register testified that he heard defendant tell Carolyn that "he was going to kill somebody if he kept his mess up." Register further testified that he knew who defendant was talking about, and that he told defendant that he was going to get himself into more trouble than he could get out of. Defendant replied, "I'll get out of it."

After Register's testimony, James E. Shaw, a State investigator, testified that subsequent to 3 May 1973 he talked with the witness Register. At that time, Register stated that he had overheard the conversation defendant had with Carolyn Black-

well on 3 May 1973. Register further told Shaw that in the conversation defendant stated to Carolyn that he was going to kill Clarence Blackwell. Defendant objected to this testimony. The court overruled the objection, but instructed the jury: ". . . I instruct you that this answer now to be given by the witness is not substantive or direct evidence. It is received for the purpose for corroboration of the witness Mitchell Register. It is for you, alone, to determine if it does so. To corroborate means to strengthen or support."

Defendant contends that the admission of the testimony of witness Shaw for the purpose of corroborating the testimony of Register was error because Shaw's testimony did not corroborate that of Register.

[3] The admissibility of prior consistent statements of the witness to strengthen his credibility has been reaffirmed by this Court in many cases. 1 Stansbury, N. C. Evidence § 51 (Brandis rev. 1973), and cases cited therein. In *Lorbacher v. Talley,* 256 N.C. 258, 260, 123 S.E. 2d 477, 479 (1962), Justice Bobbitt (later Chief Justice) quoted with approval:

> "As stated by *Smith, C.J.,* in *Jones v. Jones,* 80 N.C. 246, 250: 'In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.' *Bowman v. Blankenship,* 165 N.C. 519, 81 S.E. 2d 746; *Brown v. Loftis,* 226 N.C. 762, 764, 40 S.E. 2d 421; Stansbury, *op. cit.* § 50. . . . "

Such previously consistent statements, however, are admissible only when they are in fact consistent with the witness's testimony. *State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975); *State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298 (1949); *State v. Melvin,* 194 N.C. 394, 139 S.E. 762 (1927); 1 Stansbury, N. C. Evidence § 52 (Brandis rev. 1973).

If the previous statements offered in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. *State v. Patterson, supra; State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Case,* 253 N.C. 130, 116

S.E. 2d 429 (1960). Further, broadside objections to corroborative testimony will not generally be sustained if any portion of such testimony is competent. Rather, it is the duty of the objecting party to call to the attention of the trial court the objectionable part. *State v. Tinsley,* 283 N.C. 564, 196 S.E. 2d 746 (1973); *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354 (1963).

[4] Applying these principles to the evidence in this case, we hold that it was not prejudicial error to overrule defendant's objections to the testimony of the witness Shaw. Register testified, in substance, that he heard defendant tell Carolyn that he was going to kill somebody and that he knew who defendant was talking about. Shaw testified that Register told him that he heard defendant tell Carolyn that he was going to kill Clarence Blackwell. The testimony of Shaw tended to corroborate that of Register, showing that defendant intended to kill someone. It in no way contradicts the testimony of Register and, at least, partially corroborates it. As instructed by the trial judge, it was for the jury to determine if it did corroborate and if it did strengthen or support the testimony of Register. This assignment is overruled.

[5] The action of the trial court in allowing the testimony of H. L. Wiggins, Alvin Mitchell Register, James E. Shaw and Billy Watson as rebuttal witnesses constitutes the basis for defendant's next assignment of error. Defendant contends that the testimony of these witnesses did not in fact rebut defendant's evidence but would have been properly admissible during the State's case in chief. Conceding this to be true, it was not error to admit the testimony on rebuttal. As stated by Justice Huskins in *State v. Foster,* 284 N.C. 259, 276, 200 S.E. 2d 782, 794-95 (1973):

> "The order of proof is a rule of practice resting in the sound discretion of the trial court. *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956). 'The court, to attain the ends of justice, may in its discretion allow the examination of witnesses at any stage of the trial.' *State v. King,* 84 N.C. 737 (1881). The great weight of authority holds that 'the admission in a criminal prosecution of evidence as a part of the rebuttal, when such evidence would have been properly admissible in chief, rests in the sound discretion of the trial judge and will not be interfered with in the absence of gross abuse of that discretion.' 53 Am. Jur.,

Trial, § 129. *Accord, State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972)."

No gross abuse of discretion appears. Accordingly, we overrule this assignment.

Defendant next assigns as error certain portions of the district attorney's argument to the jury. Under G.S. 84-14, an attorney may argue "the whole case as well of law as of fact . . . to the jury." Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury. *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); 4 Strong, N. C. Index 3d, Criminal Law § 102.1 (1976). The trial court is required, upon objection, to censor remarks either not warranted by the law or facts or made only to prejudice or mislead the jury. *State v. Monk, supra; State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974). The conduct of the arguments of counsel is left to the sound discretion of the trial judge. In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial. Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse *ex mero motu. See State v. Monk, supra; State v. Noell, supra.*

In instant case, after the district attorney's argument, the following exchange took place:

> "COURT: Now that the jury is gone and absent from the Courtroom, is [sic] there any specific complaints by counsel for the defendant to counsel for the State [sic] arguments to the jury?
>
> "MR. DIEHL: With the exception to the position to which Mr. Britt took and to which I objected, there is [sic] none."

The portion of the argument to which defense counsel objected is not raised on appeal.

[6] The first portion of the argument to which defendant objects deals with the statement that defendant is a "cold-blooded, deliberate murderer, regardless of what your decision in this

case is." Later, the prosecutor stated that defendant is "guilty as sin and I'm asking you to put him out of the shooting business." In 23A C.J.S., Criminal Law § 1104, it is stated:

> "As a general rule, it is improper for the prosecuting attorney to express his personal opinion or belief in the guilt of the accused, unless it is apparent that such opinion is based solely on the evidence, and not on any reasons or information outside the evidence."

In instant case, the district attorney made the comments upon defendant's guilt after reciting the evidence introduced by the State which he felt supported the conclusions respecting defendant's guilt. There is no indication that the district attorney was traveling outside the record and it would appear that his opinion was based solely upon evidence from which his inferences and conclusions could legitimately be inferred. *See also State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Wortham,* 287 N.C. 541, 215 S.E. 2d 131 (1975).

Defendant further contends that the trial court should have, *ex mero motu,* corrected an alleged misstatement of the law of second degree murder made by the district attorney. The record fails to disclose any misstatement of the law by the district attorney. Furthermore, the trial judge fully and properly instructed the jury upon the law applicable to the case.

[7] Defendant further contends that the district attorney improperly argued self-defense to the jury after having been instructed by the trial judge not to do so. In his argument, the district attorney stated:

> "Now, you won't be charged, I think, by the Court in this case with another body of law known as self-defense, because it's not even here. This man was shot in the back. If that is not cold-blooded, deliberate murder, I don't know what it is. You don't even get the opportunity to consider self-defense in this particular case. It's not even here."

It is clear that the district attorney was explaining that under the law applicable to the case self-defense was not an issue. This he could properly do. *State v. Monk, supra,* and cases cited therein.

Defendant also assails the statement by the district attorney that only jurors may "fail to bring criminals to justice in

our system." Here, the district attorney was simply explaining how our legal system works. We do not see how this could be prejudicial to defendant.

We have examined the entire argument by the district attorney and are unable to locate any impropriety sufficient to warrant a new trial. Accordingly, all assignments addressed to the district attorney's argument are overruled.

[8] Defendant contends that prejudicial error was committed when the district attorney was permitted to ask certain questions which defendant insists were leading. A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no. *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); 1 Stansbury, N. C. Evidence § 31 (Brandis rev. 1973). However, simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response. *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973). It is within the sound discretion of the trial judge to allow counsel to use leading questions; and in the absence of an abuse of that discretion, the judge's ruling will not be disturbed on appeal. *State v. Greene, supra;* 4 Strong, N. C. Index 3d, Criminal Law § 87.1 (1976), and the plethora of cases cited therein. In ruling upon whether counsel may be permitted to lead a witness, the trial judge is guided by the statement in *State v. Greene, supra,* at 492-93, 206 S.E. 2d at 236:

> "[C]ounsel 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.]"

[9] In instant case, defendant objected to numerous questions propounded to David Blackwell. David, thirteen years of age, was the son of the deceased and an eyewitness to the shooting of his father. From the record, it appears that the questions were necessary to enable the district attorney to elicit from the witness the facts of the case. In no instance did the district attorney suggest the proper response. Further, few, if any, of the questions could be answered by a yes or no response. For example, defendant excepts to the following exchange:

> "Q. (By Mr. Britt): All right. Do you know whether or not your mother was awake or asleep when you went to sleep?
>
> MR. DIEHL: Objection.
>
> THE COURT: Overruled. He may answer if he knows."

Accordingly, due to the youth of the witness, the trial judge did not abuse his discretion in permitting leading questions to be used with respect to David Blackwell.

The remainder of the exceptions relate to questions propounded to witnesses Watson, Register and Shaw. With respect to witnesses Watson and Shaw, it is obvious that the district attorney was directing the attention of the witness "to the subject matter at hand without suggesting answers." The questions propounded to Register did not suggest the desired response and did not put any facts into evidence. We find no abuse of the trial judge's discretion in overruling defendant's objections and thus find no merit in these assignments.

When David Blackwell was offered as a witness, the following transpired:

> "MR. BRITT: David Blackwell, come around and be sworn, please.
>
> Your Honor want this child sworn?
>
> THE COURT: Yes sir."

Defendant made no objection to the statement of the district attorney and did not request an instruction that the jury disregard it. We do not feel that the remark is sufficient to warrant a new trial. Defendant had the opportunity to object to the statement and request that the jury be instructed to dis-

regard it. Further, he cross-examined the witness and could have probed the witness's propensity for truth and veracity at this time. Defendant did neither. This assignment is overruled.

[10] Defendant contends that he was denied due process of law because the State lost the knife with which deceased had stabbed defendant. From the record, it appears that the knife was lost when the Robeson County Sheriff's Department was moved from the old courthouse into new quarters. At no time during trial did defendant ever raise the issue of the loss of the knife, *see State v. Parks,* 290 N.C. 748, 228 S.E. 2d 248 (1976), and it is difficult to ascertain how it prejudices his case. Defendant cross-examined the witnesses who saw the knife on the evening of the murder—David Blackwell and Deputy Sheriff Carl Herring. During cross-examination, defendant could have elicited any information deemed necessary regarding the size, shape or type of the knife. Further, it is unclear of what relevance the knife would have been in this case, since self-defense was not an issue. Conceding, *arguendo,* that the loss of the knife was error, we hold that under the circumstances, the fact that the knife was not available is harmless error beyond a reasonable doubt. *See State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972). This assignment is overruled.

[11] Defendant further contends that the district attorney, Joe Freeman Britt, should have been removed from the prosecution of this case and that the failure of the judge to remove Mr. Britt denied defendant due process of law. Defendant bases this contention upon the fact that this is the fourth trial for this offense by the same district attorney, and the fact that this Court reversed the conviction of defendant for over-zealous conduct on the part of the district attorney in *State v. Britt, supra.* In *State v. Westbrook,* 279 N.C. 18, 36-37, 181 S.E. 2d 572, 583 (1971), we stated:

> "The prosecution of one charged with a criminal offense is an adversary proceeding. The prosecuting attorney, whether the solicitor or privately employed counsel, represents the State. It is not only his right, but his duty, to present the State's case and to argue for and to seek to obtain the State's objective in the proceeding. That objective is not conviction of the defendant regardless of guilt, not punishment disproportionate to the offense or contrary to

the State's policy. It is the conviction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand." *See also State v. Best,* 280 N.C. 413, 186 S.E. 2d 1 (1972).

In instant case, the prosecutor was acting as the advocate of the State's interest. He was, at all times, seeking to convict and punish the guilty or seeking acquittal of the innocent. Although we do not condone the actions of the district attorney in the prior trial, wherein defendant's conviction was reversed, we do not feel that those actions in the past are sufficient or of such a nature as to require his removal from the prosecution of this trial. There has been no showing of misconduct in this trial. There has been no evidence that the prosecutor has any conflict of interest, *e.g.,* prior representation of defendant; nor that the prosecutor has any self-interest in obtaining the conviction of defendant, *e.g.,* revenge; nor that the prosecutor has any interest adverse to that of protecting the State. *See Ganger v. Peyton,* 379 F. 2d 709 (4th Cir. 1967); *Farmer v. Cox,* 308 F. Supp. 914 (W.D. Va., 1970); *State v. Britton,* 203 S.E. 2d 462 (W.Va. 1974); *May v. Commonwealth,* 285 S.W. 2d 160 (Ky. App. 1955). *See generally* 63 Am. Jur. 2d, Prosecuting Attorneys § 29 (1972). Accordingly, we find that there was no denial of fairness in permitting Mr. Britt to prosecute defendant such as would constitute a denial of due process. This assignment is overruled.

Defendant next assigns as error the trial court's denial of his motion to dismiss on the grounds of double jeopardy and the failure of the State to afford him a speedy trial. The history of this case may be summarized as follows:

1. The defendant was charged in a bill of indictment with the first degree murder of Clarence Blackwell committed on 3 May 1973.

2. The defendant's first trial began during the month of August 1973 and ended in a mistrial.

3. The defendant was tried and convicted at the 4 September 1973 Session of Criminal Superior Court.

4. On 15 May 1974, the Supreme Court of North Carolina awarded the defendant a new trial.

5. The defendant was again tried and convicted at the 16 September 1974 Session of Robeson County Superior Court.

6. The defendant was awarded a new trial by the North Carolina Supreme Court on 17 December 1975.

7. The defendant was tried and convicted at the 3 May 1976 Session of Bladen County Superior Court; the case having been moved from Robeson County to Bladen County for trial upon defendant's motion for change of venue.

[12] At the first trial, the presiding judge made an impromptu remark indicating that one of the State's witnesses had testified truthfully. The next day it was learned that a man had approached a juror in the case and asked him to "[g]o easy on Jimmy. You know Jimmy takes care of his friends and if he likes you, he will do anything in the world for you." Based upon these two incidents and *upon motion of defendant,* the presiding judge declared a mistrial. An order of mistrial in a capital case will not support a plea of former jeopardy if the mistrial is entered upon defendant's motion. *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954); *State v. Dry,* 152 N.C. 813, 67 S.E. 1000 (1910); *State v. Davis,* 80 N.C. 384 (1879).

[13] On two appeals by defendant in this case, *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974), and *State v. Britt, supra,* defendant was awarded new trials for errors that occurred during the trials. In *State v. Stafford,* 274 N.C. 519, 531-32, 164 S.E. 2d 371, 380 (1968), Justice Sharp (now Chief Justice) stated: "All courts agree that when a defendant seeks a new trial by appealing his conviction he waives his protection against reprosecution." She then quoted with approval from *Ball v. United States,* 163 U.S. 662, 672, 41 L.Ed. 300, 303, 16 S.Ct. 1192, 1195 (1896):

> " '[I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.' "

Defendant's assignments based on double jeopardy are overruled.

[14] Defendant further contends that he was denied a speedy trial.

> " . . . Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. Unavoidable delays and delays caused or requested by defendant do not violate his right to a speedy trial. . . . " *State v. Spencer,* 281 N.C. 121, 124, 187 S.E. 2d 779, 781 (1972). *See also State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971); *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965).

The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969).

The history of this case as set out above shows that the State has acted swiftly in trying to bring this defendant to justice. The delays were caused by defendant's appeals, not by any arbitrary or oppressive delay by the prosecution. This assignment is overruled.

[15] On cross-examination, counsel for defendant attempted to question David Blackwell, age ten at the time of the murder, concerning actions of his deceased father on occasions prior to 3 May 1973. These questions pertained to the intoxication of the deceased on prior visits to the home of Carolyn Blackwell and to his use of a pistol on such prior occasions. These questions were not related to anything which occurred on or near 3 May 1973 (the date on which Blackwell was killed). The trial court sustained the State's objections to these questions and defendant assigns this as error.

By this attempted cross-examination, defendant's counsel was seeking to go far afield by showing the conduct of the deceased toward his wife on occasions when defendant was not present and which occurred before the events of 3 May 1973. The scope of cross-examination rests largely in the discretion of the trial judge. He hears all the witnesses, observes their demeanor, knows the background of the case, and is in a favorable position to control the legitimate limits of cross-examination. The appellate court reviews a cold record. The trial court, because of its favored position, should have wide discretion in

the control of the trial. Its rulings should not be disturbed except where prejudicial error is disclosed. *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969). "The limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. Edwards,* 228 N.C. 153, 154, 44 S.E. 2d 725, 726 (1947). *See also State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970). Here, no such showing appears. This assignment is overruled.

On substantially similar evidence, three juries have been convinced beyond a reasonable doubt that defendant was guilty of the first degree murder of Clarence Blackwell. In defendant's fourth trial, now under review, we find no prejudicial error and the verdict must be upheld.

[16] However, for the reasons stated in *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976), the death sentence must be vacated and a sentence of life imprisonment imposed in lieu thereof. Accordingly, the death sentence is hereby vacated and this case is remanded to the Superior Court of Bladen County with the following directions: (1) The presiding judge, without requiring the presence of defendant, shall enter a judgment imposing life imprisonment for the murder of which defendant has been convicted; and (2) in accordance with this judgment the clerk of the superior court shall issue a commitment in substitution of 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 in accordance with this opinion.

No error in the verdict.

Death sentence vacated; life sentence substituted.

STATE OF NORTH CAROLINA v. WAYNE FODDRELL

No. 129

(Filed 31 January 1977)

1. **Criminal Law § 15— motion for change of venue — uncorroborated assertions by defense counsel**

The trial court did not err in the denial of defendant's motion for change of venue in this rape case where defense counsel offered in support of the motion only his uncorroborated "submission" that twelve unbiased jurors could not be found in the county; that there had "been widespread animosity about this"; that at the time of the preliminary hearing "the feeling was high"; that the matter got widespread publicity in the newspaper circulated in the locale; and that an escape by defendant was given wide circulation.

2. **Constitutional Law § 29; Jury § 7— challenge to venire — exclusion of blacks — assertions by defense counsel**

The trial court properly denied defendant's challenge to the jury venire based on defense counsel's assertion that "the court could find" that a greater preponderance of jurors were white and "that" would deprive defendant of a trial by a cross section of his peers in the county where defense counsel offered no statistical evidence tending to show systematic exclusion of blacks from jury service, and defense counsel admitted that the jury panel in this case had been drawn as required by law.

3. **Jury § 6— examination of prospective juror — belief in capital punishment**

In a rape prosecution conducted before the decision invalidating the death penalty, it was not error for the district attorney to ask a prospective juror whether he "believed in capital punishment."

4. **Constitutional Law §29; Jury § 7— exclusion of jurors for capital punishment views**

In a rape prosecution conducted before the decision invalidating the death penalty, the trial court properly excused for cause six prospective jurors who made it clear that under no circumstances would they return a verdict of guilty of a crime for which the punishment was death.

5. **Criminal Law § 162— failure to object to evidence — effect of alleged constitutional violation**

An assertion that evidence was obtained in violation of defendant's constitutional rights does not prevent the operation of the rule that, nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.

6. **Criminal Law § 48— admission by silence — competency for impeachment**

In this prosecution for rape, cross-examination of defendant concerning his failure to deny that he was the victim's assailant when she identified him as the rapist at the scene of the crime immediately after the crime occurred and before he had been given the *Miranda* warnings was competent for the purpose of impeaching defendant's testimony at the trial.

7. **Criminal Law § 48— admission by silence — incompetency if objected to — harmless error**

In this prosecution for rape, defendant's admission on cross-examination that he made no statement at the time the warrant for rape was served on him at the sheriff's office, defendant having been given the *Miranda* warnings and having refused to sign a waiver of his rights prior to service of the warrant, would have been incompetent had defendant made timely objection to the question that elicited it; however, even had defendant objected, evidence of his silence was harmless beyond a reasonable doubt where the victim recognized defendant and there was no reasonable possibility of a mistaken identification of defendant by the victim, officers captured defendant running away from the scene of the crime only moments after its commission, and officers later found defendant's shirt and other items where he said he had left them near the crime scene.

8. **Criminal Law § 76— admission of defendant's statements to officer — absence of voir dire**

The trial court in a rape case did not err in failing to conduct a *voir dire* before admitting for impeachment purposes defendant's statements to an officer that he had left his shirt and two other items at a tree at the crime scene since (1) all the evidence showed that defendant broached the subject of the shirt by requesting officers to retrieve it for him, defendant made no contention that his statements were involuntary or the result of police interrogation, and a *voir dire* could have produced no further evidence, and (2) defendant's statements did not amount to a confession.

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

The trial court in a rape case did not err in failing to submit to the jury the issues of defendant's guilt of assault with intent to commit rape and assault on a female where the victim testified positively that after defendant had choked her and threatened to kill her, he penetrated her forcibly and against her will, and defendant denied that he was the man who assaulted the victim.

APPEAL by defendant under G.S. 7A-27(a) from *Lupton, J.*, at the 3 June 1974 Criminal Session, Superior Court of CASWELL, docketed and argued as Case No. 23 at the Fall Term 1975.

On 20 July 1973, defendant was arrested upon a warrant which charged that he had raped Violet Gay Matherly Reynolds

(Mrs. Reynolds) on that date. Because of his indigency, on 23 July 1973, counsel was appointed to represent him. Defendant was given a preliminary hearing on 27 July 1973 in the district court, which found probable cause and bound him over to the superior court. Soon thereafter defendant escaped from the Caswell County jail and fled to Washington, D. C. His attorney did not see him again until the first of June 1974.

At the 22 October 1973 Session the grand jury returned a true bill of indictment in which he was charged with the common law crime of rape. At his arraignment on 3 June 1974 defendant entered a plea of not guilty. Upon his trial, on 7 June 1974, the jury returned a verdict of "guilty of rape as charged in the bill of indictment." From the mandatory sentence of death imposed under G.S. 14-21 (1966) as interpreted in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), defendant appealed to the Supreme Court. His appeal was not perfected by his trial counsel, whose appointment had been continued for that purpose. By order of this Court dated 2 June 1975, trial counsel was removed. On 4 June 1975 defendant's present counsel, Melzer A. Morgan, Jr., Esquire, was appointed to bring up the appeal.

At the trial evidence for the State tended to show:

On 20 July 1973 Mrs. Reynolds, age 56, had been employed at the Hanover Mills in Yanceyville for eight weeks. She had previously lived in Virginia. On that day she was scheduled to work the third shift beginning that night at 11:30 p.m. Her residence was in sight of the mill and a five minutes' walk away. She walked to work that night, following her customary path to the mill. The path took her through the yard of the First Baptist Church, which is separated from the mill property by a driveway. The churchyard was well lighted by street lights, a flood light in the churchyard, lights in front of the mill and on its roof.

As Mrs. Reynolds passed an oak tree beside the path on the west side of the church a man ran up behind her, slapped his hand over her mouth, jerked her arm behind her back, and threw her to the ground. As she fell his hand slipped from her month, and she screamed for help. The man then jerked her up by the arm, slapped his hand over her mouth again, and pushed her back to the oak tree. There he exclaimed, "g . . d. . . , you are not the one that I was after." He said that he "was after

Diana Fuquay" and asked Mrs. Reynolds if she recognized him. She replied NO. However, she did recognize him as defendant Foddrell, for he was also an employee of the mill—the man who, practically every night, put up the yarn on the machine she operated. When he got her to the oak tree "a car was coming around" the gravel driveway around the church. He pushed her behind the tree until it passed. Then, with her arm behind her back and his hand over her mouth, he dragged her behind some four-foot high shrubbery next to the church. During this time Mrs. Reynolds lost her glasses.

Mrs. Reynolds testified that behind the shrubbery he pushed her down, put one hand on her throat and his knee on her chest. With his other hand he jerked her slacks down to her ankles and said to her, "If you try to yell another time I will cut your g. . d. . . throat . . . I am going to kill you anyhow." However, at no time did Mrs. Reynolds see a weapon of any kind. With her pants down to her ankles, she "might as well have been tied." He then pried her knees apart and told her if she did not cease her resistance he would kill her "right here and now." Mrs. Reynolds continued to resist to the limit of her ability but defendant forcibly penetrated her. During all this time she was on the ground, flat on her back, and defendant had nothing on but his shoes, underpants, and pants, which he had unfastened and dropped. While he was still assaulting her a car entered the gravel driveway around the church. When defendant saw the car lights he jumped up and ran back of the church, between the church and the mill.

In the automobile were Deputy Sheriffs Carter, Fulcher, and Webster who had come from the sheriff's office five blocks away in response to a telephone call. Hearing Mrs. Reynolds' screams the officers stopped across from the shrubbery. As they jumped from the car they saw defendant Foddrell back out of the shrubbery on his knees, jump to his feet and run. Fulcher observed that this man "was wearing blue dungaree pants and a pair of red underpants." The officers then saw Mrs. Reynolds come up on her side from a prone position and heard her say, "Lord, have mercy; somebody please help me."

Deputy Webster knew defendant. As he and Carter "took out after him," Carter pulled his gun and fired twice in the air. They pursued defendant while Fulcher remained with Mrs. Reynolds. She was "really crying" and upset. She told Fulcher

that she had been raped and she was concerned because her glasses had been knocked off somewhere on the path to the mill. One of the officers later found them in the path.

Officers Carter and Webster, without ever losing sight of defendant, overtook him in the driveway on the east side of the church. He had been running, holding up his pants with his left hand. They were still unbuttoned and his belt "flopped open" when they caught him. He was wearing red shorts and was not wearing a shirt. After capturing defendant, the deputies took him to the police car. Mrs. Reynolds and Fulcher were there and "[s]he said yes, that was him."

On the night of 20 July 1973 Deputy Sheriff Willis was patrolling the area around Hanover Mills and "giving particular attention to the shift change" between 11:15 and 11:30 p.m. He was about 300 feet from the First Baptist Church when he heard two screams coming from that area. When he saw a deputy's car coming around the church he pulled into the circular drive which ran between the church and the mill. He found Mrs. Reynolds standing by Deputy Carter's car. She was "shaking and crying" and trying to get the dirt and grass off her clothing. He observed that her lip was bleeding, one of her eyes was bruised, and there were red marks around her neck. She told him a man had attacked her and raped her and, when Webster and Carter appeared with defendant, she stated in his presence that he was the man. Willis then took Mrs. Reynolds to the sheriff's office and from there to the emergency room at the hospital.

Mrs. Reynolds testified that as a result of defendant's assault upon her she had a black eye; her teeth were knocked through her lips; his fingers made black bruises all over her arm and on her throat; that she had not been with a man in six years and she had blood on her underclothes. In the absence of the jury, Mrs. Reynolds informed the court that two weeks after she was raped she discovered that she had gonorrhea.

After defendant's arrest in the churchyard he was taken to the sheriff's office where a warrant charging him with having raped Mrs. Reynolds was served upon him. He was then fully advised of his rights and asked to sign a waiver. He chose not to sign it, and there was no interrogation. Later in the night defendant was taken to the Roxboro jail in Person

County "to maximum security." Deputy Sheriff Carter testified that the officers did not question him on the way. However, en route, defendant asked him to pick up his shirt for him. He said, "I left my shirt at the oak tree. There is also an empty pack of cigarettes there and also an empty beer can that I left there." Upon their return to Yanceyville the officers went immediately to the oak tree by the church. There they found an empty fresh beer can, an empty pack of cigarettes and a shirt (State's Exhibit 4) where defendant said they were.

Mrs. Reynolds' supervisor at the Hanover Mills and four residents of Pittsylvania County, Virginia, where she had lived before coming to work in Yanceyville, testified that Mrs. Reynolds' general character and reputation were good.

Defendant's testimony tended to show: On 20 July 1973 he was employed at Hanover Mills, working the third shift which began at 11:30 p.m. He had seen Mrs. Reynolds at the mill—never at any other place—, and he had never spoken to her. On 20 July 1973 he was living at a trailer park approximately one-fourth mile from the First Baptist Church, and his usual route to work was the path across the churchyard. Before leaving for work that evening he had been playing and running around the trailer with four friends who also lived at the park. The four friends, William Bigelow, Willie Davis, Gladys Lipcomb, and Helen Neal, testified in corroboration of this statement. Helen Neal said that at 11:25 p.m. Gladys Lipcomb told defendant he had better go to work or he would be late. Defendant testified he left running about 11:20 p.m. after someone had warned him about 11:15 that he would be late. He was carrying his shirt, intending to put it on before he entered the mill.

Upon reaching the church defendant said he took the route around the east side, farthest from the mill, in order to relieve himself. While there he heard a gunshot which was followed by a woman's scream and another shot. Defendant immediately dropped his shirt and started running. First he ran behind the church, then toward the light in front of the church. When he heard somebody say, "Halt" he stopped and the officers handcuffed him.

Defendant testified that the officers never asked him if he "had had anything to do with this lady" either that night or at any time later, and that those who took him to the jail in

Roxboro on the night of 20 July 1973 did not question him at all during the ride from Yanceyville to Roxboro. In his testimony defendant denied raping Mrs. Reynolds. He also denied ever being on the west side of the church where the shrubbery and oak tree were located.

On cross-examination defendant admitted that in Rockingham County he had once been convicted of trespass and twice of disorderly conduct; that in Martinsville, Virginia, he had been convicted of breaking and entering; that he had escaped from the Virginia prison while serving the sentence imposed for the breaking and entering and had come to Yanceyville. Defendant also admitted escaping from the Caswell County jail while being held on this rape charge. He said he escaped and fled to Washington, D. C., because he "did not get bond" and he felt that "if it was a white man that did this or was accused of this that he would have got bond." While in Washington he learned from his girl friend that the FBI was looking for him with "papers for unlawful flight to avoid prosecution," so he "turned himself in." (The record suggests that defendant was returned to North Carolina sometime about the last of May 1974, but the exact date is not shown.)

Other facts pertinent to decision will be referred to in the opinion.

Attorney General Edmisten; Deputy Attorney General Benoy; and Associate Attorney Allen for the State.

Melzer A. Morgan, Jr., for defendant appellant.

SHARP, Chief Justice.

Seven of defendant's 23 assignments of error relate to the legality and constitutionality of the death sentence. For the reasons stated in *State v. Davis,* 290 N.C. 511, 546-549, 227 S.E. 2d 97, 118-20 (1976), the sentence of death imposed upon defendant must be vacated and one of life imprisonment substituted therefor. In our further consideration of this appeal, therefore, we do not deal with a capital case. We note, however, that the record shows this case to have been tried throughout in strict compliance with our established practice in cases involving the death penalty.

[1] When this case was called for trial defense counsel orally moved for a change of venue. In support of the motion counsel

offered only his uncorroborated "submission" that twelve unbiased jurors could not be found in Caswell County; that there had "been widespread animosity about this"; that at the time of the preliminary hearing on 27 July 1973 "the feeling was high"; that the matter got "widespread notoriety in the newspaper" circulated in the locale; and that defendant's escape was also "given wide circulation." When counsel had completed his remarks the court inquired if he had "anything further" to offer in support of his motion for a change of venue. He said he did not, and the court then heard from the solicitor for the State.

After considering the arguments of both defense counsel and the solicitor for the State, Judge Lupton, in the exercise of his discretion, denied the motion to remove. In the order he recited (1) his opinion "that the defendant can receive a fair and impartial trial in Caswell County"; and (2) his intention to allow defense counsel to interrogate each prospective juror to the extent he deemed appropriate with reference to possible bias and to challenge any who appeared unable to render a fair and impartial verdict.

[2] Defendant then "raised objection to the venire" on the ground that, in his opinion, "the court could find" that a greater preponderance of the jurors were white and "that" would deprive defendant of "a trial by a cross section of his peers in the county." In answer to the court's inquiry whether the venire had been drawn in the manner required by law, defense counsel conceded that it had been so drawn. Whereupon the court overruled defendant's objection to the venire and inquired if defendant was ready for trial. His attorney answered, "Yes, Sir."

Assignments 11 and 12 challenge respectively the court's denial of the motion for a change of venue and the "motion challenging array." These assignments are overruled. It is elementary that motions for change of venue are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his ruling will not be disturbed on appeal. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). Certainly, no abuse of discretion appears here. It is equally obvious that the remarks of defense counsel with reference to the composition of the jury panel fell far short of establishing a prima facie case of racial discrimination in the selection of the venire.

The record does not disclose the relative number of blacks and whites drawn and summoned as members of the venire. Nor does it show the population ratio of the races in the county or the ratio in which they had previously served on juries. Moreover, "[a]n accused has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded." To establish a prima facie case of systematic racial exclusion, "defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. (Lengthy citations omitted.)" *State v. Brower, supra* at 653-54, 224 S.E. 2d at 558-59; *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970).

Defendant having admitted that the jury panel in this case had been drawn as required by the law, and having offered no statistical evidence tending to show systematic exclusion of blacks from jury service, the trial judge was under no obligation *ex mero motu* to conduct an inquiry into these matters. As this Court specifically noted in *State v. Cornell, supra* at 37, 187 S.E. 2d at 778, "The North Carolina statutory plan for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group."

Assignments 6, 7, 8, and 9 relate to the solicitor's *voir dire* examination of prospective jurors with reference to their attitude toward capital punishment.

[3] This case was tried prior to the decision in *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976). It was, therefore, conducted on the assumption that if the jury found defendant guilty of rape the mandatory death sentence followed as of course. The trial would have been a futile and farcical gesture had the State been required to accept as a member of the traverse jury even one person who was so opposed to capital punishment that he would have refused to return a verdict of guilty even though satisfied beyond a reason-

able doubt that defendant was guilty as charged. Such a person would be no more eligible to serve than one who had previously formed and expressed the opinion that the defendant was guilty of the crime for which he was being tried. It was not error for the solicitor to ask a prospective juror whether he "believed in capital punishment." *State v. Rogers*, 275 N.C. 411, 419, 168 S.E. 2d 345, 349 (1969). Indeed, it was the solicitor's duty to ascertain whether the prospective jurors would find the facts from the evidence adduced in court and apply to these facts the law as given to them by the court.

[4] In this case, however, no juror was excused for cause merely because he did not "believe in capital punishment." The six whom the State successfully challenged because of their attitude toward the death penalty made it quite clear that *under no circumstances* would they return a verdict of guilty of any crime for which the punishment was death. Applicable here is the statement by Justice Huskins in *State v. Britt*, 288 N.C. 699, 706, 220 S.E. 2d 283, 288 (1975): "With respect to jury selection in capital cases, we have interpreted *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), to mean that veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction; but veniremen who are unwilling to consider all of the penalties provided by law and who are irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial may be challenged for cause on that ground. (Citations omitted.) In the light of these principles, we hold that the prospective jurors here in question were properly excused for cause."

We note that when the jury was finally passed each juror seated had been accepted by defendant without exhausting his peremptory challenges. Assignments Nos. 6, 7, 8, and 9 are overruled.

Defendant's Assignment No. 16, based on his Exception No. 32, has reference to the solicitor's cross-examination of defendant concerning his failure to deny that he was Mrs. Reynolds' assailant either at the scene of the crime when she identified him as the rapist or a short time thereafter at the sheriff's office when the warrant was served upon him. This

cross-examination must be viewed in the light of the evidence which preceded it. When evaluated in context it cannot be held prejudicial error.

When the State rested its case the evidence tended to show that defendant had raped Mrs. Reynolds on the west side of the church behind some tall shrubbery; that three deputy sheriffs, who had come to the churchyard in response to a telephone call from an unidentified person, saw defendant back out of the shrubbery on his knees, his dungarees down and his red underpants showing; that he fled the scene holding up his pants, his belt flopping; and that the officers, who never lost sight of defendant, captured him in the east driveway just before he got to the highway. On cross-examination defendant explained his dishabille and his presence in the eastern drive (the longer route to the mill) by saying it was the more secluded route and he had the necessity of relieving himself; that after he had stopped "about 15 or 20 feet up in the driveway" he was interrupted in his purpose by the sound of two pistol shots. Not knowing from whence they came and fearing for his safety, he started running toward the light in front of the church. When he turned in response to someone's order to halt, an officer snapped handcuffs on him. Defendant testified, "I was brought back around to where Mrs. Reynolds was, that is when I seen her. That is the first time that I had seen the lady. She pointed me out and accused me of raping her." The cross-examination set out below, which defendant assigns as error, followed the foregoing statement by defendant:

"Q. You did not say anything, did you?

A. Did I say anything?

Q. You didn't say anything did you in response to that?

A. No, I didn't say nothing.

Q. Then later they served a warrant on you and gave you a copy of the warrant, didn't they, charging you with rape?

A. Right.

Q. And you didn't make any statement then did you?

A. No.

Q. And the reason why you didn't make any statement you knew that you had in the past raped Mrs. Reynolds?

Attorney Moore: Objection.

Court: Sustained.

(Exception No. 32)."

[5] Citing *United States v. Hale,* 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975), defendant contends that it was prejudicial error for the court "to permit the solicitor to cross-examine defendant concerning silence during police interrogation." To this contention there are several answers, each sufficient to overrule Assignment No. 16. One is that defendant neither objected to the questions at the time they were asked nor moved to strike the answers which were made. The final question, to which objection was made and sustained, was not answered. The rule is as quoted in *State v. Jones,* 280 N.C. 322, 339-340, 185 S.E. 2d 858, 869 (1972): "It is elementary that, 'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' . . . An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule." *See State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Gurley,* 283 N.C. 541, 196 S.E. 2d 725 (1973); 4 Strong's North Carolina Index 3d *Criminal Law* § 162 (1976).

The second answer to defendant's contention is that in this case *there was no police interrogation of defendant at any time.* The situation in which Mrs. Reynolds identified defendant as her attacker was not set up after the event by the police in an effort to entrap defendant into making admissions or statements which could be used against him. When the officers captured defendant running away from the scene of the crime only moments after its commission, it was natural and inevitable that they should walk him back to the spot on the other side of the church where they had left the victim for a confrontation.

[6] The moment Mrs. Reynolds saw defendant, and—so far as the record discloses—without any questions having been asked,

she said, "Yes, that's him." Defendant's silence in the face of Mrs. Reynolds' accusation and identification at the scene of the crime was entirely inconsistent with the story he told on the witness stand. When Mrs. Reynolds identified him he had not been given the *Miranda* warning; there had been no time for that. He was lawfully in custody, but he had not been charged with any crime. The evidence was competent to impeach his testimony at the trial and it was offered for no other purpose. *Compare State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974) where the defendant did not testify and, over his objection, the State offered evidence that after his arrest he had failed to deny incriminating statements made by a codefendant whom the officers interrogated in his presence.

The case of *United States v. Hale,* 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975), cited by defendant in support of his position, is distinguishable from this case on its facts. In *Hale,* following his arrest for robbery, the defendant was taken to the police station, given the *Miranda* warning, and then questioned about the source of the money found on his person. The defendant made no response to the questions. Hale testified at his trial. Over his objection, on cross-examination, the prosecutor caused him to admit he had not given the police the exculpatory information to which he had just testified.

In holding that the defendant's motion for a mistrial should have been granted, the Supreme Court said that the Government had failed "to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial," and the defendant's silence, while lacking significant probative value, held "significant potential for prejudice." Having just received the *Miranda* warning the defendant "was particularly aware of his right to remain silent." Thus his failure to offer an explanation during the custodial interrogation could "as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication." The Supreme Court based its decision on the ground that the probative value of the defendant's silence was outweighed by its prejudicial impact and so the Court did not reach the question whether the prosecutor's cross-examination infringed the defendant's constitutional right to remain silent under *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 975 (1966).

[6] We hold that the evidence of defendant's silence in the presence of Mrs. Reynolds' accusations at the scene of the crime was properly admitted in evidence for the purpose of impeaching defendant. Had defendant exercised his right not to testify, evidence of his silence at the time of the confrontation and accusation would not have been competent for it would then have been offered as affirmative or substantive evidence tending to establish guilt of the crime charged. *See Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971); *Walder v. United States,* 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 354 (1954); *State v. Huntley,* 284 N.C. 148, 200 S.E. 2d 21 (1973); *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972). However since defendant did take the stand the evidence was admissible to impeach his testimony.

[7] Defendant's admission on cross-examination that he made no statement at the time the warrant was served on him at the sheriff's office, however, would have been incompetent whether he took the stand or not, had the defendant made timely objection to the question which elicited it. *See State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132 (1975). At the time the warrant was served upon him, Deputy Sheriff Carter had fully advised defendant of his constitutional rights as defined in *Miranda,* and when the officers asked him if he would sign a waiver of rights "he chose not to sign it." Under these circumstances the rationale of *United States v. Hale, supra,* was applicable. However, defendant did not object to this evidence.

Even had defendant objected, this evidence of his silence could not be held to have prejudiced his case in view of his silence at the time he confronted Mrs. Reynolds and all the other circumstances attending his arrest. Lack of prejudice is the final answer to defendant's contention that evidence of his silence at the sheriff's office entitles him to a new trial. When evidence is erroneously admitted, the test of prejudice is "whether, in the setting of this case, we can declare a belief that the erroneously admitted evidence was harmless beyond a reasonable doubt, that is, that there is no reasonable possibility the admission thereof might have contributed to the conviction." *State v. Castor,* 285 N.C. 286, 292, 204 S.E. 2d 848, 853 (1974).

In the evidentiary setting of this case we can *and do* declare the belief that there is no reasonable possibility that

defendant's admissions of silence contributed to his conviction. Defendant was not a stranger to Mrs. Reynolds. He worked where she did, and almost every night he put the yarn on the machine she operated. Her identification of defendant was positive. Here there is no reasonable possibility of a mistaken identification. The officers saw a man wearing blue dungaree trousers and red underpants backing out of the shrubbery to which Mrs. Reynolds' screams had led them. The officers saw this man, who was not wearing a shirt, run away. He was holding up his unbuttoned pants; his unfastened belt was flopping. They gave chase and, without ever losing sight of him, the officers caught him moments later at the edge of the churchyard. The man they caught was the defendant. They immediately returned him to the scene, where Mrs. Reynolds had remained with another officer. As soon as she saw defendant she said, "Yes, it's him." Later that night, defendant asked the officers who took him to jail in Roxboro to retrieve his shirt for him. He said he had left it, along with an empty beer can and an empty pack of cigarettes, behind the oak tree by the path on the west side of the church. This debris is inconsistent with his story that he ran from his home to the church, holding only his shirt and arriving only moments before his arrest. The officers found the shirt and the other two articles where defendant had said they were. Had the officers "caught defendant in the act" the evidence could hardly have been more conclusive of his guilt. Evidence of his silence at the scene or at the sheriff's office added nothing to the State's case, and it indicated nothing but defendant's recognition at the time of the futility of a denial. Assignment No. 16 is overruled.

[8] Defendant's Assignment No. 19 concerns the failure of the court *ex mero motu* "to conduct a *voir dire* before permitting Deputy Carter to testify to the statements defendant made to him about his shirt."

On direct examination defendant testified, "I had told one of the officers where my shirt was, I don't know which one it was, but when they grabbed me I told one of them to let me get my shirt. . . . I told them to go behind the church and get my shirt." After this testimony Deputy Carter was recalled and testified as follows:

"The defendant asked me to get his shirt. At the time that he asked me to pick up his shirt for him, we were on our way

to Roxboro to carry him to jail to maximum security. We were not trying to question him."

When the solicitor asked Carter how defendant's request "came about," over defendant's objection, he gave the following answer: "We were riding along and Wayne said, 'I left my shirt at the oak tree,' and he said, 'there is also an empty pack of cigarettes there and also an empty beer can that I left there.' . . . and there is where we found it. . . ."

Carter's testimony was interrupted by a further objection from defendant. The court overruled this objection and instructed the jury that the statements which Carter said defendant made to him were received into evidence for the sole purpose of impeaching his testimony, if it did impeach him, and were to be considered for no other purpose.

Assignment No. 19 is overruled for lack of merit. All the evidence tends to show that it was defendant himself who broached the subject of the shirt by requesting the officers to retrieve it for him. He makes no contention that his statements were involuntary or the result of police interrogation. Indeed, he testified without equivocation that on the way to Roxboro, "These officers didn't undertake to question me any." Under these circumstances a *voir dire* could have produced no further evidence. Most important, however, the defendant's statements did not amount to a confession. Thus, the trial judge was not required to conduct a *voir dire* before ruling on the admissibility of the evidence, which was clearly competent for the purpose of impeachment. *State v. Shaw,* 284 N.C. 366, 200 S.E. 2d 585 (1973).

[9] Assignment No. 22, the court's failure to submit to the jury the issues of defendant's guilt of assault with intent to commit rape and assault on a female, is also devoid of any merit. Why this assignment was made or brought forward, we do not understand. In his brief defendant concedes that "submission of such issues to the jury in this case would have been error in favor of the defendant." Mrs. Reynolds testified positively that after defendant had choked her and threatened to kill her, he penetrated her forcibly and against her will. Defendant denied that he was the man who assaulted Mrs. Reynolds. His alibi was that he was on the east side of the church at the time Mrs. Reynolds was assaulted on the west side.

The trial court is required to charge the jury upon the issue of a defendant's guilt of lesser degrees of the crime charged in the indictment only when there is some evidence to sustain a verdict of defendant's guilt of such lesser degrees. There was no such evidence here. *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972).

After carefully considering each of defendant's remaining assignments of error we find them to be wholly without merit. The record reveals no error in defendant's *conviction* of the crime with which he was charged. As noted in the beginning, however, the sentence of death cannot be upheld. Accordingly, it is hereby vacated, and this case is remanded to the Superior Court of Caswell County with the following directions: (1) The presiding judge, without requiring the presence of defendant, shall enter a judgment imposing life imprisonment for the rape of which he has been convicted; and (2) in accordance with these judgments the clerk of the superior court shall issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish to 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; life sentence substituted.

STATE OF NORTH CAROLINA v. CHARLES DEWITT YOUNG

No. 1

(Filed 31 January 1977)

1. Criminal Law § 29; Constitutional Law § 37— defendant's capacity to proceed — right to hearing — waiver of right

Defendant's statutory right under G.S. 15A-1002(b)(3) to a hearing to determine his capacity to proceed with trial subsequent to his commitment to a mental health care facility was waived by defendant's failure to assert that right.

2. Constitutional Law § 30; Criminal Law § 29— defendant's capacity to proceed — failure to hold hearing — no denial of due process

Where a defendant has been committed and examined relevant to his mental capacity to proceed with trial, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings.

3. Criminal Law § 87— leading question defined — allowance discretionary

A leading question is one that suggests the desired answer and one which frequently has for its answer "yes" or "no"; however, the trial court has discretionary authority to permit leading questions in proper instances, and absent a showing of prejudice the discretionary action of the trial court will not be disturbed.

4. Criminal Law § 43— gruesome photographs — admissibility for illustration

A witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury, and if a photograph accurately depicts that which it purports to show and is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible.

5. Homicide § 20— photographs of victim — admissibility

The trial court in a first degree murder prosecution did not err in allowing into evidence with appropriate limiting instructions photographs of the victim's body, though such photographs were gruesome, since all of them were introduced to illustrate specific and relevant testimony concerning distinct aspects of the wounds and mutilations inflicted upon the victim.

6. Criminal Law § 169; Homicide § 15— irrelevant testimony concerning corpse — admission harmless error

In a first degree murder prosecution the trial court erred in allowing irrelevant and inflammatory testimony concerning the physical state of the corpse; however, admission of this evidence was harmless error beyond a reasonable doubt, since illustrative photographs which had already been admitted into evidence revealed the gruesomeness of the corpse, and a witness who performed a postmortem examination upon the body of the victim had already testified without objection to substantially the same effect concerning the corpse.

7. Criminal Law § 102— improper jury argument by private prosecutor — failure to object — no intervention by court — no error

Remark of the private prosecutor in his closing argument to the jury that "if you find this man is not guilty, I hope that each of you can have the privilege of taking him home with you," while ill advised and of dubious efficacy in favorably influencing the jury, was not so gross and highly prejudicial as to require the court to intervene and correct the abuse in the absence of a request by defendant.

8. **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 in this first degree murder prosecution.

DEFENDANT appeals from judgment of *Lee, J.*, 2 December 1975 Session, BLADEN Superior Court.

Charles Dewitt Young and Donald Brown were charged in separate bills of indictment, each proper in form, with the first degree murder of Carl Neubie Dowless on 26 June 1975 in Bladen County. As a result of plea bargaining, Donald Brown pled guilty to second degree murder and testified as a State's witness in the case against Charles Dewitt Young.

The State's evidence tends to show that Carl N. Dowless was the owner of a 1968 Chevrolet Impala, green with a black top. Donald Brown had driven for Dowless on several occasions. On 25 June 1975 Donald Brown, Carl Dowless and defendant Charles Dewitt Young left Dawsey Carroll's place of business about 11 p.m. in the Dowless car driven by Brown. They went to Whiteville and started back home about 12:15 a.m. on the morning of 26 June 1975. When they reached a point near the residence of Charles Dewitt Young in Bladen County, Young told Donald Brown "to go down that dirt road . . . I live down there." Donald Brown knew Young did not live down there and said so but Young told him to shut up and drive. Donald Brown drove the car down the dirt road into a wooded area, a distance of about a mile. Upon reaching a "T" intersection, Carl Dowless told Brown to stop so he could urinate. Brown stopped the car and all three occupants got out, leaving the motor running and the lights on. Charles Dewitt Young walked up behind Dowless and struck him in the back of the head. Dowless fell to the ground and Charles Young said, "I'm going to kill him." Then, using a knife, he stabbed and slashed Dowless numerous times. Defendant then took the victim's pocketbook, kept the contents and threw the pocketbook and the knife into the woods in opposite directions. He and Brown then loaded the victim's body into the trunk of the car, drove to a spot 9.8 miles away and unloaded the body in the edge of some woods. They cut and broke small branches and covered the body with them. All this was carried out according to directions given by defendant. The victim's car was left in a ditch about 10 miles from the point where they left the body. Brown and Young started walking and were picked up by Roosevelt Andrews.

While riding with Andrews, who knew and recognized both Brown and Young, defendant stated that he had killed Carl Dowless. Andrews so testified at the trial. They were taken to defendant's home where Brown spent the remainder of the night.

The following day defendant and Donald Brown went to Elizabethtown and at that time defendant gave Brown $5. While in Elizabethtown Donald Brown told Thomas Blanks that defendant had killed Carl Dowless and had forced Brown to stay overnight at defendant's home. Donald Brown left Elizabethtown and returned home where he told his mother that defendant had killed Carl Dowless.

About ten minutes later Sheriff Allen and his Deputy Willie Lee arrived at the Brown home. Donald Brown then rode with the officers to the spot where the body of Carl Dowless had been concealed and showed them the body.

The victim's cap was found at the murder scene and his pocketbook was found in the woods nearby. The murder weapon was never found.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree and defendant was sentenced to death. He appealed to the Supreme Court assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by David S. Crump, Associate Attorney, for the State of North Carolina.

Reuben L. Moore, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends in his first assignment of error that the trial court erred in failing to hold a hearing to determine his capacity to proceed as mandated by G.S. 15A-1002 (Cum. Supp. 1975). That statute reads in relevant part:

> "(a) The question of the capacity of the defendant to proceed may be raised at any time by the prosecutor, the defendant, the defense counsel, or the court on its own motion.

(b) When the capacity of the defendant to proceed is questioned, the court:

(1) May appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. . . .

(2) May commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. . . .

(3) Must hold a hearing to determine the defendant's capacity to proceed. If examination is ordered pursuant to subdivision (1) or (2), the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence."

We find in the record the following events relevant to this assignment of error. On 6 October 1975, defense counsel made a motion stating that in his *opinion* "the defendant may be mentally incapable of answering the charges against him, and that the undersigned has a serious question concerning the ability of the defendant to make an intelligent decision concerning a plea in connection with the charges pending against him and believes that the defendant may be mentally incapable of entering such a plea and that a determination should be made concerning the defendant's sanity and further concerning his ability to understand the probable consequences of his acts."

Pursuant to this motion the trial judge, on that same day, ordered the defendant committed to the State Hospital in Raleigh to undergo psychiatric and other examinations incident to the provisions of G.S. 15A-1002. On 21 October 1975 the North Carolina Department of Mental Health (Dorothea Dix Hospital) issued a Diagnostic Conference Report and Discharge Summary which contained the following findings:

"PSYCHOLOGICAL TESTING: Mr. Young, according to the Slosson Intelligence Test, is presently functioning in the mild range of mental retardation with an IQ of 67. He gained a score of 25 on the Competency Screening Test which demonstrates his present competency to stand trial

according to National Institute of Mental Health Standards.

SOCIAL HISTORY: Mr. Young relates a long history of excessive drinking, averaging one-fifth of alcohol per day. He was able to describe the events of the alleged crime.

PSYCHIATRIC OPINIONS: Mr. Young is competent to stand trial in that he understands the charges against him, knows the consequences if convicted, and is able to cooperate with his attorney. In my opinion, Mr. Young was responsible for his actions at the time of the alleged crime. According to Mr. Young's account, he was intoxicated to some degree at the time of the alleged crime."

There was no finding or evidence of incapacity. Apparently no hearing was held subsequent to the defendant's commitment and there is no evidence that defendant or defense counsel demanded one or that either objected to the failure of the trial judge to hold such a hearing.

Defendant now, for the first time, objects to the failure of the trial court to hold the hearing prescribed by G.S. 15A-1002(b)(3) (Cum. Supp. 1975). He first contends that the hearing was mandatory under the statute and that failure to hold such a hearing constitutes reversible error *per se.*

It is true that the statute requires the court to hold a hearing to determine defendant's capacity to proceed if the question is raised. However, as stated in *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970), "it is a general rule that 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." Further, this Court held in *State v. Parks,* 290 N.C. 748, 228 S.E. 2d 248 (1976), a recent decision dealing with a failure to hold a hearing on a request for habeas corpus, that:

> "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."

[1] In the case before us we find no indication that the failure to hold a hearing under G.S. 15A-1002(b)(3) (Cum. Supp.

1975) was considered or passed upon by the trial judge. Neither defendant nor defense counsel, although present at trial, questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney; and neither objected to the failure to hold the hearing. When arraigned, defendant entered a plea of not guilty. The defense of insanity was not raised. On these facts we hold that defendant's statutory right, under G.S. 15A-1002(b)(3) (Cum. Supp. 1975), to a hearing subsequent to his commitment, was waived by his failure to assert that right. His conduct was inconsistent with a purpose to insist upon a hearing to determine his capacity to proceed. *State v. Gaiten, supra; State v. Parks, supra. But see Featherston v. Clark,* 293 F. Supp. 508 (W.D. Texas 1968), *aff'd sub nom. Featherston v. Mitchell,* 418 F. 2d 582 (5th Cir. 1969), *cert. denied,* 397 U.S. 937 (1970).

[2] In his second contention under this assignment, defendant argues that failure to hold a hearing deprived him of due process of law. We find this contention unsound. It is true that a conviction cannot stand where defendant lacks capacity to defend himself. *Drope v. Missouri,* 420 U.S. 162, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975); *Pate v. Robinson,* 383 U.S. 375, 15 L.Ed. 2d 815, 86 S.Ct. 836 (1966). "[A] trial court has a constitutional duty to institute, *sua sponte,* a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." (Emphasis added.) *Crenshaw v. Wolff,* 504 F. 2d 377 (8th Cir. 1974), *cert. denied,* 420 U.S. 966 (1975). *See Wolf v. United States,* 430 F. 2d 443 (10th Cir. 1970) ("bona fide doubt" as to competency). However, where, as here, the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings. *See United States v. Dworshak,* 514 F. 2d 716 (8th Cir. 1975); *Jones v. Swenson,* 469 F. 2d 535 (8th Cir. 1972), *cert. denied,* 412 U.S. 929 (1973); *United States ex rel. Roth v. Zelker,* 455 F. 2d 1105 (2d Cir. 1972), *cert. denied,* 408 U.S. 927 (1972); *United States ex rel. Evans v. La Vallee,* 446 F. 2d 782 (2d Cir. 1971), *cert. denied,* 404 U.S. 1020 (1972); *Green v. United States,* 389 F. 2d 949 (D.C. Cir. 1967); *accord, United States v. Knohl,* 379 F. 2d 427 (2d Cir. 1967), *cert. denied,* 389 U.S. 973 (1967).

Therefore this contention is without merit and defendant's first assignment of error is overruled.

Defendant contends the court erred in permitting the private prosecutor to propound eighty-seven leading questions during the course of the trial.

For the sake of brevity, we do not reproduce every question. The following, specifically mentioned by defendant's brief, will suffice as examples:

(1) What, if anything, was Chester Graham doing with respect to closing his place?

(2) Could it have been as late as 2:30 in the morning?

(3) After you got into the car, did you hear Charles Dewitt Young make a statement to you as to where he was going to stay that night?

(4) Were there any savings books in the automobile, and, if so, where were they found?

(5) And was the redness of that cap what attracted your attention to it?

(6) After you lifted or assisted in lifting the deceased in the trunk of his own car, what, if anything, did the defendant, Charles Dewitt Young, then say to you or instruct you to do?

[3] A leading question is one that suggests the desired answer. Frequently, questions that may be answered "yes" or "no" are regarded as leading. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 31, and cases cited. Even so, the trial court has discretionary authority to permit leading questions in proper instances, *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), and absent a showing of prejudice the discretionary action of the trial court will not be disturbed. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251 (1962); *State v. Cranfield,* 238 N.C. 110, 76 S.E. 2d 353 (1953). If the testimony is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained. *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974). Here, no abuse of judicial discretion is shown.

Situations in which leading questions are permissible are summarized by Justice Branch 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.]"

We have examined each exception and find that of the eighty-seven alleged leading questions, twenty-nine are not leading, two are not questions, nine were admitted elsewhere without objection, fourteen merely directed the attention of the witness to the subject at hand without suggesting answers, fourteen sought to elicit preliminary or introductory testimony, and one sought to aid the recollection of the witness when he had exhausted his memory without stating the particular matter required. The remaining eighteen, while possibly leading, could in no way be considered prejudicial. Defendant's second assignment of error is overruled.

Defendant's third assignment is grounded on the contention that the trial court erroneously permitted the State to offer inflammatory photographs of the corpse and exhibit them to the jury.

[4] It is settled law in this State that a witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury; and if a photograph accurately depicts that which it purports to show and is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible. 1

Stansbury's North Carolina Evidence (Brandis rev. 1973) § 34; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970).

[5] Here, the trial judge gave an appropriate limiting instruction to the effect that the photographs were admitted for illustrative purposes only. The pictures themselves were gruesome but, as such, they only reflected the relentless brutality of the crime. All were introduced to illustrate specific and relevant testimony concerning distinct aspects of the wounds and mutilations inflicted upon the victim. Excessive or unnecessarily repetitive use of these photographs is not shown. *State v. Spaulding,* 288 N.C. 397, 219 S.E. 2d 178 (1975); *State v. Bock,* 288 N.C. 145, 217 S.E. 2d 513 (1975); *State v. Frazier, supra; State v. Atkinson, supra.* Defendant's third assignment is not sustained.

[6] For his fourth assignment of error defendant contends the trial court erroneously allowed irrelevant and inflammatory testimony concerning the physical state of the corpse. Defendant's exceptions Nos. 186 through 192, inclusive, embrace the challenged evidence given by Deputy Sheriff Willie Lee. The following is illustrative:

> "MR. BRITT: What, if anything, did you observe with respect to flies about the body of the deceased when you observed it?
>
> MR. LEE: Well, the blow flies had got at the body and started to work it.
>
> MR. BRITT: What do you mean, 'the blow flies'?
>
> MR. LEE: Flies that get into the flesh after it rots.
>
> MR. BRITT: What color was the blow flies?
>
> MR. LEE: Green.
>
> MR. BRITT: How long was the blow flies? Indicate on your finger if you can.
>
> MR. LEE: They were about that big, about as big as the end of your finger."

In like vein, in answer to the prosecutor's questions, Mr. Lee testified that the flies were about an inch long and were

making a noise similar to a swarm of bees. These seven questions and answers concerning the flies were admitted over defendant's objection and exception in each instance.

The potentially inflammatory testimony represented by the foregoing reproduction of it should have been excluded. It was clearly improper. Nothing in the questions or answers could aid the State in establishing defendant's guilt or in rebutting any theory of the defense. The court erred when it failed to sustain defendant's objections thereto. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); *State v. Gaskins*, 252 N.C. 46, 112 S.E. 2d 745 (1960). For the reasons which follow, however, we think admission of this evidence was harmless error beyond a reasonable doubt.

Dr. Marvin Thompson performed a postmortem examination upon the body of Carl N. Dowless and had already testified as a witness for the State when the foregoing evidence was elicited. During his testimony, Dr. Thompson testified that there were numerous penetrating skin defects on the body, including a long deep cut on the back of the left arm and a bluish discoloration of the skin on the right forehead. Continuing, Dr. Thompson said: "The body had maggots on the skin surface . . . By maggots, I mean these were insects and eggs, unhatched eggs, of these organisms on the skin surface. . . . I spoke a few moments ago of maggots on the body of the deceased. A maggot is just the—one of the phases of the development of a fly. A fly lays the egg; the egg hatches into the maggot. The maggot uses the body tissue as its source of nourishment. It's a part of a natural decaying process." This evidence was admitted without objection.

The murder of which defendant stands convicted was, in itself, unnecessarily gruesome. The corpse was extensively mutilated by numerous stabs and slashes of the deadly knife. This mutilation is vividly revealed by the illustrative photographs properly admitted into evidence. In light of these facts, together with the testimony of Dr. Thompson without objection, we perceive little or no additional inflammatory effect brought on by the testimony concerning the flies. The properly admitted evidence is so overwhelming, and the prejudicial effect of the evidence concerning the flies is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper evidence was harmless error. In our opinion there is no reason-

able possibility that the evidence complained of might have contributed to the conviction, or that a different result likely would have ensued had the evidence been excluded. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *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. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Defendant's fourth assignment of error is overruled.

[7] In his fifth and final assignment of error, defendant alleges the trial court erred in failing to strike *ex mero motu* certain remarks by the private prosecutor in his closing argument to the jury. The statement, objected to for the first time on appeal, comprises only a few lines from forty-one pages in the record devoted to the closing arguments for the State. It reads as follows:

> "Ladies and gentlemen of the jury, I want to tell you what Solicitor Lester Chalmers told the jury in Raleigh recently on a case. 'I want you to find this defendant guilty as charged; and if you find this man is not guilty, I hope that each of you can have the privilege of taking him home with you.'"

We note at the outset that defendant did not object to these remarks during the trial. It is the general rule that an objection not made in apt time is waived. *State v. Strickland,* 290 N.C. 169, 225 S.E. 2d 531 (1976); *State v. Davis* and *State v. Fish,* 284 N.C. 701, 202 S.E. 2d 770 (1974). Ordinarily, the effect of improper argument may be removed by curative instructions by the trial court, *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), since it is presumed that jurors will understand and comply with the instructions of the court. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972). Had defendant found the prosecutor's remarks objectionable at the time they were made, and interposed timely objection, the trial judge would have been afforded an opportunity to consider the matter and, if required, censure the improper argument and give curative instructions to the jury. It is only when the impropriety is gross that it is proper for the trial judge to intervene *ex mero motu* and correct the abuse. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967). Some transgressions are so gross and

their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors. *See State v. White,* 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975); *State v. Roach,* 248 N.C. 63, 102 S.E. 2d 413 (1958); *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954). In such instances a new trial is required. *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975). In light of these rules, we hold that the challenged remarks of the private prosecutor, while ill advised and of dubious efficacy in favorably influencing the jury, are not so gross as to suggest intervention by the court on its own motion. Therefore this assignment is overruled.

[8] The Court notes *ex mero motu* that in *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (decided 2 July 1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, by authority of the provisions of the 1973 Session Laws, chapter 1201, section 7 (1974 Session), a sentence of life imprisonment is substituted in lieu of the death penalty in this case.

Our examination of the entire record discloses no error affecting the validity of the verdict returned by the jury. The trial and verdict must therefore be upheld. To the end that a sentence of life imprisonment may be substituted in lieu of the death sentence heretofore imposed, the case is remanded to the Superior Court of Bladen 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 said 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 counsel a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND NANTAHALA POWER AND LIGHT COMPANY v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 80

(Filed 31 January 1977)

1. **Utilities Commission § 6— authority to reconsider rate order**

Until an order of the Utilities Commission in a rate case became final by expiration of the time allowed for appeal, G.S. 62-80 authorized the Commission, upon its own motion or upon the motion of any party, to reconsider its previously issued order, upon proper notice and hearing, upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise.

2. **Utilities Commission § 6— reconsideration of rate order — notice and opportunity to be heard**

The Utilities Commission did not fail to comply with the requirements of notice and opportunity to be heard set forth in G.S. 62-80 for reconsideration of an electric power rate order and, if it did, the Attorney General was not prejudiced thereby, where the Commission's order setting the matter for oral argument focused attention on whether the full increases requested by the utility, which had been placed into effect prior to the Commission's order, should be continued in effect rather than the lesser rate increase granted by the Commission in its order; a brief setting forth in detail the extent of the reconsideration requested by the utility was delivered to the Attorney General's office prior to the oral argument on the motion to reconsider; and the Attorney General did not appear at or participate in the oral argument of the motion and did not request a bill of particulars or a continuance.

3. **Utilities Commission § 6— rate hearing — consideration of data in Moody's Investment Service**

Since G.S. 62-65(b) expressly authorized the Utilities Commission to take judicial notice of data published by reputable financial reporting services, the Commission did not err in considering the earnings of 24 electric utilities as shown in Moody's Investment Service in determining a fair rate of return to be allowed a power company.

4. **Utilities Commission § 6— rate hearing — determination of fair rate of return**

Although Nantahala Power and Light Company is a unique electric utility and differences between Nantahala and Moody's 24 electric utilities are sufficient to raise grave doubt as to whether the earnings of those electric utility companies are of substantial probative value in determining a fair rate of return to be allowed Nantahala, the weight of such evidence was for the Commission, and it was for the Commission, not the reviewing court, to determine what is a fair

rate of return so long as there is substantial evidence in the record which supports its determination.

5. **Utilities Commission § 6— substantial modification of rate order — misapprehension of facts**

There is no merit in the contention that upon reconsideration of a rate order the Utilities Commission may make a substantial change in the relief allowed thereby only if (1) the original order was predicated upon an error of law, or (2) there has been a showing of a change of condition, since G.S. 62-80 is broad enough to permit the Commission to modify and amend its order, even substantially, for the reason that, upon further consideration of the record before it, the Commission comes to the opinion that its order was due to the Commission's misapprehension or disregard of the facts shown by the evidence received at the original hearing.

6. **Utilities Commission § 6— reconsideration of rate order — reappraisal of witness's testimony**

Nothing in G.S. 62-80 prevents the Utilities Commission from concluding on reconsideration that its original lack of enthusiasm for the testimony of a witness who testified concerning rate of return was ill-founded.

7. **Utilities Commission § 6— reconsideration of rate order — increase in rate of return**

Upon reconsideration by the Utilities Commission of an order allowing a power company to earn a rate of return of 3.72 per cent on the fair value of its properties, the evidence and findings were sufficient to support the Commission's determination in its final order that the company should be allowed a rate of return of 5.30 per cent on the value of its properties.

8. **Utilities Commission § 6— rate of return — attraction of capital**

An electric utility was entitled to a rate of return adequate to attract capital in the market place even though the utility contemplated no substantial expansion of its plant and so did not contemplate the issuance of stocks or bonds. G.S. 62-133(b)(4).

APPEAL by the Attorney General from the unpublished decision of the Court of Appeals, filed 21 July 1976, affirming an order of the North Carolina Utilities Commission.

On 29 March 1974, Nantahala Power and Light Company, hereinafter called Nantahala, applied to the Commission for authority to increase its retail rates for electric power so as to produce additional annual revenue in the amount of $1,523,544 and for authority to incorporate into each of its rate schedules a Purchased Power Cost Adjustment Clause, somewhat similar to the Fuel Adjustment Clause approved by this Court on 21

December 1976 in *Utilities Commission v. Edmisten,* 291 N.C. 327, 230 S.E. 2d 651.

The Commission conducted a public hearing at which the Attorney General, who had intervened on behalf of the public, appeared. The Commission not having issued its order in the matter within the time prescribed by G.S. 62-134(b), the rates so proposed by Nantahala were put into effect by the utility, subject to the order of the Commission ultimately to be entered in the proceeding.

On 23 April 1975, the Commission entered its order authorizing Nantahala to increase its rates sufficiently to produce additional annual revenues of $668,000 only, authorizing it to incorporate into its rate schedules the requested Purchased Power Cost Adjustment Clause and directing Nantahala to file new rate schedules in accordance with such order on or before 1 May 1975. In this order the Commission made ten findings of fact, summarized as follows:

1. Nantahala is a duly organized public utility company under the laws of North Carolina, furnishing electric power in the western portion of the State.

2. The reasonable original cost, less depreciation, of Nantahala's property used and useful in providing retail electric service in North Carolina is $20,019,010, including an allowance for working capital.

3. The reasonable allowance for working capital is $150,354.

4. The fair value of Nantahala's properties so used and useful is $24,866,458, including the allowance for working capital.

5. Nanahala's gross revenues for the test year, after appropriate adjustments under the old rates were $6,554,348 and under the rates proposed by Nantahala would be $8,077,892.

6. Operating expenses, including depreciation, were $5,925,317.

7. The fair rate of return which Nantahala should have the opportunity to earn on the fair value of its said properties is 3.72 per cent, which is 4.60 per cent on its "fair value equity investment" in such properties and to earn which would require additional revenue from North Carolina retail customers of $668,000.

8. The New Fontana Agreement and the resultant Apportionment Agreement with Nantahala, the Tennessee Valley Authority and Topoco (a corporate subsidiary of the Aluminum Company of America also engaged in the generation of electric power), dealing with the generation of power by Nantahala, the disposition of such power and the acquisition of power by Nantahala for use of its customers, is reasonable.

9. A Purchased Power Adjustment Clause is a reasonable and just method by which Nantahala can recover part of its reasonable operating expenses.

10. The rate design proposed by Nantahala should be modified as set forth in the Commission's order.

The Attorney General took no exception to these findings and does not contend that any of them is not supported by the evidence set forth in the record of the hearing before the Commission. Upon this appeal the Attorney General does not question the reasonableness or validity of the Purchased Power Cost Adjustment Clause so approved by the Commission.

On 15 May 1975, Nantahala advised the Commission by letter that due to inadequacy of the time allowed, it had not filed the rate schedules as directed by the order of the Commission and further advised the Commission that Nantahala intended "within the next few days to file with the Commission a motion seeking reconsideration by the Commission of its order in this docket which was dated April 23, 1975." A copy of this letter was delivered to the Attorney General.

On 21 May 1975, without waiting for such formal motion by Nantahala, the Commission entered an order reciting its receipt of the above mentioned letter from Nantahala and stating, "The Commission will treat said letter as a motion for reconsideration of the order of 23 April 1975." In this order the Commission set such "motion" for oral argument on 10 June 1975 and directed that the rates in effect prior to 23 April 1975 (the rates proposed by Nantahala and put into effect by it as above mentioned due to the delay in the issuance of the Commission's order) be reinstated "pending disposition of said reconsideration."

On 10 June 1975, oral argument before the Commission was had upon the "motion" for reconsideration, notice thereof having been given to the Attorney General. Nantahala filed a

brief setting forth the nature of the modification of the order of 23 April 1975 which it deemed proper, a copy of such brief having previously been delivered by Nantahala to the Attorney General. Nantahala and the attorney for the Commission staff participated in the oral argument but the Attorney General did not appear or file a brief. No new evidence was presented to the Commission.

On 8 August 1975, the Commission entered an order which: (1) Amended the order of 23 April 1975 to allow a rate increase sufficient to produce additional annual revenue of $1,523,544, this being a return of 5.30 per cent on the fair value of Nantahala's properties as previously found by the Commission; (2) approved the rate schedules then in effect, which, as above shown, were those proposed originally by Nantahala; and (3) approved the Purchased Power Adjustment Clause, this clause having been suspended pending such reconsideration of the order of 23 April 1975. That is, in the order of 8 August 1975, the Commission gave to Nantahala all that Nantahala had requested in its original application. In its order the Commission stated, among other things:

> "In reconsideration the Commission takes judicial notice of the rate of return on average common equity of Moody's 24 electric utilities for the year 1973 was 10.64%, and the average rate of return over the years 1965-1973 was 11.6%. The return the Commission allowed Nantahala resulted in a 6.05 per cent return on common equity using the actual capital structure of 0.99 per cent fair value common equity [apparently meaning the excess of fair value over original cost depreciated] and 19.01 per cent cost free capital.
>
> "The Commission recognizes that Nantahala will have to approximately double its existing transmission and distribution plant in order to adequately provide the service demanded by its customers. The Commission agrees with counsel for the applicant that the test for a fair rate of return is what it would require for the company to attract capital, and not whether in fact the company needs to attract capital. The fair rate of return required for Nantahala is at least that rate of return on average common equity of Moody's 24 electric utilities. Moreover, the Commission observes that ALCOA may not, in the future, sup-

ply Nantahala with its requisite need for capital, thus, sending Nantahala to the market place to secure the capital it needs.

* * *

"Upon reconsideration of the Order of April 23, 1975, the Commission concludes and so finds that the rate of return approved in its order of April 23, 1975, is inadequate and will not allow adequate service by Nantahala, and that the proposed rates as filed in the application to produce additional revenue of $1,523.544 based on a test year ending June 30, 1973, will produce test year net operating income for a return of $1,319,057, and a rate return of 5.30% on the fair value rate base, and that said rates and said return are just and reasonable and necessary to allow an adequate rate of return for Nantahala to compete in the market for capital funds on terms which are reasonable and fair to its customers and to its existing investors, as provided in G.S. 62-133(b)(4)."

Within the time allowed the Attorney General filed exceptions to the order of 8 August 1975 and appealed therefrom to the Court of Appeals. No exception relates to the Purchased Power Cost Adjustment Clause. The grounds for appeal, as set forth in the brief of the Attorney General in the Court of Appeals, were: (1) The Commission acted arbitrarily and without authority of law in finding that the rate of return approved by it in its order of 23 April 1975 was inadequate and in issuing the amended order for that the Commission failed to make adequate factual findings as to the reasons or bases upon which it based its conclusions; (2) the Commission had no authority to consider and allow an amendment to its prior final order which increased the relief allowed "on the basis of a change of mind and without finding that it had made an error of law or that new evidence required the amendment"; and (2) the rehearing proceeding was conducted improperly in that no notice was given "of what reconsideration of the prior order was to be made at the rehearing."

The Court of Appeals found no merit in these contentions.

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General.

Edward B. Hipp, Commission Attorney, by Dwight W. Allen, Assistant Commission Attorney, for the North Carolina Utilities Commission.

Joyner & Howison by R. C. Howison, Jr., and G. Clark Crampton for Nantahala Power and Light Company.

LAKE, Justice.

G.S. 62-80 provides:

> "The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions."

It will be observed that this statute does not require a motion by the public utility, or other party, as a condition precedent to the authority of the Commission to amend its previously issued order. Since the Commission may do so on its own motion, it is not necessary to consider whether the Commission acted with undue haste in treating as a motion by Nantahala the letter from Nantahala announcing its intent to file a motion for reconsideration.

G.S. 62-90 permits an appeal by any party to a proceeding before the Commission from any final order or decision therein within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission by its order made within such 30 day period. The statute provides that the appealing party shall file with the Commission notice of appeal and exceptions. It further provides that the Commission, on motion of any party or on its own motion, may set such exceptions for further hearing before the Commission.

[1] Both the letter written by Nantahala to the Commission and the Commission's order setting the matter for argument on the "motion" for reconsideration were issued prior to the expiration of the time allowed for an appeal by Nantahala from the order of 23 April 1975. We think it clear that, at least until the order became final by expiration of the time allowed for

appeal, G.S. 62-80 authorized the Commission, upon its own motion or upon the motion of any party, to reconsider its previously issued order, upon proper notice and hearing, upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise.

[2] The order of the Commission setting the matter for further argument and reconsideration stated that "pending such reconsideration, the rates as applied for and in effect as of 23 April 1975 should continue in effect, subject to refund." The letter of Nantahala to the Commission announced that Nantahala would seek "reconsideration by the Commission of its order in this docket which was dated April 23, 1975." Since the order granted Nantahala permission to put into effect the Purchased Power Cost Adjustment Clause, it would require very little exercise of imagination to suppose that the reconsideration desired by Nantahala was with reference to the Commission's having granted only about 40 per cent of the proposed increase in Nantahala's retail rate schedules. The above quoted statement in the Commission's order setting the matter for oral argument would seem clearly to focus attention on whether the full increases requested by Nantahala and, as above noted, put into effect by it prior to the order of 23 April 1975, should be continued in effect rather than the lesser rate increase granted by the Commission in its said order. The appellate brief of Nantahala states that the brief which it filed with the Commission, which is not part of the record before us on this appeal, was delivered to the Attorney General's office prior to the oral argument on the motion to reconsider and that this brief set forth in detail the extent of the reconsideration requested by Nantahala. Nevertheless, the Attorney General did not appear at or participate in the oral argument of the motion to reconsider and did not request a bill of particulars as to the matters intended to be discussed therein or a continuance of the hearing. Under these circumstances, we find no merit in the contention that the Commission failed to comply with the requirements of notice and opportunity to be heard set forth in G.S. 62-80, or, if it did, that the Attorney General was prejudiced thereby.

The final order issued 8 August 1975 does not purport to disturb, rescind or modify Findings 1 through 6 and 8 through 10 in the order of the Commission issued 23 April 1975. These findings, therefore, remain in full force and effect. The Attor-

ney General does not challenge the sufficiency of the evidence in the record before the Commission to support them. The only finding in the original order changed by the final order is No. 7, which relates to the fair rate of return upon the fair value of Nantahala's properties used and useful in rendering retail service to its customers in North Carolina. The original order found that this was 3.72 per cent. The amended order states the Commission's finding that such rate of return is inadequate, that the rates for service proposed by Nantahala would produce a rate of return on the fair value of the properties of 5.30 per cent, which is a matter of arithmetical computation, and that such return is "necessary to allow an adequate rate of return for Nantahala to compete in the market for capital funds on terms which are reasonable and fair to its customers and to its existing investors, as provided in G.S. 62-133(b)(4)." This is the test of a fair return specifically prescribed by the said statute. The Attorney General does not challenge the sufficiency of the evidence in the record before the Commission to support the finding that a rate of return of 5.3 per cent on the fair value of the company's properties, used and useful in rendering its service in this State, is necessary to enable it to compete in the market for capital funds. Our examination of the record discloses that it would support, though not require, a finding that a higher rate of return than 5.30 per cent would be fair and reasonable.

[3] The record before the Commission did not include testimony or documentary evidence as to the earnings of the 24 electric utilities whose earnings are shown in Moody's Investment Service. However, G.S. 62-65(b) expressly authorizes the Commission to take judicial notice of data published by reputable financial reporting services. Consequently, there was no error in the consideration of this data by the Commission in determining a fair rate of return to be allowed Nantahala.

[4] The Attorney General is entirely correct in his contention that the record shows many respects in which Nantahala is a unique electric utility. Among other things, it is a completely owned subsidiary of the Aluminum Company of America (ALCOA), that company supplied all of its presently invested capital, its present capitalization consists entirely of funds raised by the issuance of common stocks, its generating facilities are all hydro-electric plants, it is a small company, it serves rugged, mountainous territory, relatively thinly populated, its

largest industrial customer has under consideration plans for a withdrawal from the territory. These differences between Nantahala and Moody's 24 electric utilities are sufficient to raise grave doubt as to whether the earnings of those electric utility companies are of substantial probative value in determining a fair rate of return to be allowed Nantahala. The weight of the evidence is, however, for the Commission, not the reviewing court. It is for the Commission, not the reviewing court, to determine what is a fair rate of return, so long as there is substantial evidence in the record which supports its determination. *Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974).

[5] We find no merit in the contention of the Attorney General that upon reconsideration of its order the Commission may make a substantial change in the relief allowed thereby only if (1) the original order was predicated upon an error of law, or (2) there has been a showing of change of condition. We think it clear that G.S. 62-80 is broad enough to permit the Commission to modify and amend its order, even substantially, for the reason that, upon further consideration of the record before it, the Commission comes to the opinion that its order was due to the Commission's misapprehension of the facts, or disregard of facts, shown by the evidence received at the original hearing.

[6] We have no knowledge of what arguments were presented to the Commission at the rehearing by Nantahala. The Commission, in its original order, set forth many reasons why it did not accept as accurate the testimony of Nantahala's witness Schlesinger, the only witness who testified concerning rate of return at the original hearing. The credibility of his testimony and the reliability of his expert opinion based thereon are matters for the determination of the Commission, not the reviewing court. We perceive nothing in G.S. 62-80 which prevents the Commission from concluding on reconsideration that its original lack of enthusiasm for the testimony of such witness was ill-founded. It, of course, makes no difference in this respect whether the Commission's further consideration of evidence introduced at the original hearing and its reappraisal thereof leads to an increase in the rate of return previously allowed or to a decrease thereof, and so to a decrease in the rate relief previously allowed the utility.

[7] We, therefore, conclude that the final order of the Commission, entered 8 August 1975, is based upon findings of fact which, in turn, are supported by evidence in the record before the Commission. We find no error of law in the Commission's determination to reconsider the matter prior to the expiration of the time allowed by the statute for the taking of an appeal from its original order, or in its revision of its original finding of fact as to the reasonableness of allowing Nantahala to set rates sufficient to enable it to earn 5.30 per cent on the fair value of its properties used and useful in rendering utility service in the State. The authority of the reviewing court to modify or reverse a decision of the Commission allowing an increase in rates for service charged by a public utility is only that prescribed in G.S. 62-94 and we find in the assignments of error made by the Attorney General no basis for concluding that one of those grounds for judicial modification or reversal of the order of 8 August 1975 exists.

Since the return of 5.30 per cent on the fair value of Nantahala's properties is substantially lower than the rate of return which has been usually allowed electric utilities in recent cases coming to the attention of this Court, it should be noted that the record before us makes it clear that it is Nantahala's contention that the rate increases applied for by it, and allowed in the order of 8 August 1975, were substantially less than enough to yield to the company a fair rate of return on the fair value of its properties. The testimony of Mr. Schlesinger, the only witness who testified at the hearing with reference to rate of return, taken at its face value, supports this position. As to that, this Court expresses no opinion. The record before us shows clearly that Nantahala is unique among the electric utilities serving in North Carolina. See also, *State ex rel. Utilities Commission v. The Meade Corporation*, 238 N.C. 451, 78 S.E. 2d 290 (1953), where the early history and origin of Nantahala are discussed.

We find nothing in G.S. 62-80 which supports the Attorney General's contention that it is a condition precedent to modification of its earlier order that the Commission set forth its reasons for its change of mind concerning the credibility of the testimony of Witness Schlesinger as to what constitutes a fair rate of return to Nantahala.

G.S. 62-79(a) does require all final orders of the Commission to include "Findings and Conclusions *and the reasons or*

bases therefor upon all the material issues of fact, law, or discretion presented in the record." (Emphasis added.) We are of the opinion, however, that the order of 23 April 1975, as modified on 8 August 1975, meets this statutory requirement.

[8] It is apparent, from the supporting reasons stated in the order of 23 April 1975, that the Commission then believed Nantahala had no need to attract new capital in the market place and, therefore, a rate of return adequate to attract capital in the market was not required. This is contrary to G.S. 62-133(b)(4). Thus, the original order was based, at least in part, upon an error of law. Even though a utility contemplates no substantial expansion of its plant, and so presently does not contemplate the issuance of either stocks or bonds, it is, nevertheless, entitled to charge rates sufficient to enable it to earn a fair rate of return, as defined in G.S. 62-133(b)(4), upon the fair value of its properties used and useful in rendering its service in this State.

Affirmed.

STATE OF NORTH CAROLINA v. OMEGA PERRY, JR.

No. 159

(Filed 31 January 1977)

1. **Criminal Law § 127— arrest of judgment — when proper**

A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

2. **Rape §§ 3, 7— indictment sufficient to charge second degree rape — evidence showing first degree — conviction for second degree rape proper**

An indictment which charged that the defendant "did, unlawfully, wilfully and feloniously ravish and carnally know, by force and against her will," the prosecuting witness, a female, by use of a "dangerous" weapon but which did not charge the use of a "deadly" weapon or allege that defendant was more than 16 years of age, though insufficient to charge first degree rape, did charge all the elements of second degree rape; therefore, where the jury found

defendant guilty of first degree rape, it necessarily determined that he was guilty of each element of rape in the second degree, and the record proper would therefore support the entry of a judgment imposing a proper sentence for second degree rape.

3. **Indictment and Warrant § 9— sufficiency of indictment to charge crime**

It is well settled that an indictment will not support a conviction for a crime all the elements of which crime are not accurately and clearly alleged in the indictment.

4. **Rape § 1— elements of first degree rape**

The elements of rape in the first degree, the victim being 12 years of age or older, are: (1) carnal knowledge of a female person, (2) by force (or by fear, fright or coercion), (3) against the will of the victim, (4) the defendant being more than 16 years of age, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon, or by the infliction of serious bodily injury upon her. G.S. 14-21.

5. **Rape § 3— indictment sufficient to charge second degree rape — evidence showing first degree rape — conviction for first degree rape improper**

Where an indictment was sufficient to charge rape in the second degree but not sufficient to charge rape in the first degree, a conviction for first degree rape could not stand, even though the evidence was sufficient to support a conviction for first degree rape.

APPEAL by defendant from *McLelland, J.*, at the 28 June 1976 Session of VANCE.

The defendant, having been found guilty of first degree rape, was sentenced to death. The only assignments of error brought forward into his brief on appeal are with reference to the trial judge's instructions to the jury and the denial of his motion in arrest of judgment. The defendant did not testify in his own behalf but introduced evidence consisting of testimony by his parents and friends which, if true, established an alibi. The testimony of the defendant's mother showed that he was 19 years of age.

The evidence for the State was to the following effect:

The prosecuting witness, a woman 30 years of age, divorced and living in an apartment with her five small children, was acquainted with the defendant, who lived in the apartment of his parents three doors from that of the prosecuting witness. She had never "dated" him. At approximately 4 a.m. on 2 February 1976, she and her children were in her apartment asleep. She was awakened by someone standing over her. This

was the defendant. She had not given him permission to come into her apartment and when she went to bed her door was locked.

The prosecuting witness got out of bed and tried to get away and to fight the defendant but he hit her in the eye, knocked her down, held a knife to her throat and told her not to scream. She identified a pearl-handled pocketknife, offered in evidence by the State, as the knife so held to her throat by the defendant. Thereupon, he proceeded to have sexual intercourse with her, against her will, upon the floor of her bedroom.

Following this, pursuant to the defendant's instructions, the prosecuting witness sat on the bed and smoked a cigarette. Thereafter, he again had sexual intercourse with her against her will, to which she submitted because he was threatening her with the knife and threatening to injure her children. Saying he was going to kill her, he then compelled her to accompany him out of the house and to the bank of a nearby pond into which he said he would throw her body. Instead of killing her, he again had sexual intercourse with her against her will, continuing to hold the knife up against her. They returned to her apartment where he struck her again and stabbed her with the knife. He also inserted the knife into her vagina. Following this he compelled her to take him to ride in her car. After proceeding a short distance, he took over the driving and returned to her apartment where he committed an unnatural sexual act upon her and then departed.

After the defendant left, the prosecuting witness dressed, got her children up, went over to her parents' home and told them what had happened. They took her to the hospital where she remained for 10 days. The attending physician testified that he examined the prosecuting witness in the early morning of 2 February in the emergency room of the hospital, at which time she complained of having been assaulted. She had multiple bruises and swelling about the eyes and face with lacerations of the face, neck and upper chest and injuries in the rectal area, which was swollen. The bone under one eye had sustained a "blowout" fracture.

A forensic serologist, employed by the State Bureau of Investigation, testified that she examined the knife which had been identified by the prosecuting witness and introduced in evidence, and had found thereon blood and spermatozoa.

Investigating officers testified that they saw the prosecuting witness at the hospital on 2 February 1976, at which time they observed her right eye was bruised, the left eye was swollen shut, there were abrasions on the chin and both sides of the neck and a laceration on the top of her left breast. She told them that she had been sexually assaulted repeatedly by the defendant that morning and that he had used a pearl-handled knife, which at one point in the occurrence, he had inserted into her vagina. Following the defendant's arrest, one of the investigating officers went to the home of the defendant's parents, with whom the officer was well acquainted, and, with the consent and assistance of the defendant's mother, searched his bedroom and found under the bed a pearl-handled knife so identified by the prosecuting witness.

The testimony of the defendant's parents and friends was to the effect that, from early in the evening of 1 February to 3 a.m. on 2 February, the defendant was with his friends in an apartment near to but other than that of the prosecuting witness, and at 3 a.m. on 2 February he returned to the apartment of his parents, went to bed and remained in bed until 9 a.m. These witnesses also testified that at 3 a.m. they observed in the parking lot of the apartment development a transfer truck habitually driven by the "boyfriend" of the prosecuting witness, and at 5 a.m. they observed this truck leave the parking lot and the automobile of the prosecuting witness follow it.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Associate Attorney, and David S. Crump, Associate Attorney, for the State.

J. Henry Banks for defendant.

LAKE, Justice.

[1] There was no error in the denial of the motion in arrest of judgment. Such motion is to be distinguished from a motion to vacate or set aside an erroneous judgment in order that a proper judgment may be entered. A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. 21 Am. Jur. 2d, Criminal Law, §§ 520,

521; Strong, N. C. Index 3d, Criminal Law, §§ 127.1, 127.2; *State v. McClain,* 282 N.C. 357, 364, 193 S.E. 2d 108 (1972). "A motion in arrest of judgment only lies for some error appearing on the face of the record which vitiates the proceedings." *State ex rel. Woods v. Reed,* 93 W.Va. 150, 116 S.E. 138 (1923). See also: *State v. Carver,* 49 Me. 588 (1862); Black's Law Dictionary.

The defendant contends that the indictment upon which he was tried and convicted for first degree rape was fatally defective in that it did not allege that the defendant was 16 years of age or older and in that it did not allege that the victim had her resistance overcome, or submission procured, by the use of a deadly weapon or by the infliction of serious bodily injury upon her. For the reasons set forth below, we are of the opinion that the indictment will not support a conviction and sentence for first degree rape. It is, however, sufficient to support a conviction and sentence for second degree rape. Consequently, the indictment does charge a criminal offense and upon the defendant's conviction of such offense a proper sentence may be imposed upon him. Therefore, the motion in arrest of judgment was properly overruled.

Although the defendant does not assign as error the sentence imposed, his appeal is, itself, an exception to the judgment rendered and since error therein appears on the face of the record proper, we may consider the propriety of the sentence imposed and, for error therein, remand the case to the Superior Court for the entry of a proper judgment.

Even if there were no other error in the sentence imposed, it would be necessary to vacate the sentence to death and remand the case to the Superior Court for entry of a proper sentence by reason of the decision of the Supreme Court of the United States in *Woodson v. North Carolina,* ..... U.S. ....., 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976); *State v. Montgomery,* 291 N.C. 91, 229 S.E. 2d 572 (1976). However, for the reasons hereinafter set forth, we may not remand the present case to the Superior Court for the imposition of a sentence to imprisonment for life as was done in *State v. Montgomery, supra,* and in numerous other recent decisions of this Court in which sentences to death, previously affirmed by this Court, could not be carried out by reason of the decision in *Woodson v. North Carolina, supra.*

G.S. 14-21 provides:

"Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

"(a) First-Degree Rape—

"(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

"(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

"(b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

Prior to the enactment of G.S. 14-21 in its present form by Chapter 1201, Session Laws of 1973 (Second Session, 1974), there was but one degree of rape in North Carolina. The Act of 1973 divided the crime into two separate offenses. It did not change the definition of rape per se. Where, as here, the victim is more than 12 years of age, "Rape is the carnal knowledge of a female person by force and against her will." *State v. Hines*, 286 N.C. 377, 380, 211 S.E. 2d 201 (1975); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). It is expressly so declared in G.S. 14-21.

[2] A verdict of guilty of rape in the first degree necessarily includes the jury's determination that the defendant is guilty of each element of rape in the second degree, which the statute declares to be "a lesser-included offense of rape in the first degree." An indictment which charges, as the indictment in the present case does, that the defendant "did, unlawfully, wilfully and feloniously ravish and carnally know, by force and against her will," the prosecuting witness, a female, charges all of the

elements of second degree rape. Thus, the indictment in the present case does charge a criminal offense, namely, second degree rape, even if, for the reasons stated by the defendant, the indictment falls short of a charge of first degree rape. The jury, by its verdict, has found the defendant guilty of all of the elements of second degree rape. Therefore, the record proper will support the entry of a judgment imposing a proper sentence for second degree rape and the motion in arrest of judgment was properly denied.

[3, 4] It is well settled that an indictment will not support a conviction for a crime all the elements of which crime are not accurately and clearly alleged in the indictment. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969); *State v. Lackey*, 271 N.C. 171, 155 S.E. 2d 465 (1967); *State v. Smith*, 241 N.C. 301, 84 S.E. 2d 913 (1954); *State v. Miller*, 231 N.C. 419, 57 S.E. 2d 392 (1950); *State v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166 (1946); Strong, N. C. Index 2d, Indictment and Warrant, § 9. The elements of rape in the first degree, the victim being 12 years of age or older, are: (1) Carnal knowledge of a female person, (2) by force (or by "fear, fright or coercion" as stated in *State v. Henderson, supra)*, (3) against the will of the victim, (4) the defendant being more than 16 years of age, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon, or by the infliction of serious bodily injury upon her. G.S. 14-21.

The indictment in the present case reads:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Omega Perry, Jr., in Vance County, on or before the 2nd day of February 1976, with force and arms, at and in the County aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know [the prosecuting witness] a female, by force and against her will by use and threatened use *of firearm or other dangerous weapon* against the form of the statute in such case made and provided and against the peace and dignity of the State." (Emphasis added.)

[2] The uncontradicted evidence (the defendant's sole defense being alibi) shows a vicious, brutal rape in which the submis-

sion of the prosecuting witness was procured by the use of a knife and by the infliction upon her of serious bodily injuries. It also shows the defendant, at the time of the offense, was more than 16 years of age. Thus, the evidence is ample to show rape in the first degree. However, the indictment does not charge this offense since it does not charge the use of a "deadly" weapon but the use of a "dangerous" weapon, the two terms not being synonymous, and, further, it does not allege that the defendant, at the time of the offense, was more than 16 years of age.

This Court has repeatedly held that a conviction for murder in the first degree may be sustained under an indictment which does not charge either premeditation and deliberation or murder in the perpetration of a felony. *State v. Watkins,* 283 N.C. 17, 194 S.E. 2d 800 (1973); *State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822 (1973); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970); *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). Those cases are, however, distinguishable from the present case (rape) for the reason that G.S. 15-172 specifically provides:

> *"Verdict for murder in first or second degree.*—Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree."

G.S. 15-144 provides:

> *"Essentials of bill for homicide.*—In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as now required by law; and it is sufficient

in describing manslaughter to allege that the accused feloniously and wilfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter as the case may be."

As observed by Justice Sharp, now Chief Justice, in *State v. Talbert, supra,* the crime of murder was divided into two degrees by Chapter 85 of the Session Laws of 1893 and G.S. 15-172 was originally a part of that Act. The "existing form of indictment" to which that Act (and now G.S. 15-172) referred was prescribed by Chapter 58 of the Session Laws of 1887 (now G.S. 15-144) and thus antedated the division of the offense of murder into two degrees. Thus, as Justice Sharp, now Chief Justice, likewise observed in *State v. Watkins, supra,* the "legislative fiat made the existing form a sufficient indictment for murder in either the first or second degree." There is no such statutory provision with reference to the offenses of rape in the first degree and rape in the second degree.

Similarly, there is no such provision with reference to the form of the indictment for the offenses of burglary in the first degree and burglary in the second degree. In *State v. Fleming,* 107 N.C. 905, 12 S.E. 131 (1890), the indictment charged the defendant with burglary "as in the old form, without alleging that the building was in the occupation of anyone at the time of the commission of the crime," as the evidence showed it to be. The Court, speaking through Justice Clark, later Chief Justice, said:

"This was not required at common law, nor under the Code, sec. 995, but now, under the provision of chapter 434, Laws 1889 [G.S. 14-51], the omission of that averment makes the indictment good only as an indictment for burglary in the second degree, and for that offense the defendant was convicted. To constitute a sufficient indictment for burglary in the second degree it is not required to use the negative averment that the dwellinghouse was not actually occupied at the time of the commission of the crime. Burglary being sufficiently charged, as at common law, the omission of the additional averment of actual occupation required by the act of 1889 to constitute the capital felony of burglary in the first degree leaves simply the indictment

good for the other degree of burglary, in which that averment is not essential."

[5] Similarly, the indictment in the present case was sufficient to charge rape in the second degree but not sufficient to charge rape in the first degree and, though the evidence was sufficient to support a conviction of rape in the first degree, a conviction for that offense cannot be sustained in this case. The verdict must, therefore, be regarded as a verdict of guilty of rape in the second degree.

In *State v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861 (1958), the indictment was for rape (only one degree of that crime being then recognized under the law of this State) and it did not allege the age of the defendant. Upon a verdict of "guilty of assault on a female," the defendant was sentenced to imprisonment for 12 to 18 months. He contended that since the jury had not found that he was over 18 years of age, the maximum legal sentence was a fine not in excess of $50.00 or imprisonment for a term not in excess of 30 days. In affirming the sentence, this Court, speaking through Justice Bobbitt, later Chief Justice, said:

"Ch. 193, Public Laws of 1911, amending Revisal, Sec. 3620, was first construed in *S. v. Smith*, 157 N.C. 578, 72 S.E. 853. *The indictment, which contained no allegation as to the defendant's age,* was for an assault with intent to commit rape. The verdict was guilty of 'assault and battery on Lillian Whitson—the defendant Turner Smith being over 18 years of age.' The judgment imposed a 2-year prison sentence. After serving 30 days, the defendant, in *habeas corpus* proceedings, urged as ground for immediate discharge that, *absent an allegation that he was more than 18 years old,* the maximum lawful sentence was 30 days. This Court found no error in the order discharging the writ and remanding the petitioner to custody.

"These specific holdings in *S. v. Smith, supra,* have been followed consistently by this Court:

"1. The said 1911 Act 'was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over 18 years of age, upon a woman,' for 'it was always a crime for a man, or a boy over 18 years of age, to assault a woman.' As stated

succinctly by Barnhill, J., (later C.J.) in *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706: 'G.S. 14-33 creates no new offense. *It relates only to punishment.*'

"2. *The presumption is that the male person charged is over 18 years of age;* and the fact, if it be a fact, that he is not over 18 years of age, relevant solely to punishment, is a matter of defense. * * *

"3. Since it is not an essential element of the criminal offense, it is not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. * * *

"Whether a deadly weapon was used, whether serious damage was done, whether there was an intent to kill, whether there was an intent to commit rape, relate directly to the defendant's *conduct* in relation to the alleged assault; but whether he was then *a man or boy over 18 years of age* relates solely to the defendant's *personal status* at the time of the alleged assault." (Emphasis added.)

Thus, it is established in the law of this State that one lawfully convicted of assault upon a female may be sentenced to a longer term of imprisonment if the evidence shows him to be, and he is found to be, over 18 years of age than would be proper in the absence of such evidence and finding, even though the indictment under which he was tried does not allege his age. That case, however, is also distinguishable from the present case.

As the Court also said in *State v. Courtney, supra:*

"Section 3620, Revisal of 1905, provided: '*Assault, punishment for.* In all cases of an assault * * * the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults * * * shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape.'

"By Chapter 193, Public Laws of 1911, the General Assembly amended said Section 3620 by adding at the end thereof the following: 'or to cases of assault or assault and

battery by any man or boy over 18 years of age on any female person.' " (Emphasis added.)

The language of Section 3620 of the Revisal of 1905 and of the amending Act of 1911 makes it clear that, as the Court held in *State v. Smith, supra,* the purpose of the proviso, both as originally worded and as amended, was not to create a new offense or to divide the existing offense of assault into degrees, but was simply to provide for punishment of the offender. In contrast, G.S. 14-21, as amended in 1973, divided the crime of rape into two separate crimes, specifically providing that second degree rape "shall be a lesser-included offense of rape in the first degree."

Thus, we conclude that the age of the defendant is an essential element of first degree rape and a conviction for that offense cannot be sustained under an indictment which does not allege the defendant to have been more than 16 years of age at the time of the commission of the offense. Thus, the defendant in the present case cannot be sentenced for first degree rape. However, in *State v. Courtney, supra,* the Court also said:

> "Ordinarily, the illegality of the judgment does not vacate the verdict; but the established practice is to set aside the judgment and remand the cause for proper judgment on the verdict."

G.S. 14-21(b) provides that the punishment for second degree rape shall be "imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." The court in which this discretion is vested is, of course, the trial court, not this Court. Therefore, we may not remand this case to the Superior Court of Vance County with direction that it impose upon the defendant a sentence of life imprisonment as we did in *State v. Montgomery, supra,* in which the defendant was lawfully convicted of first degree rape.

This case must be, and is hereby, remanded to the Superior Court of Vance County for the imposition by it upon the defendant of a sentence to imprisonment for life or such term of years as that court, in its discretion, deems proper. The Superior Court is, therefore, directed to cause the defendant to be brought before it and to cause the verdict to be corrected to a verdict of guilty of second degree rape and to sentence the defendant, for that offense, to imprisonment in the State's

prison for life or for a term of years, in the discretion of the court.

We have carefully considered the defendant's assignments of error relating to the instructions given by the trial court to the jury. We find therein no error entitling the defendant to a new trial on the merits. No useful purpose would be served by discussing these alleged errors in the charge.

Judgment vacated.

Remanded for correction of verdict and imposition of proper sentence.

STATE OF NORTH CAROLINA v. DAVID EARL LOCKLEAR

No. 79

(Filed 31 January 1977)

1. **Criminal Law § 73— testimony by locksmith — no hearsay**

In a first degree murder prosecution, testimony by a locksmith as to his making of a key for a vehicle like that used for the getaway vehicle was not hearsay, since the locksmith testified only as to what he did and what he saw another person do.

2. **Criminal Law § 73— identification testimony — no hearsay**

Testimony of a murder victim's wife identifying a codefendant by name was not hearsay, though the witness admitted that she did not know the codefendant's name prior to her husband's death; moreover, even if the testimony was hearsay, defendant was not prejudiced by its admission, since the testimony placed no new material before the jury.

3. **Attorney and Client § 4; Criminal Law § 82— attorney as notary public — testimony as to validity of signature — no error**

Where the validity of defendant's signatures on two documents was called into question by defendant's testimony, defendant was not prejudiced when the State called as a witness one of defendant's attorneys who had notarized one of the documents allegedly signed by defendant, since the attorney was not called upon to testify concerning confidential attorney-client matters, but was instead called upon to testify as to the authenticity of defendant's signature.

4. **Criminal Law § 102— district attorney's jury argument — propriety**

In a first degree murder case the trial court did not err in allowing the district attorney in his jury argument (1) to explain

that the felony-murder rule applied in this case and that defendant was either guilty of first degree murder or not guilty at all; (2) to wave a pair of handcuffs in front of the jury and argue what torture could be inflicted upon a person while handcuffed; (3) to state to the jury that the defendant should have produced a certain witness, since such statement answered an argument raised by defendant; and (4) to state that defendant and his cohorts were the "lowest of crooks that you can find in this community."

5. 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 imposed in this first degree murder prosecution.

APPEAL by defendant pursuant to G.S. 7A-27(a) from the judgment entered by *McLelland, J.*, at the September 1975 Session of ROBESON Superior Court.

Defendant was tried and convicted upon an indictment, proper in form, for the murder of Hudler Hunt, and sentence of death was imposed.

The State introduced evidence tending to show that approximately four months prior to January 1975, defendant and Larry Clark were informed by Adolph Stewart that Hudler Hunt of Rowland, North Carolina, was known to carry large sums of cash on his person. Stewart showed defendant and Clark where Mr. Hunt lived and stated that Mr. Hunt would be "easy to rob."

Thereafter, on 20 January 1975, defendant, Larry Clark and one Mike Peplinski, after discussing and planning the robbery earlier that day, traveled to Mr. Hunt's house in a yellow station wagon. Upon arriving there at approximately 6:30 p.m., Clark and Peplinski went to the back door of the house and stated that Peplinski was employed by the Department of Corrections and needed to use the phone to report an escaped prisoner. Peplinski went into the house and used the phone, leaving Mr. Hunt and Clark outside beneath the carport. Mrs. Hunt became suspicious and started to walk outside to see her husband. At this time, Peplinski sprayed Mrs. Hunt with some form of tear gas. As Mrs. Hunt turned away from the gas, she heard several shots being fired in the vicinity of her husband. She also heard Peplinski ask Clark, "Did you get his pocketbook?" and Clark respond, "Hell no, I'm shot, let's get out of here." Mrs. Hunt went inside and grabbed her rifle and fired

at Clark and Peplinski sixteen times. Mr. Hunt was found dead in the area beneath the carport.

Defendant, throughout this time, was in the station wagon. When he saw Mrs. Hunt open fire with her rifle, he attempted to move the vehicle, but backed into a ditch and fled on foot.

Clark was found dead in a field close to the Hunt house. He had a pistol in his hand. By expert ballistics testimony, the pistol was identified as the weapon which fired the bullets that killed Mr. Hunt. The next afternoon, defendant was located in a swamp approximately four miles from the Hunt residence. The State introduced a statement, purportedly signed by defendant, which related facts essentially the same as those outlined above.

Defendant took the stand and testified that he knew nothing of the plans to rob Mr. Hunt. Rather, he was under the impression that Mr. Hunt was indebted to Clark and that the men were going to Hunt's house to collect the debt. He stated that when the shooting began, he backed the car into a ditch and then fled on foot. Defendant further testified that he did not sign the statement introduced by the State as his confession; that the signature appearing thereon was a forgery; and that the facts contained therein were lies.

Other facts necessary to the decision of this case will be discussed in the opinion.

Note: Mike Peplinski was tried and convicted of first degree murder for his participation in the shooting of Mr. Hunt. His conviction was affirmed in *State v. Peplinski,* 290 N.C. 236, 225 S.E. 2d 568 (1976).

Attorney General Rufus L. Edmisten by Assistant Attorney General James Wallace, Jr. for the State.

John U. McManus and J. H. Barrington, Jr. for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the testimony of Bobby Ray Jackson was hearsay and prejudicial. Jackson, a locksmith, testified that he made a key for a 1973 yellow station wagon located in a parking lot adjacent to the Hide-A-Way Lounge in

Fayetteville, North Carolina. He further testified that he then gave the key to a girl behind the counter at the Hide-A-Way Lounge. The girl paid him and signed an authorization for the making of the key in the name of Mike Peplinski. " '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.' " *King v. Bynum,* 137 N.C. 491, 495, 49 S.E. 955, 956 (1905). *See also* 1 Stansbury, North Carolina Evidence § 138 (Brandis rev. 1973); *State v. Peplinski,* 290 N.C. 236, 225 S.E. 2d 568 (1976); *State v. Deck,* 285 N.C. 209, 203 S.E. 2d 830 (1974). In instant case, the locksmith only testified as to what he did, or what he saw the girl in the Hide-A-Way Lounge do. This is not hearsay.

[2] Defendant also contends that the testimony of Naomi Hunt, identifying a codefendant as Michael Peplinski, was hearsay. At trial, she identified Peplinski as a white man who came to her house on the night in question, and she identified him by the name of Michael Peplinski. She admitted that she had not known the name of this defendant prior to the date of the murder of her husband. Defendant contends that she could only have acquired the name of Peplinski by hearsay evidence.

Assuming, for the purposes of argument, that the testimony of Mrs. Hunt referred to above was hearsay, it was not sufficiently prejudicial to warrant a new trial. Defendant, both in his statement to officers and his testimony at trial, stated that Peplinski was one of the men involved in the Hunt murder and was present at the Hunt home on the night of the shooting. Accordingly, Mrs. Hunt's identification did not place any new material before the jury and was not prejudicial. This assignment is overruled.

[3] At trial, the State introduced into evidence a statement which implicated defendant in the murder of Mr. Hunt. Deputy Sheriff Hubert Stone testified that defendant made the statement and that defendant signed the statement in Stone's presence. Defendant, however, testified that he could not read or write, that he did not sign the statement, and that he had never seen the statement before. Defendant further testified that he did not sign the affidavit in support of a motion to suppress evidence filed in the case on his behalf. The signature appearing on the affidavit was "David Locklear" and the affidavit had

been notarized by John U. McManus, Jr.—one of defendant's attorneys.

During the presentation of the State's rebuttal evidence, Mr. McManus was called as a witness. The trial judge expressly limited the scope of any testimony Mr. McManus might give to "his official function in relation to the execution of a paper which is a document in the court file in this case, but only to that extent." Thereafter, Mr. McManus testified that he was a notary public; that he had notarized the affidavit in support of defendant's motion to suppress; and that "[t]he person that signed this affidavit signed it in my presence." The district attorney then asked, "All right. Whose signature appears on that document?" Upon objection by Mr. McManus to this question, the district attorney withdrew him as a witness.

Defendant contends that prejudicial error was committed simply by permitting defense counsel to be called to the witness stand. For this proposition, he cites *State v. Sullivan,* 373 P. 2d 474 (Wash. 1962). In *Sullivan,* defense counsel was called to testify regarding matters which were clearly privileged under the attorney-client relationship. The Washington Supreme Court held that this was prejudicial error since the only motive for calling defense counsel to testify regarding privileged matters was to prejudice defendant before the jury. In instant case, defense counsel was not called as a witness to testify as to any matters within the attorney-client privilege. Rather, counsel was called upon to verify a signature signed in his presence while acting as a notary public. The validity of defendant's signatures had been called into question by defendant's testimony and it is obvious that the State was attempting to rebut defendant's evidence that the signatures were forgeries.

We find another case, also from the State of Washington, which is strikingly similar to the case at bar. In *State v. Allgood,* 313 P. 2d 695 (Wash. 1957), defendant was on trial for forgery and his handwriting was required to be proved. To facilitate this proof, defense counsel, who had notarized an affidavit bearing defendant's name and purported signature, was called as a witness for the State and was permitted to identify defendant's signature. The court found no error in the admission of this testimony and affirmed defendant's conviction. *See also State v. Manning,* 291 A. 2d 750 (Conn. 1971); *State v. Crissman,* 287 N.E. 2d 642 (Ohio App. 1971); *State v.*

Stiltner, 377 P. 2d 252 (Wash. 1962); *People v. Boford,* 256 P. 2d 334 (Cal. App. 1953).

Confidential communications made to an attorney in his professional capacity by his client are privileged. The attorney cannot be compelled to testify to them unless his client consents, "[b]ut the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, 58 A.J. 274, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged. [Citations omitted.]" *Dobias v. White,* 240 N.C. 680, 684-85, 83 S.E. 2d 785, 788 (1954). *See State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); 1 Stansbury, North Carolina Evidence § 62 (Brandis rev. 1973).

In present case, defendant's attorney, as a notary, witnessed the signing of the affidavit by defendant. This was for the purpose of enabling the notary, if necessary, to testify as to the authenticity of defendant's signature. Hence, it was not a communication which was regarded as being confidential between attorney and client, and no privilege attached to the notarization. Further, we do not feel, under the facts of this case, that defendant was prejudiced by his attorney being called as a witness. Accordingly, this assignment is overruled.

Defendant next assigns as error certain portions of the district attorney's argument to the jury. In this jurisdiction, counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue the facts in evidence and all reasonable inferences to be drawn therefrom, together with the relevant law, so as to present his case. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976); *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). Ordinarily, an impropriety in the argument should be brought to the attention of the trial court in time for the impropriety to be corrected in the charge. After verdict, an objection to argument comes too late. *State v. Noell, supra; State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970). The argument of counsel must ordinarily be left to the sound discretion of the judge who tries the case and this Court will not

review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. *State v. Noell, supra.* Under G.S. 84-14, counsel may argue to the jury "the whole case as well of law as of fact."

The argument, however, is not without its limitations. The trial court has the duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. *State v. Monk, supra; State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974). "If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu.*" *State v. Monk, supra. See State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954). As stated in *State v. Noell, supra,* at 696, 202 S.E. 2d at 767:

> " 'The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed.' "

[4] At trial, defendant entered no objections to the district attorney's arguments, but contends that the trial court should have corrected them *ex mero motu.* Defendant first argues that the district attorney's argument went beyond the bounds of propriety in the instant case by telling the members of the jury that it was up to them to either find the defendant guilty of first degree murder or "let him walk out of the courtroom." In this portion of the argument, the district attorney was explaining that the felony-murder rule applied to the case and that defendant was either guilty of first degree murder or he was not guilty. The district attorney correctly stated the law applicable to the case. This he may properly do. *See State v. Monk, supra,* and the cases cited therein.

Defendant further contends that there was prejudicial error in allowing the district attorney to wave a pair of handcuffs in front of the jury and argue to them what torture could be inflicted upon a person while handcuffed. The evidence disclosed that the handcuffs in question were found in the car which was driven by this defendant and were introduced in evidence. The district attorney did not argue that they were actually used by

defendant, but simply as to how they could be used. The argument proved nothing and did not tend to introduce any evidence outside the record. It was a matter left to the sound discretion of the trial judge. No abuse of discretion appears. *See State v. Holbrook,* 232 N.C. 503, 61 S.E. 2d 361 (1950).

Defendant further contends that the trial court improperly allowed the district attorney to argue to the jury that defendant should have produced one Adolph Stewart to testify concerning the alleged confession of the defendant. Defendant, in his statement to the officers, stated that Adolph Stewart told him sometime before the attempted robbery that Hudler Hunt lived near Rowland with his wife, that he ordinarily carried from seven to ten thousand dollars, and that he could be easily robbed—"Just throw a gun on him and he would faint and give his money." Defendant further stated that he and Clark were shown the Hunt home by Adolph Stewart and that the men agreed to give Stewart one-half of any proceeds realized from the robbery.

In his argument, the district attorney said: "The lawyer [defense attorney] says, 'Where is Adolph Stewart? The State can get him.' You know, that man is protected in his constitutional rights. I couldn't make Adolph Stewart testify in a case wherein he's also indicted. I can't make a man testify against himself, but they have the right of subpoena. They can put him on if he wants to go on. Why, I wonder why you haven't heard from Adolph Stewart if there is nothing to do with this statement that David Earl made in this case."

In this assignment, it is apparent that the prosecutor was answering an argument made by defense counsel. Since the arguments of defense counsel were not included in the record, we are unable to ascertain the context or the inducement for the prosecutor's argument. *See State v. Monk,* 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Taylor,* 289 N.C. 223, 221 S.E. 2d 359 (1976). However, we do not deem the prosecutor's argument to be prejudicial in light of the fact that defendant brought the issue before the jury.

The State offered Jimmy Sams, a Fugitive Sergeant of the North Carolina Department of Corrections, as a witness to identify the body of Clark. Defendant's attorney, Mr. Barrington, in his argument to the jury stated (as recited by the district attorney in his argument): "Sergeant Sams, what did he have to

do with it? Just wanted to prejudice your minds to show you that there was an escapee involved." In reply, the district attorney said:

> "No, that is not true. Hubert Stone stated there was a body out in the hog pen that he did not recognize, but that he now knows to be the body of Larry Clark. I wanted to show you who that body was out there in the hog pen. And the body was removed to the morgue and Sams came in and identified it, because he knew him. How did he know him? He knew him because he was looking for him. He was the escape sergeant at McCain and had been looking for him over a period of time. That is important from two aspects. It shows you that it was in fact Larry Clark. How in the world did Hubert Stone know to include Larry Clark? He didn't even know his name at that time. So how could he include it in there? How did Hubert Stone know also if he made this up; to include the name Peplinski? You heard the evidence. Peplinski hadn't been apprehended. Nobody knew who he was. He was still out in the woods at the time David Earl was making this statement. How did the officers know to include those two names? That is why I wanted to show you what I did show you in this particular case. You follow me? Okay, Sergeant Sams said, and it is important from another reason, he is an escapee. I wanted you to know that. I think it's important to know that David Earl Locklear who was under bond at that time to start pulling a prison sentence for killing another human being, was out with an escapee from prison, hooked up with a barkeeper over in Fayetteville, making a key for an abandoned 1973 Chevrolet, going down to South Carolina, setting up some sort of sanctuary down there. I think all of those facts are important to you because you need to know what type of people you are dealing with. You are dealing with the lowest of crooks that you can find in this community. Do you believe what Sergeant Sams has to say about this case, Ladies and Gentlemen of the Jury?"

Counsel should not go beyond the testimony in a case or characterize a defendant or witnesses in a manner calculated to prejudice the jury against him. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962); *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466 (1949); *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35 (1948); *State v. Correll,* 229 N.C. 640, 50 S.E. 2d 717

(1948). However, the district attorney may use " 'appropriate epithets which are warranted by the evidence.' " *State v. Wortham,* 287 N.C. 541, 546, 215 S.E. 2d 131, 134 (1975), wherein the district attorney's characterization of defendants as "thieves," "rogues," and "scoundrels" was held not to be improper under the evidence in that case, but very nearly so. In instant case, we do not think its use in the light of the facts shown by the record constitutes such error as to justify a new trial. The evidence introduced at trial tended to show that defendant was out on bond pending appeal of a manslaughter conviction at the time of the Hunt murder and was, at the time of trial, serving ten years in prison on the manslaughter conviction. Clark was an escapee from prison; and Peplinski had apparently appropriated a comparatively new automobile which did not belong to him. Accordingly, the district attorney must have been of the opinion that the facts of the case warranted his reference to defendant and his cohorts as "crooks."

We have carefully examined the district attorney's entire argument. Our examination discloses nothing in the argument that indicates any abuse of sound legal discretion by the trial judge and certainly no such extreme case of abuse of the privilege of counsel as to warrant a new trial. The assignments of error addressed to the prosecutor's argument are overruled.

[5] The record reveals no error in defendant's conviction of the crime of which he was charged. However, for the reasons stated in *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976), the sentence of death imposed upon defendant must be vacated and one of life imprisonment substituted therefor. Accordingly, the sentence of death is vacated and this case is remanded to the Superior Court of Robeson County with the following directions: (1) The presiding judge, without requiring the presence of defendant, shall enter a judgment imposing life imprisonment for the murder of which he has been convicted; and (2) in accordance with this judgment, the clerk of the superior court shall issue commitment in substitution for the commitment heretofore furnished. It is further ordered that the clerk furnish to defendant and his attorneys a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the verdict.

Death sentence vacated; life sentence substituted.

BROADWELL REALTY CORPORATION v. J. HOWARD COBLE, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 155

(Filed 31 January 1977)

1. **Taxation § 23— construction of tax statute**

Where a statute imposing a tax is ambiguous or there is doubt as to the proper interpretation of the statute, the statute is construed in favor of the taxpayer and against the State; however, where a statute provides an exemption from taxation, the statute is construed strictly against the taxpayer and in favor of the State.

2. **Taxation § 23— construction of tax statute — administrative interpretation**

While the construction placed upon a revenue Act by the Commissioner of Revenue will be given due consideration by the courts, such construction is not controlling or binding.

3. **Taxation § 26— franchise tax base — deferred income taxes on installment sales**

Deferred potential state and federal income taxes on income which will be received in the future from installment sales are not "definite and accrued legal liabilities" or "taxes accrued" which may be deducted from the taxpayer's franchise tax base under G.S. 105-122(b).

4. **Taxation § 26— franchise tax base — deferred income taxes on installment sales**

A corporate taxpayer, having voluntarily elected the installment method of accounting for income tax purposes, may not deduct deferred income taxes on installment sales from surplus in determining its franchise tax base, although generally accepted accounting principles would permit such a deduction from surplus, since the franchise tax statute, G.S. 105-122, does not authorize the deduction of deferred income taxes from the franchise tax base or the use of generally accepted accounting principles to compute the tax.

5. **Taxation § 26— franchise taxes — use of corporation's books and records**

That portion of the franchise tax statute, G.S. 105-122, which states that the tax shall be computed from the "books and records of the corporation" is not a requirement that the Commissioner of Revenue follow the categorizations placed upon the information contained in the books and records; rather, the statute authorizes the Commissioner to require such facts and information as are deemed necessary to comply with his duty to assess the franchise tax in accordance with the statute.

6. Taxation § 26— franchise taxes — deferred income taxes — different treatment of accrual and cash basis taxpayers — equal protection — uniform taxation

To permit an accrual method taxpayer to deduct from its franchise tax base those taxes attributable to installment sales and to deny such a deduction to a cash basis taxpayer reporting under the installment method is not a denial of equal protection of the laws under the Fourteenth Amendment to the U. S. Constitution or a violation of Article V, § 3 (as it existed in 1965) of the N. C. Constitution requiring that taxes be levied by "uniform rule," since the different treatment of cash basis and accrual taxpayers is based upon a rational reason, and all corporations in the same classification are taxed in the same manner.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 30 N.C. App. 261, 226 S.E. 2d 869, which affirmed judgment for plaintiff entered by *Bailey, J.*, at the 9 October 1975 Civil Session of WAKE Superior Court.

Plaintiff is a North Carolina corporation whose principal activity is the construction and sale of residential dwellings to individuals in Cumberland County. To effectuate a sale, plaintiff usually received a small down payment from the purchaser. The purchaser then assumed a first mortgage on the property, which was held by a third party lender, and gave plaintiff a second mortgage upon the property. Plaintiff remained liable on the first mortgage.

Pursuant to section 453 of the Internal Revenue Code, plaintiff elected to report the income received from these sales under the "installment method." Under this method, plaintiff reported taxable gain, and accordingly paid income tax thereon, on the installments in the year in which the payments were actually received. The money to be received in the future as installment payments was carried on plaintiff's books as "Deferred Sales—Installment Basis." For the year ending 31 October 1964, plaintiff had $142,650.87 in the deferred sales account.

In computing the amount owed as franchise tax for 1965 (this covered the year ending 31 October 1964), plaintiff did not include the $142,650.87 of deferred sales. The Secretary of Revenue audited plaintiff and assessed an additional franchise tax of $213.98, plus $6.42 interest, based upon an inclusion of the deferred sales account in the computation of plaintiff's franchise tax base. Plaintiff sued for a partial refund. In its

complaint, plaintiff alleged that if the amount carried as deferred sales was to be included in the computation of the franchise tax, a deduction for future state and federal income taxes arising from those sales should be allowed as a deduction.

At trial on the merits, before Judge Bailey, without a jury, both parties introduced evidence. At the close of the evidence, defendant moved for nonsuit. This was overruled, and plaintiff's claim for a partial refund was allowed, based upon Judge Bailey's conclusion that a deduction from deferred sales for state and federal income taxes to become due in the future was proper. The Court of Appeals affirmed and we granted defendant's petition for discretionary review.

Other facts necessary to the decision of this case will be discussed in the opinion.

Biggs, Meadows, Batts, Etheridge & Winberry by Frank P. Meadows, Jr. for plaintiff appellee.

Attorney General Rufus L. Edmisten by Assistant Attorney General George W. Boylan for J. Howard Coble, Secretary of Revenue, defendant appellant.

MOORE, Justice.

The sole question for decision is whether the plaintiff, having voluntarily elected the installment method of accounting for income tax purposes, may deduct deferred, potential state and federal income tax liabilities from its franchise tax base under G.S. 105-122(b).

Plaintiff contends that it should be permitted to deduct from its franchise tax base, as computed under G.S. 105-122(b), the amount of state and federal income taxes which may become due as certain installment income is received in the future. This contention is based upon the premise that generally accepted accounting principles would permit such a deduction from surplus. Defendant rejects this contention upon the ground that G.S. 105-122 provides that no reservation or allocation from surplus or undivided profits shall be allowed for items other than those specified in G.S. 105-122(b). Defendant thus argues that since future income tax liability which may or may not arise in the future does not constitute a "definite and accrued

legal liability" or "taxes accrued" within the meaning of G.S. 105-122(b), the amount claimed by plaintiff is not deductible.

The franchise tax payable by a corporation in this State is determined by G.S. 105-122 through G.S. 105-129.1. G.S. 105-122(b), in pertinent part, provides:

> "(b) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. . . . "

Franchise taxes are imposed upon corporations for the opportunity and privilege of transacting business in this State. It is an annual tax which varies with the nature, extent and magnitude of the business conducted by the corporation in this State. *Telephone Co. v. Clayton, Comr. of Revenue,* 266 N.C. 687, 147 S.E. 2d 195 (1966); *Stagg v. Nissen Co.,* 208 N.C. 285, 180 S.E. 658 (1935). *See also Texaco, Inc. v. Calvert,* 526 S.W. 2d 630 (Tex. Civ. App. 1975).

[1, 2] In construing taxing statutes, there are several well established rules of construction. Where the statute is ambiguous or there is doubt as to the proper interpretation of a statute which imposes a tax, the statute is construed in favor of the taxpayer and against the State. *Food House, Inc. v. Coble, Sec. of Revenue,* 289 N.C. 123, 221 S.E. 2d 297 (1976); *In re Clayton-Marcus Co.,* 286 N.C. 215, 210 S.E. 2d 199 (1974); *Pipeline Co. v. Clayton, Comr. of Revenue,* 275 N.C. 215, 166 S.E. 2d 671 (1969). However, where a statute provides for an exemption from taxation, the statute is construed strictly against the taxpayer and in favor of the State. *In re Clayton-Marcus Co., supra; In re Appeal of Martin,* 286 N.C. 66, 209 S.E. 2d 766 (1974). The underlying premise when interpreting taxing statutes is: "Taxation is the rule; exemption the exception." *Odd Fellows v. Swain,* 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940). Further, the construction placed upon a revenue Act by the Commissioner of Revenue will be given due consideration by the Court; but such construction is not controlling or binding. *Campbell v. Currie, Commissioner of Revenue,* 251 N.C. 329,

111 S.E. 2d 319 (1959). The above stated rules of construction are relevant, however, only in those instances in which the interpretation of the statute is ambiguous or in doubt. When the statute is clear and not capable of several interpretations, the plain meaning, as gleaned from the words of the statute, controls. *In re Clayton-Marcus Co., supra; In re Appeal of Martin, supra; Pipeline Co. v. Clayton, Comr. of Revenue, supra.*

[3] The threshold question is whether plaintiff's deferred taxes are "definite and accrued legal liabilities" or "taxes accrued" under G.S. 105-122(b) as interpreted by the rules of construction stated above. As was stated in *Dixie Pine Products Co. v. Commissioner,* 320 U.S. 516, 519, 88 L.Ed. 270, 272, 64 S.Ct. 364, 365 (1944), a liability is accrued, and thus deductible, when "all events [have occurred] in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent. . . . " Taxes are generally deemed to accrue when all events have occurred which fix the amount of the tax and the taxpayer's liability therefor. *VanNorman Co. v. Welch,* 141 F. 2d 99 (1st Cir. 1944). *See also Hart Metal Products, Corp. v. Commissioner,* 437 F. 2d 946 (7th Cir. 1971).

The allowable deductions from the franchise tax base under G.S. 105-122(b) are clear and unambiguous. The permissible deductions, relevant to this case, are "definite and accrued legal liabilities" and "taxes accrued." The amounts which plaintiff is attempting to deduct are not definite and accrued liabilities. The sums are not definitely fixed in amount and plaintiff is not presently liable for the amounts. Likewise, there is no permissible deduction for the amounts sought to be deducted as "taxes accrued." Neither the amount of, nor the liability for, such deferred taxes is fixed. Thus, under the plain meaning of G.S. 105-122(b), the deduction claimed by plaintiff for deferred income taxes was properly denied.

[4] In its opinion, the Court of Appeals stated that the deferred taxes were not technically "accrued" under the wording of G.S. 105-122(b), but further stated that the statute should be strictly construed against the Commissioner because it was a tax levy. That court reasoned that G.S. 105-122 provides for the computation of the franchise tax in accordance with the books and records of the corporation, and that books and records of a corporation should be kept in accordance with the Business

Corporation Act, Chapter 55 of the General Statutes of North Carolina. Therefore, the definitions contained in Chapter 55 relating to the computation of "surplus" should be controlling. Since under the Act these records and computations are to be maintained in accordance with generally accepted accounting principles, the court further reasoned that the franchise tax should also be computed in such manner. Accordingly, since plaintiff's evidence showed that it is a generally accepted accounting principle to deduct deferred income taxes from the income which will be received from the installment sales, the Court of Appeals held the deferred taxes were properly deductible.

The Court of Appeals relied heavily upon *American Can Co. v. Director of Div. of Tax*, 207 A. 2d 699 (N. J. Super. Ct.), *cert. denied*, 210 A. 2d 629 (1965). In *American Can*, the Director audited plaintiff's franchise tax return and included amounts listed as deferred income taxes in the computation of surplus for franchise tax purposes. The New Jersey Superior Court held that this was error. The franchise tax statute in New Jersey states that a franchise tax shall be levied upon the net worth of a corporation as determined from the books and records of the corporation. The statute, however, further provides that the Director is empowered to make his own determination of net worth "in accordance with sound accounting principles. . . ." Since the Director was statutorily required to make his determination in accordance with sound accounting principles, the court held that deferred income taxes were properly deductible from the franchise tax computation.

We are of the opinion that *American Can* is distinguishable from instant case. G.S. 105-122(a) provides, in addition to that portion of the statute relied upon by the Court of Appeals, that corporations shall:

> "[M]ake and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, *containing such facts and information as may be required by the Commissioner of Revenue as shown by the books and records of the corporation at the close of such income year.*" (Emphasis added.)

There is no requirement contained in the North Carolina franchise tax statute that the Commissioner of Revenue follow

generally accepted accounting principles in making his determination of the franchise tax due from a corporation. Thus, we do not feel that *American Can* is dispositive of the case at bar.

In *National-Standard Co. v. Department of Treasury*, 180 N.W. 2d 764 (Mich. 1970), plaintiff contended that it should be permitted to deduct deferred taxes from its franchise tax base on the ground that this was in accordance with generally accepted accounting principles. Plaintiff made this argument even though there was no statutory requirement that the Commissioner follow generally accepted accounting principles. The Michigan Supreme Court rejected this argument by stating that the Commissioner was required to follow the franchise tax statute even if it contravened generally accepted accounting principles. Further, even though the plaintiff's books treated deferred income taxes as a liability and a certified public accountant concurred in this categorization, the court held that the dictates of the statute were controlling, stating:

> "Because of their professional competence, the opinions of certified public accountants are entitled to be given great weight. . . . The state, in making its determination of the privilege fee, is bound, however, to follow not the accepted standards for corporate accounting, no matter how correct such standards may be as a matter of accounting principles, *but rather the directive of the privilege fee statute.* Delegation of the power to private accountants or to CPA's to determine surplus or capital or indebtedness, in lieu of a legislative standard set forth in the statute, would be clearly unconstitutional." (Emphasis added.) 180 N.W. 2d at 769.

In determining that reserves for deferred federal income taxes were not deductible from the franchise tax base, the Michigan Court noted:

> " . . . Here, once again, we are confronted with a conflict between generally accepted accounting principles on the one hand—which may be good and prudent corporate practice by setting up of reserves to meet future contingencies—and on the other hand, with the statutory test—surplus is to be determined by deducting from the net value of the corporation's property its *outstanding indebtedness* and paid-up capital.

"Future Federal income taxes are not an outstanding indebtedness—they are a mere contingency. The fact that a tax is certain to accrue in years to come does not make it a present debt. . . . " 180 N.W. 2d at 773-74.

See also Brunswick Corp. v. State, 192 N.W. 2d 246 (Mich. 1971), *rev.'g,* 181 N.W. 2d 556 (Mich. App. 1970) ; *Kroger Co., v. Bowers,* 209 N.E. 2d 209 (Ohio 1965) ; *Trunkline Gas Co. v. Mississippi State Tax Comm.,* 119 So. 2d 378 (Miss. 1960).

Brunswick Corp. v. State, supra, involves a factual situation identical to the case at bar. In *Brunswick,* plaintiff elected, pursuant to Internal Revenue Code section 453, to have its installment sales reported as deferred income. Plaintiff, as does plaintiff in instant case, contended that its deferred federal income taxes should be deducted from its surplus for franchise tax purposes. Apparently relying upon *National-Standard Co. v. Department of Treasury, supra,* and the franchise tax statute which did not expressly permit the deduction of such amounts, the court held that such deferred income taxes could not be deducted from surplus and that the Commissioner was correct in denying taxpayer's deduction.

[4, 5] G.S. 105-122 does not authorize either the deduction of deferred income taxes from the franchise tax base or the use of generally accepted accounting principles to compute the tax. That portion of the statute which states that the tax shall be computed from the "books and records of the corporation" is not a requirement that the Commissioner follow the categorizations placed upon the information contained in the books and records. Rather, the statute authorizes the Commissioner to require such facts and information as is deemed necessary to comply with his duty to assess the franchise tax in accordance with the statute. As was stated in *Watson v. Farms, Inc.,* 253 N.C. 238, 241-42, 116 S.E. 2d 716, 719 (1960) :

"The phrase 'in accordance with generally accepted principles of sound accounting practice' appears repeatedly in those sections of the Act [Business Corporation Act] relating to accounting and finance. Sec. 49(b), relating to the legality of dividends, adds to the quoted phrase 'applicable to the kind of business conducted by the corporation.' This addition is, we think, an inherent qualification when the statutory provisions are applied to a particular corporation. What is standard accounting practice for a corner grocery

store may not be standard accounting practice for corporate giants such as General Motors, American Telephone & Telegraph, and similar corporations.

" . . . A corporation may, pursuant to promulgated state and federal regulations, use either a cash receipt or an accrual basis in computing its income taxes. These methods of accounting are not new. Each has been in general use for many years. It is not, we think, logical to conclude that the Legislature, in adopting the Business Corporation Act, intended to require a corporation to keep two sets of books, one for its stockholders, the other for the government, if it wished to compute its taxes on a cash receipt basis. It is even more illogical to assume that the Legislature intended by the Business Corporation Act to void regulations permitting computation of taxes on the cash receipt basis and thereby outlaw that method of accounting, or to invalidate an accepted method of determining capital and surplus for franchise tax returns required by G.S. 105-122."

In present case, the Secretary of Revenue, in making his determination of plaintiff's franchise tax liability, was bound to follow the directive of the franchise tax statute. No matter how correct certain accounting standards may be, the statute itself must control the permissible accounting methods available for the measurement of the franchise tax base. G.S. 105-122(b) clearly does not permit a deduction for future income taxes from the franchise tax base. Further, the statute does not require that the Commissioner use generally accepted accounting principles in making his determination of the franchise tax. To accept plaintiff's argument would clearly violate the statutory requirements for deductibility set forth in G.S. 105-122(b).

[6] As an alternative argument, plaintiff contends that to permit an accrual method taxpayer to deduct from its franchise tax base those taxes attributable to installment sales and to deny such a deduction to a cash-basis taxpayer reporting under the installment method (Internal Revenue Code section 453) is a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and a violation of Article V, Section 3 (as it existed in 1965) of the North Carolina Constitution requiring that taxes be levied by "uniform rule."

Although the provision of the North Carolina Constitution does not expressly apply to a franchise tax but rather to "property and other subjects," numerous decisions of this Court have held the clause to be applicable to license, franchise and other forms of taxation. *See Hajoca Corp. v. Clayton, Comr. of Revenue,* 277 N.C. 560, 178 S.E. 2d 481 (1971); *Finance Co. v. Currie, Commissioner of Revenue,* 254 N.C. 129, 118 S.E. 2d 543 (1961), and cases cited therein. In *Hajoca Corp. v. Comr. of Revenue, supra,* at 568, 178 S.E. 2d at 486, this Court stated: "'[T]he requirements of "uniformity," "equal protection," and "due process," are, for all practical purposes, the same under both the State and Federal Constitutions.'" A tax is uniform when it imposes an equal tax burden upon all members of a particular class. *Hajoca Corp. v. Clayton, Comr. of Revenue, supra.* As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the distinction will be upheld by the Court. *In re Appeal of Martin,* 286 N.C. 66, 209 S.E. 2d 766 (1974); *Rigby v. Clayton, Comr. of Revenue,* 274 N.C. 465, 164 S.E. 2d 7 (1968); *Finance Co. v. Currie, Commissioner of Revenue,* 254 N.C. 129, 118 S.E. 2d 543, *appeal dismissed,* 368 U.S. 289, 7 L.Ed. 2d 336, 82 S.Ct. 375 (1961); *Nesbitt v. Gill, Comr. of Revenue,* 227 N.C. 174, 41 S.E. 2d 646, *aff'd,* 332 U.S. 749, 92 L.Ed. 336, 68 S.Ct. 61 (1947). *See also Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 3 L.Ed. 2d 480, 79 S.Ct. 437 (1959); *Carmichael v. Southern Coal and Coke Co.,* 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868 (1937).

In instant case, we hold that the application of the franchise tax as applied to plaintiff does not violate the equal protection clause of the Fourteenth Amendment or the North Carolina Constitution. The different treatment between plaintiff and those taxpayers reporting income under the accrual method is based upon a rational reason. *Snyder v. Maxwell, Comr. of Revenue,* 217 N.C. 617, 9 S.E. 2d 19 (1940). Those taxpayers reporting under the accrual method are actually liable, at the time the franchise tax return is filed, for the income taxes arising from the installment sales. Those taxes are "accrued." A cash-basis taxpayer reporting under the installment sales method is liable for income taxes as each installment is paid. Such a taxpayer may never be liable for any taxes arising from the installment sales, and thus may never be required to pay the amounts listed as deferred taxes. This is a sufficient basis, for constitutional purposes, upon which to sustain a distinction between cash-basis and accrual taxpayers.

Plaintiff has voluntarily elected to place itself in the classification about which it now complains; to wit, a cash-basis taxpayer reporting its income under the installment method. *See Watson v. Farms, Inc., supra.* Plaintiff makes no contention that all corporations in plaintiff's classification—*i.e.*, cash-basis, corporate taxpayers reporting under the installment method—are not taxed in the same manner. In fact, it appears that all are taxed the same.

Accordingly, we hold that plaintiff, having voluntarily elected the installment method of accounting for income tax purposes, may not deduct from its franchise tax base an anticipated future state and federal income tax liability. This holding is in accordance with those cases interpreting statutes similar to G.S. 105-122, *see Trunkline Gas Co. v. Mississippi State Tax Comm., supra,* and *Brunswick Corp. v. State, supra,* and is in accordance with the interpretations of the Commissioner of Revenue and the Attorney General over a number of years. *See* 38 Op. Att'y. Gen. 84 (1966); 27 Op. Att'y. Gen. 229 (1944).

For the reasons stated, the decision of the Court of Appeals is reversed and the case is remanded to that court with direction that it remand the case to the Superior Court of Wake County for entry of judgment sustaining defendant's motion for nonsuit, treated as a motion for dismissal under Rule 41 of the North Carolina Rules of Civil Procedure.

Reversed and remanded.

TENNESSEE-CAROLINA TRANSPORTATION, INC. v. STRICK CORPORATION

No. 52

(Filed 31 January 1977)

1. **Rules of Civil Procedure § 26— prohibition against further discovery — taking of deposition prohibited — error**

The trial court erred in prohibiting the defendant from taking the deposition of an out-of-state expert witness, though the court had previously entered an order barring further discovery, since defendant sought to take the deposition to obtain evidence for use at the trial which was relevant to the issue to be determined by the jury and such evidence was not merely cumulative.

2. **Appeal and Error § 6— order affecting substantial right — order appealable**

The order of the trial court prohibiting defendant from taking the deposition of an out-of-state expert witness effectively precluded defendant from introducing evidence concerning tests performed by the witness; thus, the order affected a substantial right of defendant and was appealable. G.S. 1-277(a).

3. **Rules of Civil Procedure § 26— order prohibiting discovery — no good cause shown**

Where the trial court's ground for prohibition against the taking of the deposition of an out-of-state expert witness was that the court had previously entered an order fixing the time within which discovery must be completed and had rejected an application by defendant for an extension of that time, such ground did not amount to good cause as required by G.S. 1A-1, Rule 26(c).

4. **Rules of Civil Procedure § 26— discovery — knowledge of matters sought — no ground for objection**

The fact that a party seeking discovery has knowledge of the information as to which discovery is sought is not grounds for objection.

Justice BRANCH dissenting.

Justices HUSKINS and EXUM join in the dissent.

ON rehearing upon petition of defendant for reconsideration of the decision of this Court, reported in 289 N.C. 587, 223 S.E. 2d 346, dismissing defendant's appeal from the decision of the Court of Appeals which, in turn, dismissed its appeal from the Superior Court of MECKLENBURG County.

This is the fourth time that this litigation has been before this Court. It is an action for damages for breach of an alleged implied warranty of fitness for purpose growing out of a contract for the manufacture and sale by the defendant to the plaintiff of 150 trailers. Upon the first trial of the action, the jury found that there was an implied warranty of fitness for purpose and a breach thereof and awarded damages. From the resulting judgment upon the verdict the defendant appealed and a new trial was ordered on the issue as to the extent of the breach of the warranty and on the issue of damages. *Transportation, Inc. v. Strick Corporation,* 283 N.C. 423, 196 S.E. 2d 711 (1973). On the second trial of the action, the plaintiff again recovered judgment and, on appeal therefrom, a new trial was granted for error in the exclusion of evidence offered by the defendant. *Transportation, Inc. v. Strick Corporation,* 286 N.C. 235, 210 S.E. 2d 181 (1974).

In the course of the second trial, through cross-examination of the plaintiff's president, the defendant learned for the first time that the plaintiff had caused scientific tests to be made by Mr. George Aseff, a metallurgist residing in Atlanta, Georgia, upon some of the trailers with reference to the hardness of the metal used in the construction of the top rails of these trailers. At that trial, proposed cross-examination of this witness by the defendant concerning such tests was excluded by the trial court. For present purposes, Mr. Aseff is assumed to be a qualified expert.

Following the remand of the action to the trial court for a third trial, the defendant moved in the Superior Court for additional time in which to "conduct discovery" with reference to the tests so made by Mr. Aseff. That motion was denied for two reasons: (1) Prior to the second trial of the case, the Superior Court had entered an order terminating all discovery as of 15 August 1973; and (2) the age of the case.

Thereafter, on 27 May 1975, the defendant gave notice that it would take the deposition of Mr. Aseff on 23 June 1975 for for the purpose of using such deposition as evidence at the third trial. No date for the third trial had then been set. On 6 June 1975, the defendant also gave notice that it would take the deposition of a Mr. Headrick, in Chattanooga, Tennessee, for use as evidence at the third trial.

The notice of the taking of the proposed deposition stated, "The deposition herein referred to is to be taken for use as evidence in the trial of this action as provided in Rule 26 of the N.C.R. of Civ. Proc." and that the deposition would be taken on 23 June 1975 at the place of business of the proposed deponent in Atlanta, Georgia. The subpoena issued for Mr. Aseff commanded him to be present at the specified time and place "to be examined on deposition for the purpose of discovery and for the preservation of testimony," and directed him to bring with him "all documents or reports you have in connection with the above-stated case."

On 9 June 1975, the plaintiff moved that the trial court forbid the taking of these two proposed depositions on the ground that they constituted discovery and, for this reason, were barred by the order refusing to grant additional time for the conduct of discovery. On 13 June 1975, the Superior Court issued its order prohibiting the taking of the deposition of Mr.

Aseff but refusing to prohibit the taking of the deposition of Mr. Headrick, distinguishing the two on the ground that the defendant knew, in substance, what Mr. Headrick would testify but did not know what the testimony of Mr. Aseff would be and, consequently, the taking of the deposition of Mr. Aseff would be discovery. It is in this order, prohibiting the taking of the deposition of Mr. Aseff, from which the present appeal is taken. At the time it was entered, the case had not been set for the third trial.

The defendant's appeal from this order of the Superior Court was dismissed by the Court of Appeals, from which dismissal the defendant appealed to this Court. On 6 April 1976, this Court dismissed the appeal in the decision now being reconsidered, saying:

> "Defendant contends that the trial judge's ruling denying the taking of Mr. Aseff's deposition resulted in a denial of his constitutional right to due process because he was denied the right to present competent evidence in defense to plaintiff's claim. We do not agree. Defendant did not raise this question in the court below and we do not ordinarily consider constitutional questions which were not raised and passed upon in the court below. * * * Further the judge's ruling involved a procedural matter embodied in our statutes and the question here presented is whether the trial judge erred in prohibiting defendant from taking the deposition of George V. Aseff because defendant did not know 'what the testimony of the witness would be and the taking of said deposition would, therefore, constitute discovery which would be a violation of the former orders of this Court.'
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> * * *
>
> "We find no decisions in this jurisdiction offering guidance on the narrow question here presented. * * *
>
> "The general rule is that orders denying or allowing discovery or depositions are not appealable. * * * This rule is consistent with our rule that appeal lies only from final judgment unless the order affects some substantial right and injury will result to appellant unless corrected before appeal from final judgment. * * * Further the granting or denial of this protective order was addressed to the

trial judge's discretion and his ruling will not be disturbed absent a showing of abuse.

* * *

"Further, it appears that at the second trial defendant offered expert testimony on the very question about which he seeks to examine plaintiff's expert. It is true that there is some indication that Mr. Aseff tested some of the trailers two years before the second trial. Nevertheless defendant fails to show when his expert or experts made their tests or examinations. In the present posture of this case it appears that the evidence sought by deposition would be cumulative. Thus defendant has failed to show substantial prejudice resulting from the trial judge's order or that there was abuse of discretion on the part of the trial judge in entering the order."

Welling & Miller by George J. Miller and Charles M. Welling; Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell for defendant appellant.

Wallace S. Osborne; Waggoner, Hasty & Kratt by William J. Waggoner and Robert D. McDonnell for plaintiff appellee.

LAKE, Justice.

[1] On further consideration, we reach the conclusion that our original decision to dismiss this third appeal in this action should be recalled and vacated and that there was error in the order of the Superior Court prohibiting the defendant from taking the deposition of Mr. Aseff for use as evidence at the third trial.

In our decision upon the first appeal in this action, 283 N.C. 423, 196 S.E. 2d 711 (1973), we held that the defendant was entitled to a new trial on the issue of damages and we said:

"Of necessity, a new trial on the issue of damages also requires a new trial on the issue as to breach of warranty because the jury that assesses the damages should be the same jury that determines whether, *and to what extent,* the fitness warranty was breached. * * * We hold that this evidence entitles plaintiff to go to the jury on the breach of warranty issue with respect to all 150 trailers."

By reason of error found by us on the second appeal, 286 N.C. 235, 210 S.E. 2d 181 (1974), the determination of the jury on the second trial that the implied warranty of fitness for purpose had been broken and its determination as to the extent of that breach were set aside and a new trial ordered. Consequently, upon the third trial, yet to be had, a crucial question is as to how many, if any, of the trailers were defective. The plaintiff contends that all of the 150 trailers were defective, by reason of the failure of the metal used in the construction of the top rails in the several trailers to measure up to the proper degree of hardness. The defendant contends that none of the trailers (or in any event less than all of them) was defective in this respect. Therefore, upon the third trial of the action, the degree of hardness of the metal in the top rails, with reference to each of the 150 trailers, is a critical question, on which the right of the plaintiff to recover for the breach of warranty with reference to that trailer depends.

From the record and briefs now before us, it appears that the defendant made tests of some, but not all, of the trailers for the purpose of determining the hardness of such metal in the top rails thereof. At the second trial, the defendant learned that the plaintiff had caused Mr. Aseff, an expert metallurgist, to make tests upon some of the trailers to determine the hardness of the metal in the top rails thereof. The defendant does not know which trailers Mr. Aseff so tested, or what his tests revealed as to the hardness of the metal in the top rails of those trailers. They may or may not be the same trailers tested by the defendant's expert. Mr. Aseff resides in another state and cannot be reached by subpoena issuing from the Superior Court of Mecklenburg County.

It appears from the defendant's brief that the purpose of its taking of Mr. Aseff's deposition is to determine, for introduction in evidence at the third trial: (1) When Mr. Aseff conducted his tests, (2) how many and which trailers he tested, (3) the type of test used by him, (4) the "readings" obtained by such tests, and (5) the qualifications of Mr. Aseff to make such tests. The defendant does not seek so to obtain, and to introduce in evidence at the trial, any conclusion or opinion formed by Mr. Aseff. Its right to do so is not presently before us.

Clearly, the evidence which the defendant so seeks to obtain and use at the trial is relevant to the issue to be determined

by the jury. It may or may not relate to the same trailers tested by the defendant's expert. Whether it does or not, the "readings" obtained upon the tests made by Mr. Aseff are quite material in the determination of the critical question remaining for decision and are not merely cumulative evidence. These "readings" may or mav not corroborate testimony to be given by other witnesses. They may support the defendant's contention that there was no breach of warranty or they may completely demolish the position taken by the defendant in this action. The fact that, at this time, the defendant does not know what will be the effect of the Aseff testimony upon its case does not determine the right of the defendant to take the deposition.

If, at the time the case is reached for the third trial, Mr. Aseff should be personally present in the courtroom, the defendant could call him to the stand as its witness, notwithstanding its then lack of knowledge as to what would be the nature of his testimony. Trial counsel do no normally take such risks with their client's cases, but this does not make the evidence incompetent. The competency of a specific question propounded to the witness in the taking of the deposition, with reference to a claim of privilege or other basis for objection, is to be determined by the trial court at the trial under the regular rules of evidence, applied as though the witness were then present and testifying. G.S. 1A-1, Rule 32(a). Apparently, the defendant assumes that, since the plaintiff did not call Mr. Aseff as its witness at the second trial, the "readings" obtained by him from his tests were not favorable to the plaintiff's contention. On this basis, the defendant has elected to take the risk of calling Mr. Aseff as a witness. This, nothing else appearing, the defendant has the right to do.

Nothing else appearing, Mr. Aseff being beyond the reach of a subpoena, the defendant may take his deposition for use at the trial. If it does so and the testimony proves disastrous to the defendant's contention, the plaintiff is free to introduce the deposition in evidence itself. G.S. 1A-1, Rule 32(a) provides:

> "At the trial * * * any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions.

* * *

"(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * (ii) that the witness is at a greater distance than 100 miles from the place of trial * * * or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used * * * ."

In 23 Am. Jur. 2d, Depositions and Discovery, § 104, it said:

"It has been generally held, in the absence of express provision on the point by statute or court rule, that a deposition containing competent evidence and filed in the cause, but not introduced in evidence by the party at whose instance it was taken, may be introduced by the other party."

[2] The order of the Superior Court prohibiting the taking of the deposition of Mr. Aseff by the defendant effectively precludes the defendant from introducing evidence of the "readings" concerning the hardness of the metal obtained by the tests which Mr. Aseff made. Thus, the order affects a substantial right of the defendant and is appealable. G.S. 1-277(a) provides:

"An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference * * * which affects a substantial right claimed in any action or proceeding."

It would be highly impractical to proceed with the third trial of this complex action and then let the defendant, if unsuccessful again before the jury, appeal for the reason that it was denied the right to offer evidence of the "readings" obtained by Mr. Aseff's testing of a now undetermined number of the trailers. The sensible thing to do is to determine this question before the parties, their witnesses and the trial court are put to the expense and time consuming effort of a third trial on the merits.

In *Carter Products, Inc. v. Eversharp, Inc.*, 360 F. 2d 868 (7th Circuit, 1966), the appellant moved for an order directing a discovery-deponent to answer specific questions, which the deponent, on advice of his counsel, had refused to answer. The district court denied the motion. The moving party appealed and the deponent moved to dismiss on the ground that the district court's order was not final. The Court of Appeals held that this order was final and appealable and reversed the district court's order. See also: *Celanese Corp. v. Duplan Corporation*, 502 F. 2d 188 (4th Circuit, 1974), where the appeal was determined on the merits.

G.S. 1A-1, Rule 30(a), formerly Rule 26(a), provides:

> "*When depositions may be taken.*—After commencement of the action, *any party* may take the testimony *of any person*, including a party, by deposition upon oral examination. Leave of court * * * must be obtained *only* if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant. * * * . " (Emphasis added.)

This language is clear and unequivocal. The use of the deposition at trial is governed by Rule 32(a), quoted above in part. Whether a deposition may be used at trial pursuant to Rule 32(a)(4) will depend upon the circumstances at the time of the trial, but the right to take the deposition granted by Rule 30(a) is unqualified except for the provision of Rule 26(c) authorizing the trial court to issue "protective orders." That provision of the rule reads, in pertinent part, as follows:

> "(c) *Protective orders.*—Upon motion by a party or by the person from whom discovery is sought, *and for good cause shown*, the judge * * * may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) *that the discovery not be had;* * * * " (Emphasis added.)

[3] The authority of the trial judge to issue such protective order is not unqualified. The statute provides that such order may be issued only "for good cause shown" and that it may be issued only "to protect a party or person from unreasonable annoyance, embarrassment, oppression or undue burden or ex-

pense." No such basis for the order prohibiting the taking of the deposition of Mr. Aseff is shown in the record. Nothing whatever indicates that the taking of the deposition on the date specified in the notice therefor would have delayed the third trial of the action. On the contrary, the record indicates clearly that the parties contemplated that such third trial would be had at a special term to be arranged, that no special term had been arranged at the time the notice was served or when the order was entered or when the deposition was to be taken, and that it was not contemplated that such term would be requested for a time prior to the date proposed for the taking of the deposition.

The basis for the issuance of the order prohibiting the taking of the deposition of Mr. Aseff was that the court had previously entered an order fixing the time within which discovery must be completed and had rejected an application by the defendant for an extension of that time. This does not constitute "good cause" for the prohibition of the taking of the deposition, even if the purpose had been mere discovery, certainly not where, as here, the purpose is to obtain evidence for introduction at the trial. Rule 26(d) provides:

> "(d) *Sequence and timing of discovery.*— * * * Any order or rule of court setting the time within which discovery must be completed *shall be* construed to fix the date after which the pendency of discovery will not be allowed to delay trial * * * *but shall not be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial * * * is not thereby delayed.*" (Emphasis added.)

As above shown, the taking of the deposition of Mr. Aseff could not have delayed the third trial of this action. The delay therein has resulted, not from the proposed taking of the deposition, but from the entry of the order prohibiting the taking of the deposition and the resulting appellate procedures. Had the defendant been permitted to proceed with the taking of the deposition as permitted by Rule 30(a), the third trial could have been had no later than the Fall of 1975 and any appeal from a judgment entered pursuant thereto could have been determined by this time.

[4] Rule 26(b)(1) provides, "It is not ground for objection * * * that the examining party has knowledge of the information as to which discovery is sought." Thus, even if we

regard the taking of the deposition of Mr. Aseff as mere discovery, as distinguished from a procedure for obtaining evidence for use at the trial, it would be immaterial that the defendant had knowledge of the "readings" obtained by Mr. Aseff's tests of the trailers examined by him. However, nothing indicates that the defendant had such information and, on the contrary, the order of the court prohibiting the taking of the deposition makes it clear that the court issued the order because the defendant did not have such information and, therefore, in the opinion of the court, it was embarking upon a mere fishing expedition. As above noted, this was not the purpose of the defendant as shown in the record. The purpose of the deposition was to obtain evidence for use at the trial, not mere information for the guidance of counsel in preparation for trial.

In Shuford, North Carolina Civil Practice and Procedure, we find the following pertinent statements:

> "The fact that the examining party has knowledge of the matters as to which testimony is sought from the deponent is not a ground for objection. Although the Federal Rule does not contain specific language to this effect, as North Carolina Rule 26(b) does, the majority of Federal decisions reach this conclusion." § 26-7.
>
> "Rule 30(a) [formerly 26(a)] provides a broad right of discovery from *any* person by means of oral examination after the action has been commenced. *No leave of court is necessary* unless the plaintiff desires to take a deposition prior to the expiration of a 30 day period following service of the summons and complaint." (Second emphasis added.) § 30-3.1.
>
> "The court may order 'that the deposition not be taken.' This is obviously the most drastic prohibition against the liberal right of discovery and should be used sparingly. There must be a clear showing that such relief is required before the court will stay or prohibit a deposition." § 30-5.

In 23 Am. Jur. 2d, Depositions and Discovery, § 144, it is said:

> "It has been broadly stated that statutes or procedural rules relating to discovery procedures should be liberally construed in favor of disclosure in order to accomplish the various purposes of discovery, unless the request is

clearly improper by virtue of well-established causes for denial. Because of their remedial character, statutes or rules of procedure governing discovery proceedings should be liberally construed with a view to providing a more speedy and less expensive method than by proceedings in equity."

We find nothing in the record to indicate that the taking of the deposition of Mr. Aseff, pursuant to the notice served by the defendant, would have delayed the third trial of this action, would have caused the plaintiff or Mr. Aseff any unreasonable annoyance, embarrassment, oppression or undue burden or expense. Whether the evidence which the defendant seeks thereby to obtain would have been favorable or unfavorable to the defendant's position in the litigation is presently speculative, but it cannot be doubted that such information is highly material to the determination of the critical question to be resolved at the third trial of this action—the hardness of the metal used in the construction of the top rails of the trailers examined by Mr. Aseff. Consequently, we conclude that the order of the Superior Court prohibiting the taking of the deposition was improvidently issued and should be vacated.

Since we conclude that the statutory rules do not authorize the Superior Court to prohibit the taking of the deposition of Mr. Aseff, we do not reach the constitutional question propounded by the defendant's brief and discussed in our former opinion.

For the reasons stated above, the previous decision of this Court upon the present appeal is hereby withdrawn and the matter is remanded to the Court of Appeals with direction that it enter an order remanding the matter to the Superior Court of Mecklenburg County with direction to that court that it vacate its order prohibiting the defendant from taking the deposition of Mr. Aseff for use at the third trial of this action.

Reversed and remanded.

Justice BRANCH dissenting.

For the reasons stated in *Transportation, Inc. v. Strick Corp.*, 289 N.C. 587, 223 S.E. 2d 346, and in reliance upon the authorities cited therein, I respectfully dissent.

Justices HUSKINS and EXUM join in this dissent.

ALICE LUCILLE CRAVEN BRITT, OSSIE GERMAN BRITT AND IDA LEOLA CRAVEN BRISTOW v. GARLAND W. ALLEN

No. 124

(Filed 31 January 1977)

1. **Trial §§ 48, 54— setting aside verdict — new trial — discretionary authority of court**

The trial judge is vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony.

2. **Appeal and Error § 54— discretionary action — no review on appeal**

The Court of Appeals did not err in affirming the trial judge's discretionary action in setting the verdict aside on the ground that it was against the greater weight of the evidence, and the trial court's acknowledgment that he had committed unspecified errors of law was mere surplusage and did not make his order appealable.

3. **Appeal and Error § 54; Rules of Civil Procedure § 50— judgment n.o.v. — appeal from discretionary order — absence of motion for judgment n.o.v.**

The Court of Appeals, upon finding that defendant was erroneously denied a directed verdict at the close of all the evidence, erred in directing entry of judgment for defendant notwithstanding the verdict for plaintiffs since (1) the question of legal sufficiency of plaintiffs' evidence to go to the jury was not presented by a purported appeal from the court's discretionary order setting aside the verdict as being against the greater weight of the evidence, and (2) the Court of Appeals had no authority to enter a judgment n.o.v. where defendant made no motion for such judgment in the trial court, and the trial court did not, on its own motion after judgment, grant, deny or redeny the motion for directed verdict made at the close of the evidence. G.S. 1A-1, Rule 50(b)(2).

4. **Appeal and Error § 41— record on appeal — narration of evidence — mandatory requirement**

Narration of the evidence in the record on appeal as specified in App. R. 9(c) is mandatory, and an appeal is subject to dismissal for violation of the rule.

ON petition for discretionary review of the decision of the Court of Appeals reported in 27 N. C. App. 122, 218 S.E. 2d 218 (1975), affirming in part and reversing in part the order of *Long, J.*, entered at the 9 December 1974 Session of the Superior Court of RANDOLPH County, docketed and argued as Case No. 19 at the Spring Term 1976.

In this action plaintiffs, Mr. and Mrs. O. G. Britt and Mrs. Ida L. Bristow, seek to recover damages from defendant G. W.

Allen for the breach of an alleged contract to buy and sell land. The controversy has been before the Court of Appeals in one posture or another five different times. *See Britt v. Smith,* 6 N.C. App. 117, 169 S.E. 2d 482 (1969); *Britt v. Allen,* 12 N.C. App. 399, 183 S.E. 2d 303 (1971); *Britt v. Allen,* 15 N.C. App. 196, 189 S.E. 2d 543 (1972); *Britt v. Allen,* 21 N.C. App. 497, 204 S.E. 2d 903 (1974); *Britt v. Allen,* 27 N.C. App. 122, 218 S.E. 2d 218 (1975).

Plaintiffs' evidence, summarized except when quoted, tended to show the following facts:

In October 1966 plaintiffs owned a 33½ acre farm in Randolph County which was subject to a first deed of trust securing their note for $3,000.00 to Peoples Savings and Loan Association (S & L Association) and to a second deed of trust securing a loan of $1,100.00 from the Bank of Coleridge. In October 1966 plaintiffs were behind with their payments to the S & L Association and the property was advertised for sale at public auction on 25 November 1966. At that time plaintiffs owed the S & L Association $2,200.00 and the bank between $400.00 and $500.00.

Mrs. Britt testified that in October 1966 she requested defendant to lend plaintiffs $3,000.00 on the land "to straighten it up." Defendant declined to lend plaintiffs any money on the land, but he said he would see she did not lose her home; that as soon as he could get it surveyed "he would take enough land, buy enough land to clear it up. Then he would sell it back to [plaintiffs] with a six percent interest, if [they] wanted it back. . . . He said he would take it [the land] on the right of the driveway going into the house, and [plaintiffs] agreed on that." Such a division would leave plaintiffs with about 15 acres including the house, barns, and outbuildings; and defendant "would buy the rest." Thereafter, according to Mrs. Britt's testimony, defendant "claimed he couldn't get a surveyor," and the land was sold on 25 November 1966. Defendant, however, assured Mrs. Britt that he would file an upset bid on the property, and he did, in fact, raise the bid. Whereupon the trustee readvertised the land for sale on 27 December 1966.

On 27 December 1966 defendant told Mrs. Britt that he had not been able to get a surveyor but if anyone raised his bid he would "put a bid over them" and that he would see they didn't lose the property. He told Mrs. Britt to go home and bring

Mr. Britt to his office and they would "make the deed now." However, when Mrs. Britt returned with her husband, defendant told her they could not "fix" the papers then; that he would tell them when to come back and make the deed.

Thereafter Mrs. Britt heard nothing further about "this foreclosure" until 16 January 1967 when three men appeared at her home and announced they had bought the property at the foreclosure sale. In May 1968, the purchasers evicted plaintiffs.

After the payment of all liens against the property out of the proceeds of the sale ($3,500.00) the trustee paid the surplus of about $705.00 into the office of the clerk of the superior court.

Plaintiffs' evidence tended to show that the fair market value of the property in December 1966 was between $12,000.00 and $33,500.00.

At the close of plaintiffs' evidence defendant moved for a directed verdict on the ground that plaintiffs had sued upon an oral contract for the sale and purchase of land which was void under the statute of frauds, G.S. 22-2. The court overruled the motion.

The defendant's testimony summarized, except when quoted, is set out below:

After the first sale of plaintiffs' property in November 1966, acting on his own initiative and without having discussed the matter with Mrs. Britt, defendant upset the sale by an increased bid of $200.00. Thereafter Mrs. Britt asked him "not to bid any more," and he promised her not to raise the bid again. She then told defendant she would like to sell him the land and have him "deed her back out of what [he] purchased from her approximately 15 acres or one-half of the tract." Defendant agreed that if plaintiffs would "make warranty deed and put it in escrow" with his attorneys he would turn over to those attorneys the money with which to pay all the indebtedness; that he would have the land surveyed and then deed back to her the land on the north side of the road which ran through the property, leaving him with approximately 18.5 acres. Mrs. Britt agreed to these terms; and defendant called his attorney, Mr. Moser, and instructed him to prepare the deed. Mr. and Mrs. Britt then left his office to go to the lawyer's office and make the deed so that he could "take up the loan."

Then Mrs. Britt's daughter, Mrs. Kivett, came to defendant and said she would like to buy ten acres of the land from him after he got title to the property. He "agreed to sell the daughter back ten acres . . . for $200 per acre, if [he] were able to get the property."

Three or four days after Mr. and Mrs. Britt left defendant's office to go to the office of Moser and Moser to execute the deed to defendant, Mr. Britt returned to defendant's office and told him he would not sign the deed conveying the property to defendant. He said, "We have had some domestic troubles and I have been drinking some, and she ran me off from home and we are separated. I am not allowed to go back home." Thereafter, defendant kept calling Mr. Moser's office to inquire if Mr. and Mrs. Britt had signed the deed. They never did, and he never paid off the indebtedness on the land.

On 27 December 1966 the trustee sold the land at public auction for $3,500.00. No upset bid was filed and the clerk of superior court confirmed the sale on 11 January 1967.

At the close of all the evidence defendant again moved for a directed verdict "on the same grounds specified at the close of plaintiffs' evidence." The motion was again denied.

Three issues, to which the record shows no objection, were submitted and answered as follows:

"1. Did the defendant, Garland W. Allen, enter into a contract with the plaintiffs by which he agreed to purchase 33½ acres of land for them at a foreclosure sale in exchange for their promise to convey him a portion thereof?

ANSWER: Yes.

2. If so, did the defendant breach said contract?

ANSWER: Yes.

3. What amount of damages, if any, are the plaintiffs entitled to recover of the defendant?

ANSWER: $11,000.00."

Defendant did not move under G.S. 1A-1, Rule 50(b)(1) to have judgment entered in accordance with his motion for a directed verdict. Instead he moved the court "to set aside the verdict . . . and declare a mistrial for that the verdict is con-

trary to the evidence and for errors of law committed during the trial. . . . " The trial judge granted defendant's motion. Neither defendant's motion nor the court's order specified the errors of law referred to therein.

Plaintiffs excepted to the judge's order and appealed. The Court of Appeals affirmed the order setting aside the verdict but reversed the order for a new trial. Upon reviewing the evidence, that court held that "[d]efendant's alleged promise to purchase a quantity of land from plaintiffs is clearly unenforceable for four reasons: (1) the quantity of land was never agreed upon, (2) the location of the lines was never agreed upon, (3) the purchase price was never agreed upon, and (4) the alleged agreement [being one for the purchase of land] was in violation of the statute of frauds because it was not in writing." *Britt v. Allen,* 27 N.C. App. 122, 125, 218 S.E. 2d 218, 220 (1975). The Court of Appeals accordingly reversed the order for a new trial and, *ex mero motu,* remanded the case to the superior court with directions to enter judgment for defendants. Upon plaintiffs' petition we allowed certiorari.

Ottway Burton and Millicent Gibson for plaintiff appellants.

Moser and Moser for defendant appellee.

SHARP, Chief Justice.

Plaintiffs' first assignment of error is that the Court of Appeals erred in affirming the trial judge's discretionary action in setting the verdict aside on the ground that it was against the greater weight of the evidence, and that unspecified errors of the law were committed during the trial. Plaintiffs' contention is that the verdict was in accordance with the evidence and that no errors of law occurred. This assignment has no merit and is overruled.

[1] "The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice." *Bird v. Bradburn,* 131 N.C. 488, 489, 42 S.E. 936 (1902). The trial judge is "vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony." *Roberts v. Hill,* 240 N.C. 373, 380, 82 S.E. 2d 373, 380 (1954). Since such a

motion requires his appraisal of the testimony, it necessarily invokes the exercise of his discretion. It raises no question of law, and his ruling thereon is irreviewable in the absence of manifest abuse of discretion. *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95 (1967); *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872 (1965); *Thomas v. Myers,* 87 N.C. 31 (1882); 7 Strong's N. C. Index 2d *Trial* §§ 48, 51 (1968). Certainly, the record in this case manifests no abuse of discretion. When a verdict is set aside for error in law, the decision is not a matter of discretion. In such a situation, "the aggrieved party may appeal, provided the error is specifically designated." *McNeill v. McDougald,* 242 N.C. 255, 259, 87 S.E. 2d 502, 504 (1955).

The adoption of the Rules of Civil Procedure (N. C. Sess. Laws 1967, ch. 954, § 4, effective 1 January 1970; N. C. Sess. Laws 1969, ch. 803, § 1) and the repeal of G.S. 1-207 (1953) did not diminish the trial judge's traditional discretionary authority to set aside a verdict. The procedure for exercising this traditional power was merely formalized in G.S. 1A-1, Rule 59, which lists eight specific grounds and one "catch-all" ground on which the judge may grant a new trial. Section (a) (9) of Rule 59 authorizes the trial judge to grant a new trial for "any other reason heretofore recognized on grounds for a new trial." *See* Sizemore, *General Scope and Philosophy of the New Rules,* 5 Wake Forest Intramural L. Rev. 1, 42-43 (1969).

[2] Judge Long specifically found that the verdict in this case is "contrary to the evidence" and that it was set aside "in the discretion of the court." The fact that he also acknowledged he had committed unspecified errors of law detracted not one whit from the effect of his discretionary order setting aside the verdict. This statement was mere surplusage and did not make Judge Long's order appealable. *See Atkins v. Doub,* 260 N.C. 678, 133 S.E. 2d 456 (1963); 1 Strong's N. C. Index 3d *Appeal and Error* § 54.3 (1976). *See also Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257 (1951).

[3] Plaintiffs' second assignment of error, that the Court of Appeals erred in remanding this case to the superior court for the entry of a directed verdict for defendant in accordance with his motion made at the close of all the evidence, must be sustained.

Upon reviewing the records in the four preceding appeals in this case, the Court of Appeals correctly concluded that in its opinion on the fourth appeal (21 N.C. App. 497, 204 S.E. 2d 903) it had misinterpreted the evidence and so had "applied sound principles of law to a state of facts not supported by the evidence." Being of the opinion that but for its error on the fourth appeal, the trial judge would have directed a verdict for defendant in accordance with his motion at this last trial, the Court of Appeals reversed his order for a new trial, affirmed his order setting aside the verdict, and remanded the case for entry of judgment notwithstanding the verdict so "that justice would be served."

However, the present posture of the case will not permit its termination by this method. The question of legal sufficiency of plaintiffs' evidence to go to the jury was not before the Court of Appeals. There being no abuse of discretion, the trial court's order setting aside the verdict as being against the greater weight of the evidence was not reviewable on appeal; there was left nothing from which an appeal would lie. *Atkins v. Doub,* 260 N.C. 678, 133 S.E. 2d 456 (1963); *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257 (1951); *Strayhorn v. Fidelity Bank,* 203 N.C. 383, 166 S.E. 312 (1932); 1 Strong's N. C. Index 3d *Appeal and Error* § 54.3 (1976). A contention based on a question of law is not presented by an exception to the court's discretionary order setting aside a verdict. 7 Strong's N. C. Index 2d *Trial* § 51 (1968). Thus, the Court of Appeals disposed of this case by ruling on questions of law which were not the basis of *any* assignment of error and which, therefore, were not within the scope of review on appeal. *State v. Brooks,* 275 N.C. 175, 166 S.E. 2d 70 (1969); *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912 (1960); *Jones v. Jones,* 235 N.C. 390, 70 S.E. 2d 13 (1932). *See also* App. R. 10 (1975).

Even if the court's discretionary order were appealable, it was defendant who made the motion to set the verdict aside, and in no view of the matter is he now an aggrieved party entitled to appeal under G.S. 1-271 (1969). *Bethea v. Kenly,* 261 N.C. 730, 136 S.E. 2d 38 (1964).

Upon return of the verdict in favor of plaintiffs, had defendant then desired to preserve for appellate consideration the question of the sufficiency of their evidence to support a recovery against him, his proper course would have been to move

under G.S. 1A-1, Rule 50(b) for a judgment notwithstanding the verdict. (This motion, of course, would have had to have been made prior to the time the judge exercised his discretion to set aside the verdict.) Had defendant's motion for judgment *n.o.v.* been denied and judgment entered against him, he could then have had the legal questions raised by his motion determined on his appeal. *See* Sizemore, *General Scope and Philosophy of the New Rules,* 5 Wake Forest Intramural Law Rev. 1, 41 (1969); *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1973), *vacated on other grounds,* 283 N.C. 277, 196 S.E. 2d 262 (1973).

However, defendant did not follow this route and, since he did not, the Court of Appeals cannot remand the cause to the superior court with directions to enter judgment *n.o.v.*, for G.S. 1A-1, Rule 50(b)(2) specifically provides:

"An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied, or redenied the motion for a directed verdict in accordance with Rule 50(b)(1)." *See Hensley v. Ramsey,* 283 N.C. 714, 727-729, 199 S.E. 2d 1, 8-9 (1973); 2 McIntosh, North Carolina Practice and Procedure § 1488.45 (Phillips Supp. 1970).

Rule 50(b) was rewritten by 1969 N. C. Sess. Laws, ch. 895, § 11 to incorporate section (2), which is set out in the preceding paragraph. The reasons for this revision are stated by Professor Phillips in his commentary on Rule 50:

"This provision [N. C. R. 50(b)(2)], not found in the Federal Rule counterpart, is designed to codify the result nonetheless dictated under that Rule by *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947) motion denied 331 U.S. 794, 67 S.Ct. 1725, 91 L.Ed. 1822. The reasons are important to an understanding of the intended application of the whole judgment n.o.v. practice. Where no judgment n.o.v. motion is made, the verdict winner is not given a pre-appeal chance to argue either before or after grant of the motion for the justice of giving him a new trial instead of granting judgment n.o.v. The trial judge is the

judicial officer in the best position to make this decision. Consequently, if on appeal the appellate court were able to reverse and direct entry of judgment in accordance with the motion for directed verdict, it would almost invariably feel impelled to remand upon reversal to allow the trial judge to consider for the first time the propriety of granting a new trial as a matter of grace. This could result in a second appeal. The practice dictated by this Rule forces the parties and the courts into a procedure which will require a trial court ruling on both alternatives so that they can likewise both be disposed of on one appeal." 2 McIntosh, North Carolina Practice and Procedure § 1488.45 n. 14 (Phillips Supp. 1970). *See* J. R. Elster, *Highlights of Legislative Changes to the New Rules of Civil Procedure,* 6 Wake Forest Intramural L. Rev. 267, 278-280 (1970).

In *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752 (1947), the defendant moved for a directed verdict at the close of all the evidence on the ground that the plaintiff's proof was insufficient to go to the jury. The motion was denied and, on the return of an adverse verdict, defendant did not move for judgment *n.o.v.* The Court of Appeals decided that certain evidence for the plaintiff had been improperly admitted and that without this evidence, the plaintiff's case would be insufficient to go to the jury. (153 F. 2d 576 (4th cir. 1946).) It then reversed the judgment of the trial court and directed that judgment be entered for the defendant. In reversing the decision of the Court of Appeals, the Supreme Court said that the trial judge had an unequalled "personal knowledge of the issues involved, the kind of evidence given, and the impression made by the witnesses. . . . Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. (Citations omitted.) Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all evidence has been evaluated, to view the proceedings in a perspective available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.'" *Id.* at 216, 91 L.Ed. 852-53.

[4] We understand and appreciate the desire of the Court of Appeals to correct an inadvertence and to end this protracted

litigation. Notwithstanding, this end may not be achieved by disregarding mandatory rules of procedure. It would, however, have been appropriate to dispose of this appeal by summarily dismissing it for appellant's flagrant disregard of Rule 19(d), Rules of Practice in the Court of Appeals of North Carolina. 2 N.C. App. 690 (1969); Rule 19(4), Rules of Practice in the Supreme Court of North Carolina. *See* App. R. 9(c), *applicable since* 1 July 1975 (1975 N. C. Sess. Laws, ch. 391, § 7).

In the record on appeal plaintiff-appellants have set out in question and answer form, just as it was transcribed by the court reporter, all the evidence elicited at the trial. The rambling, redundant, and confused record thus produced comprises 125 pages of the record when 25 would have sufficed for a proper narration. It has not only added to the cost of this fifth appeal, but has caused both appellate courts to expend time, which our rules requiring narration of the evidence were designed to save. Since none of the evidence was the subject of an exception, no judgment decision as to what evidence should be stated in question and answer form was involved. There can be no possible excuse for this disobedience of the rules of appellate procedure. Such an infraction constrains us to admonish all appellants that narration of the evidence as specified in App. R. 9(c) is mandatory.

The decision of the Court of Appeals affirming the trial court's order setting aside the verdict is affirmed. Its judgment vacating the trial court's order of a new trial and remanding the cause for entry of a directed verdict in accordance with defendant's motion at the close of all the evidence is reversed. Accordingly, this case is returned to the Court of Appeals with direction that it be remanded to the superior court for a trial *de novo*.

Affirmed in part; reversed in part and remanded.

IN THE MATTER OF: CRAIG ALLEN ARTHUR

No. 125

(Filed 31 January 1977)

1. **Statutes § 4— construction — avoidance of unconstitutionality**

Where one of two reasonable constructions of a statute will raise a serious constitutional question, the construction which avoids this question should be adopted.

2. **Constitutional Law § 31; Infants § 10; Narcotics § 3— report of analysis for narcotics — admission statute — inapplicability to juvenile delinquency proceedings**

The statute rendering the written report of the chemical analysis of matter in certain laboratories to determine whether it contains a controlled substance admissible as evidence of the truth of the analysis "in all proceedings in the district court," G.S. 90-95(g), does not apply to juvenile delinquency proceedings, which are not appealable to the superior court for trial *de novo*, but applies only to district court criminal proceedings which, in felony cases and in some juvenile cases, involve determinations only of probable cause and in which, in misdemeanor cases, an appeal of right to the superior court lies for a trial *de novo;* that is, the statute applies only to criminal proceedings in which an opportunity for confrontation and cross-examination of the chemist who performed the analysis is assured ultimately in the superior court. G.S. 7A-285.

THIS case comes to us on petition for discretionary review under General Statute 7A-31 of a decision of the Court of Appeals reported in 27 N.C. App. 227, 218 S.E. 2d 869 (1975), affirming a district court adjudication of petitioner as a delinquent juvenile. Docketed and argued as No. 27 at the Spring Term 1976.

Rufus L. Edmisten, Attorney General, by John M. Silverstein, Special Deputy Attorney General, for the State.

Wheatly & Mason, P.A., by L. Patten Mason, Attorneys for Juvenile Petitioner.

EXUM, Justice.

One question presented here, our answer to which is determinative of the case, is whether General Statute 90-95(g) applies to proceedings leading to an adjudication of juvenile delinquency in the district court. The statute provides:

"Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte,

North Carolina, Police Department Laboratory or to the Clinical Toxicological Lab, North Carolina Baptist Hospital, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed."

Relying on this statute, the district court allowed into evidence against the juvenile over objection a written report proper in form of an SBI laboratory analysis which concluded that certain "green vegetable material" found in his possession was in fact marijuana. The chemist who performed the analysis was not present and did not testify. The juvenile was found to have violated the Controlled Substances Act and was adjudged to be a delinquent child.

On appeal to the Court of Appeals the juvenile contended that if General Statute 90-95(g) applied to this proceeding it was unconstitutional in that it denied him the right to confront and cross-examine the chemist who performed the analysis. He relied on the Confrontation Clause of the Sixth Amendment of the United States Constitution and similar language in article I, § 23, of the North Carolina Constitution. The Court of Appeals determined the constitutional issue adversely to the juvenile.

We hold that General Statute 90-95(g) was not intended to apply to proceedings which result in adjudications of delinquency in the district court. We, consequently, do not reach the constitutional issue decided by the Court of Appeals and express no opinion regarding the correctness of that Court's resolution of it.

[1] The pertinent maxims of statutory interpretation are well established. The intent of the legislature is controlling. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967). In ascertaining this intent, the Court should consider the act as a whole, *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), weighing "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Steven-*

son v. City of Durham, supra at 303, 188 S.E. 2d at 283. "Words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E. 2d 880." *In re Watson*, 273 N.C. 629, 635, 161 S.E. 2d 1, 7 (1968). Lastly, and most pertinent, are these maxims: "[W]hen there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment . . . . " *Highway Commission v. Hemphill, supra* at 539, 153 S.E. 2d at 26. Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted. This Court recently said in *In re Dairy Farms*, 289 N.C. 456, 465-66, 223 S.E. 2d 323, 328-29 (1976):

> "If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question. *Milk Commission v. Food Stores*, 270 N.C. 323, 331, 154 S.E. 2d 548 (1967); *State v. Barber*, 180 N.C. 711, 104 S.E. 760 (1920). In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, 1361 (1936), the Supreme Court of the United States said: 'The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*' See also: *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1931); *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786 (1924); *Re Keenan*, 310 Mass. 166, 37 N.E. 2d 516, 137 A.L.R. 766, (1941)." (Emphasis added.)

[2] While the statute, by its terms, refers to "all proceedings in the district court division" we, applying the maxims of construction set out, are confident that the legislature at the time of its enactment had in mind the great majority of district court criminal proceedings which, in felony cases and in some juvenile cases, involve determinations only of probable cause and in which, in misdemeanor cases, an appeal of right to the

superior court lies for a trial *de novo*. In all these proceedings an opportunity for confrontation and cross-examination of the chemist is assured ultimately in superior court.

We think it significant that General Statute 90-95(g) is the last subsection of a statute which creates and defines *criminal* violations and penalties under the Controlled Substances Act. Every *criminal* proceeding under that statute in district court would be either a preliminary hearing if the crime were a felony, or, if a misdemeanor, a trial from which an appeal of right would lie for trial *de novo* in the superior court. The policy underlying General Statute 90-95(g) is obviously one of convenience to the state. By permitting the written report of the chemical analysis to serve as evidence of the truth of the analysis itself the statute relieves busy SBI and other chemists from having to spend time traveling to and from courthouses throughout the state for the purpose of testifying. Since juvenile proceedings such as that here under consideration comprise a very small percentage of the total volume of business in the district courts, our view of the legislative intent is consistent with this policy.[1] In Article 23 of Chapter 7A, moreover, which prescribes the procedures for juvenile adjudication, the legislature has explicitly mandated the preservation of "the right to confront and cross-examine witnesses." G.S. 7A-285. Construing the statute in question and General Statute 7A-285 *in pari materia* leads logically to that view of the legislative intent which we adopt.

Unquestionably if General Statute 90-95(g) applies to proceedings which result in adjudications of deliquency, a serious question of its constitutionality *as so applied* arises. In such a proceeding the district court is the ultimate fact-finding forum. General Statutes, ch. 7A, art. 23, especially G.S. 7A-279. There is no trial *de novo* in superior court. Appeals from adjudications of delinquency go directly to the Court of Appeals. G.S. 7A-289. Use of General Statute 90-95(g) may thus effectively deprive the juvenile of ever having the opportunity to confront or cross-examine the chemist who performed the analysis, the

[1] In 1975, for example, the latest year for which figures are now available, there were 602,130 misdemeanor cases not counting motor vehicle violation waivers and 28,456 preliminary hearings disposed of in the district court division. There were only 16,168 juvenile delinquency adjudications. Annual Report, Administrative Office of the Courts, at 64, 78 (1975). There is no breakdown in the data according to type of offense, i.e., controlled substance violations, larcenies, burglaries, and the like.

results of which are crucial to the adjudication. The juvenile must either forego this right or, himself, subpoena the chemist.

The Court of Appeals carefully considered the constitutional issue. In a reasoned and well researched opinion it recognized that juveniles in deliquency proceedings were entitled to the constitutional right of confrontation. *See In re Gault,* 387 U.S. 1 (1967); *cf. McKeiver v. Pennsylvania,* 403 U.S. 528 (1971). It concluded, however, that since "[j]uvenile proceedings are somewhat less than a full blown determination of criminality" the scope of the protection of the right of confrontation might not be so broad as in adult criminal proceedings and, further, that the written report in question possessed the "requisite indicia of regularity, trustworthiness, and reliability" so that its introduction was constitutionally permissible. *In re Kevin G.,* 80 Misc. 2d 517, 363 N.Y.S. 2d 999 (Fam. Ct. 1975); *cf. Mancusi v. Stubbs,* 408 U.S. 204 (1972).

We express no opinion upon the correctness of these conclusions other than to note: While not all the provisions of the Bill of Rights are applicable to juvenile proceedings through the Due Process Clause of the Fourteenth Amendment, *McKeiver v. Pennsylvania, supra; In re Gault, supra,* we doubt the validity of the proposition that any applicable provision might nevertheless be given less force or vigor in juvenile proceedings than in adult criminal prosecutions. It was held in *Gault* that the privilege against self-incrimination "is applicable in the case of juveniles as it is with respect to adults." 387 U.S. at 55. Following *Gault,* this Court said in *In re Burrus,* 275 N.C. 517, 530, 169 S.E. 2d 879, 887 (1969), *aff'd sub nom. McKeiver v. Pennsylvania, supra,* "[t]he privilege applies in juvenile proceedings the same as in adult criminal cases." This Court's decision in *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972), *cert. denied,* 409 U.S. 1043 (1972), casts some doubt upon the Court of Appeals' reliance on the inherent reliability of the written report. In *Watson,* Justice Branch, speaking for the Court, addressed the constitutionality of the admission of a portion of a death certificate of the victim in a murder trial. The death certificate, admitted under General Statute 130-66, was considered as "prima facie evidence of the facts therein stated" as provided by that statute. The Court, holding that the admission of the certificate violated the mandates of both federal and state constitutions, observed:

> "The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. . . . The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance." *Id.* at 230, 188 S.E. 2d at 294. (Citations omitted.)

Quoting *People v. Holder*, 230 Cal. App. 2d 50, 54, 40 Cal. Rptr. 655, 657 (1964), the Court added:

> "The point of the matter is not that conclusionary entries on death certificates are necessarily unreliable . . . . The coupling of hearsay and conclusionary elements in a single piece of evidence arouses the more fundamental problem of fairness to the defendant in a criminal case. The cause of death entry may emanate from a complex value judgment drawn by a medical expert. . . . When it rides into the fray mounted on a saddle of a public document, it is unaccompanied by the expert. The latter appears in court only in the form of the document. He himself is not available for cross-examination by the defense." *Id.* at 232, 188 S.E. 2d at 295.

Whether there is an inherent reliability in the report of an SBI laboratory analysis which would save the statute as here applied from constitutional infirmity are serious questions that, because of our view of the legislative intent, we need not address.

The Court of Appeals also relied on what it perceived as a legislative policy to permit by numerous statutes the introduction into evidence of "test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. G.S. 8-34 (Official Writings); G.S. 8-35 (Authenticated Copies of Public Records); G.S. 8-37 (Automobile Ownership); G.S. 8-45.1 (Photographic Reproduction Admissible); G.S. 20-139.1(a) (Motor Vehicle Operators Blood Alcohol Content); G.S. 106-89 (Fertilizer Analysis). *See, e.g.*, 1 Stansbury's North Carolina Evidence §§ 153-55, 165 (H. Brandis Rev. 1973). The business records doctrine, recognized by statute in G.S. 55A-27.1, is an exception to the hearsay rule applicable to private sector records. 1 Stansbury's North Carolina Evidence § 155 (H. Brandis Rev. 1973)." 27 N.C. App. at 230, 218 S.E. 2d at 872.

A significant difference between all these enactments and General Statute 90-95(g) is that the former apply to court proceedings generally while the latter is by its terms applicable only to proceedings in the district court. Obviously the General Assembly did not feel that the written report of a laboratory analysis possessed the necessary indicia of reliability to be itself admissible in superior court trials. We believe it must have felt likewise regarding a juvenile proceeding leading to a final adjudication of delinquency.

It was, consequently, error for the district court to admit the report into evidence in this case. Since the report was the only evidence that the material possessed by the juvenile was marijuana, the error was clearly prejudicial. The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for remand to the District Court of Carteret County for such further proceedings as may be appropriate not inconsistent with this opinion.

Reversed and remanded.

RICKEY MARTIN VERNON v. GARRY RANDALL CRIST

No. 40

(Filed 31 January 1977)

1. **Negligence § 12; Rules of Civil Procedure § 7— necessity for pleading last clear chance**

When G.S. 1A-1, Rule 7(a) as amended is read in conjunction with G.S. 1A-1, Rule 8(d), it is evident that some pleading alleging last clear chance is necessary if a plaintiff seeks to prove last clear chance at trial because G.S. 1A-1, Rule 8(d) only deems affirmative defenses appearing in the answer as denied or avoided if a responsive pleading is neither required nor permitted, and G.S. 1A-1, Rule 7(a) permits a party to serve a reply alleging last clear chance.

2. **Negligence § 12— pleading last clear chance — reply — complaint**

While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, a plaintiff who files no such reply may receive the benefit of the doctrine of last clear chance if the facts alleged in the complaint are sufficient to give rise to the doctrine.

3. **Rules of Civil Procedure § 8— pleading defenses**

G.S. 1A-1, Rule 8(e)(1), which states that no technical forms of pleading are required, and G.S. 1A-1, Rule 8(f), which requires

pleadings to be construed so as to do substantial justice, apply with equal force to statements of claims and statements of defenses.

4. **Automobiles § 43; Negligence § 23— last clear chance — sufficiency of pleading**

In an action to recover for injuries received when defendant drove a car forward while plaintiff was leaning against or sitting on the trunk of the car, plaintiff's complaint was sufficient to raise the issue of last clear chance where it alleged that plaintiff was in a position that he could not properly protect himself; that defendant either saw or in the exercise of reasonable care should have seen that it was necessary for him to take action to avoid injuring the plaintiff; that defendant had ample opportunity to act to avoid injury to plaintiff; that defendant was negligent in failing to act, specifically in failing to warn plaintiff before moving the car forward; and that defendant's negligence was the proximate cause of the accident; and where the allegation that plaintiff's own negligence created his perilous position was supplied by defendant's own answer alleging contributory negligence.

5. **Negligence § 12— last clear chance — burden of proof**

The burden of proof on the issue of last clear chance lies with the plaintiff.

6. **Negligence § 12— last clear chance — prerequisites**

For the doctrine of last clear chance to apply it must appear that after the plaintiff, by his own negligence, had gotten into a position of helpless peril or into a position of peril to which he was inadvertent, the defendant discovered or should have discovered the plaintiff's helpless peril or inadvertence, and thereafter the defendant, having the means and time to avoid the injury, negligently failed to do so.

7. **Automobiles § 86; Negligence § 39— last clear chance — sufficiency of evidence**

In this action to recover for injuries received by plaintiff when defendant drove a car forward while plaintiff was leaning against or sitting on the trunk of the car, causing defendant to fall and strike his head on the trailer hitch of the car or on the pavement, the evidence was sufficient for submission of an issue of last clear chance to the jury where there was evidence tending to show that plaintiff was unaware that defendant had entered the car or that the car had been started; defendant saw plaintiff sitting on the trunk of the car before he started the car and heard a passenger's warning to be careful because plaintiff was on the trunk; defendant waited 15 to 20 seconds after starting the car before driving forward as a joke; and defendant thus had ample time in which to warn plaintiff so as to avoid the accident.

8. **Automobiles § 86; Negligence § 39; Rules of Civil Procedure § 49— failure to request last clear chance issue — no waiver**

Plaintiff did not waive submission of an issue of last clear chance to the jury by his failure to make a formal demand for submission

of the issue before the jury retired as required by G.S. 1A-1, Rule 49(c), where the court had denied plaintiff's request for leave to amend his complaint explicitly to allege last clear chance and plaintiff's request for instructions on last clear chance, since (1) it is obvious that a demand for submission of the issue would have been denied, and plaintiff was not required to perform a vain act in order to preserve his right to have the issue tried by a jury, and (2) Rule 49(c) was designed to prevent otherwise proper trials from being jeopardized through the inadvertent omission of an issue, and omission of the issue of last clear chance does not appear to have been inadvertent.

Justice HUSKINS dissents.

WE allowed petition for discretionary review of the decision of the Court of Appeals, 28 N.C. App. 631, 222 S.E. 2d 445 (1976), which reversed judgment of *Albright, J.* at the 7 April 1975 Session, FORSYTH County Superior Court.

Plaintiff instituted this tort action to recover damages for personal injuries. Plaintiff's evidence tended to show the following:

Late Saturday night, 24 April 1971, plaintiff, defendant and two girls left work together in defendant's car. After getting something to eat, they drove to the home of some other friends. As a prank, they placed bags of leaves and grass on the doorstep of the house, rang the doorbell and drove away. Circling the block once, they parked the car in front of the same house and got out to remove the trash bags and to talk to their friends who had come to the door.

The girls, who had either returned to the car first or never left the car the second time, locked the car doors from the inside as a joke. Plaintiff, returning to the car and finding that the girls would not let him in, went around to the back of the car and leaned against the trunk with his legs and hands crossed.

At about the same time, defendant came back to the car and with some difficulty entered the car and took the driver's seat. Once inside, one of the girls warned the defendant to be careful because the plaintiff was on the trunk. Defendant saw the plaintiff through the rearview mirror and decided, as a joke, to start the car and drive a short distance before letting the plaintiff off the trunk and into the car. No one in the car, including the defendant, warned the plaintiff that the car was about to be started and moved.

Plaintiff was unaware that defendant had successfully entered the car because he was facing in the opposite direction and he was not expecting the car to move. The last thing plaintiff could remember, the car started and, while he was uncrossing his legs to right his position, the car pulled away causing him to fall backwards and strike his head on the trailer hitch or the pavement. At the time of these events, plaintiff was 17 years of age, 6 feet 2½ inches tall, and weighed approximately 280 pounds. Medical testimony indicated the plaintiff suffered a skull fracture.

Defendant's evidence tended to show the following:

Plaintiff was sitting on the trunk of the car. Defendant started the car, released the emergency brake, and waited 15 to 20 seconds before putting the car in forward gear. During this time, he checked in the mirror to make sure the plaintiff would not fall off. He then drove the car approximately 100 feet at 5 miles per hour. After the car had traveled about 25 feet, the plaintiff either jumped or fell from the car and received the head injury. Defendant testified that he believed the plaintiff had enough time to get off the trunk after the motor was started and before the car was driven forward.

The case was submitted to the jury on three issues. The jury found the defendant negligent, the plaintiff contributorily negligent and did not answer the damages issue. Based on this verdict, the court entered judgment that the plaintiff recover nothing on his claim against the defendant. The Court of Appeals reversed and granted a new trial.

Other facts necessary to the decision will be related in the opinion.

White & Crumpler by Michael J. Lewis for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson by P. M. Stockton, Jr., James H. Kelly, Jr., and W. Thompson Comerford, Jr. for defendant appellant.

COPELAND, Justice.

This appeal presents several issues for our determination all related to the question of whether the trial court should have allowed the issue of last clear chance to be submitted to the jury.

Prior to the effective date of the Rules of Civil Procedure, 1 January 1970, our Court had repeatedly said that in order to submit an issue of last clear chance there must be both *allegata* and *probata*. *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968); *Wooten v. Cagle*, 268 N.C. 366, 150 S.E. 2d 738 (1966); *Phillips v. R. R.*, 257 N.C. 239, 125 S.E. 2d 603 (1962); *Gunter v. Winders*, 256 N.C. 263, 123 S.E. 2d 475 (1962); *Collas v. Regan*, 240 N.C. 472, 82 S.E. 2d 215 (1954); *Wagoner v. R. R.*, 238 N.C. 162, 77 S.E. 2d 701 (1953); *Bailey v. R. R.* and *King v. R.R.*, 223 N.C. 244, 25 S.E. 2d 833 (1943); *Hudson v. R.R.*, 190 N.C. 116, 129 S.E. 146 (1925). Whether a pleading is necessary under the new rules for the issue to be submitted has not been analyzed.

Last clear chance is a plea in avoidance to the affirmative defense of contributory negligence and thus logically is pleaded in a reply to an answer alleging contributory negligence. *Exum v. Boyles, supra.* The better pleading practice dictates that a plaintiff should not anticipate a defense and undertake to avoid it in his complaint. *See Exum, supra.* When a reply is not a required pleading, as it appears at first glance is true under G.S. 1A-1, Rule 7(a), the question arises as to whether the avoidance must be pleaded in order to present proof at trial and to have the issue decided by the jury.

The North Carolina Rules of Civil Procedure are in most instances verbatim copies of the Federal Rules of Civil Procedure, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), and originally, Rule 7(a), outlining the permissible and required pleadings, was no exception. The rule required a reply only to a "counterclaim denominated as such" and provided that, in other cases, a reply was not allowed except that a court could, in its discretion, order a reply. G.S. 1A-1, Rule 7(a) (1969), as amended, (Cum. Supp. 1975).

The better reasoned Federal cases and leading commentators construing Federal Rules 7(a) and 8(d) (also enacted in North Carolina verbatim) concluded that where a reply was not required, the allegations of the answer were deemed denied or avoided and thus a plaintiff could meet the allegations at trial in any manner that would have been proper had a reply been allowed. *Crain v. Blue Grass Stockyards Co.*, 399 F. 2d 868 (6th Cir. 1968); *Neeff v. Emery Transp. Co.*, 284 F. 2d 432 (2d Cir. 1960); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213 (8th Cir. 1951); *Cowling v. Deep Vein Coal Co.*, 183 F. 2d 652

(7th Cir. 1950); *First Presbyterian Church of Santa Barbara, Cal. v. Rabbitt,* 118 F. 2d 732 (9th Cir. 1940); 2A Moore's Federal Practice § 8.29 (2d ed. 1975); 5 Wright & Miller, Federal Practice and Procedure § 1279 (1969). A recent case on point held that a plaintiff was not required to plead last clear chance under the Federal Rules of Civil Procedure in order to take advantage of the doctrine. *Kline v. McCorkle,* 330 F. Supp. 1089 (E.D. Va. 1971) (Hoffman, C.J.).

Nevertheless, even after the effective date of the new civil procedure rules in North Carolina, plaintiffs continued to petition trial judges for permission to file a reply alleging last clear chance. *See* Explanation of General Statutes Commission of Senate Bill 569 as Amended by House Judiciary II (1971 Sess.) [hereinafter cited as *Explanation of S.B. 569*]. These plaintiffs apparently relied on the older North Carolina cases which required, albeit arguably in dicta, the doctrine to be pleaded in order for the issue to be submitted to the jury. *Exum, supra; Wooten, supra; Phillips, supra; Gunter, supra; Collas, supra; Wagoner, supra; Bailey, supra; Hudson, supra.* Those earlier cases had failed to mention two code pleading provisions almost identical in language to Rule 7(a) and Rule 8(d) which ostensibly would have allowed proof of last clear chance and submission of the issue to the jury without the filing of a responsible pleading. G.S. 1-141, -159 (repealed effective 1 January 1970); *see Barnhardt v. Smith,* 86 N.C. 473 (1882).

The inconvenience of having to secure permission from the court to file under the new rules what was perceived to be a necessary pleading led the General Statutes Commission to recommend an amendment to Rule 7(a) to allow plaintiffs to file a reply alleging last clear chance. *See Explanation of S.B. 569, supra.* Rule 7(a) now provides in relevant part:

> "There shall be a complaint and an answer, a reply to a counterclaim denominated as such. . . . If the answer alleges contributory negligence, a party *may* serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer . . . " (Emphasis added.) G.S. 1A-1, Rule 7(a) (Cum. Supp. 1975), amending, (1969).

[1] The words "may serve a reply" in Rule 7(a) could be misleading if a plaintiff construed the "may" as permissive and

the failure to file a reply as not foreclosing any rights. When Rule 7(a) as amended is read in conjunction with Rule 8(d), it is evident that some pleading alleging last clear chance is necessary if a plaintiff seeks to prove the avoidance at trial because Rule 8(d) only deems affirmative defenses appearing in the answer as denied or avoided if a responsive pleading is neither required nor *permitted.*

[2] Plaintiff in this case opted not to file a reply. While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, it is not the exclusive pleading alternative. In *Exum v. Boyles, supra* at 579, 158 S.E. 2d at 855, Justice Lake speaking for our Court said:

> "It would be exceedingly technical to hold that, though the complaint . . . alleged facts giving rise to the doctrine of the last clear chance, the plaintiff may not receive the benefit of the doctrine . . . merely because . . . facts were alleged in the complaint rather than in a reply."

Examining plaintiff's complaint, we do not find the words "last clear chance." This omission, however, is not fatal. "While the plaintiff must plead the facts making the doctrine applicable in order to rely upon it, it is not required that he plead the doctrine by its generally accepted name." *Exum v. Boyles, supra* at 578, 158 S.E. 2d at 854. The complaint does reveal the following allegations:

> "3. That at all times herein complained of the defendant was negligent in the following manner, among others:
>
> * * *
>
> "c. That although he had ample opportunity to do so and although he saw, or in the exercise of reasonable diligence should have seen, that the plaintiff was standing and leaning against the rear of the automobile, that it was necessary for him to take action to avoid injuring the plaintiff, nevertheless took no action whatsoever to avoid injuring the plaintiff.
>
> * * *
>
> "i. That the defendant was standing in close proximity to the plaintiff and saw, or should have seen, that the plaintiff was in a position where he could not properly protect himself but nevertheless proceeded to get into the car without any warning whatsoever to the plaintiff and

started the car forward causing the plaintiff to fall and injure himself as set out herein.

"4. That the negligence of the defendant as herein alleged in starting the automobile forward without warning the plaintiff was the sole and only proximate cause of the accident complained of and injury to the plaintiff."

[3] Rule 8(b) provides that "[a] party shall state in short and plain terms his defenses to each claim asserted." This language is nearly identical to the language of Rule 8(a) governing the pleading of a claim for relief. Rule 8(e)(1) which states that no technical forms of pleading are required and Rule 8(f) which requires pleadings to be construed so as to do substantial justice apply with equal force to statements of claims and defenses. The requirements for pleading a defense are no more stringent than the requirements for pleading a claim for relief. *Bell v. Insurance Co.*, 16 N.C. App. 591, 192 S.E. 2d 711 (1972).

In *Sutton v. Duke, supra* at 104, 176 S.E. 2d at 167, this Court, speaking through Justice Sharp (now Chief Justice), said:

"A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." *Accord Rose v. Motor Sales*, 288 N.C. 53, 215 S.E. 2d 573 (1975).

[4] Although plaintiff's complaint was less than artfully drawn and, as admitted by counsel, no model pleading, we believe it met the minimum requirements of notice pleading. The complaint alleges that the plaintiff was in a position that he could not properly protect himself; that the defendant either saw or in the exercise of reasonable care should have seen that it was necessary for him to take action to avoid injuring the plaintiff; that the defendant had ample opportunity to act to avoid injury to the plaintiff; that defendant was negligent in failing to act, specifically in failing to warn the plaintiff before moving the car forward; and that defendant's negligence was the proximate cause of the accident. If an element of last clear chance was lacking, it was the allegation that plaintiff's own

negligence created his perilous position. That element was supplied by defendant's own answer alleging contributory negligence. *See Nathan v. R. R.*, 118 N.C. 1066, 24 S.E. 511 (1896). In his answer defendant alleged:

> "Prior to the accident complained of, the plaintiff had voluntarily and knowingly placed himself in a place of danger on the trunk of the defendant's vehicle or in immediate and close proximity to the trunk of the defendant's vehicle and remained there when the accident occurred, voluntarily subjecting himself to danger and to any injury which might occur. The plaintiff failed to keep a proper lookout; failed to take proper care under the circumstances; placed himself in a position of known peril; remained in that position in spite of all the facts and circumstances involved; and the plaintiff was thereby guilty of such contributory negligence. . . . "

Because of our resolution of this pleading issue, we do not reach the issue of whether the trial court abused its discretion under Rule 15(a) in denying plaintiff's motions for leave to amend the complaint to specifically allege last clear chance or the issue of whether last clear chance was tried by the implied consent of the parties under Rule 15(b). We do note, however, that leave to amend should be "freely given when justice so requires" and that the burden is on the party objecting to the amendment to show that he would be prejudiced thereby. G.S. 1A-1, Rule 15(a) and (b); *see Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972); *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

[5] We next consider the question of the sufficiency of plaintiff's proof of last clear chance. The burden of proof on this issue lies with the plaintiff. *Exum v. Boyles, supra; Hudson v. R. R., supra.* The last clear chance or discovered peril doctrine applies "if and when it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the party injured or killed and could have avoided the injury, but failed to do so." *Earle v. Wyrick*, 286 N.C. 175, 178, 209 S.E. 2d 469, 470 (1974).

In this jurisdiction last clear chance is "but an application of the doctrine of proximate cause." *Exum, supra* at 578, 158 S.E. 2d at 854. If defendant had the last clear chance to avoid injury to the plaintiff and failed to exercise it, then his negli-

gence, and not the contributory negligence of the plaintiff, is the proximate cause of the injury. This interpretation of the doctrine is in keeping with the theory behind the original English "Fettered Ass Case," *Davies v. Mann,* 10 M. & W. 547, 152 Eng. Rep. 588. "The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such 'original negligence' of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved." *Exum v. Boyles, supra* at 576-77, 158 S.E. 2d at 853.

[6] For the doctrine to apply it must appear "that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so." *Exum v. Boyles, supra* at 576, 158 S.E. 2d at 853. Viewing the evidence in the light most favorable to the plaintiff, we believe there was sufficient evidence of each element of the avoidance to submit this issue to the jury.

[7] Defendant argues that the peril to be avoided was not created until the car actually began moving forward and that there was no evidence presented indicating that he could have stopped the automobile in time to avoid the accident. We believe the peril was created when the car was started and the plaintiff continued to lean against or sit on the car inattentive and unaware that the car would be moving forward. The best evidence that the plaintiff was in a position of inadvertent peril at an earlier stage and that defendant had discovered plaintiff's peril came from a passenger in the car who cautioned defendant "before he started to pull away" to be careful. Defendant admitted that he saw plaintiff sitting on the trunk and that he had heard the passenger's warning.

According to defendant's own testimony, he waited 15 to 20 seconds after starting the car before driving forward. He thus had ample time in which to warn the plaintiff so as to avoid the accident. Instead, defendant decided to drive forward as a joke and to take the risk that the plaintiff would not fall off the car when it moved forward unexpectedly. This is not the care that a reasonably prudent person would have exercised under like circumstances. Under these circumstances, we believe

that a jury could find that defendant's negligence was the proximate cause of the accident and that defendant had the last clear chance to avoid the accident.

[8] Plaintiff did not formally demand the submission of the issue of last clear chance before the jury retired as required by G.S. 1A-1, Rule 49(c). However, the plaintiff had twice requested leave to amend his complaint to explicitly allege last clear chance and had requested and tendered instructions on the doctrine of last clear chance. All of these requests were denied. It is obvious that a demand for submission of the issue would likewise have been denied. Plaintiff was not required to perform a vain act in order to preserve his right to have the issue tried by a jury.

Rule 49(c) was designed to prevent otherwise proper trials from being jeopardized through the *inadvertent* omission of an issue. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975); Comment, G.S. 1A-1, Rule 49 (1969). In this case the omission does not appear to have been inadvertent and thus the case is not a proper one for application of Rule 49(c)'s sanction.

We hold that the issue of last clear chance should have been submitted to the jury for its determination. The decision of the Court of Appeals is

Affirmed.

Justice HUSKINS dissents.

STATE OF NORTH CAROLINA v. TOMMY LEE YANCEY

No. 149

(Filed 31 January 1977)

1. **Criminal Law § 66— illegal pretrial confrontation — in-court identification — when allowed**

The in-court identification of a witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure.

2. Criminal Law § 66— illegal pretrial confrontation — in-court identification not tainted

Though the pretrial single exhibition of defendant to a rape victim was unnecessarily suggestive, the determination by the trial court that the victim's in-court identification of defendant was based on her observation of him at the crime scene and was not tainted by any suggestion during the pretrial exhibition was supported by competent evidence where such evidence tended to show that the victim observed defendant for 30 minutes in her partially lighted dwelling, for 2 to 5 minutes as she sat beside him in a car, and for a few minutes as he obtained gas at a brightly lighted gas station; the victim had previously seen defendant while in high school and had located two of his pictures in her high school annual on the same night she was attacked; and the victim had observed defendant several days before the rape when he came to her trailer, asked for a ride, and inquired if there were any dogs about.

3. Rape § 5— second degree rape — force used — sufficiency of evidence

Evidence in a second degree rape prosecution was sufficient to show that the alleged carnal knowledge of the prosecuting witness was consummated by force where it tended to show that defendant and another black man entered the victim's trailer while she was asleep, awakened her, went with her to a gas station, returned to her trailer and began to fondle her and remove her clothes; the victim began to cry and begged the men not to harm her; the defendant instructed the victim to be quiet or she would get hurt; defendant and his companion forced the victim to have intercourse with them; and the victim stated that she was afraid for her life and for that of her infant daughter who was in the same room at the time of the crime.

4. Criminal Law § 128— mistrial — discretionary matter

A motion for mistrial in a case less than capital is addressed to the trial judge's sound discretion and his ruling thereon is not reviewable without a showing of gross abuse.

5. Criminal Law §§ 128, 169— motion for mistrial — denial proper

In a first degree burglary and second degree rape case the trial court did not err in denying defendant's motion for mistrial since any possible prejudice to defendant resulting from various answers of witnesses was cured when the court allowed defense counsel's motions to strike and instructed the jury to disregard the answers.

6. Criminal Law § 169— evidence improperly stricken — error beneficial to defendant

Error of the trial court in striking testimony of a rape victim that, immediately after the alleged rape, she went to her parents' home and told them "that two black men had broke in on me and raped me" was beneficial to defendant, since the testimony was not a legal conclusion but was admissible both as a shorthand statement of fact and as part of the *res gestae*.

7. Criminal Law § 71; Rape § 4— testimony as to oral sex — shorthand statement of fact

Testimony by a rape victim that defendant's companion "made me have oral sex with him" while defendant was committing the act of rape upon her was admissible as a shorthand statement of fact, and was relevant and admissible to show that the prosecuting witness did not consent to have sexual intercourse with defendant.

APPEAL from *Preston, J.*, 10 May 1976 Session of ALAMANCE Superior Court.

Defendant was tried upon bills of indictment charging him with first-degree burglary and the second-degree rape of Rebecca Karen Toney. The charges were consolidated for trial.

The jury returned verdicts of guilty of second-degree rape and guilty of non-felonious breaking and entering. The trial judge consolidated the cases for judgment and imposed a sentence of life imprisonment.

The facts will be more fully set forth in our consideration of the questions presented by this appeal.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

James K. Roberson for defendant.

BRANCH, Justice.

Defendant assigns as error the action of the trial judge in denying his motion to suppress the in-court identification of defendant by the prosecuting witness, Rebecca Karen Toney Pleasant. On 5 April 1976, defendant filed a pretrial motion to suppress statements made to police officers by defendant and to suppress identification testimony from the prosecuting witness or any other persons participating in identification procedures conducted by the Alamance County Sheriff's Department on 27 February 1976. The motion was supported by defendant's affidavit to the effect that he was exhibited to the prosecuting witness singly. He averred that there was no lineup and that he was the only black person in the room, the other occupants of the room being the prosecuting witness and a white detective. He further stated that he was without counsel and did not participate in this identification procedure with knowledge of its legal consequences.

At the pretrial hearing on defendant's motion to suppress, the sole witness was Rebecca Karen Toney Pleasant who testified that on the night of 26 February 1976 her name was then Rebecca Karen Toney. Since that time she had obtained a divorce and had married a Mr. Pleasant. She testified that on 26 February 1976, she was living in a two-bedroom trailer with her two-year-old daughter Leann. On that night she retired at about 11:15 and was later awakened by a "nudge." She observed two black men standing over her. She thereafter left the trailer with the two men and went to a well-lighted service station where defendant obtained some gas. They returned to her home where the two men remained for about thirty minutes. She was in the presence of the two men for about 45 minutes. Later that night she told Detective McPherson what had happened to her and specifically told him "that she had seen this person (defendant) somewhere before." She was taken to a hospital and upon returning home, she looked through her high school annuals and recognized defendant Tommy Lee Yancey in two of them.

On 28 February 1976, she went to the police station where Detective McPherson told her to go to a certain room "to look at someone." She stated that she knew the officers wanted her to look at a person that they thought was in her home in the early morning hours of 27 February 1976. When she went to the indicated room the only person there was defendant and a white detective. She recognized and identified defendant as one of her assailants within five or six seconds. At the hearing, she positively identified defendant as the man who raped her. On cross-examination the witness stated that she gave the police a description of defendant for the purpose of making a composite drawing. She stated that at that time she was not absolutely sure "that defendant was the man who entered her home." She said, "I was sure but I was not really sure in my mind. I did not want to blame somebody else for something." On redirect examination she said that the lights were not on in her trailer but that the utility lights on the outside furnished ample light to permit her to walk around without using the inside lights.

After finding facts consistent with the evidence above stated, the trial judge found and concluded:

> That there is clear and convincing evidence that the witness's identification of the defendant in the courtroom

this day is based on her observation of the alleged person in and out of the trailer on the night of February 25 and the early morning of February 26, 1976; that she had adequate opportunity to observe the defendant for a period of at least forty-five minutes, and her in-court identification is not tainted by any suggestion when she saw him at the Sheriff's Office at a later hour on the same day.

Now therefore the motion to suppress the testimony and in-court identification of the defendant by this witness is denied.

At trial the State did not offer any evidence of a confession or as to the pretrial identification proceedings. We, therefore, are only concerned with the admissibility of the in-court identification testimony.

[1] The overwhelming weight of authority is that the in-court identification of a witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926; *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951; *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407; *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10; *State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384.

Unconstitutionally obtained evidence is excluded by our courts as an essential to due process and the recognized test as to the admissibility of evidence concerning pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. *Foster v. California,* 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127; *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610.

We noted in *State v. Henderson, supra,* that these due process requirements have been enlarged by court decisions which require the presence of counsel at lineups or showups conducted after the initiation of adversary, judicial proceedings. *Kirby v.*

Illinois, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877. In *Henderson* we held that the confrontation had not reached this critical stage, noting, *inter alia,* that the only showing of adversary procedures was that a warrant was served on the defendant on the same day of the confrontation. We there concluded that it was reasonable to infer that the warrant was served *after* the confrontation between the witness and the defendant. Instant case differs in that here defendant was in custody upon a warrant which was issued on the day preceding the single exhibition of defendant to the witness.

Our courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification. *Stovall v. Denno, supra; State v. Shore, supra; State v. Henderson, supra.* However, the total circumstances surrounding each case must be considered in determining whether such a confrontation denies an accused his due process rights. We observe parenthetically that in *State v. Henderson, supra,* at page 11, we noted cases in which the courts have held that due process rights were not violated by the single exhibition of a suspect for purposes of identification.

[2] In our opinion, the totality of the circumstances surrounding the pretrial single exhibition of defendant in this case were unnecessarily suggestive. We, therefore, consider whether the trial judge correctly found and concluded that the prosecuting witness' in-court identification was not tainted by the pretrial confrontation.

The United States Supreme Court case of *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375, reconfirmed earlier holdings that even if a pretrial confrontation is suggestive, due process is not violated by the admission of identification evidence when the total circumstances show the identification to be reliable. In so holding the court enumerated some of the factors to be considered in determining the reliability of the identification, to wit:

> . . . [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

In instant case the prosecuting witness had opportunity to closely observe defendant in her partially lighted dwelling for a period of about thirty minutes. She sat beside him in an automobile for a period of from two to five minutes and observed him as he obtained gas at a brightly lighted self-service gasoline station. The evidence tends to show that she had previously seen defendant while in high school and had located two of his pictures in two of her high school annuals on the same night that she was attacked. The witness had also seen defendant on the Saturday before the 26th of February 1976 when he came to her trailer, asked for a ride and inquired if there were any dogs nearby. He also asked to use her phone and she directed him to her mother's house. On direct examination the prosecuting witness unequivocally identified defendant as the man who raped her. The witness' answers on cross-examination, which indicated some uncertainty, obviously grew out of her concern that she correctly identify the person who committed the crime.

The trial judge's finding that "there is clear and convincing evidence that the witness' identification of defendant in the courtroom . . . is based on her observation of the alleged person in her trailer on . . . the early morning of 26 February 1976 . . . and her in-court identification is not tainted by any suggestion when she saw him in the Sheriff's Office" is supported by competent evidence. The findings of the trial court, when supported by competent evidence, are conclusive upon this Court. *State v. Shore, supra; State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884; *State v. Haskins, supra.* The defendant's motion to suppress the in-court identification testimony of the prosecuting witness was properly denied.

[3] Defendant next argues that the trial judge improperly denied his motion for judgment as of nonsuit.

Rape is the carnal knowledge of a female person by force and against her will. G.S. 14-21. It is defendant's contention that there was insufficient evidence to show that the alleged carnal knowledge of the prosecuting witness was consummated "by force."

On a motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the State and every reasonable inference drawn in favor of the State. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156; 4 N. C. Index 3d, Criminal Law § 104, p. 541. When so viewed, if there is any competent

evidence of each essential element of the offense charged, then the trial judge must deny the motion and submit the case to the jury. *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506; 4 N. C. Index 3d, Criminal Law § 106, p. 547.

In instant case the testimony of Rebecca Toney Pleasant revealed that when she was awakened by a "nudge" at about 2:00 a.m. on 26 February 1976, she observed two black males standing only one or two feet from the bed in which she and her two-year-old daughter were sleeping. She described one of the men as being about 5 feet 8 inches tall and weighing 150-160 pounds. The other man appeared to be about 5 feet 6 inches tall and to weigh about 145 pounds. Defendant told her that they were not going to hurt her, but that they had given out of gas and wanted her to take them to a service station. After obtaining gas at a nearby service station, the prosecuting witness, her daughter, and the two men returned to her mobile home. Mrs. Pleasant, with her daughter in her arms, was taken into the bedroom by the two men. There defendant began to fondle her and remove her clothes. She began to cry and begged the men not to harm her. She testified that at this point "[d]efendant placed his hand over her mouth and told her to shut up or I would get hurt. I just kept saying, 'Please don't do this.' The defendant threw my blue jeans on the floor and took out my Tampax." Defendant then consummated the intercourse with the prosecuting witness. The other assailant forced her to simultaneously have oral sex with him. She testified that at no time did she consent to have sexual relations with defendant and further stated, "I was afraid for my daughter's life and my life."

The only reasonable inference which may be drawn from this evidence is that Mrs. Pleasant did not voluntarily engage in sexual intercourse with defendant, but "submitted at a time and place when she was helpless to protect herself and her submission was induced by fear of death or serious bodily harm if she resisted." *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481. It is well established that the force necessary to constitute rape need not amount to actual physical force. Fear, fright or coercion may take the place of actual force. *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894; *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620.

Here, there is plenary evidence to show that fear for her own safety and life and for the safety and life of her infant daughter overcame the prosecuting witness' resistance and caused her to submit to the desires of her assailants. The trial judge properly overruled defendant's motion for judgment as of nonsuit.

Defendant assigns as error the denial of his motion for mistrial.

[4] A motion for mistrial in a case less than capital is addressed to the trial judge's sound discretion and his ruling thereon is not reviewable without a showing of gross abuse. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481.

[5] During the direct examination of the prosecuting witness, the District Attorney asked her: "Where were you taken after that?" She replied, "To the bedroom." Defense counsel objected and moved to strike and Judge Preston allowed the motion to strike and instructed the jury not to consider the answer. Immediately thereafter the District Attorney asked the witness what occurred and the witness replied, "I was raped." Again defense counsel's motion to strike was allowed and an instruction given to the jury not to consider the answer. Shortly thereafter the witness, without objection, described in detail the physical acts done by the defendant which met the legal definition of rape.

In response to the District Attorney's questions as to what the defendant did to her the witness replied "he made me have sexual intercourse with him." The trial judge allowed counsel's motion to strike and instructed the jury not to consider the answer. This evidence appears to be relevant as to the question of consent.

Upon cross-examination as to whether defendant used a weapon, the witness explained her answer by saying, "I felt like my daughter was used as a weapon." The trial judge allowed defendant's motion to strike this answer and again instructed the jury not to consider it.

Statements by police officers describing the window in the prosecuting witness' trailer as having been "pried up, pulled up or raised up" and the telephone cord as having "been removed from the phone" were admissible as shorthand statements of fact.

Initially it is our opinion that the majority of this evidence was admissible. Even if it were not, the impact of the evidence was so minimal that we cannot perceive that the result of this case could have been changed by its admission. Further, the action of the trial judge in allowing defense counsel's motions to strike and instructing the jury to disregard the answers cured any possible prejudice to defendant. In *State v. Ray*, 212 N.C. 725, 194 S.E. 482, Justice Devin (later Chief Justice) stated:

> . . . [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.

We further observe that defendant did not move for a mistrial at the time that this evidence was admitted but elected to proceed and take his chances with the jury then impaneled.

Under these circumstances we hold that the trial judge did not abuse his discretion by denying defendant's motion for mistrial.

[6] The prosecuting witness testified that after the two men left, she put on her pants, put her child's coat on her, walked about 75 steps to her parents' trailer and immediately told them "that two black men had broke in on me and raped me." Her testimony tended to show that she arrived at her parents' trailer about two minutes after the men had driven away. Defense counsel objected to the admission of this testimony and the trial judge allowed the defendant's motion to strike. Defendant argues that this evidence was incompetent because it was a legal conclusion and the judge's allowance of his motion to strike did not remove its prejudicial impact.

We are of the opinion that the trial judge erred, but to the benefit of defendant when he allowed defense counsel's motion to strike. This statement was admissible as a "shorthand statement of fact" about which the prosecuting witness had already positively and unequivocally testified. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190. Further, statements of the victim of a sex crime made within a short time after the commission of the crime are admissible as part of the *res gestae* when there are no circumstances indicating lack of spontaneity. *State v. Cox*, 271 N.C. 579, 157 S.E. 2d 142. The

statement here challenged was made within two or three minutes after the crime occurred and bore every indication of spontaneity.

Further, the testimony of Shirley Ballinger, mother of the prosecuting witness, that her daughter told her that "two black men broke in and raped me" was properly admitted for the purpose of corroborating the testimony of her daughter. 1 Stansbury's N. C. Evidence (Brandis Rev. 1973), § 51, p. 146.

[7] There is no merit in defendant's contention that the trial judge erred by permitting the prosecuting witness' statement that the defendant's companion "made me have oral sex with him" while the defendant was committing the act of rape upon her. Defendant argues that this statement violated the opinion evidence rule and prejudiced defendant because it implied that "defendant made her have sexual relations with him." The inference from this shorthand statement of fact is so well understood that it would have been a waste of time and a needless imposition upon this witness to describe every sordid detail of the act of oral sex. 1 Stansbury's N. C. Evidence (Brandis Rev. 1973), § 125, p. 389; *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469. The very degrading nature of this act made it relevant and admissible to show that prosecuting witness did not consent to have sexual intercourse with defendant.

Our careful examination of this entire record discloses that defendant was accorded a fair trial in which there was

No error.

SAMUEL MANGANELLO v. PERMASTONE, INC.

No. 158

(Filed 31 January 1977)

1. Rules of Civil Procedure § 50— motion for directed verdict — ruling when close question presented

Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury since (1) if the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided; and (2) if the

jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

2. **Rules of Civil Procedure § 50— motion for directed verdict**

A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff.

3. **Negligence § 53— swimming facility operator — duty to patrons**

While the operator of a swimming facility used for public amusement is not an insurer of the safety of his patrons, he must exercise ordinary and reasonable care for their safety lest he be held liable for injury to a patron resulting from breach of his duty.

4. **Negligence § 53— recreational facility proprietor — vigilance required**

The vigilance required of the proprietor of a recreational facility in discovering a peril to an invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the facility, the portion of the facility involved, and the degree of injury reasonably foreseeable.

5. **Negligence § 53— swimming pool operator — duty to provide supervision**

At least as to paying invitees, a swimming pool operator must exercise ordinary care to provide a sufficient number of competent attendants to supervise the swimmers not only for the purpose of warning or rescuing those in imminent danger, but also to guard the swimming facility and surrounding areas for potentially dangerous activities.

6. **Negligence § 53— swimming pool — rough or boisterous play — foreseeable consequences**

While rough or boisterous play in water is not dangerous *per se*, hazardous consequences to other swimmers and bathers are clearly reasonably foreseeable when such activities are left unattended and unrestricted.

7. **Negligence § 57— swimming pool operator — failure to control "horseplay"**

Plaintiff's evidence was sufficient for submission to the jury of the issue of negligence by defendant swimming facility operator where it tended to show that plaintiff was an invitee at defendant's swimming facility; some young men, located some 20 to 30 feet from plaintiff, began standing on the shoulders of each other and jumping backwards into the water; this "horseplay" continued for at least 20 minutes during which time the young men moved closer to where plaintiff was located in the water; defendant's lifeguards did nothing to stop or control such conduct; one of the young men jumped backwards from the shoulders of another and fell on plaintiff; and such

activity was not an accepted aquatic practice under Y.M.C.A. and American Red Cross guidelines.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) to review decision of the Court of Appeals reported at 30 N.C. App. 696, 228 S.E. 2d 627 (1976) (opinion by Britt, J., Hedrick, J., concurring, Martin, J., dissenting), affirming judgment of *Hall, J.*, at the 17 November 1975 Civil Session, CUMBERLAND Superior Court.

Plaintiff instituted this action to recover damages for personal injuries. Plaintiff's evidence tended to show that the plaintiff, along with his family and friends, went to Permastone Lake, owned by defendant corporation, on Labor Day 1973. The parties stipulated that the defendant was engaged in operating a recreational facility which included a lake for swimming and that defendant charged a fee to members of the general public to use the lake and adjacent facilities. Plaintiff testified that on 3 September 1973 he paid the fee for himself and his family. It was further stipulated that defendant employed lifeguards at Permastone Lake for safety purposes and that lifeguards were present and on duty on the day and during the hours in question.

After plaintiff had been at the lakeside for some time, he entered the water with his children near the sliding board. Plaintiff's children slid down the board while plaintiff stood by to catch them and otherwise look after their safety. The water was about chest high on the plaintiff in the sliding area. The sliding continued for approximately one hour.

While this was going on, some young men, located about 20 to 30 feet away, began standing on the shoulders of one another and jumping backwards into the water. This activity continued for at least 20 minutes during which time the young men either gradually or suddenly moved over closer to the slide.

Plaintiff, thinking his children had been in the water long enough, sent them ahead to the pier. While he was swimming behind them to the dock, one of the young men jumped backwards from the shoulders of another and fell upon the back of plaintiff's head and neck, forcing him under the water. When plaintiff surfaced, he appeared to have been "knocked silly." A friend assisted him to the pier where he rested for about five minutes. Sometime later, a man, who was apparently the father

of the young man involved, came up and apologized for the conduct of his son.

Earlier, plaintiff had observed the young men doing backflips but stated on cross-examination, "I did not see any danger to myself or my children or the people around the slide while I was there with the children. The last time I saw the men they were far enough away that I was not concerned about them."

The lifeguards on duty were 16 to 17 years of age and, according to the testimony, at times appeared to be paying more attention to the young female patrons than to the swimmers. These lifeguards did nothing to stop or control what the plaintiff described as "horseplay" and did not come to the plaintiff's aid at any time after he was injured.

The trial court permitted a Physical Education Director of the Fayetteville Y.M.C.A. to testify to accepted standards of aquatic safety as promulgated by the American Red Cross and the Y.M.C.A. The witness testified that it was not an acceptable aquatic practice to allow young men to get on one another's shoulders and do backflips into the water.

Plaintiff offered expert medical testimony to the effect that he had sustained a five percent permanent neck disability which could have been caused by the blow received at Permastone Lake.

At the conclusion of plaintiff's evidence, Judge Hall directed a verdict for the defendant and dismissed the action. Plaintiff appealed and the Court of Appeals affirmed the judgment.

Smith, Geimer & Glusman, P.A., by Kenneth Glusman for plaintiff appellant.

Clark, Clark, Shaw & Clark by Heman R. Clark for defendant appellee.

COPELAND, Justice.

The sole issue presented by this appeal questions whether the trial court erred in directing a verdict for the defendant. We hold that the trial court did commit error.

[1] Before discussing the merits of this case, one procedural point deserves mention. Where the question of granting a di-

rected verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. *See* Comment, G.S. 1A-1, Rule 50 (1969); 5A Moore's Federal Practice § 50.14 (2d ed. 1975).

[2] A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Investment Properties of Asheville v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972); *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971). As was true of a compulsory nonsuit, a directed verdict is not properly allowed "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *See Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658 (1956); *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757 (1950).

We do not quarrel with the Court of Appeals' statement of the law in its opinion but do disagree with its application of the law to the facts in the instant case.

[3] The duty imposed on the owner or proprietor of a swimming facility used for public amusement is stated generally in *Wilkins v. Warren*, 250 N.C. 217, 108 S.E. 2d 230 (1959). The owner is not "an insurer of the safety of his patrons" but he must exercise "ordinary and reasonable care" for their safety lest he be held liable for injury to a patron resulting from

breach of his duty. *Wilkins, supra* at 219, 108 S.E. 2d at 232. We discussed a proprietor's duty to protect invitees against the acts, negligent or intentional, of third parties in *Aaser v. City of Charlotte,* 265 N.C. 494, 144 S.E. 2d 610 (1965). In that case we said:

> "In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity . . . arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to discover it by the exercise of due diligence and to have removed or warned against it. [Citations omitted.]
>
> " 'The proprietor is liable for injuries resulting from the *horseplay* or *boisterousness* of others, regardless of whether such conduct is negligent or malicious, if he had sufficient notice to enable him to stop the activity. But in the absence of a showing of timely knowledge of the situation on his part, there is no liability.' " (Emphasis added.) [Citation omitted.] *Aaser, supra* at 499-500, 144 S.E. 2d at 615.

Webster's Third New International Dictionary at page 1093 (1971) defines "horseplay" as "rough or boisterous play." In *Aaser, supra,* the boisterous activity complained of consisted of young boys knocking a hockey puck back and forth with hockey sticks in a corridor of the Charlotte Coliseum. The plaintiff, a paying spectator at an ice hockey game, sued for damages for injuries she sustained when struck by a puck while walking in the corridor during an intermission. We held in that case that a nonsuit should have been granted because there was no showing that the defendant had any knowledge of an unsafe condition in the corridor or that the defendant could have discovered the condition by the exercise of reasonable care in inspecting the corridors.

Aaser is distinguishable from the case at bar. In *Aaser* the plaintiff had passed through the same corridor a few minutes before she received her injury and had not observed the boys playing. In fact, she did not notice the boys' activity on her return trip through the hallway until after she was struck. Nor was there any evidence introduced tending to show that anyone else had seen these boys, or any others, playing in the corridor

in any dangerous manner on the evening in question prior to the time the plaintiff was struck. In the instant case, uncontroverted testimony established that the "horseplay" had continued unabated for at least 20 minutes before the plaintiff was injured.

[4] The vigilance required of a proprietor in detecting potentially dangerous activity will vary with the circumstances. In *Aaser,* Justice Lake speaking for our Court, said, "[T]he vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injury therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably foreseeable." *Aaser, supra* at 499, 144 S.E. 2d at 614. The same considerations apply in determining the vigilance required of the owner of a recreational facility.

[5] As Judge Martin correctly pointed out below in his dissenting opinion, the duty imposed is greater with respect to a swimming facility where the water "poses inherent dangers" and "the lifeguards are employed for the specific purpose of keeping a lookout over all patrons." 30 N.C. App. at 704, 228 S.E. 2d at 631. At least as to paying invitees, swimming pool operators must "exercise ordinary care to provide a sufficient number of competent attendants to supervise the bathers and to rescue any of those who appear to be in danger." *Sneed v. Lions Club,* 273 N.C. 98, 101, 159 S.E. 2d 770, 773 (1968). The supervision required is not merely for the purpose of warning those who are in imminent danger or rescuing those who have already been injured, but includes the duty to guard the swimming facility and surrounding areas for potentially dangerous activities. Preventive supervision at a pool or lake poses little additional burden on the proprietor and results in the avoidance of many unnecessary water related accidents.

[6] While rough or boisterous play in water is not dangerous *per se,* hazardous consequences to other swimmers and bathers are clearly reasonably foreseeable when such activities are left unattended and unrestricted. If rough or boisterous play is to be permitted at all, it should be confined to a restricted area or, at a minimum, closely guarded. We have said that "[t]he law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons." *Aaser v. Char-*

lotte, supra at 499, 144 S.E. 2d at 614. However, this does not alter the proprietor of a public establishment's duty to see that all permitted activities are conducted in a reasonably safe manner.

[7] The Court of Appeals in seeking to fit this case into the holding of *Aaser v. Charlotte, supra,* indicated that the activity did not become dangerous until the plaintiff and those engaged in doing backflips had moved close enough together for the plaintiff to be in striking range, and that the activity, after it had become dangerous to plaintiff, did not exist long enough to put the defendant on notice. This position is untenable and not supported by our case law.

The activity here in question, backflips done from off another's shoulders, qualifies as a "rough or boisterous" activity. The testimony of plaintiff's witness that this activity was not an accepted aquatic practice under Y.M.C.A. and American Red Cross guidelines is some evidence that dangerous consequences could reasonably be expected to flow from this type of activity.

The nature of the activity was such that its participants could reasonably be expected to change direction and move to different locations posing danger to other swimmers and bathers. The fact that plaintiff testified that, when he first observed the young men engaged in the horseplay, "they were far enough away that they weren't causing me any problems," is not a controlling factor in this case.

Presumably, many people were engaged in recreational activity in Permastone Lake on Labor Day; the "acre or two" lake was described as "moderately crowded." Without question, defendant owed a duty to all its patrons, including plaintiff, either to prohibit roughhousing or to closely supervise it. A jury question has been presented as to whether plaintiff's injury was proximately caused by a breach of this duty. The decision of the Court of Appeals affirming Judge Hall's directed verdict for defendant was therefore erroneous and must be

Reversed.

THOMAS A. DILLON III v. NUMISMATIC FUNDING CORPORATION

No. 139

(Filed 31 January 1977)

1. **Constitutional Law § 24; Process § 14— foreign corporation — in personam jurisdiction — requirements**

The test to determine if a corporation may be subjected to *in personam* jurisdiction in a foreign forum depends upon whether maintenance of the suit in the forum offends traditional notions of fair play and substantial justice.

2. **Constitutional Law § 24; Process § 14— foreign corporation — in personam jurisdiction — sufficient minimum contacts — due process**

Where defendant, a foreign corporation, actively solicited orders for its coins from residents of N. C. on a regular basis during a period of approximately 21 months, made several mass mailings to residents of N. C., sold coins to 27 different citizens in 142 separate transactions, and sent a representative to appraise a private coin collection in N. C. and thereafter sold the collector coins valued at more than $21,000, the assumption of *in personam* jurisdiction over defendant by the courts of N. C. does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution, and defendant's contacts with the State are sufficient to satisfy due process requirements.

ON petition for discretionary review of the decision of the Court of Appeals, reported in 29 N.C. App. 513, 225 S.E. 2d 137, which reversed the order entered by *Lupton, J.*, on 12 September 1975 in GUILFORD Superior Court.

Plaintiff alleges that during 1974 he was a resident of Greenville, South Carolina, and employed as an investment portfolio manager. During early August 1974 defendant, through its executive vice president, offered plaintiff a position with defendant in New York, commencing 1 September 1974. Relying upon this offer, plaintiff terminated his employment in Greenville, South Carolina, gave up his apartment, packed his belongings, and prepared to move to New York. Just prior to his departure, defendant notified plaintiff that the position which had been offered to him was no longer available. Plaintiff then moved to his parent's home in Greensboro, North Carolina, and attempted to secure suitable employment. After searching for approximately five months, he was successful in obtaining employment. However, his new position was at a smaller salary than his prior employment in Greenville.

On 25 February 1975, plaintiff brought this action in Guilford County, North Carolina, for damages arising from defendant's breach of the alleged employment agreement and for punitive damages due to certain fraudulent misrepresentations made by defendant's officers. Defendant did not answer, but filed a motion to dismiss under Rule 12(b) of the North Carolina Rules of Civil Procedure. The basis for the motion was, *inter alia*, that defendant had not had sufficient contacts with North Carolina to confer jurisdiction upon her courts. Judge Lupton held otherwise and denied defendant's motion to dismiss. The Court of Appeals reversed. We granted plaintiff's petition for discretionary review.

Turner, Enochs, Foster & Burnley by James H. Burnley IV for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by William L. Stocks for defendant appellee.

MOORE, Justice.

The sole issue posed for decision is whether the trial court acquired *in personam* jurisdiction of defendant pursuant to G.S. 1-75.4. The resolution of this question involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant. If so, does the exercise of this power by the North Carolina courts violate due process of law. *See Pulson v. American Rolling Mill Co.*, 170 F. 2d 193 (1st Cir. 1948).

G.S. 1-75.4(1) confers jurisdiction upon a court in this State having subject matter jurisdiction in the following instances:

> "(1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State; or
>
> b. Is a natural person domiciled within this State; or
>
> c. Is a domestic corporation; or
>
> d. *Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.*" (Emphasis added.)

G.S. 1-75.4 is commonly referred to as the "long-arm" statute. In *Chadbourn, Inc. v. Katz,* 285 N.C. 700, 208 S.E. 2d 676 (1974), G.S. 1-75.4(6) was discussed and analyzed in conjunction with the United States Supreme Court cases which formed the constitutional basis for such "long-arm" statutes. In *Chadbourn,* Justice Huskins stated:

> "State legislatures have responded to these expanding notions of due process with 'long-arm' legislation designed to keep abreast of this jurisdictional trend and to make available to the courts of their states the full jurisdictional powers permissible under due process. Chapter 1, Article 6A of the North Carolina General Statutes reflects this national approach to personal jurisdiction. [Citation omitted.]" 285 N.C. at 705, 208 S.E. 2d at 679.

See also Sparrow v. Goodman, 376 F. Supp. 1268, 1270 (W.D.N.C. 1974), wherein G.S. 1-75.4(3) was interpreted to be a " 'legislative attempt to assert *in personam* jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution.' "

By the enactment of G.S. 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. *See* 1 McIntosh, North Carolina Practice and Procedure § 937.5 (Supp. 1970). Thus, we hold that G.S. 1-75.4(1)(d) applies to defendant and, statutorily, grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process.

The second inquiry is, therefore, whether due process of law would be violated by permitting the courts of this jurisdiction to exercise their power over defendant. The United States Supreme Court cases of *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); and *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), are frequently cited to illustrate the modern trend in personal jurisdiction away from the strict common law requirements, as stated in *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878), of either establishing a nonresident defendant's consent to jurisdiction in a state or personally serving a defendant while present within the state's territory. We will use these and other cases to guide our decision in the case at bar.

In *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952), defendant, a Philippine corporation, was sued by a nonresident of Ohio in the Ohio courts. Defendant contended that because it was not an Ohio corporation, the Ohio courts could not, as a matter of law, exercise jurisdiction over defendant based upon a claim arising from its activities outside of Ohio. The Supreme Court held that federal due process did not prohibit Ohio from entertaining the action as a matter of law. Rather, the activity of the foreign corporation in the forum state should be analyzed to determine if such activity was sufficiently substantial and of such a nature as to make it proper that defendant be required to defend the suit. The Court further stated, quoting from *International Shoe Co. v. Washington, supra:*

> " '. . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. . . .' " 342 U.S. at 447, 96 L.Ed. at 493, 72 S.Ct. at 419.

We find a trilogy of Fourth Circuit Court of Appeals decisions illustrative of the requirements of due process under the pertinent United States Supreme Court cases. In *Ratliff v. Cooper Laboratories, Inc.*, 444 F. 2d 745 (4th Cir. 1971), plaintiffs were nonresidents of the forum state—South Carolina. Defendants were two drug companies, one of which had sent occasional mailings into South Carolina; the other had employed several persons to solicit orders in the forum state. It appeared that the claim for relief arose elsewhere than South Carolina and that plaintiffs brought the action in South Carolina to avail themselves of a longer limitations period. The Fourth Circuit held that defendants could not be subjected to *in personam* jurisdiction in South Carolina. The court was of the opinion that in those cases wherein plaintiff was not a resident of the forum state and the claim for relief arose from activities not occurring in the forum state, defendant's contacts with the forum must be "fairly extensive." Within the above stated rule, the court held defendant's activities in the forum were not sufficient and the suit could not be maintained in South Carolina.

Several years later, in *Lee v. Walworth Valve Co.*, 482 F. 2d 297 (4th Cir. 1973), plaintiff was a resident of South Carolina and brought an action for the wrongful death of her

husband due to conduct by defendant (a foreign corporation) occurring outside of South Carolina. The evidence of defendant's "contacts" with the forum state tended to show that it sent salesmen into South Carolina with some degree of regularity; that it occasionally sent engineers into the state to examine special problems; and that it derived revenue from its activities in the forum state. The court held that jurisdiction over defendant was proper and did not deny defendant due process. In reaching this conclusion, the court reasoned that in those cases (such as *Ratliff v. Cooper Laboratories, Inc., supra)* in which the plaintiff is a stranger to the forum state, more "contacts" are required on the part of defendant than in those cases wherein plaintiff is a resident of the forum state and not forum shopping. For when there is a resident plaintiff, the fairness to the plaintiff in permitting the suit to be maintained in his or her home state and not a distant forum is considered in determining the fairness to defendant of being required to defend the suit.

In *O'Neal v. Hicks Brokerage Co.*, 537 F. 2d 1266 (4th Cir. 1976), plaintiffs were residents of South Carolina and were injured in an accident in North Carolina. The evidence showed that defendant Hicks, a corporation, was a cotton broker in Mississippi and had hired the truck, which caused the injury to plaintiff, as an agent for a third party. Defendant Hicks had virtually no contact with South Carolina, except it had occasionally arranged for hauling into the state. The Fourth Circuit again used the test of whether there were sufficient contacts with the forum state to justify jurisdiction and whether it was fair to require defendant to litigate in South Carolina. The court held that Hicks's contacts with South Carolina were so *"de minimus"* that it could not be required to litigate in that state.

[1] From these cases, it appears that the test to determine if a corporation may be subjected to *in personam* jurisdiction in a foreign forum depends upon whether maintenance of the suit in the forum offends " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158. In making this determination, the interests of, and fairness to, both the plaintiff and the defendant must be considered and weighed. As stated by Parker, J. (later Chief Justice), in *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963):

"Whether the type of activity conducted within the State is adequate to satisfy the requirements depends upon the facts of the particular case. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 492. It seems, according to the most recent decisions of the United States Supreme Court, that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298; *International Shoe Co. v. Washington, supra*, U.S. p. 319, L.Ed. p. 104."

In instant case, plaintiff is a resident of North Carolina as a result of defendant's alleged breach of contract. There is no hint of forum shopping. Undoubtedly, it would be a large burden upon plaintiff to maintain this action in South Carolina or New York (defendant's principal place of business). In fact, this could possibly preclude plaintiff from asserting his claim.

[2] Defendant, a corporation, has actively solicited orders for its coins from residents of this State on a regular basis during a period of approximately twenty-one months. During this time, it has made several mass mailings to North Carolinians and has sold coins with a value in excess of $50,000 to some 27 different citizens in 142 separate transactions. In each transaction, defendant employed an invoice which stated: "TITLE TO THE ABOVE MERCHANDISE DOES NOT PASS UNTIL ALL OF THE ABOVE MERCHANDISE IS PAID IN FULL." These invoices ranged from $13.50 up to $9,400 and represented sales in all sections of North Carolina. In addition, defendant sent a representative to visit a resident of Burlington, North Carolina, to appraise her coin collection and thereafter sold her coins valued at more than $21,000. By these acts, it appears that the defendant has "purposefully [availed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958).

Applying the law as interpreted by the Supreme Court of the United States to these facts, we hold that assumption of

in personam jurisdiction over defendant by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment and that defendant's contacts with the State are sufficient to satisfy due process requirements. As was said in *McGee v. International Life Ins. Co., supra,* 355 U.S. at 222-23, 2 L.Ed. 2d at 226, 78 S.Ct. at 201:

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

In its brief, defendant does not question the validity of the service of process upon it. Therefore, we do not pass upon that issue. However, *see Travelers Health Assoc. v. Virginia,* 339 U.S. 643, 94 L.Ed. 1154, 70 S.Ct. 927 (1950); *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950); *Chadbourn, Inc. v. Katz, supra.*

For the reasons stated herein, we reverse the decision of the Court of Appeals. The case is remanded to the Court of Appeals with directions that it remand to the Superior Court of Guilford County for further proceedings in accordance with this opinion.

Reversed.

STATE OF NORTH CAROLINA v. WILLIE JUNIOR JONES

No. 3

(Filed 31 January 1977)

1. **Criminal Law § 93— rebuttal testimony**

In this homicide prosecution, a State's witness was properly allowed to give testimony on rebuttal which contradicted defendant's evidence as to his whereabouts on the night of the crime and that there were no bloodstains on the sweater he wore that night; moreover, such testimony would have been admissible had it not contradicted defendant's evidence, since the order of proof is a matter completely within the discretion of the trial judge.

2. **Criminal Law § 71— blood on defendant's shirt — lay testimony — shorthand statement of fact**

A witness's testimony that he saw blood on defendant's shirt was admissible as a shorthand statement of fact.

3. **Criminal Law § 114— recapitulation of testimony — no expression of opinion**

Trial court's recapitulation of a witness's testimony that defendant "was wearing a white turtleneck sweater and had blood on his shirt" did not constitute a comment on the evidence in violation of G.S. 1-180.

4. **Homicide § 26— instructions — duty to find guilt of second degree murder**

Where all the evidence tends to show a killing resulting from the intentional use of a deadly weapon, and there is no evidence which will support a finding that the killing was done in the heat of passion on sudden and sufficient provocation or that defendant used excessive force while fighting in self-defense, the trial judge is required to instruct the jury that if they are satisfied beyond a reasonable doubt that defendant intentionally inflicted a wound upon the decedent with a deadly weapon which proximately caused his death it would be their duty to return a verdict of guilty of murder in the second degree.

5. **Homicide § 30— first degree murder — failure to submit manslaughter**

The trial court in a prosecution for first degree murder did not err in failing to submit the issue of defendant's guilt of manslaughter where defendant's defense was alibi and all the evidence for the State tended to show that defendant went to the home of the deceased for the purpose of collecting money from him, and that when defendant ascertained deceased had no money he deliberately and intentionally killed him with knives and a heavy shovel, all deadly weapons, after having stated his intention to do so.

APPEAL by defendant under G.S. 7A-27(a) from *Preston, J.*, at the 25 August 1975 Session, DURHAM Superior Court.

Defendant was tried upon a bill of indictment (drawn under G.S. 15-144) which charged him with the first degree murder of Willis Daniels. The trial was conducted in the manner prescribed for a capital case. The State's evidence tended to establish the following facts:

Helen Beasley's apartment in Durham was the scene of frequent gatherings by young people. Around 10:00 p.m. on 4 January 1975 Billy Perry, age 14, was at this apartment. There he was joined by defendant Willie Jones. After a brief conversation they decided to go to a nightclub. Defendant told Perry that an elderly man, Mr. Willis Daniels, owed him money, and the two left to go to his home. En route Perry complained of being cold and defendant gave him his jacket.

At Daniels' dwelling, when he answered defendant's knock, defendant grabbed him by the neck, choked him, and said, "Give me my money." Daniels said he had no money. Whereupon defendant pushed him into a bedroom, and Perry heard him tell Daniels to remove his pants. Defendant soon came out and announced that he would have to kill Daniels. He procured a kitchen knife from the back of the house and reentered the room where Daniels was. He returned shortly thereafter laughing, and he told Perry the knife had broken. Defendant went to the back of the house again, got another knife, and reentered the room where he had left Daniels. Perry heard the second knife hit the floor, and defendant again emerged laughing. He told Perry the other knife had broken also. This time he picked up a short-handled shovel (State's Exhibit 9) and said, "That won't break." He then reentered the bedroom where Perry saw him raise the shovel and hit Daniels on the head. Perry then "took off running up the street."

Defendant came out of the house and called Perry to come back. The two then crossed a small branch and went into some bushes where defendant threw the shovel away. A few minutes later the two separated. Perry returned to Mrs. Beasley's apartment, left defendant's jacket there, and then went home. About ten days later police officers came to see him. He gave them a statement and then took them to the area where defendant had discarded the shovel. After some "looking around," they retrieved the shovel.

About noon on 5 January 1975 Daniels' body was discovered by Ben Hawkins, a neighbor who had become concerned

about him. He found the front door ajar and immediately observed Daniels lying partly on the bed, "his head full of blood." After a brief look he called the police.

Upon arrival the police found Daniels lying on his back, nude from the waist down and hanging off the bed. The head had been badly battered. One eyeball was out of the socket; two teeth had been knocked out and were lying beside him on the bed; and there were several lacerations about the face. The room was "pretty well torn up." The Durham County medical examiner was summoned, and he concluded that Daniels had then been dead from five to seven hours. The pathologist who performed the autopsy testified that the wounds on Daniels' body had been inflicted by both sharp and blunt instruments, and they were consistent with blows from a shovel and cuts with a knife. It was his opinion that the blow which caused Daniels' death was the one which knocked the eye out of the socket and lacerated the nose. Blood from this wound had flowed through the trachea and into the lungs. A blood test revealed that at the time of his death Daniels' blood alcohol level was 260 milligrams percent. He was, therefore, intoxicated when he died.

The defendant did not testify. However, he offered evidence tending to show that from 8:00 a.m. on 4 January 1975 until 1:30 a.m. on 5 January 1975 he was with his older brother, James Jones; that they started drinking about 8:15 and that during the day they consumed two 6-packs of beer and three fifths of wine. From 9:00 p.m. until 1:30 a.m. they were both at the home of their mother, Mrs. Margie Jones, where they played cards and drank wine. At 1:30 a.m. James "walked" defendant home and saw him enter his residence. Mrs. Vanessa Jones, defendant's wife, testified that she had been in bed watching television when defendant came home just before 2:00 a.m. on 5 January 1975; that he was so "high" he went to sleep as soon as he undressed and "hit the bed"; that he slept beside her until 8:00 a.m. She further said that on the night of 4-5 January, 1975 defendant was wearing a white turtleneck sweater which she washed later in the week, and at no time did she see any blood on it.

At the close of defendant's evidence the State called Robert Johnson as a rebuttal witness. He testified that during the early morning hours of 5 January 1975, about 12:20 a.m., he

went to Helen Beasley's apartment, where he saw defendant, who was then wearing a white turtleneck sweater. He saw defendant's shirt and noticed that there were blood stains on it. At that time some other poeple, including Vanessa Jones, defendant's wife, were also at Mrs. Beasley's apartment. Defendant left the apartment before his wife, who stayed for about a half hour longer.

The court instructed the jury it might return one of three verdicts: guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. The jury's verdict was "guilty of murder in the second degree." From the judgment that he be imprisoned for the term of his natural life, defendant appealed to the Supreme Court. Defendant's appeal was not perfected within the time required by law. His petition for certiorari was allowed on 29 January 1976. The case was docketed in this Court on the 13th of April 1976 and argued on 14 September 1976.

Attorney General Rufus L. Edmisten and Assistant Attorney General William Woodward Webb for the State.

William A. Graham III for defendant appellant.

SHARP, Chief Justice.

[1] Defendant brings forward four assignments of error. Three relates to the testimony of Robert Johnson, a witness called by the State after the close of defendant's evidence. Defendant argues first that Johnson's evidence was inadmissible because it did not contradict the testimony of any defense witness. In making this contention defendant misperceives both the effect of Johnson's testimony and the law governing the order of proof. His entire defense was based on evidence tending to establish an alibi. In support of his contention that he was elsewhere when Mr. Daniels was killed, he called as a witness his brother, James Junior Jones, who testified that he and defendant were at James's residence throughout the night of 4 January 1975 and until 1:30 on the morning of January 5th when he escorted defendant to his door and saw him enter his own house. Johnson, on the other hand, testified that he saw defendant at Mrs. Beasley's apartment around 12:20 a.m. on January 5th.

Johnson's evidence also tended to contradict defendant's evidence in another respect. Vanessa Jones testified that de-

fendant wore a white turtleneck sweater and blue jeans that night and that the sweater was not bloodstained. Johnson testified that when he saw defendant he was wearing a white turtleneck sweater and dark blue pants, and that the "shirt" was bloodstained. (It is not clear from the record whether Johnson meant that the turtleneck or a separate garment was bloodstained.) Thus, Johnson's testimony did contradict defense witnesses and, as such, was properly admitted on rebuttal. However, the order in which Johnson testified is irrelevant to this appeal.

The order of proof and presentation of witnesses is a matter completely within the discretionary control of the trial judge. "The court, to attain the ends of justice, may in its discretion allow the examination of witnesses at any stage of the trial." *State v. King*, 84 N.C. 737, 741 (1881). *Accord, In re Westover Canal*, 230 N.C. 91, 52 S.E. 2d 225 (1949); *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948); *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E. 2d 708, 710 (1940); 4 Strong's N. C. Index 3d *Criminal Law* § 93 (1976). There was no abuse of judicial discretion in this case.

Defendant's second contention is that in allowing Johnson to testify he saw blood on defendant's shirt the judge erroneously permitted him to state a conclusion based on facts not within his personal knowledge. This contention is also without merit.

[2] The average layman is familiar with bloodstains; they are a part of common experience and knowledge. When a witness says he saw blood he states an opinion based on his observations, and most likely it would be exceedingly difficult for him to describe the details which led him to conclude that the stains were blood. When he testifies they looked like blood to him he has stated his conception. "This Court has long held that a witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' Such statements are usually referred to as shorthand statements of facts." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975). *See* 1 Stansbury's North Carolina Evidence § 125 (Brandis rev. ed. 1973). The Court did not err in admitting this testimony.

[3] Nor did the judge err when, in recapitulating Johnson's evidence, he stated that the witness testified, "at the time he [Johnson] saw him [defendant] he was wearing a white turtleneck sweater and had blood on his shirt." The judge did no more than repeat what Johnson had said. Such a summary of testimony was not a comment on the evidence within the meaning of G.S. 1-180.

Defendant's first three assignments of error are overruled.

In his charge the trial judge instructed the jury to return one of three verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. Defendant's final assignment of error is that the judge erred in failing to submit the issue of his guilt of manslaughter. This assignment has no merit.

[4] Murder in the second degree, the crime for which defendant was convicted, is the unlawful killing of a human being with malice but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Cousins,* 289 N.C. 540, 223 S.E. 2d 338 (1976); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174 (1962). Where all the evidence tends to show a killing resulting from the intentional use of a deadly weapon, and there is no evidence which will support a finding that the killing was done in the heat of passion on sudden and sufficient provocation or that the defendant used excessive force while fighting in self defense, the law of this State requires the trial judge to instruct the jury that if they are satisfied beyond a reasonable doubt that defendant intentionally inflicted a wound upon the decedent with a deadly weapon which proximately caused his death it would be their duty to return a verdict of guilty of murder in the second degree. *State v. Hankerson,* 288 N.C. 632, 651, 220 S.E. 2d 575, 589 (1975).

[5] In this case all the evidence for the State tended to show that defendant went to the home of the deceased, an elderly black man, for the purpose of collecting money from him; that when defendant ascertained Daniels had no money he deliberately and intentionally killed him with knives and a heavy shovel, all deadly weapons, after having stated his intention to do so. There was not a scintilla of evidence that defendant acted either in the heat of passion on sudden provocation or in self

defense. Defendant's defense was an alibi. Neither the State nor defendant adduced any evidence which would support a verdict of manslaughter, and it would have been improper for the court to have submitted the issue. *See State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *The presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). None of the evidence adduced would support or allow a submission of the charge of manslaughter to the jury.

Defendant has had a fair trial, free of prejudicial error. The State's evidence made out against him a brutal case of murder in the first degree. G.S. 14-17 (Cum. Supp. 1975); *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487 (1970). A lenient jury, although rejecting his evidence of alibi, convicted him of the lesser offense of second degree murder. He has no cause to complain.

No error.

STATE OF NORTH CAROLINA v. GEORGE BLAKLEY THOMAS

No. 8

(Filed 31 January 1977)

1. **Bill of Discovery § 6; Criminal Law § 60— fingerprint comparison made during trial — no disclosure pursuant to discovery order**

The district attorney was not required, by virtue of a court order providing for disclosure of evidence in the State's possession, to submit to defendant a fingerprint comparison made during an overnight recess in the course of the trial, since the comparison in question did not exist at the time the court's order was entered; the district attorney made the comparison available to defendant promptly following his decision to use it in evidence; and defendant had opportunity to make timely objection to its introduction.

2. **Bill of Discovery § 6; Criminal Law § 60— fingerprint comparison — no disclosure by State — defendant given opportunity to make comparisons**

Even if G.S. 15A-903 and the trial court's order based thereon required the district attorney to furnish defendant a fingerprint com-

parison made during a trial recess and the fingerprint cards themselves upon which the comparison was based, the district attorney's failure to do so gave defendant no right to have the fingerprint evidence excluded, since the trial judge offered defendant sufficient time at the close of the State's evidence to make any comparisons he deemed necessary for his defense, but defendant failed to avail himself of the offer. G.S. 15A-910.

3. **Constitutional Law § 30— withholding of evidence by State — information not helpful to defense**

Failure of the State to submit to defendant fingerprint lifts and inked impressions of defendant's fingerprints with which the lifts were compared did not violate defendant's due process rights where the information allegedly withheld was not "exonerative or helpful" to defendant but proved to be devastating to defendant's case.

DEFENDANT appeals from judgment of *Collier, J.*, 8 December 1975 Session, IREDELL Superior Court.

Defendant was charged in separate bills with armed robbery and the felony murder of Kathy Diane James on 8 August 1975 in Iredell County. Defendant was placed upon trial for armed robbery and, for reasons undisclosed, for second degree murder only.

The State's evidence tends to show that the body of Kathy Diane James was found by her husband around 7:45 p.m. on 8 August 1975 in the kitchen area of their home. The body was in a large pool of blood and had multiple wounds both front and back.

The defendant and the victim's husband had been together in the James home earlier that day. Defendant knew large sums of money were kept in the home. After the murder the sum of $400 to $500 was missing. It was kept in a Cherrios cereal box (S-19) which bore a fingerprint of defendant. A serrated steak knife (S-18) also bore defendant's fingerprint in blood on the blade. It was human blood of the same grouping as that of the victim. Expert medical testimony tends to show that the victim suffered three stab wounds in the back and one in the low neck, any one of which could have produced death. Death was caused by perforation of the heart by a weapon such as the steak knife, S-18.

SBI Agent Layton testified that he compared the fingerprints on State's Exhibit 18 and State's Exhibit 19 with the inked impressions of defendant's fingerprints contained on a

card marked State's Exhibit 38 and that in his opinion the same finger that made the latent lift on State's Exhibit 18 made the inked impressions of the right middle finger on State's Exhibit 38. Agent Layton further testified that he compared the latent lift taken from the cereal box (S-19) with the inked impression of defendant's fingerprints marked S-38 and that in his opinion the latent lift taken from the cereal box was made by defendant's left middle finger, the inked impression of which is shown on State's Exhibit 38.

Defendant testified in his own behalf. He denied returning to the James home, denied stabbing the deceased, and stated he never touched the steak knife (S-18) or any other knife in the James home and didn't know how his fingerprints got on the knife in blood. He further stated that when he learned the police were looking for him on 8 August 1975, he thought they intended to arrest him for bad checks which he had previously written and for that reason he fled to California to avoid arrest but returned voluntarily within a week. He also offered evidence of his good character.

Defendant was convicted of armed robbery and second degree murder. For reasons not disclosed, judgment was arrested in the armed robbery case. He was sentenced to life imprisonment for the second degree murder conviction and appealed to the Supreme Court.

Rufus L. Edmisten, Attorney General, by Robert P. Gruber, Special Deputy Attorney General, for the State of North Carolina.

Robert E. McCarter, attorney for defendant appellant.

HUSKINS, Justice.

Defendant's sole assignment of error relates to the admission, over objection, of the results of fingerprint comparisons made by SBI Agent Layton during an overnight recess in the course of the trial.

It appears from the record that defendant sent a letter to the district attorney on 27 August 1975 requesting voluntary discovery in certain areas as provided in G.S. 15A-902. The district attorney failed to comply with the request, and on 29 September 1975 defendant moved for a court order to force

compliance. On that same day the trial judge issued an order requiring, among other things, that the district attorney:

> "Permit the defendant to inspect and copy of [sic] photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies of or portions thereof which are within the possession, custody or control of the State and which are material to the preparation of his defense, or are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant; . . .
>
> In addition, the above named parties shall permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or sample of it, available to the Solicitor if the State intends to offer said evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case."

This order substantially paraphrased G.S. 15A-903 which lists the information subject to disclosure under the new Criminal Procedure Act.

Under this order defense counsel received, about two weeks prior to trial, copies of the SBI fingerprint analysis which compared defendant's fingerprints on file with the Hickory Police Department (S-37) with lifts of latent prints from the knife and cereal box (S-18 and S-19). Counsel did not receive the lifts themselves on which the comparisons were based. The knife was in custody of the SBI Laboratory in Raleigh and not seen by defense counsel until shortly before trial. The cereal box was not seen by defendant until after the trial had started. Even so, defendant made no further requests for these items.

At the trial the judge excluded State's Exhibit 37 because the State had no witness present who could testify that he knew said exhibit (S-37) bore the inked impressions of defendant's fingerprints. However, the State had inked impressions of defendant's fingerprints taken by the Iredell County Sheriff's Department at the time of his arrest in this case, and these fingerprints of defendant were subsequently admitted into evidence without objection as State's Exhibit 38. During an overnight recess, SBI Agent Layton compared the latent fingerprints lifted from the steak knife and the Cherrios cereal box (S-18 and S-19) with defendant's inked impressions on State's Exhibit

38 and concluded that the prints on the knife and the cereal box were made by the defendant. It is the admission of this comparison, over objection, that defendant now assigns as error.

The record discloses that at the time defendant's objection was overruled and the fingerprint comparisons admitted, the trial judge stated:

> "If you feel it necessary in order to present a fair defense for the defendant, we will adjourn at the end of the State's evidence for any comparisons you feel necessary to prepare for the defense. Other than that, I don't feel how I can rule any different. I think this was available to you all last night if you had requested it or pursued it."

[1] Under the discovery order the State had no duty to submit the second fingerprint comparison to defendant, *i.e.*, the comparison of the latent lifts from the steak knife and cereal box (S-18 and S-19) with defendant's known inked impressions on State's Exhibit 38. This comparison did not exist prior to the trial. The State was only required to submit this comparison to defendant promptly following its decision to use the comparison. G.S. 15A-907. This the State did, and its action in that respect amounts to substantial compliance with the court order and the discovery statutes. The comparison was used the next day, and the record discloses that defense counsel knew of it prior to its admission and in time to make timely objection to its introduction.

[2] Judge Collier's order is couched in the broad general language of G.S. 15A-903 and does not specify any particular photograph, book, paper, document, or tangible object which the State shall permit the defendant to inspect and copy. Assuming *arguendo*, without conceding, that G.S. 15A-903 and Judge Collier's order based thereon required the district attorney to furnish defendant not only the fingerprint *comparison* of the prints lifted from the steak knife and cereal box with the known fingerprints of defendant shown on State's Exhibit 37 but also the fingerprint cards themselves upon which the comparison was based, the district attorney's failure to do so gives defendant no right to have the fingerprint evidence excluded. If a party fails to comply with a discovery order the court, in addition to exercising its contempt powers, may:

> (1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders. G.S. 15A-910.

Imposition of these sanctions rests entirely within the discretion of the trial judge. The exercise of that discretion, absent abuse, is not reviewable on appeal. See 1 N. C. Index 3d, Appeal and Error, § 54 and cases cited. No abuse of discretion by the trial judge is made to appear. In fact, the judge offered defendant sufficient time at the close of the State's evidence to make any comparisons he deemed necessary for his defense. Thus defendant was granted one of the remedies authorized under G.S. 15A-910 and failed to avail himself of it. We hold, under the facts of this case, that this constituted sufficient compliance with the statute. The fact that defendant failed to avail himself of the offer strongly suggests the absence of any prejudice. Moreover, the rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State's mode of compliance.

[3] Defendant further contends that the failure of the State to submit the lifts and inked impressions violated his due process rights, citing *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), and *Giles v. Maryland,* 386 U.S. 66, 17 L.Ed. 2d 737, 87 S.Ct. 793 (1967). Those decisions are inapplicable to the facts of this case. There, the United States Supreme Court suggested, in split decisions, that where the State possessed evidence *helpful* to the defense, it must be disclosed to defense counsel to meet the due process requirement of the Fourteenth Amendment. Here, the information allegedly withheld illegally was *not helpful* to the defense and proved to be devastating to defendant's case. There is no suggestion that the State ever believed, or had any basis for a belief, that the latent lifts taken from the steak knife and the cereal box could be "exonerative or helpful" to defendant. There is no merit in this contention.

Defendant has been convicted in a trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

IN RE: MARY ALBERTA HATLEY

No. 142

(Filed 31 January 1977)

1. **Appeal and Error § 9; Insane Persons § 1— commitment to mental institution — discharge of patient — appeal**

Appeal from an involuntary commitment order was not rendered moot by the expiration of the 90-day commitment order under which respondent was institutionalized, since such commitment might form the basis for a future commitment, and other collateral legal consequences may result from the determination that respondent was mentally ill.

2. **Insane Persons § 1— involuntary commitment — imminent danger to self or others — insufficiency of evidence**

Trial court's finding that respondent was imminently dangerous to herself and others was not supported by clear, cogent and convincing evidence where respondent's mother testified only that respondent had previously been confined to mental institutions because of nervous breakdowns, that respondent went into a neighbor's house while the neighbor was not at home, that respondent backed her car too fast and didn't look over her shoulder like she should, and that she signed an affidavit that respondent threatened a relative with a brick but she had no firsthand knowledge of the incident, and where a medical report admitted in evidence was based upon the facts testified to by respondent's mother rather than upon facts discovered by the physician's examination and an application of his training and experience.

APPEAL from the decision of the Court of Appeals, *Morris, J.*, dissenting, 30 N.C. App. 413, 227 S.E. 2d 144, affirming the judgment of *Paschal, J.*, at the 4 August 1975 Session of ORANGE County District Court.

On 25 July 1975 Mrs. Etta Couch initiated proceedings for the involuntary commitment of her daughter, Mary Alberta Hatley, pursuant to Ch. 122, Article 5A, of the North Carolina General Statutes. She alleged in her petition that her daughter,

the respondent, was mentally ill and imminently dangerous to herself or others. On the basis of this petition, a magistrate ordered that respondent be taken into custody in order that she might be examined by a qualified physician.

Respondent was then examined by Dr. Tom Wilson at North Carolina Memorial Hospital in Chapel Hill. Dr. Wilson determined that respondent was mentally ill and imminently dangerous to herself or others.

Respondent was then transferred to John Umstead Hospital where she was examined by Dr. Mohammed Elmaghraby, who also found respondent to be mentally ill and imminently dangerous to herself or others.

On 4 August 1975 a hearing was held in the District Court pursuant to G.S. 122-58.7, to determine whether respondent should be committed for further treatment. At the conclusion of the hearing, the trial judge ordered that respondent be committed to John Umstead Hospital for a period not to exceed 90 days.

The sworn testimony at the hearing in District Court and the medical report of Dr. Tom Wilson will be more fully considered in the opinion.

Attorney General Edmisten, by Isaac T. Avery III, for the State.

Jerry P. Davenport for respondent appellant.

BRANCH, Justice.

[1] We initially consider the State's contention that this appeal is moot in light of the fact that the 90-day commitment order under which respondent was institutionalized has expired.

When events occur during the pendency of an appeal which cause the underlying controversy to cease to exist, this Court properly refuses to entertain the cause merely to adjudicate abstract propositions of law. *Parent-Teacher Assoc. v. Bd. of Education,* 275 N.C. 675, 170 S.E. 2d 473. However, even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance. *Sibron v. New York,* 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889.

The question of whether an appeal from an involuntary commitment order is rendered moot by the discharge of the patient was considered in the case of *In re Ballay*, 482 F. 2d 648. There the Court of Appeals for the District of Columbia stated:

> There is yet another independent reason why the present appeal is not moot—the collateral consequences of being adjudged mentally ill remain to plague appellant. We recently had occasion to consider whether the standard applied in criminal cases, that a "case is moot only if it is shown that there is *no possibility* that any collateral legal consequence will be imposed on the basis of the challenged conviction," *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 1900, 20 L.Ed. 2d 917 (1968) (emphasis added), is applicable to contested civil commitment adjudications. We answered in the affirmative relying upon the multitude of legal disabilities radiating from the label "mentally incompetent." . . .
>
> * * *
>
> . . . Indeed, such an adjudication, while not always crippling, is certainly always an ominous presence in any interaction between the individual and the legal system. Such evidence will frequently be revived to attack the capacity of a trial witness. Depending upon the diagnosis, it may be admissible for impeachment purposes. Indeed, even in a criminal trial it may be available to attack the character of a defendant if he has put character in issue. Most significantly, records of commitments to a mental institution will certainly be used in any subsequent proceedings for civil commitment, a factor which may well have been influential in the present case.

Accord: In re Sciara, 21 Ill. App. 3d 889, 316 N.E. 2d 153.

As previously noted, Judge Paschal based his commitment order, in part at least, upon a finding that respondent had a history of prior commitments. The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequences, convinces us that this appeal is not moot. We, therefore, proceed to consider this case on its merits.

The General Assembly declared its policy as to involuntary commitment of the mentally deranged in the following lan-

guage: "It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminenty dangerous to himself or others; . . . . " G.S. 122-58.1.

G.S. 122-58.7(i), in part, provides: "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings." Our legislative statement of public policy and the statutory requirements found in Article 5A of Ch. 122 of the North Carolina General Statutes are consistent with the recent case of *O'Connor v. Donaldson,* 422 U.S. 563, 45 L.Ed. 2d 396, 95 S.Ct. 2486, which, *inter alia,* holds that there is no constitutional basis for the involuntary confinement of an individual who is mentally ill if he is dangerous to no one and can live safely in freedom. *See also People v. Sansone,* 18 Ill. App. 3d 315, 309 N.E. 2d 733.

[2] The only witness to appear at the commitment hearing in District Court was Mrs. Etta Couch, the mother and neighbor of respondent. Mrs. Couch testified that respondent had been confined to mental institutions in 1972, 1973 and 1974 because of "nervous breakdowns." She testified that Mrs. Hatley went into the house of a neighbor, Mrs. McPherson, while Mrs. McPherson was not there. On cross-examination the witness stated that she did not "know firsthand whether Mrs. McPherson was actually in the house or not." The evidence shows nothing inconsistent with a neighborly visit except that someone called a deputy sheriff who found respondent in the neighbor's home. The witness also stated that she signed an affidavit that respondent threatened a relative with a brick, but that she did not see the incident and "had no firsthand knowledge" of this incident. She testified that there were times when, in her opinion, Mrs. Hatley should not be driving because "when she was backing up, she wouldn't look over her shoulder like she should or make the proper sign. She would also back up too fast." However, Mrs. Couch qualified this statement with the following language:

> No, she did not almost have an accident at any time that I can recall. No, she does not drink and drive. No, when I was in the car with her the car never left the road. No, I never saw her run through a stop sign or violate a

stoplight. No, she never came close to injuring a pedestrian. Yes, she seldom drives. She has driven more lately than she did in prior years. I think she could have an accident however, but for the past month she hasn't been driving too much.

The court accepted into evidence the medical report of Dr. Tom Wilson which was at follows:

Next of kin or other responsible person:

Parne Hatley
Rt. 6 Box 472
Chapel Hill, N. C. 27514

On 7-25-75, at 3:30 a.m. o'clock, I examined the above-named person in AT NCMH EMERGENCY ROOM, with the following findings:

Indications for Mental Illness or Inebriacy:

Erratic behavior that has included: (1) threatening a relative yesterday with a brickbat without provication (sic), (2) reportedly careless and reckless driving of her motor vehicle, (3) receiving money from church for "food for poor persons" which she used to buy cases of goods at local food store for which she had no purpose (case of weiners, chicken, etc.) has become increasing hostile and aggressive toward relatives, (4) ran away from home yesterday and deputy sheriff had to be called to find her in a neighbor's house.

Indications for Imminent Danger to Self or Others:

Threatened another person with brick, erratic behavior such that she is unable to comprehend her actions, erratic driving habits which have developed along with other symptoms.

Abnormal Physical Condition Noted, Including Any Pertinent History: None

Current Medications: None—given 100 mg. Thorazine in E.R.

Tentative Diagnosis: psychotic behavior—prob. paranoid schizophrenia

As a result of the examination, it is my opinion that the named person:

IS Mentally Ill or Inebriate, and Imminently Dangerous to Himself or Others:

s/ TOM WILSON M.D.
Qualified Physician
NCMH
Chapel Hill, N. C. 27514

(Sworn to 4:00 o'clock on this
25 day of July, 1975.)

We note that the record discloses an undated, unsworn medical report signed by Dr. Mohammed Elmaghraby which might have furnished evidence to support the trial judge's findings since it appears to be based solely upon the observation and examination of a qualified physician. However, the judgment in this cause discloses that the trial judge relied solely upon the testimony of the sworn witness and the sworn medical report of Dr. Tom Wilson.

At the conclusion of the hearing Judge Paschal entered the following pertinent findings:

6. That the Court further heard evidence of Mrs. Couch and finds that the respondent is mentally ill because (a) she has a history of mental and emotional distress and has been committed to a hospital on several occasions in the past; (b) she was driving in a careless and reckless manner such that the lives of persons with whom she came in contact might or could be endangered; (c) she entered a house at a time when that house was not physically present by that neighbor who usually occupied the house;

7. That based on the evidence the Court finds that the respondent is imminently dangerous to herself in that she was driving in a careless and reckless manner such that the lives of persons with whom she came in contact might or could be endangered and in that she entered a house at a time when that house was not physically present by that neighbor who usually occupied the house;

He then ordered that respondent be committed to John Umstead Hospital for a period not to exceed 90 days.

Although a stricter degree of proof may be required in those cases requiring clear and convincing evidence, the terms "clear" and "convincing" are "not susceptible of separate, analytical comparison with greater weight of the evidence." *McCorkle v. Beatty*, 225 N.C. 178, 33 S.E. 2d 753. It is for the trier of fact to determine whether evidence offered in a particular case is clear and convincing. 2 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 213, p. 162.

We find nothing in the testimony of the witness, Mrs. Couch, which would even support a reasonable inference that Mrs. Hatley was imminently dangerous to herself or others.

We now turn to the medical evidence. G.S. 122-58.4, in part, provides: "The findings of the qualified physcian and the facts on which they are based, shall be in writing, in all cases." Dr. Wilson's compliance with the mandate of the statute makes it readily apparent that the findings denominated "Indications" in the form medical report are based upon the very same facts testified to by Mrs. Couch in the District Court rather than upon facts discovered by Dr. Wilson's examination and an application of his training and experience. The insertion of these same facts in a medical report does not give them greater force or dignity than the sworn testimony presented in the District Court. There is nothing to indicate that the findings or "Indications" contained in this report were based on a medical examination by Dr. Wilson or upon his experience or study as a qualified psychiatrist.

We wish to make it absolutely clear that we do not intend to restrict or change the existing rules of evidence. We simply hold that the finding in this case that respondent was imminently dangerous to herself and others is not supported by clear, cogent and convincing evidence.

For the reasons stated, the decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. DIANNE EVERHART

No. 118

(Filed 31 January 1977)

1. **Homicide § 6— involuntary manslaughter — definition**

Involuntary manslaughter is the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty.

2. **Homicide § 6— manslaughter — negligence required**

For negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others.

3. **Homicide § 21— manslaughter of baby — insufficiency of evidence**

Evidence in a prosecution for manslaughter was insufficient to show that defendant acted in such a manner as to import a thoughtless disregard of the consequences of her act or heedless indifference to the rights and safety of her baby where the evidence tended to show that defendant was a young girl with an I.Q. of 72; she gave birth to a baby unassisted while lying on the floor and dropped the newborn infant while attempting to place him upon the bed; thinking the baby was dead, she wrapped him in a blanket; at the time, defendant was ill and scared; a doctor who performed an autopsy on the body found no evidence of trauma or a purposeful act upon the body of the baby; and the doctor concluded that the child was accidentally smothered or died of neonatal respiratory failure—the failure to have proper stimulation to cause continued breathing.

ON petition by defendant for discretionary review of the decision of the Court of Appeals, a decision reported without published opinion at 30 N.C. App. 260, which affirmed the judgment entered by *Kivett, J.*, at the 22 September 1975 Session of ROWAN Superior Court.

Defendant was tried upon an indictment for manslaughter and convicted of involuntary manslaughter. She was sentenced to imprisonment for a maximum term of forty-two months.

The State introduced evidence tending to show that on the morning of 18 February 1975, defendant gave birth to a male infant. After delivering the baby without any assistance while

lying on the floor of her bedroom, defendant dropped the infant when she attempted to lift him from the floor to the bed. At this point, defendant thought the infant was dead because he was not crying. She then wrapped the baby in a blanket covering his head. Later, defendant went to the hospital for treatment and denied that she had given birth to a child. Subsequently, she recanted this denial and related the facts stated above to police officers. The officers found the infant, wrapped in a blanket, in defendant's bedroom.

The State offered the testimony of the physician who performed the autopsy. The physician stated that the baby was alive at the time of birth. However, he was not able to find any evidence of a purposeful act, such as a blow to the child's body or smothering by placing one's hand over the child's mouth. The physician concluded that the infant died of suffocation, either caused by being accidentally smothered by the blanket covering his head, or by the lack of outside assistance in enabling him to continue breathing after his first breath was taken.

Defendant testified in her own behalf. She stated that although she had given birth to a child previously, she did not know that she was pregnant on this occasion. She then related facts surrounding the delivery of the baby which were substantially the same as those testified to by the State's witnesses. Defendant offered the testimony of several other witnesses which tended to show that she had an I.Q. below normal; that she had engaged in track and field activities prior to the birth of the baby; and that her track coach did not know she was pregnant.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Norma S. Harrell for the State.

Robert M. Davis for defendant appellant.

MOORE, Justice.

Defendant assigns as error the overruling of her motion to dismiss at the close of all the evidence. As used in G.S. 15-173, there is no difference in legal significance between a "motion to dismiss" and a motion "for judgment as in case of nonsuit." *See State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). The

rule to be applied when considering whether the State has introduced sufficient evidence to withstand a motion for nonsuit is well settled in this jurisdiction. A motion for nonsuit is properly denied when there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the bill of indictment or warrant, considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State. *See State v. Sauls,* 291 N.C. 253, 230 S.E. 2d 390 (1976); *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974); 4 Strong, N. C. Index 3d, Criminal Law §§ 104, 106 (1976), and the plethora of cases cited therein.

[1] Defendant was convicted of involuntary manslaughter. Involuntary manslaughter has been defined as the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Massey,* 271 N.C. 555, 157 S.E. 2d 150 (1967); *State v. Neal,* 248 N.C. 544, 103 S.E. 2d 722 (1958); *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564 (1951). *See also* 4 Strong, N. C. Index 2d, Homicide § 6 (1968).

[2] In instant case, the State had the burden of proving that defendant killed her child by an act done in a culpably negligent manner. Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. As is stated in 1 Wharton, Criminal Law and Procedure, § 291 at 613 (1957), "There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. . . ."

Defendant contends that the baby's death was caused at most by an unavoidable accident, and that she is not guilty of any culpable negligence. Defendant's assertion of accidental killing is not an affirmative defense and in a prosecution for

an unlawful homicide the burden is always upon the State to prove an unlawful slaying. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889 (1968).

> " 'Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of accident.' 26 Am. Jur., Homicide, s. 220, p. 305. The negligence referred to in the foregoing rule of law has been declared by this Court to mean something more than actionable negligence in the law of torts. It imports wantonness, recklessness or other conduct, amounting to culpable negligence. [Citations omitted.]" *State v. Faust,* 254 N.C. 101, 112-13, 118 S.E. 2d 769, 776 (1961). *See also State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337 (1965).

For example, in *State v. Church,* 265 N.C. 534, 144 S.E. 2d 624 (1965), defendant was convicted of involuntary manslaughter on evidence tending to show that decedent had been shot and killed by defendant. It was shown that decedent and defendant were good friends and there was no ill will between the two. The only evidence introduced at trial regarding how the shooting occurred was defendant's exclamation, "It was an accident. I didn't mean to." This Court reversed defendant's conviction, holding that the evidence showed only that the shooting had occurred by accident. The statement by defendant that the shooting occurred by accident was not, standing alone, sufficient evidence to support a finding of culpable negligence.

At trial in the present case, Dr. William Warga, the physician who performed the autopsy, read from his report as follows:

> "The findings of this autopsy were those of acute congestion with subpleural petechial hemorrhages, and a hematoma of the scalp. The fact that the lungs were ex-

panded showed that this child breathed after delivery, and therefore was a live birth. There was no evidence on autopsy findings of trauma or a purposeful act. The subpleural petechial hemorrhage and generalized congestion suggest anoxia. The hematoma of the scalp probably represented a birth injury, since no abrasion of the skin overlying this could be definitely identified.

"The patient stated that since the baby did not move, she thought it was dead and wrapped it up in clothing and placed it on the bed. Having found no purposeful act to explain this death, I am left with the conclusion that this child was accidentally smothered or died of neonatal respiratory failure. From the history given in this particular case, the mother stated that she believed the child was dead before she wrapped it up in clothing and placed it on the bed. The possibility of neglect cannot be determined by the findings of the autopsy or the history that I was given."

Dr. Warga further testified:

"There was no evidence of wilful trauma.

* * *

"After going through all the matters which I did, I was left with the conclusion that the child was accidently [sic] smothered or died of neonatal respiratory failure. The neonatal respiratory failure is the child not breathing anymore without some help. This determination was arrived at after I had made an examination and tests over a period of perhaps days or a month."

[3] In instant case, the evidence shows that defendant was a young girl, with an I.Q. of 72. She gave birth to the baby while lying on the floor and dropped the newborn infant while attempting to place him upon the bed. Thinking the baby was dead, she wrapped him in a blanket. At this time, the defendant had just delivered a baby without any assistance; was ill; and was scared. The doctor found no evidence of trauma or a purposeful act upon the body of the baby. He concluded that the child was accidentally smothered or died of neonatal respiratory failure—the failure to have proper stimulation to cause contin-

ued breathing. Under these facts there was not sufficient evidence to show that defendant acted in such a manner as to import a thoughtless disregard of the consequences of her act or heedless indifference to the rights and safety of the baby.

We hold, therefore, that the trial court erred when it denied defendant's motion to dismiss. *State v. Massey, supra; State v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491 (1958).

The decision of the Court of Appeals affirming the judgment of the superior court is reversed. The Court of Appeals will remand the cause to the Superior Court of Rowan County with instructions that it reverse the judgment denying defendant's motion to dismiss.

Reversed.

STATE OF NORTH CAROLINA v. KIM ALLAN MANUEL

No. 9

(Filed 31 January 1977)

1. **Criminal Law § 87— allowance of leading questions**

The trial court has discretionary authority to permit leading questions in proper instances, and upon defendant's failure to show prejudice such discretionary action by the trial court will not be disturbed.

2. **Criminal Law § 87— allowance of purported leading questions**

The trial court did not err in the admission of purportedly leading questions where most of the questions challenged were not leading or else the answers elicited had been received without objection at other points in the testimony.

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

The State's evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that defendant concealed himself in the bathroom of deceased's home for the purpose of robbing deceased, and that defendant shot and killed deceased with a .22 caliber rifle shortly after deceased entered his home.

4. **Constitutional Law § 36; Homicide § 31— substitution of life imprisonment for death penalty**

Sentence of life imprisonment is substituted for the death penalty imposed on defendant for first degree murder.

DEFENDANT appeals from judgment of *Ervin, J.*, 3 November 1975 Session, CATAWBA Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the first degree murder of Fred Thomas Copas on 28 December 1974 in Catawba County.

The State's evidence tends to show that defendant and his brother-in-law William Gene Anderson lived in the same house. In September and December 1974 they had several discussions about robbing Fred Thomas Copas. Defendant talked about using some gas from a hospital—"throw it in on them and go in and get the money from the house." On the night of the murder Anderson loaned his .22 rifle to defendant and then accompanied defendant in defendant's car to the home of the victim. They cut the screen on a back window of the victim's house, entered the Copas residence and concealed themselves in the bathroom to await the arrival of Mr. Copas. William Gene Anderson, having pled guilty to second degree murder in a plea-bargaining arrangement, testified that after about 15 minutes he went outside the house and about 30 minutes later heard shots fired; that he ran to the car and defendant arrived shortly thereafter and stated that he had shot the victim in the stomach. Defendant and Anderson then drove some distance from the crime scene where Anderson hid the rifle.

The testimony of Mrs. Fred Copas tends to show that on the night of 27 December 1974 she was at home alone; that she went to bed about 10 p.m. after seeing that all of the doors were locked and the windows closed; that her husband came in the front door about 1 a.m., turned on some lights and went toward the bathroom; that she then heard a shot followed by two more shots, and heard her husband screaming; that she saw him lying in the hall and ran to a neighbor's house for help.

The body of Fred Thomas Copas was found lying in the bedroom doorway with his feet in the hall. He had suffered two .22 caliber gunshot wounds, one of which had lacerated both lungs and the aorta causing massive bleeding resulting in death. A .38 pistol was lying near his body. Two .22 caliber shell casings were found in the bathroom and another was found on the back porch. These shell casings were conclusively

determined by ballistics experts to have been fired from the .22 rifle belonging to William Gene Anderson. The testimony of a Sears Roebuck sales clerk tended to show that during October 1974 defendant had purchased .22 caliber shells similar to those found at the Copas home.

Defendant offered no evidence.

From a verdict of guilty as charged and judgment imposing the death penalty, defendant appealed to the Supreme Court.

Rufus L. Edmisten, Attorney General; Claude W. Harris, Assistant Attorney General, for the State of North Carolina.

J. Steven Brackett, attorney for defendant appellant.

HUSKINS, Justice.

In his brief and upon oral argument, defendant abandoned all assignments of error except assignments Nos. 3 and 6. Those will be discussed in the order listed.

By his third assignment defendant contends the court erred in permitting the prosecution to elicit evidence by the use of leading questions.

[1, 2] A leading question is one that suggests the desired answer. Frequently, questions that may be answered by "yes" or "no" are regarded as leading. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 31, and cases there cited. Nevertheless, the trial court has discretionary authority to permit leading questions in proper instances, *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6 (1965), and upon defendant's failure to show prejudice such discretionary action by the trial court will not be disturbed. *State v. Cranfield*, 238 N.C. 110, 76 S.E. 2d 353 (1953). ". . . [T]his Court has wisely and almost invariably held that the presiding judge has wide discretion in permitting or restricting leading questions. When the testimony so elicited is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained." *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974). Here, no abuse of judicial discretion is shown. Most of the questions challenged

were not leading or else the answers elicited had been received without objection at other points in the testimony. In no event has the defendant been prejudiced. This assignment is overruled.

[3] Failure to nonsuit at the close of the State's evidence constitutes defendant's sixth assignment of error. Such motion requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971). "Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). The Court is not concerned with the weight of the testimony when considering such motion but only with its sufficiency to carry the case to the jury and sustain the indictment. *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). When tested by these principles there is abundant evidence to carry the case to the jury. The motion for compulsory nonsuit was therefore properly denied.

Defendant's motion to set aside the verdict and for a new trial is merely formal and requires no discussion. Such motion is addressed to the discretion of the court, and refusal to grant it is not reviewable. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960).

Defendant's motion in arrest of judgment is deemed abandoned under Rule 28, Rules of Appellate Procedure, 287 N.C. 671 at 741, since no reason or argument in support of it is set out in defendant's brief.

[4] The Court notes *ex mero motu* that in *Woodson v. North Carolina,* ..... U.S. ....., 49 L.Ed. 2d 944, 96 S.Ct. 2978 (decided 2 July 1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, by authority of the provisions of the 1973 Session Laws, chapter 1201, section 7 (1974 Session), a sentence of life imprisonment is substituted in lieu of the death penalty in this case.

Our examination of the entire record discloses no error affecting the validity of the verdict returned by the jury. The trial and verdict must therefore be upheld. To the end that a sentence of life imprisonment may be substituted in lieu of the death sentence heretofore imposed, the case is remanded to the Superior Court of Catawba 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 said 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 counsel 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

ATKINS v. BURDEN

No. 14 PC.

Case below: 31 N.C. App. 660.

Petition by respondent for discretionary review under G.S. 7A-31 denied 31 January 1977.

BEESON v. MOORE

No. 13 PC.

Case below: 31 N.C. App. 507.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 January 1977.

CAMERON-BROWN v. SPENCER

No. 10 PC.

Case below: 31 N.C. App. 499.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

COX v. DICK

No. 16 PC.

Case below: 31 N.C. App. 565.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 January 1977.

EQUIPMENT CO. v. SMITH

No. 127 PC.

Case below: 31 N.C. App. 351.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 31 January 1977.

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

EQUITY ASSOCIATES v. SOCIETY FOR SAVINGS

No. 118 PC.

Case below: 31 N.C. App. 182.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

FENCE CO. v. CHEMICALS, INC.

No. 2 PC.

Case below: 31 N.C. App. 524.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 January 1977.

IN RE CHAVIS and IN RE CURRY and IN RE OUTLAW

No. 9 PC.

Case below: 31 N.C. App. 579.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 31 January 1977.

MOZINGO v. BANK

No. 121 PC.

Case below: 31 N.C. App. 157.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

ROLLINS v. GIBSON

No. 120 PC.

Case below: 31 N.C. App. 154.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 31 January 1977.

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

SCOTT v. MOSER

No. 133 PC.

Case below: 31 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STANBACK v. STANBACK

No. 116 PC.

Case below: 31 N.C. App. 174.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STATE v. BOYD

No. 131 PC.

Case below: 31 N.C. App. 328.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STATE v. CODY

No. 40.

Case below: 31 N.C. App. 524.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 January 1977.

STATE v. CORPENING

No. 33.

Case below: 31 N.C. App. 376.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 January 1977.

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

STATE v. GILLESPIE

No. 1 PC.

Case below: 31 N.C. App. 520.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977. Notice of appeal withdrawn by defendant.

STATE v. HARDY

No. 7.

Case below: 31 N.C. App. 67.

Appeal dismissed ex mero motu for lack of substantial constitutional question 11 January 1977.

STATE v. HARMON

No. 26.

Case below: 31 N.C. App. 368.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 January 1977.

STATE v. IVEY

No. 126 PC.

Case below: 31 N.C. App. 524.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STATE v. McFADDEN

No. 134 PC.

Case below: 31 N.C. App. 524.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 31 January 1977. Motion of Attorney Generel to dismiss appeal for lack of substantial constitutional question denied 31 January 1977.

STATE v. MORGAN

No. 8 PC.

Case below: 31 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STATE v. MOTSINGER

No. 18 PC.

Case below: 31 N.C. App. 594.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 January 1977.

STATE v. PARKER

No. 123 PC.

Case below: 31 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 dismissed 31 January 1977.

STATE v. PERRY

No. 46.

Case below: 31 N.C. App. 156.

Appeal dismissed ex mero motu for lack of substantial constitutional question 4 February 1977.

STATE v. REEVES

No. 112 PC.

Case below: 31 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

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

STATE v. ROSS

No. 124 PC.

Case below: 31 N.C. App. 394.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 January 1977.

STATE v. SHOOK

No. 17 PC.

Case below: 31 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 31 January 1977.

STATE v. SMALL

No. 15 PC.

Case below: 31 N.C. App. 556.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

STATE v. SMEDBERG

No. 19 PC.

Case below: 31 N.C. App. 585.

Petition by defendants for discretionary review under G.S. 7A-31 denied 31 January 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 January 1977.

STATE v. STARNES

No. 6 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

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

STATE v. TUTTLE

No. 125 PC.

Case below: 28 N.C. App. 198.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 31 January 1977.

STATE v. VINSON

No. 129 PC.

Case below: 31 N.C. App. 318.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 January 1977.

STATE v. WALLACE

No. 20 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 January 1977.

STATE BAR v. HALL

No. 119 PC.

Case below: 31 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 31 January 1977. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 31 January 1977.

STONEY v. MacDOUGALL

No. 21 PC.

Case below: 31 N.C. App. 678.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

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

WIGGINS v. TAYLOR

No. 101 PC.

Case below: 31 N.C. App. 79.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 January 1977.

APPENDIXES

AMENDMENT TO RULES OF
APPELLATE PROCEDURE

AMENDMENTS TO
RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

PRESENTATION OF
DENNY PORTRAIT

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The first paragraph of Rule 14(d)(1) of the Rules of Appellate Procedure, 287 N.C. 671, 712, shall be amended to read as follows (new material, except for caption, appears in italics):

> **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; *provided, however, that when the appeal is based solely upon the existence of a substantial constitutional question the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist.* Within 15 days after the service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

This amendment to Rule 14(d)(1) was adopted by the Supreme Court in conference on January 31, 1977, to become effective immediately upon its adoption. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

EXUM, J.

For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The amendment below to the Rules Governing Admission to to the Practice of Law in the State of North Carolina was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by rewriting Section .0502 (5) and (7) and adding a new section (10), Requirements for Comity Applicants, as appears in 289 N.C. 735, 744-45 as follows:

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(5) prove to the satisfaction of the board:

(a) that the applicant is licensed to practice law in a state, the District of Columbia or a territory of the United States having comity with North Carolina; and,

(b) that in such state, the District of Columbia or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, actively and substantially engaged in:

(i) the practice of law as defined by G.S. 84-2.1, or

(ii) activities which would constitute the practice of law if done for the general public, or

(c) that in such state, the District of Columbia or a territory of the United States having comity with North Carolina the applicant has been, for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary, serving as,

(i) a judge of a court of record, or

(ii) a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or

(iii) a full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to in subsection (b) above. Time spent in North Carolina in activities which would constitute the practice of law if done for the general public, not to exceed three (3) years, may be included in computing the five-year period referred to in subsections (b) and (c) above.

(7) be in good professional standing in the state, the District of Columbia or territory of the United States from which he seeks comity;

(10) not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing of the applicant's comity application.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 27th day of January, 1977.

s/ B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 31 day of January, 1977.

s/ Susie Sharp
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 31 day of January, 1977.

s/ Exum, J.
For the Court

Ceremonies

For the Presentation of a Portrait

of

The Late Chief Justice Emery Byrd Denny

to

The Supreme Court of North Carolina

10:30 a.m., 28 April 1976

Courtroom of the Supreme Court

Justice Building

Raleigh

INTRODUCTORY REMARKS
BY
CHIEF JUSTICE SUSIE SHARP

Ladies and Gentlemen:

The Court is convened this morning to receive the portrait of the late Chief Justice Emery Byrd Denny. For the members of his family and the Court, I express appreciation to all of you for your presence at this very meaningful ceremony.

At the request of the Denny family, the presentation address will be delivered by our former Chief Justice, the Honorable William H. Bobbitt. Because of his long friendship with Chief Justice Denny, a friendship which began years before either was a justice of the Supreme Court and which was cemented by the 12 years they served together on the Court, a more felicitous choice could not have been made. The Court now recognizes Chief Justice Bobbitt.

PRESENTATION ADDRESS

By

THE HONORABLE WILLIAM H. BOBBITT

MAY IT PLEASE THE COURT:

The late Emery Byrd Denny served with diligence and distinction as an Associate Justice and as Chief Justice of this Court for more than twenty-four years. He died April 24, 1973, in Raleigh, N. C., and was buried in Raleigh's Oakwood Cemetery.

On behalf of the family of our friend and former Chief Justice, I have the honor to present to the Court this portrait, soon to be unveiled, and a memorial of his good life and remarkable career.

The portrait was painted from life by the late Irene Price in her studio in Blowing Rock, N. C., in August of 1966. Miss Price, a native of North Carolina, was a gifted artist whose services as a painter of portraits were in great demand. She had previously painted from a photograph the portrait of former Chief Justice Stacy which has hung on the wall of this chamber since its presentation to this Court in 1953.

Emery Denny was born November 23, 1892, on a farm in Surry County, N. C., less than a mile from the base of Pilot Mountain, the area's famous landmark, and about three miles southwest of the town of Pilot Mountain. His father and mother, the Reverend Gabriel Denny and his wife, Sarah Stone Denny, were the parents of fourteen children, eleven of whom, seven boys and four girls, lived to maturity. Emery, their thirteenth child, was their youngest son.

Gabriel Denny was born December 20, 1842. When on duty as a Confederate soldier he became ill with measles. Serious complications following this disease crippled him for life. He became a Primitive Baptist preacher and served rural churches for many years. Since the members of that denomination did not believe in paying a person to do the Lord's Work, Elder Denny had to look elsewhere for the means to support his rapidly growing family. In 1875, shortly before the birth of his fourth child, he bought the 112-acre farm in Surry County which thereafter was the Denny homeplace. The residence was a two-story frame farmhouse with two rooms on each floor. A separate building was used as the kitchen.

On account of Gabriel Denny's crippled condition, the plowing and other heavy work on the farm was done by his sons. However, Gabriel stayed busy supervising such activities as the operation of his cane mill, corn mill, sawmill, and blacksmith shop, and supervising the construction of auxiliary farm buildings, such as the packhouse, the feed barn in which the mules were kept, and the tobacco barns.

By the time Emery reached his early teens, his older brothers had gone from the farm, leaving him as the only one who could do the plowing. The farm equipment he used consisted largely of a mule-drawn "bull-tongue" plow constructed of heavy timber. Plowing with such equipment required long and strenuous physical exertion. Doubtless this exercise in the bracing air of the foothills contributed greatly to Emery's stamina and good health across the years. However, the necessity of remaining on the farm to do the plowing and other heavy work seriously delayed the opportunity he desired for further formal education.

Until the age of eighteen, Emery's formal education consisted of the instruction he had received in a Surry County one-room rural school. During his later years on the farm, he had visions of becoming a lawyer. In daylight hours he plowed his father's fields and at night read the few books, including law books, he was able to obtain. Later, he stated: "There wasn't much time to study. Growing tobacco, corn and wheat on that Surry County farm was a back-breaking task."

During the four years from 1910 to 1914, Emery attended Gilliam's Academy, a preparatory school in Alamance County, N. C. The headmaster was a Primitive Baptist preacher. During the summer following his first year at Gilliam's Academy Emery worked on his father's farm. A different arrangement having been made in respect of the farm, Emery worked in Greensboro during the succeeding two summers. He graduated from the Business Department of Gilliam's in 1913 and from the Academic Department in 1914. During his last year at Gilliam's Academy, Emery was an instructor as well as a pupil. His own earnings, supplemented by assistance from one or more of his older brothers, paid his way through Gilliam's Academy.

Before leaving the record of his life in Surry County and at Gilliam's Academy, it should be noted: Although Emery Denny was never a member of the Primitive Baptist Church, he acquired in his boyhood and youth, and retained throughout

his life, many of the qualities for which Primitive Baptists were greatly respected, including industry, honesty, and fidelity to truth.

After graduation from Gilliam's Academy in 1914, but lacking funds to continue his formal education, Emery got a job in Salisbury as bookkeeper for a hotel company. He continued in this employment until September 1916 when he entered the law school of the University of North Carolina. He continued the study of law at Chapel Hill, N. C., until December 7, 1917. At that time, which was during World War I, Emery enlisted in the aviation section of the Signal Corps of the United States Army.

The Armistice marking the end of hostilities was signed November 11, 1918. Emery was honorably discharged, with the rank of master electrician, at Vancouver Barracks, Washington, on February 21, 1919. Thereafter, until May of 1919, he served the Army in San Francisco as a civilian employee. In June of 1919 he returned to Chapel Hill for courses preparatory to taking the bar examination. He passed the bar examination and was licensed to practice law in North Carolina in August of 1919.

One of Emery's classmates in Law School was Harley B. Gaston, a resident of the town of Lowell in Gaston County, N. C. Harley was to become Emery's first law partner and lifelong friend. In 1909 the county seat of Gaston County had been moved from Dallas to Gastonia, the latter a rapidly growing industrial town on the main line of the Southern Railway. These law students discussed the anticipated growth of Gaston County as an industrial center and the prospects there for a lawyer who was ready, able and willing to take an active part in its development.

As partners, Denny and Gaston started the practice of law in Gastonia in the Fall of 1919. At the end of two years Gaston decided to locate in Belmont, another thriving Gaston County town, where he practiced until his death. Following Gaston's departure, Denny became the younger member of the highly regarded law partnership of Mangum and Denny. This partnership continued until the death of A. G. Mangum in 1930. After Mangum's death, Denny practiced alone but shared a suite of offices with the late Ernest Warren, another lifelong friend. He continued as a sole practitioner until his appointment in 1942 as an Associate Justice of this Court.

Upon arrival in Gastonia, Denny quickly became an active participant in the religious, professional, fraternal, civic and political life of the community.

Meanwhile, Bessie Brandt Brown, having graduated in the Class of 1918 from the State College for Women, which is now the University of North Carolina at Greensboro, taught school for three years in her hometown of Salisbury, N. C. Having decided to teach elsewhere the following year, she accepted an offer to teach in Gastonia during the school year 1921-1922. After taking additional teacher training courses at Columbia University in New York City during the summer of 1921, she reported for duty in Gastonia in September of 1921. Soon thereafter, in accordance with custom, the new teachers were welcomed to Gastonia at a public reception given in their honor. Although a comparatively new citizen of Gastonia, Denny, then twenty-eight and unmarried, deemed it appropriate to join with others in welcoming the young ladies who were to teach in Gastonia. This reception was the scene of the first meeting of Emery and Bessie Brandt. The spark there kindled burned brighter and brighter as the days passed. Bessie Brandt taught all of the 1921-1922 school year and until December of the following school year. She and Emery were married December 27, 1922, at the home of the bride's parents in Salisbury. After their honeymoon their first home was in the Armington Hotel in Gastonia in which Emery had acquired an interest and acted as supervising manager. According to the benighted view of that day, Bessie Brandt's eligibility for further teaching was terminated by her marriage.

No event in Emery's career contributed more to his happiness and success than his marriage with Bessie Brandt. It had subsisted for more than half a century when he died. During these years the bonds of mutual respect and devotion had grown stronger.

Upon marriage, Bessie Brandt, originally a member of the First Presbyterian Church of Salisbury, placed her membership with that of Emery in the First Baptist Church of Gastonia. In this church Emery was a deacon, having served as chairman of the board; and for 18 years he served as the scholarly and much-beloved teacher of the Men's Bible Class. Too, Bessie Brandt and the children, as members, attended the services and participated in the activities of this church. Throughout the

years, whether in Gastonia or in Raleigh, the church had a place of first importance in the Denny household.

In Gastonia, Denny was soon recognized as a constructive leader in all worthwhile community activities.

In 1922-1923 he was a charter member of the Gastonia Civitan Club and served as its first President.

In 1925 he served as President of the Gastonia Chamber of Commerce.

In 1926 he served as Commander of Gaston Post #23 of the American Legion.

From 1929 to 1937 he served four successive two-year terms as Mayor of Gastonia. The violence and bloodshed growing out of the Communist inspired and led strike in West Gastonia and the acute financial problems growing out of the great depression occurred during his tenure as Mayor.

In 1934, Denny received the Civitan Citizenship Cup, awarded annually to the citizen of Gastonia adjudged to have rendered the most outstanding and unselfish service to the City of Gastonia outside the regular line of duty. The presentation speech by Mr. A. G. Myers, President of the Citizens National Bank, included the following:

"Mr. Denny's work in re-financing the city's bonded indebtedness, in helping settle the strike at the Clara, Dunn and Armstrong Mills a year ago, his work in helping organize the National Bank of Commerce from the old First National and the work he did in helping locate the Firestone Tire Company in Gastonia, formed some of the many deeds which won for him this worthy honor."

From 1935 to 1942, Denny served as chairman of the Board of Trustees of the Gaston County Public Library.

From 1934 to 1939 he served as chairman of the Board of Trustees of Garrison Memorial Hospital, the major Gastonia hospital.

On December 13, 1941, he received the Silver Beaver Award of the Boy Scouts of America for his services in Gaston County and throughout the eleven counties of the Piedmont Council.

From 1941 to 1943 he was a member of the Board of Trustees of the University of North Carolina.

From 1924 to 1926 he served as chairman of the Gaston County Board of Elections.

From 1926 to 1928 he served as chairman of the Gaston County Democratic Executive Committee.

On account of his standing in the community and his participation in municipal and county government affairs, candidates in statewide election contests sought his endorsement and support. In 1932, Denny supported J. C. B. Ehringhaus in his successful campaign for election to the office of Governor. In 1936, he was Gaston County manager for Clyde R. Hoey in his successful campaign for election to the office of Governor.

Denny was an active Mason. In Gastonia, he was a member of Holland Memorial Lodge No. 668, having served as Master thereof; a member of Gastonia Chapter No. 66, Royal Arch Masons, having served as High Priest thereof; a member of Gastonia Commandery, No. 28, Knights Templar; and a member of St. Titus Conclave No. 72, Red Cross of Constantine.

Although his Gastonia years were filled with varied activities in the religious, civic, fraternal and political life of the community, the major part of his time was devoted to the practice of his profession. His service as assistant city solicitor from 1925 to 1929 provided experience in the criminal law. However, Denny's practice developed in the various fields of civil law. In an era of industrial growth in Gaston County, he developed an extensive practice and became an expert in the legal problems of private business corporations as well as in the legal problems of municipal and county governments. From 1927 to 1942 he served as County Attorney for Gaston County. In 1937-1938 he was attorney for the North Carolina Railroad. He was general counsel for the well-known investment banking firm of R. S. Dickson and Company. He was recognized locally and elsewhere as a leader of the Gaston County Bar. It should be noted that, in addition to his legal services, Denny's advice in matters of business policy was often sought. He served as director of R. S. Dickson and Company, Ranlo Manufacturing Company, United Spinners Corporation, and Hardin Manufacturing Company; and from 1936 to 1941 he was President of Ranlo Manufacturing Company.

Years later, when Denny retired as Chief Justice, the Gastonia Gazette, in a feature article, recounted his accomplish-

ments and services during his Gastonia years. The author's summary included the following:

"A new generation has grown up in Gastonia since Emery Byrd Denny left here a quarter of a cenutry ago. But, during the 1920's and '30's Denny was a dynamic figure in the life of this city and county. The pulse beat of the city during the depression was keyed to this man who held the reins of government. As county attorney, he saw Gaston through some difficult days as well. . . . The generation before knew Emery Denny well. He guided its destinies and few conversations transpired that did not in some way involve his name."

In 1940, at the urgent request of his friend, J. Melville Broughton, Denny served as State Manager for Broughton in his successful Primary Contest for the Democratic Nomination for Governor. Following Broughton's nomination, Denny was chosen as chairman of the State Democratic Executive Committee. He served in this capacity during the General Election of 1940 and until his appointment to the Supreme Court in 1942. During the 1941 Session of the General Assembly he served as Governor Broughton's special counsel and liaison with the General Assembly and as such explained and supported the Governor's program.

During the 1940 campaign and the 1941 Session of the General Assembly, Denny had been required to spend much of his time in Raleigh. Upon the adjournment of the General Assembly of 1941, he returned to Gastonia to resume on a full-time basis his law practice and his life at home with his wife and their four children. However, on January 29, 1942, Denny was appointed by Governor Broughton an Associate Justice of the Supreme Court of North Carolina to fill the vacancy created by the death of Associate Justice Heriot Clarkson. Denny took the oath of office on February 3, 1942, and entered immediately upon his duties as an Associate Justice.

Denny was well known in Mecklenburg County by the members of the bar and by the general public. With reference to his appointment to the Supreme Court, an editorial in the Charlotte Observer expressed the general sentiment of the lawyers and laymen in these words:

"Judge Denny is a clean, honorable, able man, with unimpeachable moral character, a splendid judicial mind and a lawyer of distinction in his profession. He will grace the Supreme Court bench and fill his place there with honesty, in-

tegrity, and acceptability. What more can be asked of an appointee to this high responsibility?

"It is only an incident that he was the Governor's campaign manager and, therefore, that his choice may seem to involve political debt-paying. Such criticism could only fairly apply against an appointee who is lacking in the essential characteristic which this great office requires. . . . Mr. Denny, by common consent, possesses these qualities, and deserves such a responsible place in his own name and right and without reference to any past political services or friendship for the governor. . . . The important and only consequential phase of the governor's selection is that he has put his appointive authority upon an excellent citizen, a splendid lawyer, and an admirable character."

Denny's service as a member of the Supreme Court fully justified this appraisal of his qualifications. He served as Associate Justice under Governor Broughton's appointment until the general election of November 1942. Thereafter, pursuant to successive elections, he served as Associate Justice until March 14, 1962. On that date, pursuant to appointment by Governor Sanford, he took the oath of office as Chief Justice, filling the vacancy created by the retirement of Chief Justice Winborne. He served as Chief Justice under Governor Sanford's appointment until the general election of November 1962, when he was elected to serve the unexpired portion of the term for which Chief Justice Winborne had been elected. He served as Chief Justice until his retirement on February 5, 1966.

During Denny's service as Associate Justice and as Chief Justice, he was the author of eleven hundred and thirty-nine (1139) of the Court's opinions, apart from concurring and dissenting opinions. In addition, after his retirement, when serving as an emergency Justice from March 28, 1966 to July 7, 1966, he was the author of twenty-one of the Court's opinions. His opinions appear in Volumes 221 through 266 of the North Carolina Supreme Court Reports. They relate to the whole spectrum of the law. They reflect the author's sound judgment and capacity for clear exposition of legal principles. Judges and lawyers will consult them for guidance in the years ahead.

In addition to his judicial service, Denny's capacity for efficient administration was an asset to the Court and to the State. While serving as Chief Justice his administrative talents greatly facilitated the orderly establishment of the new unified statewide court system.

In 1942, shortly after Emery had taken office as an Associate Justice, the Denny family moved to Raleigh. It was difficult to leave the many Gastonia friends and associates of the several members of the family. However, the children were still in graded or high school and it seemed best to make Raleigh their future home.

In addition to his work as a member of the Court, Denny continued in Raleigh the same type of service in good causes which had characterized his life in Gastonia.

In Raleigh, the Denny family became members of the Hayes Barton Baptist Church and participated in its activities. Denny became a deacon in 1943. He served as chairman of the board in 1947-1948. In 1964, he was elected a life deacon. For a number of years, he taught the Townsend and Bunn Bible Classes.

Denny became a member of the Raleigh Executives Club and served as its President in 1946-1947.

In Raleigh, Denny continued his interest and activity as a Mason, serving as Grand Historian, Grand Steward and Grand Deacon of the Grand Lodge of North Carolina, A. F. and A. M.; as Judge Advocate of the Grand Lodge; and from 1967 to 1973 as a member of its Board of General Purposes. Too, he was Chief Adept of the North Carolina College Societas Rosicruciana In Civitatibus Foederatis.

In 1950, Denny was elected by the Southern Baptist Convention as one of the first trustees of the Southeastern Baptist Theological Seminary at Wake Forest; and, with the exception of the year 1963-1964, he served continuously on this board. For two years he was chairman of the board and at the time of his death was a member of the executive committee and chairman of the committee on long range planning. In appreciation for his long and faithful service, the seminary library building was named for him in 1969.

Elected by the State Baptist Convention, Denny served over a period of twenty-one years as a member of the Board of Trustees of the Baptist Hospital in Winston-Salem.

Denny served in various places of responsibility in the State Baptist Convention. In 1973, the year of his death, he was one of the persons to whom the 1973 Annual of the State Baptist Convention of North Carolina was dedicated. His picture and a biographical sketch appear at the front of this bound volume.

The honorary degree of LL.D. was conferred upon Denny by the University of North Carolina in 1946 and by Wake Forest College in 1947.

Denny was a member and past President of the Gaston County Bar Association; a member and past Vice-President of the North Carolina Bar Association; a member of the American Bar Association; a Fellow of the American Bar Foundation; and a member of the American Judicature Society. He was an honorary member of the Phi Delta Phi Legal Fraternity. He served from 1956 to 1962 as chairman of the Judicial Council.

Denny was a member of the Newcomen Society of North America and of the Watauga Club of Raleigh.

In May of 1962, Denny was temporarily hospitalized with what was diagnosed as "a cardiovascular accident." He had completely recovered when the Court convened for the Fall Term of 1962 and performed all the duties of the office of Chief Justice, both judicial and administrative, until his retirement on February 5, 1966. He realized that further full service as Chief Justice would subject him to strain and tension to such extent as to endanger his health. Accordingly in keeping with his doctor's advice, he retired prior to the expiration of his term.

On March 16, 1966, the North Carolina Citizens Association awarded Denny its certificate of Distinguished Citizenship. In presenting this award, Colonel William T. Joyner referred to the recently retired Chief Justice "as a faithful servant to his community, a highly esteemed member of the judiciary, a wise counselor in the affairs of local and State government." Editorially, the Greensboro Daily News commented that the North Carolina Citizens Association had honored itself in honoring Emery Byrd Denny. The editorial continued: "Chief Justice Denny brought a high administrative talent to the State Court. He kept the Court functioning smoothly as a unit and even after his health began to fail he carried a full load both in cases and administration."

Although relieved by retirement from the pressures of the office of Chief Justice, Denny continued to render significant public service.

Reference has been made to his authorship of opinions for the Court while serving as an emergency Justice.

The History of the Supreme Court of North Carolina covering the first century of its existence from January 1, 1819 until

January 1, 1919 was written by former Chief Justice Walter Clark and published in Volume 177 of the North Carolina Supreme Court Reports. Denny continued Clark's work by writing the History of the Supreme Court of North Carolina from January 1, 1919 until January 1, 1969. This includes a biographical sketch of each of the persons who became justices and served during this fifty-year period. This significant and appreciated contribution to the Court's history is published in Volume 274 of the North Carolina Supreme Court Reports.

On February 9, 1970, on behalf of the family of the late Chief Justice Winborne, Denny presented to this Court the Winborne portrait, which now appears on the wall of this chamber, and a memorial of Winborne's life and career. For more than twenty years he had known Winborne as a close friend and a colleague on this Court. This memorial address, delivered in this chamber to the full Court, is published in Volume 277 of the North Carolina Supreme Court Reports.

In 1968 Denny served as Chairman of the Commission created by the North Carolina Bar Association and the North Carolina State Bar to study the Constitution of North Carolina. The Commission's assignment called for a comprehensive revision of the Constitution of 1868 as amended from time to time, primarily to delete provisions which had become obsolete or had been held invalid as violative of the Constitution of the United States, and to rephrase certain provisions in order to express more clearly their accepted meaning. The Commission drafted such a comprehensive revision, excluding all seriously controverted proposals. Under Denny's guidance and influence, the Commission recommended that the proposed comprehensive revision be submitted as a separate amendment, and that amendments involving seriously controverted proposals be separately submitted. The General Assembly followed the Commission's recommendations, and on November 3, 1970, the electorate adopted the amendment in which the comprehensive revision was set forth. The Commission had achieved the primary objective of the sponsoring organizations. The General Assembly failed to submit certain of the seriously controverted proposals, and the electorate failed to adopt certain of those the General Assembly did submit. By the separate submission of the amendment providing for comprehensive revision in respect of non-controversial matters, the fate of prior efforts for general revision had been avoided.

Denny retained a keen interest in the people of Surry County. He enjoyed participating in the reunions of the Denny family. From its formation in 1956 he was a member of the Board of Trustees of the Charles H. Stone Memorial Library in Pilot Mountain, N. C. and contributed his time and counsel to the success and perpetuation of this library. Although the property had previously passed from the Denny family he was delighted when what had been the Denny farm became a part of the Pilot Mountain State Park.

From time to time he returned to Gaston County. Often he was called upon to address the Gaston County Bar Association and other groups with which he had been associated. In 1967, he was called upon to present the Gastonia Civitan Club's annual citizenship award to an old friend. This was the same award he himself had received in 1934. In his presentation address, he told Hawthorne's story of the "Great Stone Face." It may be that this story appealed to him so much because it engendered thoughts of the days when as a teenage plowboy in Surry County confronted by handicaps and delay in his desire for better educational advantages, he drew inspiration, purpose and resolution from the ever present view of Pilot Mountain. Although a difficult and rugged climb, by determined effort the pinnacle could be reached. In his own life he had overcome the obstacles and had reached the summit.

In the last year or so of his life, Denny's activities were sharply curtailed by a failing heart. During this period he was confined to his home or in the hospital much of the time. In a gracious handwritten acknowledgment of flowers sent to him by members of this Court on November 23, 1972, his 80th birthday, he referred to the fact that he had "had a fine day with all eighteen members of [his] family present for Thanksgiving Dinner." His family had first claim upon his affection. To a marked degree his wife and children responded with complete devotion.

Denny is survived by Bessie Brandt Denny, his widow, to whom he was happily married for more than fifty years, and the four children of their marriage, a married son and three married daughters. The four couples are Emery B. Denny, Jr., and wife, Betty Stonebanks Denny, of Chapel Hill, N. C.; Betty Brown Denny Shook and husband, Lenoir G. Shook, of Tarboro, N. C.; Sarah Catherine Denny Williamson and husband, Bailey P. Williamson, of Raleigh, N. C.; and Jean Stone Denny Ashley and husband, Wallace Ashley, Jr., of Smithfield, N. C. Too,

Denny is survived by eight grandchildren. He would be so proud and happy if he were physically present with us today. In a real sense, his spirit abides and pervades this occasion.

After Denny's death, many of the organizations with which he had been associated adopted resolutions of appreciation and condolence. The General Assembly of North Carolina at its 1973 Session adopted a joint resolution of appreciation and condolence in which the following accurate appraisal of our beloved friend and former Chief Justice appears:

"Emery B. Denny exemplified the highest qualities of integrity and responsibility in both his public and private life, contributing quietly and effectively to the improvement and functioning of the society in which he lived, and elevating and enriching the lives of those with whom he was associated."

In closing it seems appropriate to repeat the following portion of a prayer offered at Denny's funeral service:

"We remember with gratitude his confidence in the power of truth, his inflexible integrity clothed in gentleness, his systematic and thorough work in church and state, and his pure purpose to do justly and to walk humbly with Thee."

The time has come for the unveiling of the portrait. This will be done by Betty Brandt Williamson, granddaughter of the late Chief Justice Denny, who will be escorted for this purpose by the Honorable Adrian J. Newton, the Clerk of this Court and a long-time friend and fellow churchman of Emery Byrd Denny.

REMARKS OF CHIEF JUSTICE SUSIE SHARP IN ACCEPTING THE PORTRAIT OF THE LATE CHIEF JUSTICE EMERY BYRD DENNY

We are grateful to Chief Justice Bobbitt for the extensive research and discerning interpretation of the events and relationships which molded the life of Chief Justice Denny. With oils, on canvas the late Miss Irene Price painted his physical likeness; with words fitly spoken, Chief Justice Bobbitt has portrayed the qualities and traits which made Chief Justice Denny the Christian gentleman, legal scholar, and patriot we all knew him to be. No man ever loved this State more unselfishly than did he. When he spoke, in almost reverent tones, of "the North Carolina way"—as he often did—he meant that both public officials and private citizens were expected to plow a straight furrow and that public morality must meet the highest standards of private morality. To him a public office was indeed a public trust.

During two terms of this Court—the Fall Term 1960 and the Spring Term 1961—our junior justice, the Honorable James G. Exum, Jr., had the good fortune to be associated with Justice Denny as his law clerk. Justice Lake and I are the only members of the present Court who were privileged to serve with "Judge" Denny, as he was affectionately called by all who knew him. It was he who administered the oath of office to both of us. He swore me in as his junior justice only moments after he himself had taken the office as chief justice, and it is with difficulty that I refrain from speaking of his kindness and consideration. However, these were innate characteristics of the man whom Judge Bobbitt has described in his informative and impressive memorial, and I would not attempt "to add another hue to the rainbow."

The Court expresses its thanks to the Denny family for this very fine portrait. It will be hung on a wall of this chamber, where it will be an inspiration to us and to our successors. The record of these proceedings will be added to the minutes of the Court and printed in the North Carolina Reports.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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WITNESSES

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

A civil litigant adjudged in contempt for failing to comply with a discovery order may immediately appeal for the purpose of testing the validity of both the original order and the contempt order where the contemnor can purge himself of contempt only by complying with the discovery order. *Willis v. Power Co.*, 19.

Rule 54(b) did not bar appellate review of order dismissing plaintiff's claim for punitive damages for failure to state a claim for relief even though the order did not expressly determine "there was no just reason for delay." *Newton v. Insurance Co.*, 105.

Plaintiff could appeal from a partial summary judgment which affected a substantial right of plaintiff in the absence of a finding by the trial court that there was "no just reason for delay." *Nasco Equipment Co. v. Mason*, 145.

Order of the trial court prohibiting defendant from taking the deposition of an out of state witness was appealable. *Transportation, Inc. v. Strick Corp.*, 618.

§ 9. Moot Questions

Appeal from an involuntary commitment order was not rendered moot by the expiration of the 90-day commitment. *In re Hatley*, 693.

§ 41. Form and Requisites of Transcript

Narration of the evidence in the record on appeal is mandatory. *Britt v. Allen*, 630.

§ 54. Discretionary Matters

The Court of Appeals did not err in affirming trial judge's discretionary action in setting the verdict aside on the ground that it was against the greater weight of the evidence. *Britt v. Allen*, 630.

ARBITRATION AND AWARD

§ 9. Attack of Award

Action of arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties constituted misconduct sufficient to vacate the award of the arbitrators, and depositions of the arbitrators were admissible in a proceeding to vacate the award. *Fashion Exhibitors v. Gunter*, 208.

ARREST AND BAIL

§ 5. Method of Making Arrest and Force Permissible

The use of excessive force in a lawful arrest does not take a law officer outside the performance of his duties for the purposes of G.S. 14-34.2. *S. v. Irick*, 480.

ARSON

§ 1. Nature and Elements of the Offense

Since voluntary intoxication is not a defense to a charge of arson, it likewise is not a defense to a charge of felony-murder having as its underlying felony the crime of arson. *S. v. White*, 118.

ASSAULT AND BATTERY

§ 5. Assault with a Deadly Weapon

The use of excessive force in a lawful arrest does not take a law officer outside the performance of his duties for the purposes of G.S. 14-34.2. *S. v. Irick,* 480.

§ 14. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for assault with a firearm on a law officer. *S. v. Irick,* 480.

ATTORNEY AND CLIENT

§ 4. Testimony by Attorney

Where the validity of defendant's signatures on two documents was called into question, defendant was not prejudiced when the State called as a witness one of his attorneys who had notarized one of the documents. *S. v. Locklear,* 598.

AUTOMOBILES

§ 43. Pleadings

Plaintiff's complaint was sufficient to raise the issue of last clear chance. *Vernon v. Crist,* 646.

§ 86. Submission of Last Clear Chance Issue

Evidence was sufficient for submission of the issue of last clear chance in an action to recover for injuries received by plaintiff when defendant drove a car forward while plaintiff was leaning against or sitting on the trunk of the car. *Vernon v. Crist,* 646.

BILL OF DISCOVERY

§ 6. Discovery in Criminal Cases

Trial court did not err in failing to require the district attorney to furnish the truck occupied by deceased for defendant's examination pursuant to defendant's motion under former G.S. 15-155.4. *S. v. Philyaw,* 312.

Trial court did not err in permitting two witnesses to give corroborating testimony for the State when their names were not on the list of 21 witnesses furnished by the district attorney to defense counsel pursuant to pretrial discovery. *S. v. Smith,* 505.

The district attorney was not required, by virtue of a court order providing for disclosure of evidence in the State's possession, to submit to defendant a fingerprint comparison made during an overnight recess in the course of the trial. *S. v. Thomas,* 687.

BILLS AND NOTES

§ 19. Competency of Parol Evidence

In an action to recover on demand notes, defendant's evidence of an oral agreement executed contemporaneously with the notes was admissible at the hearing upon plaintiff's motion for summary judgment. *Bank v. Gillespie,* 303.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Indictment charging defendant with first degree burglary sufficiently described the premises allegedly entered. *S. v. Beaver*, 137.

In a burglary case, occupation or possession of a dwelling is tantamount to ownership. *Ibid.*

§ 5. Sufficiency of Evidence

Evidence in a first degree burglary case was sufficient to show a breaking and entry without permission and defendant's intent to commit larceny at the time he broke and entered a home. *S. v. Sweezy*, 366.

Evidence was sufficient for the jury in a first degree burglary case. *S. v. Irick*, 480.

§ 8. Sentence

Imposition of a life sentence upon a conviction for first degree burglary does not constitute cruel and unusual punishment. *S. v. Sweezy*, 366.

Trial court erred in refusing to permit defense counsel to tell the jury in his final argument that the law prescribed mandatory life imprisonment for first degree burglary. *S. v. Irick*, 480.

CLERKS OF COURT

§ 3. Probate Jurisdiction

G.S. 7A-241 vests probate jurisdiction in the superior court to be exercised originally by the clerks as ex officio judges of probate, and the clerks and superior court judges have no concurrent jurisdiction. *In re Estate of Adamee*, 386.

CONSTITUTIONAL LAW

§ 21. Right to Security in Person and Property

Defendant had no standing to assert an unlawful search of the exterior of his car located in a garage belonging to another person. *S. v. Monk*, 37.

§ 24. Requisites of Due Process

Defendant, a foreign corporation, was subject to the in personam jurisdiction of this State where it actively bought and sold coins in this State. *Dillon v. Funding Corp.*, 674.

§ 29. Right to Trial by Duly Constituted Jury

Defendant failed to make out a prima facie case of arbitrary or systematic exclusion of male blacks from the jury by showing only that the district attorney excluded all male blacks by use of peremptory challenges. *S. v. Tatum*, 73; *S. v. Smith*, 505.

Exclusion of veniremen who expressed scruples against the death penalty did not violate defendant's right to a jury reflecting a cross section of the community. *S. v. Montgomery*, 235; *S. v. Smith*, 505.

Statute permitting a defendant to admit a previous conviction when such conviction is an element of the offense affecting punishment does not deprive defendant of his right to a jury trial. *S. v. Smith*, 438.

CONSTITUTIONAL LAW — Continued

Trial court properly denied defendant's challenge to the jury venire based on defense counsel's assertion that "the court could find" that a greater preponderance of jurors were white. *S. v. Foddrell*, 546.

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial where a two year delay between indictment and trial was caused by defendant. *S. v. Davis*, 1.

The testimony of three witnesses who gave incriminating testimony against defendant was not inadmissible on the ground the police coerced the witnesses into giving perjured testimony. *S. v. Montgomery*, 235.

The fact that a witness at trial repudiated his prior sworn statement given to police officers was not sufficient, standing alone, to bring into operation the rule regarding the knowing use of perjured testimony. *Ibid.*

Prejudice resulting from pretrial word-of-mouth publicity may require a change of venue or special venire under N. C. statutes. *S. v. Boykin*, 264.

Defendant was not denied due process by trial court's failure to remove the district attorney from prosecution of the case. *S. v. Britt*, 528.

Defendant who was charged with first degree murder failed to show how the loss by the State of a knife with which deceased allegedly stabbed defendant amounted to denial of due process. *Ibid.*

Defendant was not denied his right to a speedy trial where delays were caused by his appeals. *Ibid.*

Failure of the State to submit to defendant evidence in its possession did not violate defendant's due process rights where the information allegedly withheld was not exonerative or helpful to defendant. *S. v. Thomas*, 687.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence

Trial court properly denied defendant's motion for discovery of "the original notes of the arresting officers" pertaining to the house where a homicide occurred. *S. v. Tatum*, 73.

Indigent defendant was not entitled to appointment of a private investigator at State expense. *S. v. Montgomery*, 91; *S. v. Tatum*, 73.

Defendant was not deprived of his rights to a fair trial and to confront the witnesses against him by his removal from the courtroom during the trial. *S. v. Sweezy*, 366.

Statute rendering the written report of the chemical analysis of matter in certain laboratories to determine whether it contains a controlled substance admissible as evidence in all proceedings in the district court does not apply to juvenile delinquency proceedings. *In re Arthur*, 640.

§ 32. Right to Counsel

Trial court did not err in refusing, without a hearing, to remove defendant's counsel and appoint two black lawyers in their stead. *S. v. Sweezy*, 366.

CONSTITUTIONAL LAW — Continued

§ 33. Self-incrimination

Trial court's requirement that defendant don a mask at an armed robbery trial where the victim testified her assailant had worn a similar mask did not violate defendant's right against self-incrimination. *S. v. Perry*, 284.

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where in an earlier trial the presiding judge declared a mistrial based upon two incidents affecting the jury and upon defendant's motion. *S. v. Britt*, 528.

§ 36. Cruel and Unusual Punishment

Sentence of life imprisonment is substituted for the death penalty in a prosecution for first degree rape. *S. v. Montgomery*, 91.

Sentence of life imprisonment is substituted for the death sentence imposed in a first degree murder case. *S. v. Monk*, 37; *S. v. White*, 118; *S. v. Harding*, 223; *S. v. Boykin*, 264; *S. v. Riddick*, 399; *S. v. Smith*, 505; *S. v. Britt*, 528; *S. v. Young*, 562; *S. v. Locklear*, 598; *S. v. Manuel*, 705.

Sentence of life imprisonment is substituted for the death penalty for murder committed between the Waddell decision and the rewriting of G.S. 14-17. *S. v. Montgomery*, 235.

Imposition of a life sentence upon a conviction for first degree burglary does not constitute cruel and unusual punishment. *S. v. Sweezy*, 366.

§ 37. Waiver of Constitutional Rights

When a defendant seeks a new trial by appealing his conviction, he waives his protection against reprosecution. *S. v. Britt*, 528.

Defendant's statutory right to a hearing to determine his capacity to proceed with trial subsequent to his commitment to a mental health care facility was waived by defendant's failure to assert that right. *S. v. Young*, 562.

CONTEMPT OF COURT

§ 8. Appeal and Review

A civil litigant adjudged in contempt for failing to comply with a discovery order may immediately appeal for the purpose of testing the validity of both the original order and the contempt order where the contemnor can purge himself of contempt only by complying with the discovery order. *Willis v. Power Co.*, 19.

COURTS

§ 5. Concurrent Original Jurisdiction

G.S. 7A-241 vests probate jurisdiction in the superior court to be exercised originally by the clerks as ex officio judges of probate, and the clerks and superior court judges have no concurrent jurisdiction. *In re Estate of Adamee*, 386.

§ 21. What Law Governs; As Between Laws of This and Other States

A wife injured in an automobile collision in N. C. may maintain in the courts of N. C. an action against her husband for damages on account

COURTS — Continued

of injuries received in the collision although the parties were domiciled in a state which did not permit such an action to be maintained by a wife against her husband. *Henry v. Henry*, 156.

CRIMINAL LAW

§ 9. Aiders and Abettors

Contention of one defendant in an armed robbery prosecution that the trial court should have sentenced him as the aider and abettor to a lesser sentence than that imposed upon the principal was without merit. *State v. Slade*, 275.

§ 10. Accessories Before the Fact

Defendant was properly tried as accessory before the fact to murder upon an indictment for first degree murder. *S. v. Philyaw*, 312.

Trial court properly submitted issue of defendant's guilt of accessory before the fact to murder although one of the principals had not been convicted of murder at the time of defendant's trial. *Ibid.*

§ 15. Venue

Defendant's motion for change of venue on the ground of prejudicial pretrial publicity was properly denied. *S. v. Harding*, 223.

Prejudice resulting from pretrial word-of-mouth publicity may require a change of venue or special venire under N. C. statutes. *S. v. Boykin*, 264.

Trial judge in a first degree murder case did not abuse his discretion in denial of defendant's motion for change of venue or special venire because of pretrial word-of-mouth publicity of rumors concerning defendant's participation in the crime charged or in various other criminal activities. *Ibid.*

Trial court properly denied defendant's motion for change of venue in a rape case based upon defense counsel's uncorroborated statement concerning publicity and the feeling in the community. *S. v. Foddrell*, 546.

§ 23. Plea of Guilty

In the absence of an agreement between defendants and the prosecutor, defendants were not prejudiced by the trial court's denial of their motion that prior plea bargaining negotiations be made a part of the record. *S. v. Slade*, 275.

Defendant was not entitled to a continuance as a matter of right when the trial judge rejected his negotiated plea offered prior to arraignment. *S. v. Williams*, 442.

§ 26. Plea of Former Jeopardy

Although a homicide and kidnapping were parts of one continuous transaction, defendant could properly be convicted of both first degree murder and kidnapping where kidnapping was submitted to the jury only as a separate and distinct offense and not as a basis for a possible finding of felony-murder. *S. v. Tatum*, 73.

Trial court in a felony-murder case erred in imposing additional punishment on the verdict of guilty of arson. *S. v. White*, 118.

CRIMINAL LAW — Continued

Defendant's act in firing a gun at two officers constituted two assaults for which he was properly given consecutive prison sentences. *S. v. Irick*, 480.

When a defendant seeks a new trial by appealing his conviction, he waives his protection against reprosecution. *S. v. Britt*, 528.

Defendant was not subjected to double jeopardy where in an earlier trial the presiding judge declared a mistrial based upon two incidents affecting the jury and upon defendant's motion. *Ibid.*

§ 29. Mental Capacity to Plead

Defendant's statutory right to a hearing to determine his capacity to proceed with trial subsequent to his commitment to a mental health care facility was waived by defendant's failure to assert that right. *S. v. Young*, 562.

§ 40. Evidence and Record at Former Trial or Proceeding

A 70 year old resident of Florida was unavailable within the meaning of that requirement for admission of previously recorded testimony. *S. v. Smith*, 505.

§ 43. Photographs

Gruesome photograph was admissible to illustrate testimony of a witness. *S. v. Young*, 562.

§ 44. Bloodhounds

Trial court in a burglary and assault case properly allowed testimony concerning tracking by a bloodhound. *S. v. Irick*, 480.

§ 46. Flight of Defendant as Implied Admission

Trial court in a rape case properly admitted evidence of defendant's flight. *S. v. Montgomery*, 91.

Evidence in a burglary case was sufficient to support an instruction on flight of defendant. *S. v. Irick*, 480.

§ 48. Silence of Defendant as Implied Admission

Defendant's admission on cross-examination concerning his failure to deny that he was a rape victim's assailant when she identified him at the crime scene before he had been given the Miranda warnings was competent for the purpose of impeaching defendant's testimony at the trial, but defendant's admission that he made no statement at the time the warrant for rape was served on him at the sheriff's office after he had been given the Miranda warnings and had refused to sign a waiver of his rights would have been incompetent had defendant made timely objection to the question that elicited it. *S. v. Foddrell*, 546.

§ 50. Expert and Opinion Testimony

Evidence was sufficient to support the finding of the trial court that a witness was an expert in the field of soil analysis, and the court properly allowed the witness to give his opinion that soil samples taken from defendant's car and those taken from the dirt road adjacent to the scene of the crime were from the same source. *S. v. Monk*, 37.

CRIMINAL LAW — Continued

§ 51. Qualification of Experts

Trial court did not express an opinion on the credibility of a witness in ruling in the presence of the jury that the witness was an expert. *S. v. Irick*, 480.

§ 53. Medical Expert Testimony

Trial court in a rape case properly allowed a pathologist to testify concerning a Pap smear of the victim. *S. v. Montgomery*, 91.

§ 57. Evidence in Regard to Firearms

Though the trial court in a first degree murder prosecution did not expressly find a witness to be an expert in ballistics, the court presumably found him an expert, since it admitted the witness's testimony as to the caliber of the bullet taken from the body of deceased. *S. v. Monk*, 37.

Evidence in a homicide case was sufficient to identify a .32 caliber pistol and to establish its competency, and the pistol was properly admitted without the State having shown a chain of custody. *S. v. Smith*, 505.

§ 60. Evidence in Regard to Fingerprints

The question of whether fingerprints could have been impressed only at the time a crime was committed is a question of fact for the jury. *S. v. Irick*, 480.

Provisions of the Criminal Procedure Act concerning nontestimonial identification do not apply to accused persons in custody. *Ibid.*

The district attorney was not required, by virtue of a court order providing for disclosure of evidence in the State's possession, to submit to defendant a fingerprint comparison made during an overnight recess in the course of the trial. *S. v. Thomas*, 687.

§ 61. Evidence as to Tire Tracks

Trial court properly allowed expert testimony as to tire tracks. *S. v. Monk*, 37.

§ 62. Lie Detector Test

Trial court did not err in denial of motion for mistrial made when a State's witness stated during cross-examination that he had been given a polygraph test. *S. v. Montgomery*, 235.

§ 66. Evidence of Identity by Sight

Trial court in a rape case properly allowed into evidence a photograph of a composite picture of the assailant, a photograph of a lineup shown to the victim and her companions, and in-court identifications of defendant by the victim and her companions. *S. v. Montgomery*, 91.

Defendant's objection and request for a voir dire after the witness had positively identified him in court came too late. *Ibid.*

In-court identification of defendant was not rendered inadmissible by the fact that the witness had been told by police that if he told a lie he would be prosecuted for perjury or by the fact the witness had talked to other State's witnesses before he agreed to testify. *S. v. Montgomery*, 235.

In-court identification of defendant was based on the witness's observation of defendant during the crime and on his personal acquaintance with defendant. *Ibid.*

CRIMINAL LAW — Continued

Nothing in a pretrial photographic examination of pictures by the prosecuting witness gave rise to any misidentification. *S. v. Sweezy*, 366.

Though the trial court should have made findings as to whether a lineup involving defendant was suggestive and conducive to misidentification, it was not error for the court to allow an in-court identification of defendant. *Ibid.*

Though the pretrial single exhibition of defendant to a rape victim was unnecessarily suggestive, the trial court properly determined that the victim's in-court identification of defendant was based on her observation of him at the crime scene and was not tainted by the exhibition. *S. v. Yancey*, 656.

§ 69. Telephone Conversations

Trial court in a homicide case properly allowed evidence as to a victim's telephone calls made shortly before his death. *S. v. Harding*, 223.

§ 71. "Shorthand" Statement of Fact

A witness's testimony that he saw blood on defendant's shirt was admissible as a shorthand statement of fact. *S. v. Jones*, 681.

§ 73. Hearsay Testimony

Statements made by two perpetrators of a murder to a deputy sheriff implicating defendant were not suppressible as hearsay since they were offered only for corroboration. *S. v. Philyaw*, 312.

§ 75. Tests of Voluntariness of Confession and Admissibility

Illiteracy does not render inadmissible a voluntary confession. *S. v. White*, 118.

Lapse of 45 minutes between a warning as to defendant's rights and defendant's statement did not render the statement inadmissible. *Ibid.*

An officer's expression of opinion that defendant knew something about the crime and was not telling the truth did not constitute a resumption of interrogation within the meaning of the Miranda decision. *S. v. Riddick*, 399.

There was no continued interrogation of defendant in violation of the Miranda rules after defendant asserted his right to remain silent where defendant decided to change the statement he had given to officers and invited the officers to listen while he related his revised version. *Ibid.*

The law in N. C. does not require that the issue of voluntariness of a confession be submitted to the jury. *S. v. Miley*, 431.

§ 76. Determination and Effect of Admissibility of Confession

Trial court properly found that defendant understood his constitutional rights and made a voluntary statement. *S. v. Miley*, 431.

Trial court in a rape case did not err in failing to conduct a voir dire before admitting for impeachment purposes defendant's statements to an officer that he had left his shirt and two other items at a tree at the crime scene. *S. v. Foddrell*, 546.

§ 77. Admissions and Declarations

Trial court was not required to make findings of fact as to the voluntariness of admissions by defendant to fellow prisoners. *S. v. Monk*, 37.

CRIMINAL LAW — Continued

§ 78. Stipulations

Statute permitting a defendant to admit a previous conviction when such conviction is an element of the offense affecting punishment does not deprive defendant of his right to a jury trial. *S. v. Smith*, 438.

§ 79. Acts and Declarations of Co-conspirators

Testimony of a State's witness concerning statements by a homicide victim's wife was admissible as that of a co-conspirator. *S. v. Miley*, 431.

§ 80. Books, Records and Private Writings

Trial court properly denied defendant's motion for discovery of "the original notes of the arresting officers" pertaining to the house where a homicide occurred. *S. v. Tatum*, 73.

Trial court did not err in failing to require the district attorney to furnish the truck occupied by deceased for defendant's examination pursuant to defendant's motion under former G.S. 15-155.4. *S. v. Philyaw*, 312.

§ 82. Privileged Communications

Where the validity of defendant's signatures on two documents was called into question, defendant was not prejudiced when the State called as a witness one of his attorneys who had notarized one of the documents. *S. v. Locklear*, 598.

§ 83. Competency of Husband or Wife to Testify For or Against Spouse

Trial court in a felony murder prosecution did not err in allowing into evidence the pistol used in the murder and testimony of the owner which incriminated defendant, though officers learned about the pistol and its whereabouts from defendant's wife. *S. v. Cousin*, 413.

§ 86. Credibility of Defendant

Trial court in a rape case properly allowed the prosecutor to cross-examine defendant concerning prior convictions. *S. v. Davis*, 1.

§ 87. Direct Examination of Witnesses

The State is not required to furnish defendant with the names and addresses of all the witnesses the State intends to call. *S. v. Tatum*, 73.

Where there was doubt as to whether a witness purporting to have a refreshed recollection was indeed testifying from his own recollection, the use of such testimony was dependent upon the credibility of the witness and was a question for the jury. *S. v. Smith*, 505.

Trial court properly allowed leading questions to elicit testimony from the 13 year old son of the murder victim who witnessed the murder. *S. v. Britt*, 528.

Defendant was not prejudiced where the trial court allowed a witness whose name was not on the list furnished to defense counsel to testify. *S. v. Britt*, 528; *S. v. Smith*, 505.

§ 89. Corroboration of Witnesses

The trial court in a second degree rape case did not err in allowing a physician who examined the victim to give testimony corroborating that of the prosecuting witness, and discrepancy in minor details would not warrant a new trial. *S. v. Davis*, 1.

CRIMINAL LAW — Continued

A detective's testimony concerning his conversation with a rape victim was admissible for corroboration. *S. v. Montgomery*, 91.

§ 91. Continuance

Defendant was not entitled to a continuance as a matter of right when the trial judge rejected his negotiated plea offered prior to arraignment. *S. v. Williams*, 442.

§ 92. Consolidation and Severance of Counts

Consolidation of three murder charges was not rendered improper by the admission into evidence of dying declarations of one of the victims. *S. v. Harding*, 223.

District attorney's motion for joinder of defendants' cases made at the beginning of trial was not required to be in writing. *S. v. Slade*, 275.

Joinder of cases against defendants was proper where each defendant was charged with the same offense of armed robbery. *Ibid.*

Trial court properly consolidated for trial two charges for first degree burglary and two for assualt with a firearm upon an officer. *S. v. Irick*, 480.

Consolidation for trial of charges against defendants for murder committed during a robbery was not rendered improper because certain evidence would not have been admissible against one defendant in a separate trial or because such defendant offered no evidence and was denied the last jury argument. *S. v. Smith*, 505.

§ 93. Order of Proof

A State's witness was properly allowed to give rebuttal testimony which contradicted testimony by defendant. *S. v. Jones*, 681.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced by a witness's reference to another offense committed by him where the evidence was immediately withdrawn from the jury's consideration. *S. v. Perry*, 284.

§ 98. Presence of Defendant; Custody of Defendant or Witnesses

Defendant was not entitled to mistrial on the ground some jurors viewed defendant in handcuffs while he was being escorted from the jail building to the courthouse. *S. v. Montgomery*, 235.

Defendant was denied his right to be present at the jury selection where the State breached an agreement to give defendant a half day's notice that his case would be called and when defendant arrived in court the jury had been selected. *S. v. Hayes*, 293.

Defendant was not deprived of his rights to a fair trial and to confront the witnesses against him by his removal from the courtroom during the trial. *S. v. Sweezy*, 366.

§ 102. Argument and Conduct of District Attorney or Counsel

District attorney's comment on defendant's credibility in his jury argument was proper. *S. v. Davis*, 1.

Prosecutor's comments on the veracity of a witness in his jury argument were not prejudicial to defendant. *S. v. Monk*, 37.

In a prosecution for accessory before the fact to forgery and uttering forged instruments, defendant was not prejudiced by district attorney's statement that "this is where perhaps a voir dire would be appropriate to establish conspiracy." *S. v. Sauls*, 253.

Trial court erred in refusing to permit defense counsel to tell the jury in his final argument that the law prescribed mandatory life imprisonment for first degree burglary. *S. v. Irick*, 480.

Defendant was not denied due process by trial court's failure to remove the district attorney from prosecution of the case. *S. v. Britt*, 528.

Defendant was not prejudiced by the district attorney's characterization of him during jury argument as a "cold-blooded, deliberate murderer." *Ibid.*

District attorney in a first degree murder case did not improperly argue self-defense to the jury. *Ibid.*

District attorney's argument that "The State had to put [a named witness] up. He's a friend of the defendants. He's the kind of person they run around with," did not improperly attempt to impeach both the character of a State's witness and the character of defendants themselves. *S. v. Smith*, 505.

Improper jury argument by a private prosecutor was not prejudicial to defendant. *S. v. Young*, 562.

District attorney's waiving of handcuffs before jury and his arguments that the felony-murder rule applied, that defendant should have produced a certain witness, and that defendant and his cohorts were the lowest of crooks were not improper. *S. v. Locklear*, 598.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court in an armed robbery prosecution did not express an opinion by referring to one defendant as the principal and the other defendant as the aider and abettor. *S. v. Slade*, 275.

§ 117. Charge on Credibility of Witness

Trial court's instruction in a rape case that the jury should consider evidence of the victim's reputation for credibility only was proper. *S. v. Davis*, 1.

§ 119. Requests for Instructions

Defendant's request for an instruction in a rape case was properly denied where such instruction would have amounted to an expression of opinion by the court. *S. v. Davis*, 1.

§ 126. Polling the Jury and Acceptance of Verdict

Trial court's response to question of a juror during polling of the jury was not prejudicial. *S. v. Asbury*, 164.

§ 128. Discretionary Power of Trial Court to Order Mistrial

Defendant was not entitled to mistrial on the ground some jurors viewed defendant in handcuffs while he was being escorted from the jail building to the courthouse. *S. v. Montgomery*, 235.

Trial court did not err in failing to declare mistrial because of a question asked defendant on cross-examination where the question was asked

CRIMINAL LAW — Continued

in good faith based on an extra-judicial statement of a third person. *S. v. Smith*, 505.

A motion for mistrial in a case less than capital is addressed to the trial judge's discretion. *S. v. Yancey*, 656.

§ 131. New Trial for Newly Discovered Evidence

Trial court in a first degree burglary case properly denied defendant's motion for a new trial on the ground of newly discovered evidence. *S. v. Beaver*, 137.

Defendant's motion for a new trial on the ground of newly discovered evidence was properly denied where such evidence consisted of testimony which would have been incompetent in a new trial. *S. v. Sauls*, 253.

§ 134. Form and Requisites of Judgment or Sentence

Where the trial judge after verdict ordered that prayer for judgment be continued until the next criminal term, and the presiding judge at that term conducted a hearing before entering judgment, sentence was properly imposed. *S. v. Sauls*, 253.

§ 140. Concurrent and Cumulative Sentences

Defendant's act in firing a gun at two officers constituted two assaults for which he was properly given consecutive prison sentences. *S. v. Irick*, 480.

§ 141. Sentence for Repeated Offenses

Statute permitting a defendant to admit a previous conviction when such conviction is an element of the offense affecting punishment does not deprive defendant of his right to a jury trial. *S. v. Smith*, 438.

§ 147. Motions in the Supreme Court

Defendant who made no motion to quash the bill of indictment could properly raise the issue of its sufficiency on appeal. *S. v. Beaver*, 137.

§ 154. Case on Appeal

Cost of mimeographing part of the record on appeal concerning the selection of the jury to which no assignment of error related is taxed against defendant's attorney. *S. v. Montgomery*, 91.

§ 162. Objections, Exceptions and Assignment of Error to Evidence

Defendants were not prejudiced by failure of trial court on one occasion to rule on an objection during the State's cross-examination of one defendant. *S. v. Smith*, 505.

An assertion that evidence was obtained in violation of defendant's constitutional rights does not prevent the operation of the rule that the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered. *S. v. Foddrell*, 546.

§ 166. The Brief

Counsel for defendant is taxed with cost of mimeographing part of the record on appeal because of lengthy statement of facts in the brief. *S. v. Monk*, 37.

Assignments of error not discussed in the brief are deemed abandoned. *S. v. Riddick*, 399.

DAMAGES

§ 11. Punitive Damages

While punitive damages are not allowed for breach of contract, an identifiable tort which constitutes or accompanies a breach of contract may give rise to a claim for punitive damages. *Newton v. Insurance Co.*, 105.

Aggravated conduct in addition to actionable fraud is not necessary for an award of punitive damages. *Ibid.*

§ 12. Sufficiency of Pleading of Damages

Trial court properly dismissed plaintiff's claim for punitive damages for defendant insurer's failure to pay plaintiff's claim for loss by theft or burglary. *Newton v. Insurance Co.*, 105.

DEATH

§ 4. Time Within Which Action for Wrongful Death Must be Instituted

The ten year limitation in the proviso of G.S. 1-15(b) applies only to cases in which bodily injury or defect in property was not readily apparent to claimant at the time of its origin. *Raftery v. Construction Co.*, 180.

Action for wrongful death allegedly caused by a defect in a crane manufactured by defendant 19 years prior to intestate's injury was not barred by the 10-year limitation in the proviso of G.S. 1-15(b) or by the three-year limitation of G.S. 1-52(5). *Ibid.*

DEEDS

§ 12. Estates Created by Construction of the Instrument

Conveyances executed after 1 January 1968 in which there are inconsistent clauses shall be construed in accordance with G.S. 39-1.1 so as to effectuate the intent of the parties as it appears from all the provisions of the instrument so long as such construction does not prevent the application of the rule in Shelley's case. *Whetsell v. Jernigan*, 128.

§ 15. Estates Upon Special Limitations

Clause in an 1884 deed providing for reverter of title to the grantor is not valid and effective when it appears only at the end of the description and is not referred to elsewhere in the deed. *Whetsell v. Jernigan*, 128.

ELECTRICITY

§ 3. Rates

The Utilities Commission acted within its statutory authority in permitting a power company to utilize a fossil fuel adjustment clause as an adjunct, or rider, to its regular rate schedule. *Utilities Comm. v. Edmisten*, 327; *Utilities Comm. v. Edmisten*, 361.

Utilities Commission's ex parte order allowing a fuel adjustment clause to be placed into effect on an interim basis did not violate due process. *Utilities Comm. v. Edmisten*, 327.

ELECTRICITY — Continued

Utilities Commission had authority to approve a fossil fuel adjustment clause when the utility had only applied for a coal adjustment clause. *Utilities Comm. v. Edmisten*, 361.

The Utilities Commission did not err in eliminating textile mill, high load factor and military service schedules for electricity and placing customers formerly in those schedules in a general service classification. *Utilities Comm. v. Edmisten*, 424.

The Utilities Commission did not err in relying on a power company's cost-of-service study based on systemwide retail data in both N. C. and S. C. *Ibid.*

Utilities Commission had no authority to permit a power company to impose a surcharge for the recovery of excess costs of fossil fuel burned during the two months immediately preceding the termination of the Fuel Adjustment Clause by G.S. 62-134(e). *Utilities Comm. v. Edmisten, Atty. General*, 451.

EXECUTORS AND ADMINISTRATORS

§ 5. Attack on Appointment of Personal Representative

Separation agreement was rescinded when the parties resumed living together in the marital home irrespective of whether they resumed sexual relations, and the wife was entitled to qualify as administratrix of the husband's estate. *In re Estate of Adamee*, 386.

FORGERY

§ 2. Prosecution and Punishment

Evidence was sufficient for the jury in a prosecution for accessory before the fact to forgery and uttering forged instruments. *S. v. Sauls*, 253.

State's evidence that defendant, without the payee's authorization or consent, endorsed the payee's name to a check and negotiated the check was sufficient for the jury in a prosecution for forgery irrespective of whether any person was actually defrauded. *S. v. Williams*, 442.

HOMICIDE

§ 8. Effect of Intoxication Upon Mental Capacity

Since voluntary intoxication is not a defense to a charge of arson, it likewise is not a defense to a charge of felony-murder having as its underlying felony the crime of arson. *S. v. White*, 118.

§ 12. Indictment

Defendant was properly tried as accessory before the fact to murder upon an indictment for first degree murder. *S. v. Philyaw*, 312.

§ 16. Dying Declarations

Consolidation of three murder charges was not rendered improper by the admission into evidence of dying declarations of one of the victims. *S. v. Harding*, 223.

HOMICIDE — Continued

The fact that a homicide victim made statements implicating defendant in which he did not express a fear of death did not invalidate later statements to the same effect which clearly qualified as dying declarations. *Ibid.*

Trial court in a felony murder prosecution properly allowed into evidence dying declarations made by one of the victims. *S. v. Cousin*, 413.

§ 20. Demonstrative Evidence; Physical Objects and Photographs

Trial court in a felony murder prosecution did not err in allowing into evidence the pistol used in the murder and testimony of the owner which incriminated defendant, though officers learned about the pistol and its whereabouts from defendant's wife. *S. v. Cousin*, 413.

Evidence in a homicide case was sufficient to identify a .32 caliber pistol and to establish its competency, and the pistol was properly admitted without the State having shown a chain of custody. *S. v. Smith*, 505.

Gruesome photograph was admissible to illustrate testimony of a witness. *S. v. Young*, 562.

§ 21. Sufficiency of Evidence

Evidence in a first degree murder case was sufficient for the jury where it tended to show death by shooting. *S. v. Harding*, 223.

Trial court properly submitted issue of defendant's guilt of accessory before the fact to murder although one of the principals had not been convicted of murder at the time of defendant's trial. *S. v. Philyaw*, 312.

Evidence was sufficient for the jury in a prosecution for homicide of a convenience store employee during a robbery. *S. v. Cousin*, 413.

Evidence was sufficient for the jury in prosecution of two defendants for the murder of two motel employees. *S. v. Smith*, 505.

Evidence was insufficient for the jury in a prosecution against defendant for manslaughter of her baby. *S. v. Everhart*, 700.

State's evidence was sufficient for the jury in a prosecution for first degree murder committed during the attempted robbery in the victim's home. *S. v. Manuel*, 705.

§ 26. Instructions on Second Degree

Trial judge was required to instruct the jury that if they were satisfied beyond a reasonable doubt that defendant intentionally inflicted a wound upon deceased with a deadly weapon which proximately caused his death, it would be their duty to return a verdict of guilty of murder in the second degree. *S. v. Jones*, 681.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Charge on involuntary manslaughter was not required where all the evidence showed deceased was fatally wounded when defendant intentionally discharged his pistol under circumstances naturally dangerous to human life. *S. v. Redfern*, 319.

Trial court in a prosecution for first degree murder did not err in failing to submit the issue of defendant's guilt of manslaughter. *S. v. Jones*, 681.

HOMICIDE — Continued

§ 31. Verdict and Sentence

Although a homicide and kidnapping were parts of one continuous transaction, defendant could properly be convicted of both first degree murder and kidnapping where kidnapping was submitted to the jury only as a separate and distinct offense and not as a basis for a possible finding of felony-murder. *S. v. Tatum*, 72.

Trial court in a felony-murder case erred in imposing additional punishment on the verdict of guilty of arson. *S. v. White*, 118.

Sentence of death imposed for first degree murder is vacated and sentence of life imprisonment is substituted therefor. *S. v. Tatum*, 73; *S. v. Monk*, 37; *S. v. White*, 118; *S. v. Harding*, 223; *S. v. Boykin*, 264; *S. v. Riddick*, 399; *S. v. Britt*, 528; *S. v. Smith*, 505; *S. v. Young*, 562; *S. v. Locklear*, 598; *S. v. Manuel*, 705.

Sentence of life imprisonment is substituted for the death penalty for murder committed between the Waddell decision and the rewriting of G.S. 14-17. *S. v. Montgomery*, 235.

HUSBAND AND WIFE

§ 7. Right of Spouse to Maintain Action in Tort Against Other Spouse

A wife injured in an automobile collision in N. C. may maintain in the courts of N. C. an action against her husband for damages on account of injuries received in the collision although the parties were domiciled in a state which did not permit such an action to be maintained by a wife against her husband. *Henry v. Henry*, 156.

§ 12. Revocation and Rescission of Separation Agreement

Where a husband and wife resumed cohabitation in the marital home, their action amounted to a resumption of marital cohabitation, irrespective of whether they had resumed sexual relations, which would rescind a prior separation agreement. *In re Estate of Adamee*, 386.

INFANTS

§ 10. Commitment of Minors for Delinquency

Statute rendering the written report of the chemical analysis of matter in certain laboratories to determine whether it contains a controlled substance admissible as evidence in all proceedings in the district court does not apply to juvenile delinquency proceedings. *In re Arthur*, 640.

INSANE PERSONS

§ 1. Commitment of Insane Persons to Hospitals

Appeal from an involuntary commitment order was not rendered moot by the expiration of the 90-day commitment. *In re Hatley*, 693.

Trial court's finding that respondent was imminently dangerous to herself and others was not supported by testimony of respondent's mother or by a medical report based upon the facts testified to by respondent's mother. *Ibid.*

INSURANCE

§ 116. Fire Insurance Rates

Fire Insurance Rating Bureau properly withdrew an extended coverage rate filing before the Commissioner of Insurance took any action thereon and before the filing could go into effect pursuant to the "deemer" provision. *Comr. of Insurance v. Rating Bureau*, 55.

A withdrawn rate filing would be competent in evidence at a properly convened hearing before the Commissioner of Insurance pursuant to G.S. 58-131.2. *Ibid.*

Statute and rules of the Insurance Advisory Board forbid the Comr. of Insurance, acting on his own motion, to order a material reduction in premium rates for extended coverage insurance without notice and without a hearing upon the merits of such rate change. *Ibid.*

Failure of the Rating Bureau to request a hearing on the merits of extended coverage rates pursuant to G.S. 58-131.5 did not obviate the necessity of a public hearing where the Rating Bureau had withdrawn its filing and had no notice that the Commissioner of Insurance contemplated a change in the premium rate pursuant to an independent investigation as authorized by G.S. 58-131.2. *Comr. of Insurance v. Rating Bureau*, 55.

A decrease of 19% in extended coverage rates is a material change in the rate level within the meaning of the Insurance Advisory Board rule requiring a public hearing when such a change is involved. *Ibid.*

The "deemer" provision of G.S. 58-131.1 has application only when there is before the Commissioner of Insurance for his approval a filing by the Rating Bureau. *Ibid.*

JUDGES

§ 5. Recusation of Judges

It was improper for the trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings. *Bank v. Gillespie*, 303.

JURY

§ 5. Selections; Personal Disqualifications

Trial court properly denied defendant's challenge for cause of a juror who stated that he worked with the brother of the State's chief witness and that he was friendly with several police officers. *S. v. Tatum*, 73.

Defendants have no cause for complaint that two jurors were chosen from additional talismen summoned by an officer when the regular venire was exhausted. *S. v. Smith*, 505.

§ 6. Examination of Jurors

Trial judge did not err in refusing to permit defense counsel to ask prospective jurors whether they had heard certain rumors about defendant where defendant did not request that jurors be separately examined. *S. v. Boykin*, 264.

It was not error for the district attorney in a rape prosecution to ask a prospective juror whether he believed in capital punishment. *S. v. Foddrell*, 546.

JURY — Continued

§ 7. Challenges

Trial court in a first degree murder prosecution properly allowed the State's challenges for cause of jurors opposed to the death penalty. *S. v. Monk*, 37; *S. v. Montgomery*, 235; *S. v. Smith*, 505.

Trial court did not err in refusing to allow defendant's challenge for cause of a juror who had formed an opinion as to defendant's guilt but stated he could render a fair verdict. *S. v. Sweezy*, 366.

Trial court properly excused jurors because of their death penalty views without giving defendants a chance to "rehabilitate" the jurors. *S. v. Smith*, 505.

Trial court properly denied defendant's challenge to the jury venire based on defense counsel's assertion that "the court could find" that a greater preponderance of jurors were white. *S. v. Foddrell*, 546.

Defendants were not denied a representative jury by the State's use of peremptory challenges to exclude blacks from the jury. *S. v. Tatum*, 73; *S. v. Smith*, 505.

LARCENY

§ 8. Instructions

Where the only stolen articles found in defendant's possession were cuff links not listed in the indictment, court should have instructed that in order for the doctrine of possession of recently stolen property to apply the jury must find the cuff links were stolen at the same time and place as the items listed in the indictment. *S. v. Fair*, 171.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action

Action for wrongful death allegedly caused by a defect in a crane manufactured by defendant 19 years prior to intestate's injury was not barred by the 10-year limitation in the proviso of G.S. 1-15(b) or by the three-year limitation of G.S. 1-52(5). *Raftery v. Construction Co.*, 180.

The ten year limitation in the proviso of G.S. 1-15(b) applies only to cases in which bodily injury or defect in property was not readily apparent to claimant at the time of its origin. *Ibid.*

NARCOTICS

§ 3. Competency and Relevancy of Evidence

Statute rendering the written report of the chemical analysis of matter in certain laboratories to determine whether it contains a controlled substance admissible as evidence in all proceedings in the district court does not apply to juvenile delinquency proceedings. *In re Arthur*, 640.

§ 4. Sufficiency of Evidence

State's evidence was sufficient for the jury to find all 19 envelopes found in defendant's house contained marijuana although the contents of only five envelopes were analyzed. *S. v. Hayes*, 293.

NEGLIGENCE

§ 12. Doctrine of Last Clear Chance

While some pleading alleging last clear chance is necessary for plaintiff to prove last clear chance at trial, the doctrine need not be pleaded in a reply, since a plaintiff may receive the benefit of the doctrine if the facts alleged in the complaint are sufficient to raise that issue. *Vernon v. Crist*, 646.

§ 23. Pleading Last Clear Chance

Plaintiff's complaint was sufficient to raise the issue of last clear chance. *Vernon v. Crist*, 646.

§ 39. Instructions on Last Clear Chance

Evidence was sufficient for submission of the issue of last clear chance in an action to recover for injuries received by plaintiff when defendant drove a car forward while plaintiff was leaning against or sitting on the trunk of the car. *Vernon v. Crist*, 646.

§ 57. Sufficiency of Evidence in Actions by Invitees

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant swimming facility operator in failing to control "horseplay" by other swimmers. *Manganello v. Permastone, Inc.*, 666.

PROCESS

§ 14. Service of Process on Foreign Corporation by Service on Secretary of State

Defendant, a foreign corporation, was subject to the in personam jurisdiction of this State where it actively bought and sold coins in this State. *Dillon v. Funding Corp.*, 674.

RAPE

§ 3. Indictment

Where the indictment upon which defendant was tried charged common law rape, the language was sufficient to embrace second degree rape. *S. v. Davis*, 1.

Where the indictment was sufficient to charge rape in the second degree but not sufficient to charge rape in the first degree, a conviction for first degree rape could not stand even though the evidence was sufficient to support a conviction for first degree rape. *S. v. Perry*, 586.

§ 5. Sufficiency of Evidence

Evidence in a second degree rape case was sufficient to show that the alleged carnal knowledge of the prosecuting witness was consummated by force. *S. v. Yancey*, 656.

§ 6. Submission of Lesser Degrees of the Crime

In a rape case where consent was the only issue, submission of lesser degrees of the crime to the jury was improper. *S. v. Davis*, 1.

Trial court in a rape case did not err in failing to submit lesser offenses to the jury. *S. v. Foddrell*, 546.

RAPE — Continued

§ 7. Verdict and Judgment

Sentence of life imprisonment is substituted for the death penalty in a prosecution for first degree rape. *S. v. Montgomery*, 91.

Where the jury found defendant guilty of first degree rape but the indictment was sufficient to charge only second degree rape, entry of judgment imposing a sentence for second degree rape was proper. *S. v. Perry*, 586.

ROBBERY

§ 5. Instructions

Trial court's jury instructions in an armed robbery prosecution as to the requirement that the life of the victim was endangered or threatened by use of a firearm did not prejudice defendants. *S. v. Slade*, 275.

§ 6. Verdict and Sentence

Contention of one defendant in an armed robbery prosecution that the trial court should have sentenced him as the aider and abettor to a lesser sentence than that imposed upon the principal was without merit. *S. v. Slade*, 275.

RULES OF CIVIL PROCEDURE

§ 26. Depositions and Discovery

In responding to interrogatories requesting defendant to identify certain documents, defendant should have identified those documents which met the relevancy requirements of Rule 26(b)(1) even if the documents may not be discoverable because they are privileged or fall within the trial preparation immunity. *Willis v. Power Co.*, 19.

While the relevancy requirements of Rule 26 are mandatory, a discretionary protective order may be granted under Rule 26(c) even as to relevant material. *Ibid.*

The protection of the attorney-client privilege under Rule 26 is absolute. *Ibid.*

The trial preparation immunity of Rule 26(b) protects any materials prepared in anticipation for any litigation by the party from whom discovery is sought, including materials prepared for litigation between different parties which was terminated prior to the pending case. *Ibid.*

A plaintiff may be allowed discovery of materials subject to the trial preparation immunity upon a showing of "substantial need" and "undue hardship." *Ibid.*

Information in all of defendant's claims files relating to shocks or burns wherever and whenever they may have occurred would be neither relevant to plaintiff's claim against defendant nor likely to lead to relevant information and would fall outside the scope of discovery provided by Rule 26(b)(1). *Ibid.*

Trial court erred in prohibiting defendant from taking the deposition of an out of state expert witness based on the court's previous order barring further discovery. *Transportation, Inc. v. Strick Corp.*, 618.

The fact that a party seeking discovery had knowledge of the information as to which discovery is sought is not grounds for objection. *Ibid.*

RULES OF CIVIL PROCEDURE — Continued

No good cause was shown supporting the trial court's order prohibiting further discovery by defendant. *Ibid.*

§ 34. Discovery and Production of Documents for Inspection

Order holding defendant in contempt for failure to comply with an order to produce documents and failure to answer a specified interrogatory was erroneous. *Willis v. Power Co.*, 19.

Order for production of documents under former Rule 34 was erroneous where it was not based upon a showing or finding of good cause. *Ibid.*

§ 50. Motion for a Directed Verdict

The Court of Appeals, upon finding that defendant was erroneously denied a directed verdict at the close of all the evidence, erred in directing entry of judgment for defendant notwithstanding the verdict for plaintiffs. *Britt v. Allen*, 630.

Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. *Manganello v. Permastone, Inc.*, 666.

§ 54. Judgments

Rule 54(b) did not bar appellate review of order dismissing plaintiff's claim for punitive damages for failure to state a claim for relief even though the order did not expressly determine "there was no just reason for delay." *Newton v. Insurance Co.*, 105.

Plaintiff could appeal from a partial summary judgment which affected a substantial right of plaintiff in the absence of a finding by the trial court that there was "no just reason for delay." *Nasco Equipment Co. v. Mason*, 145.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Defendant had no standing to assert an unlawful search of the exterior of his car located in a garage belonging to another person. *S. v. Monk*, 37.

Officers executing a warrant to search premises occupied by defendant's parents and cousin properly seized a pair of tennis shoes belonging to defendant which were in plain view through an open door. *S. v. Riddick*, 399.

§ 2. Consent to Search

Defendant's consent to a second search of his home was not a mere acquiescence and was voluntary. *S. v. Riddick*, 399.

§ 3. Requisites and Validity of Search Warrant

It was not necessary that an affidavit to obtain a search warrant contain all the evidence presented to the issuing officer. *S. v. Hayes*, 293.

Affidavit was sufficient to show that marijuana was being possessed in the premises to be searched and that a confidential informant was reliable. *Ibid.*

SEARCHES AND SEIZURES — Continued

Affidavit was sufficient to support issuance of a warrant to search defendant's home for tennis shoes, a murder weapon, and loot stolen from the victim's home. *S. v. Riddick*, 399.

§ 4. Search Under the Warrant

Officers properly seized three pairs of tennis shoes pursuant to a warrant authorizing a search for tennis shoes with a diamond tread. *S. v. Riddick*, 399.

STATUTES

§ 4. Construction in Regard to Constitutionality

Where one of two reasonable constructions of a statute will raise a serious constitutional question, the construction which avoids this question should be adopted. *In re Arthur*, 640.

TAXATION

§ 26. Franchise Taxes

A corporate taxpayer using the installment method of accounting for income tax purposes may not deduct deferred income taxes on installment sales from surplus in determining its franchise tax base. *Realty Corp. v. Coble*, 608.

UNIFORM COMMERCIAL CODE

§ 16. Title; Good Faith Purchasers

Title to a loadster passed at the time of its delivery by plaintiff to defendant where there was no "explicit agreement" to the contrary. *Nasco Equipment Co. v. Mason*, 145.

Plaintiff's allegations of title retention of a loadster delivered to defendant dealer were not of themselves sufficient to allow any inference of a consignment. *Ibid.*

§ 71. Particular Transactions

There was no genuine issue of material fact as to plaintiff's contention that a transaction between plaintiff and defendant involving a loadster was a consignment. *Nasco Equipment Co. v. Mason*, 145.

§ 73. Security Agreement and Rights of Parties Thereto

Since the debtor acquired possession of goods, the seller would have been required to execute a written security agreement to render its security interest created by retention of title to the goods enforceable. *Nasco Equipment Co. v. Mason*, 145.

Evidence of a bank was sufficient to show as a matter of law that the bank had valid and enforceable security interest in a loadster in the possession of defendant. *Ibid.*

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

The Utilities Commission acted within its statutory authority in permitting a power company to utilize a fossil fuel adjustment clause as an

UTILITIES COMMISSION — Continued

adjunct, or rider, to its regular rate schedule. *Utilities Comm. v. Edmisten,* 327; *Utilities Comm. v. Edmisten,* 361.

Utilities Commission's ex parte order allowing a fuel adjustment clause to be placed into effect on an interim basis did not violate due process. *Utilities Comm. v. Edmisten,* 327.

Utilities Commission had authority to approve a fossil fuel adjustment clause when the utility had only applied for a coal adjustment clause. *Utilities Comm. v. Edmisten,* 361.

The Utilities Commission did not err in eliminating textile mill, high load factor and military service schedules for electricity and placing customers formerly in those schedules in a general service classification. *Utilities Comm. v. Edmisten,* 424.

The Utilities Commission did not err in relying on a power company's cost-of-service study based on system-wide retail data in both N. C. and S. C. *Utilities Comm. v. Edmisten,* 424.

Utilities Commission had no authority to permit a power company to impose a surcharge for the recovery of excess costs of fossil fuel burned during the two months immediately preceding the termination of the Fuel Adjustment Clause by G.S. 62-134(e). *Utilities Comm. v. Edmisten, Atty. General,* 451.

Until an order of the Utilities Commission in a rate case became final by expiration of the time allowed for appeal, the Commission was authorized to reconsider its previously issued order upon the record already compiled. *Utilities Comm. v. Edmisten,* 575.

There is no merit in the contention that upon reconsideration of a rate order the Commission may make a substantial change in the relief allowed only if (1) the original order was predicated upon an error of law or (2) there has been a showing of a change of condition. *Ibid.*

Commission did not err in considering the earnings of 24 electric utilities as shown in Moody's Investment Service in determining a fair rate of return to be allowed a power company. *Ibid.*

Commission properly allowed a power company to earn a rate of return of 5.30% on the fair value of its properties upon reconsideration of an order which had allowed a rate return of 3.72%. *Ibid.*

An electric utility was entitled to a rate of return adequate to attract capital in the marketplace even though the utility contemplated no substantial expansion of its plant. *Ibid.*

WITNESSES

§ 1. Competency

The State is not required to furnish defendant with the names and addresses of all the witnesses the State intends to call. *S. v. Tatum,* 73.

Defendant was not prejudiced where the trial court allowed a witness whose name was not on the list furnished to defense counsel to testify. *S. v. Britt,* 528; *S. v. Smith,* 505.

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