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SUPREME COURT OF NORTH CAROLINA

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OF
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* Appointed effective 18 July 1977.

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[1] Resigned 1 June 1977.
[2] Retired 31 July 1977.

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[1] Retired 31 July 1977. Succeeded by E. Alex Erwin, Jacksonville, 12 August 1977.
[2] Retired 31 August 1977.
[3] Appointed Chief Judge 6 September 1977.
[4] Appointed 6 September 1977.
[5] Appointed Chief Judge 15 July 1977.
[6] Resigned 30 June 1977. Succeeded by Joseph Andrew Williams, Greensboro, 18 July 1977.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1977

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 90

(Filed 8 February 1977)

1. **Insurance § 79.1— N. C. Automobile Rate Administrative Office — responsibilities**

The N. C. Automobile Rate Administrative Office has the responsibility of maintaining rules and regulations and fixing rates for automobile bodily injury and property damage insurance, of promulgating and preparing rates for motor vehicle liability insurance, and of maintaining and furnishing to the Commissioner of Insurance the statistics on income derived from member companies from the investment of unearned premium reserves on automobile liability policies written in this state. G.S. 58-246.

2. Insurance §§ 1, 79.1— rate fixing — power of Commissioner and Rate Office

The N. C. Automobile Rate Administrative Office is vested with the primary authority to fix, adjust and propose rates, and the Commissioner of Insurance does not have concurrent authority with the Rate Office to fix or reduce rates.

3. Insurance § 79.1— proposed rate increase — approval of all or part or none by Commissioner — decrease improper

When there is a filing for a proposed change in insurance rates pursuant to G.S. 58-248, the Rate Office may amend its filing so as to propose a smaller increase than that proposed in the original filing, but in the absence of such amendment, the Commissioner of Insurance upon proper findings of fact supported by substantial evidence may approve all of the increase proposed by the Rate Office, approve a part of the proposed increase, or disapprove the entire proposed increase; however, nothing in G.S. 58-248 authorizes the Commissioner to order a reduction in then existing rates.

4. Insurance § 79.1— proposed rate increase — authority of Commissioner to order revision

In this proceeding under G.S. 58-248 in which the filing proposed an increase in insurance rates the Insurance Commissioner was without authority to fix a rate reducing the then existing rate; however, upon a determination in this proceeding that the rates charged or filed were excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest, the Commissioner could have properly exercised the authority granted to him by G.S. 58-248.1 and issued an order to the Rate Office directing that rates then existing or rates proposed in the filing before him be altered or revised in the manner and to the extent stated in such order to produce rates which were reasonable, adequate, not unfairly discriminatory and in the public interest. Such order would allow the Rate Office, the agency which possesses the primary authority to fix a just and adequate rate, an opportunity to propose adjustments in conformity with his decision.

5. Insurance § 79.1— proposed rate decrease — authority of Commissioner to order greater decrease

The Commissioner of Insurance exceeded his statutory authority where the N. C. Automobile Rate Administrative Office requested a 13.3% reduction in bodily injury insurance rates, but the Commissioner ordered a 23.8% decrease in such rates thereby reducing existing rates in excess of the requested decrease without resorting to the authority granted him by the provisions of G.S. 58-248.1.

6. Insurance § 79.1— property damage insurance rate change — failure to consider certain investment income

Evidence was sufficient to support findings by the Commissioner of Insurance that investment income from loss reserves and unearned premium reserves was not taken into account by the Rate Office in formulating its proposed rate changes for property damage insurance; and such investment profits data was relevant and material for rate-

making purposes, since G.S. 58-248 specifically provided that such information could be included in the rate-making formula in order to arrive at a fair and equitable rate.

7. Insurance § 79.1— rate change proposal — no limitation on evidence to be considered

G.S. 58-248 does not restrict the Insurance Commissioner, in considering a rate change proposal, to consideration of statistical data furnished by the Rate Office, and he may consider evidence from other sources if it is otherwise competent.

8. Insurance § 79.1— hearings on proposed rate change — "fast track" data — effect of energy crisis — admissibility of evidence

In hearings on a proposal to revise insurance rates charged for bodily injury and property damage liability insurance applicable to private passenger automobiles, certain "fast track" data which would indicate what effect, if any, the "energy crisis" was having on insurance companies' loss experience was not inadmissible *per se*, since rules adopted by the Insurance Advisory Board and in effect at the time of the hearings in question provided that all evidence of any type having reasonable probative value was admissible, and any evidence of the type upon which responsible persons were accustomed to rely in the conduct of insurance affairs was deemed to have reasonable probative value.

9. Insurance § 79.1— rate reduction — effect of energy crisis — insufficiency of evidence

Findings by the Insurance Commissioner which resulted in a 5% supplementary reduction in the rate level for property damage insurance were unsupported by substantial and material evidence where such findings were based on testimony by an out-of-state expert witness as to his theories concerning the effect of economic conditions and the energy crisis on N. C. drivers.

10. Insurance § 79.1— proposed rate increase — trending factor — different application by Commissioner and Rate Office

Though in the Rate Office's proposal for increased insurance rates property damage insurance trends were measured separately for paid claim costs and paid claim frequency, it was not error for the Commissioner of Insurance to apply the trending factor to the composite of average paid claim cost and frequency or the average loss cost per automobile.

11. Insurance § 79.1— proposed rate change — trending loss experience

The Commissioner of Insurance is considered to be a specialist in the field of insurance and his projection of past experience and present conditions into the future is assumed to be correct and proper if supported by substantial evidence; expert testimony, otherwise competent, that a trend upward or downward may reasonably be expected to continue into the future is evidence of reasonable and related factors which the Commissioner may consider in making his projections. Moreover, G.S. 58-248 does not require that procedures and methods for trending loss experience for the future shall be frozen.

12. Insurance § 79.1— proposed rate change — trending period cut-off date — error by Insurance Commissioner

Where the Rate Office selected 1 March 1976 as the trending period cut-off date, but the Insurance Commissioner trended the loss experience only until 1 April 1975, which was the projected effective date of the proposed rate revisions, the Commissioner failed to accomplish the purpose of G.S. 58-248 which contemplates a trending method which, on the basis of trends in past loss experience, projects the losses to be anticipated during the future period in which the proposed rates will be in effect.

13. Insurance § 79.1— proposed rate change — trending past loss experience to future date — unity trend factor

In trending past loss experience to a future date, the Commissioner of Insurance did not err in using a unity trend factor for the year of the energy crisis, the effect of which was to give no consideration for that period for the Commissioner's projection as to property damage rates, since the Commissioner's use of the unity trend factor was based on the evidence and testimony of an expert witness, and since the insurance companies benefited by the use of such factor.

14. Insurance § 79.1— proposed rate change — retroactive rate-making

Rate-making is a process which envisions a projection of past experience into the future to provide for a reasonable profit and nothing more; however, should hindsight reveal that rates validly instituted have failed to produce a reasonable profit, this would not warrant a recoupment of that deficit by an otherwise unjustified increase in future rates, since this would constitute retroactive rate-making.

15. Insurance § 79.1— proposed rate change — retroactive rate-making

The disapproval of a rate increase because of a "cushion" created by previously implemented and approved charges is not within the statutory authority granted the Insurance Commissioner by G.S. 58-248 to approve premium rates "for the future"; therefore, though the Commissioner properly made a finding, based upon substantial evidence, that "unallocated loss adjustment expenses did not rise at the same rate as the losses. . . ." he erred by taking into consideration past excess profits derived from previously approved and implemented rates.

16. Constitutional Law § 23; Insurance § 79.1— automobile liability insurance rates — order not violative of due process rights

Order of the Insurance Commissioner fixing the rate charged for bodily injury and property damage liability insurance applicable to private passenger automobiles lower than the then existing rate did not violate constitutional guarantees of due process or subject appellees to confiscatory rates.

17. Insurance § 79.1— rate change hearings — actions of Insurance Commissioner — no violation of constitutional procedural provisions

In hearings on a proposal for the revision of rates charged for bodily injury and property damage liability insurance, the Insurance

Commissioner did not act arbitrarily or capriciously or assume the role of consumer advocate in such a manner that his order violated constitutional procedural provisions.

APPEAL from the decision of the Court of Appeals, 30 N.C. App. 427, 227 S.E. 2d 603, reversing the order of the Commissioner of Insurance entered on 28 March 1975. *Martin, J.*, dissented. This case was docketed and argued as No. 141 at the Fall Session 1976.

On 1 July 1974 the North Carolina Automobile Rate Administrative Office (hereafter referred to as Rate Office), pursuant to G.S. 58-248, filed with the Commissioner of Insurance a request for a revision in the rates charged for bodily injury and property damage liability insurance applicable to private passenger automobiles. This filing was based upon the underwriting experience of the member companies for the two-year period ending on 30 June 1973 and also upon an upward trend in average paid claim costs for claims paid between 1 October 1970 and 30 September 1973. The proposed rate revision called for a reduction of 3.7% for bodily injury liability rates and an increase of 11.4% for property damage liability rates, or an overall average increase of 3.2%.

On 26 September 1974 the Attorney General intervened in behalf of the using and consuming public of the State of North Carolina.

Three pre-hearing meetings were held. As a result of these hearings the Commissioner requested that the Rate Office furnish more recent data than that upon which its filing was based. In particular, certain "fast track" data was sought, which would indicate what effect, if any, the "energy crisis" was having on insurance companies' loss experience. The Commissioner also requested data showing the average paid claim frequency, a trending factor not theretofore employed in the rate-making procedures of the Rate Office.

The Rate Office submitted an amended filing to the Commissioner on 2 January 1975, proposing a rate level reduction of 13.3% for bodily injury and a rate level increase of 22.5% for property damage, or an overall average increase of 0.9%. This amended filing reflected a change in procedure to include a trend factor based upon trends in average paid claim frequency, in addition to trends in average paid claim costs. The

trending period was also changed to extend fourteen months beyond the filing date, rather than the previously employed period of three months from the date of the filing.

The Commissioner conducted public hearings on the proposed rate revisions on 25, 26 November 1974, 10 December 1974, 6, 7, 15, 21, 22, 23, 24, 27, 28, 29 January 1975, 4, 7 February 1975, and 10, 17 March 1975. In support of the rate adjustments requested in the amended filing, the Rate Office relied primarily upon the testimony of Paul L. Mize, General Manager of the Rate Office, John J. Kollar, Assistant Actuary with Insurance Services Office, and John H. Muetterties, Vice President of Insurance Services Office. The Insurance Department staff presented the testimony of Phillip K. Stern, Actuary with the New Jersey Department of Insurance, which testimony formed the principal basis for the findings of fact entered by the Commissioner in his final order. The testimony presented at these hearings and the Commissioner's final order will be hereinafter more fully discussed.

On 28 March 1975 the Commissioner entered an order directing that private passenger automobile liability insurance rates be reduced by 23.8% for bodily injury and increased by 2.5% for property damage, for an overall average decrease of 13.0%, to become effective on 1 May 1975.

The Rate Office and the member companies which are parties to this action appealed from this order. The Court of Appeals reversed the order of the Commissioner, holding that it was not supported by material and substantial evidence. From the decision of the Court of Appeals, the State of North Carolina, ex rel. Commissioner of Insurance appealed to this Court, pursuant to G.S. 7A-30(2).

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr.; Hunter & Wharton, by John V. Hunter III, for Commissioner of Insurance, appellant.

Allen, Steed and Allen, P.A., by Arch T. Allen, Thomas W. Steed, Jr., and Arch T. Allen III; Broughton, Broughton, McConnell & Boxley, P.A., by J. Melville Broughton, Jr.; Young, Moore, Henderson & Alvis, by Charles H. Young; Manning, Fulton & Skinner, by Howard E. Manning, for defendant, appellee.

BRANCH, Justice.

The first question presented by this appeal is whether the order of the Commissioner was in excess of his statutory authority.

The provisions of Chapter 58 of the North Carolina General Statutes have recently been fully reviewed in *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 and in *In re Filing by Automobile Rate Office*, 278 N.C. 302, 180 S.E. 2d 155. Nevertheless, we find it necessary to review certain portions of the statute contained in that chapter.

[1] The North Carolina Automobile Rate Administrative Office was created as a branch of the Compensation Rating and Inspection Bureau of North Carolina and its objects and functions are enumerated in G.S. 58-246. That statute empowers and fixes the Rate Office with the responsibility of maintaining rules and regulations and fixing rates for automobile bodily injury and property damage insurance. The statute provides further that the bureau should promulgate and prepare rates for motor vehicle liability insurance. It also requires the bureau to maintain and furnish to the Commissioner of Insurance the statistics on income derived by member companies from the investment of unearned premium reserves on automobile liability policies written in this state.

We consider the provisions contained in G.S. 58-248 and G.S. 58-248.1 to be crucial in deciding this assignment of error. We, therefore, quote pertinent provisions from these statutes.

G.S. 58-248, in pertinent part, provides:

> . . . All such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved. . . .
>
> In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates

are being considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with rate filings.

The Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. Proposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit.

On or before July 1 of each calendar year the North Carolina Automobile Rate Administrative Office shall submit to the Commissioner the data hereinabove referred to for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. Such rate proposals shall be approved or disapproved by the Commissioner in writing within 90 days after submission to him: Provided, the Commissioner shall have at least 30 days after the completion of hearings and the receipt of any additional data requested from the North Carolina Automobile Rate Administrative Office in which to consider the rate proposals.

G.S. 58-248.1, *inter alia,* states:

Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent

stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest.

[2] The Rate Office and the Commissioner possess only such respective powers as are granted by the General Assembly. Our decisions construing Chapter 58 of the General Statutes firmly establish that the Rate Office is vested with the primary authority to fix, adjust and propose rates and that the Commissioner of Insurance does not have *concurrent* authority with the Rate Office to fix or reduce rates. *In re Filing by Automobile Rate Office, supra.* It is equally clear that the provisions of G.S. 58-248 mandate that no rates shall be put into effect until approved by the Commissioner and that existing rates will remain in effect until validly disapproved by him.

The provisions of Chapter 58 and our decisions relating thereto fail to clearly state the exact procedure to be followed by the Commissioner when the proposed rates are submitted to him for approval under G.S. 58-248 or upon a determination by him pursuant to G.S. 58-248.1 that the rates are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest.

[3] We first consider the provisions of G.S. 58-248 which provide that "[a]ll such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for *approval* and no such rates shall be put into effect in this State until *approved* by the Commissioner of Insurance and not subsequently *disapproved*. . . . The Commissioner shall *approve* proposed changes in rates . . . *to the extent* necessary to produce rates . . . which are reasonable, adequate, not unfairly discriminatory, and in the public interest. . . . " [Emphasis ours.] When there is a filing pursuant to G.S. 58-248 the Rate Office may, as was done here, amend its filing so as to propose a smaller increase than proposed in the original filing, but in the absence of such amendment the Commissioner upon proper findings of fact supported by substantial evidence *may approve all of the increase proposed by the Rate Office, approve a part of the proposed increase or disapprove the entire proposed increase. In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207. We find nothing in G.S. 58-248 or in this Court's interpretation of that statute which authorizes the Commissioner to order a reduction in then existing rates.

Under this statute he may approve in toto, approve in part, or totally disapprove the rates *proposed.*

We next consider the procedure to be followed by the Commissioner under G.S. 58-248.1. Under that section when the Commissioner determines, after notice and hearing, that the rates charged or filed are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, he shall issue an order to the Rate Office directing that such rates be altered or revised in the manner or to the extent stated in such order so as to produce rates which are reasonable, adequate, not unfairly discriminatory and in the public interest. It is from this statute that the Commissioner derives his authority to affirmatively order that reasonable and adequate rates be fixed.

We find *In re Rating Bureau,* 245 N.C. 444, 96 S.E. 2d 344, to be a case which gives guidance as to the procedure to be followed by the Commissioner when acting under this statute in response to an unwarranted, unreasonable, improper or unfairly discriminatory filing. There the North Carolina Fire Insurance Rating Bureau filed with the Commissioner of Insurance in November 1955 a request for a 25% increase in fire insurance rates on farm property. Evidence produced at the hearing on this filing indicated that in an October 1954 filing the Rating Bureau had sought a rate increase of 16% for farm dwellings. The Commissioner found that the evidence presented at the 1954 hearing did not support the Rating Bureau's contention that farm and non-farm dwellings presented different classes of risk, when both types of dwellings are similar in location and construction and are subject to the same degree of fire protection. This ruling modified risk classifications approved in 1947 which placed farm and non-farm property in different classes for rate-making purposes. On the basis of this unjustified classification in the 1954 filing, the Commissioner disapproved the requested 16% increase and allowed the Rating Bureau an opportunity to propose new rate adjustments based on proper classifications. The Rating Bureau took no appeal from the Commissioner's order disapproving its original filing. Instead it ignored the order and filed the November 1955 request, based upon the same classifications expressly disapproved previously by the Commissioner. The Commissioner rejected the filing, again on grounds that there was no evidence to support the Rating Bureau's proposed differential in fire insurance

rates on unprotected farm dwellings and unprotected non-farm dwellings.

The pertinent portion of that decision was directed to the part of G.S. 58-131.2 which states:

> Whenever the Commissioner finds, after notice and hearing, that the Bureau's application of an approved rating method, schedule, classification . . . is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the Bureau to revise or alter the application of such rating method, schedule, classification . . . in the manner and to the extent set out in the order.

The language of this statute parallels the statutory declaration found in G.S. 58-248.1 concerning the Commissioner's powers and duties in an automobile rate case upon a finding that the rates filed are excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest.

In affirming the Commissioner's action, this Court stated: "[I]n accord with the provisions of the statute [G.S. 58-131.2], the Commissioner left the matter open so that the Rating Bureau might have an opportunity to propose adjustments in conformance with the decision [disapproving the filing]."

Interpretation placed upon G.S. 58-131.2 by the Court in *In re Rating Bureau, supra,* applies with equal force to G.S. 58-248.1 as it relates to the facts of instant case.

[3, 4] We conclude that in this proceeding pursuant to a filing under G.S. 58-248 the Commissioner was authorized to approve the filing in toto, approve the filing in part, or disapprove the filing. In a proceeding under this statute in which the filing proposes an increase in rates the Commissioner is without authority to fix a rate reducing the then existing rate. However, upon a determination in this proceeding that the rates charged or filed were excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest, the Commissioner could have properly exercised the authority granted to him by G.S. 58-248.1 and issued an order to the Rate Office directing that rates then existing or rates proposed in the filing before him be "altered or revised in the manner and to the extent stated in such order to produce rates . . . which are reasonable, adequate, not unfairly discriminatory, and in the public interest." By so doing he would have left the matter open so

that the Rate Office, the agency which possesses the primary authority to fix a just and adequate rate, might have an opportunity to propose adjustments in conformity with his decision. *In re Rating Bureau, supra; Monroe v. Insurance Services Office of Arkansas,* 257 Ark. 1018, 522 S.W. 2d 428.

We here note that the Commissioner's powers granted under G.S. 58-248.1 are not limited to instances growing out of a G.S. 58-248 filing but he may upon his own motion or upon petition of any aggrieved party exercise the powers as granted to him by the statute (G.S. 58-248.1) with respect to rates "filed or *charged.*" *See Insurance Serv. Office v. State Bd. for Prop. & Cas. R., Okl.,* 530 P. 2d 1359.

[5] The Rate Office, by its amended filing, requested a 13.3% reduction in the bodily injury rates. The Commissioner ordered a 23.8% decrease in such rates thereby reducing existing rates in excess of the requested decrease without resorting to the authority granted him by the provisions of G.S. 58-248.1. By so doing, he exceeded his statutory authority.

The Rate Office, by its amended filing, proposed a rate increase of 22.5% for property damage insurance and the Commissioner ordered a rate increase of 2.5%. He thereby approved in part the filing of the Rate Office as to property damage rates. Thus be acted within his statutory authority if his findings and order were supported by material and substantial evidence. G.S. 58-9.4; *In re Filing by Fire Ins. Rating Bureau, supra; Comr. of Insurance v. Automobile Rate Office, supra.*

We recognize that the provisions of G.S. 58-248 might have been written so as to give the Commissioner more authority as a rate-maker or so as to provide a more expeditious procedure in altering proposed rates. However, this Court cannot, under the guise of judicial interpretation, interpolate into the statute provisions which are wanting. 7 N. C. Index 2d, Statutes § 5, p. 70; *Board of Education v. Wilson,* 215 N.C. 216, 1 S.E. 2d 544.

We, therefore, must turn to the question of whether the findings and order approving in part the requested property damage rate increase were supported by material and substantial evidence.

[6] One of the factors considered by the Commissioner in ordering a smaller increase in property damage rates than requested by the Rate Office was the anticipated earnings of the

participating insurance companies realized from the investment of unearned premium reserves and loss reserves.

The Commissioner made the following findings of fact, pertinent thereto:

16. That the rate changes proposed by the Rate Office are based on a rate-making formula containing an allowance of 5% of earned premium for underwriting profit and contingencies.

17. That the annual return from the investment of unearned premium reserves and loss reserves for all private passenger automobile liability insurance in North Carolina is 2.3% of earned premium, based on the latest available statistics.

18. That an underwriting profit of 2.7% of earned premium provides for a fair and reasonable underwriting profit within the meaning of G.S. 58-248, which finding is supported by the testimony of expert witness Stern.

19. That adding said 2.3% return to said 2.7% allowance for underwriting profit to arrive at a 5% of earned premium allowance for overall profit and contingencies is an equitable manner of including the amount of earnings from the investment of unearned premium reserves and loss reserves in the rate-making formula, which finding is supported by the testimony of expert witness Stern, and which procedure was set forth and followed in the last order (by the former Commissioner) effecting private passenger automobile liability insurance rate changes, which order was affirmed by the North Carolina Court of Appeals. 18 N.C. App. 23, 195 S.E. 2d 572 (1973), *cert. denied* 283 N.C. 585 (1973).

The ultimate question facing the Commissioner is whether an increase in premium rates is necessary to "provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a *fair and reasonable underwriting profit.*" G.S. 58-248. [Emphasis ours.] Whether provision has been made for a "fair and reasonable underwriting profit" is not "a question upon which the determination of the Bureau is conclusive. It is a question of fact to be determined by the Commissioner upon evidence. As to this, as well as to the other

factors in the equation, the burden of proof is upon the Bureau to show that the existing premium rates are not sufficient." *In re Filing by Fire Ins. Rating Bureau, supra.*

Appellees opposed the use of data relating to profits from these types of investments, contending (1) that this factor had been duly considered by the Rate Office in formulating its proposed rate changes, and (2) that such data is not relevant and material for rate-making purposes.

We do not believe that the evidence adduced at the hearings on this filing supports the Rate Office's contention that investment income had been taken into account in arriving at the new proposed rates. Mr. Mize, General Manager of the Rate Office, testified on cross-examination that the 1971 filing (upon which present rates are based) had been reduced by two percentage points to account for this investment income. He acknowledged, however, that "[i]nvestment income from loss reserves and unearned premium reserves has not been taken into consideration arithmetically in preparing the proposed rate change contained in RO Exhibit 22 [the 2 January 1975 amended filing]." Similarly, Mr. Muetterties of Insurance Services Office testified that "it is the position of insurance companies, it is the position of Insurance Services Office, that in order to write the business that it is necessary to have the five percent profit, plus the so-called other income, investment income, in addition, and not to subtract it off." The record also reveals the following exchange between the Commissioner and Mr. Muetterties:

> THE COMMISSIONER: In other words, you think that your profit should be totally based on the premiums written and that the insurance companies should receive five percent, plus the two point three percent, or a total of seven point three percent, not of their investment, but seven point three percent of the premiums written, is that correct?
>
> MR. MUETTERTIES: Yes, sir. . . .

It is apparent that the formula employed by the Rate Office in deriving its proposed rate included a provision for a five percent underwriting profit, but did not account for anticipated profits from investments of loss reserves and unearned premium reserves.

The Rate Office's objection to the use of this investment profits data on grounds that it is not relevant and material for

rate-making purposes is overcome by G.S. 58-248 which provides:

> . . . The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in any equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.

The testimony of witness Stern, upon which the Commissioner based his determinations with respect to the investment and underwriting profits, was, in part, as follows:

> . . . First, let me say that there is no evidence other than historical to support the 5 per cent provision. Attempts to establish a rational basis for the 5 per cent have failed . . . . The insurance business is different from any other business, because its working capital generates income. If a manufacturer buys equipment and builds a factory and puts ten million dollars into it, that money is used up; if anything, it depreciates. If an insurance company starts with ten million capital, that money generates income, investment income . . . . Now, if you operate on a two-to-one ratio, that means, in terms of premiums, you need a return of three and a half per cent after tax and that is the situation in New Jersey today. Now, the operating return consists of the return from the rates and the return from the investment of the unearned premium reserves and loss reserves. We are dealing here—we have calculations here indicating this return is two point three per cent—that is the investment income. I was guided by my knowledge of the things I have recited and I subtracted two point three per cent from three point five, not from five, the three point five per cent return, after tax, in terms of premium and I get one point two per cent after federal income tax. The rates have to contain a loading to provide for the tax liability and applying the 48 per cent income tax bracket to that 1.2 per cent, I arrived at 2.4; however, I was informed that a short-cut method in North Carolina used in the past was to subtract the 2.3 from the 5. It is arithematically not correct, but it gives you the same answer; you get 2.7 instead of my 2.4.

> And that's another little cushion which is not significant enough to spend a lot of time upon it. So this is how we arrived at the 2.7 per cent provision for underwriting profit in the rates. . . .
>
> * * *
>
> It's my opinion, under the circumstances in this case and after reviewing the filing, that the 2.7 per cent for underwriting profit and contingencies would be just and reasonable.

"Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Automobile Rate Office, supra.* When measured by this standard, we believe that the testimony of witnesses Stern, Mize and Muetterties constitutes material and substantial support for the Commissioner's findings, conclusions, and order as they relate to the inclusion of profits from investments of loss reserves and unearned premium reserves in the rate-making formula.

We next consider whether there was material and substantial evidence to support the Commissioner's findings which resulted in a 5% supplementary reduction in the rate level for insurance on private passenger automobiles.

The pertinent findings as to the challenged "fast track energy data" relating to the supplementary 5% reduction in rates are:

> 25. That the National Association of Insurance Commissioners "energy crisis" experience for North Carolina collected under said plan or system represents the private passenger automobile liability insurance loss experience for companies writing approximately 65% of the total premium volume for such insurance in North Carolina and that therefore such experience is significant for rate-making purposes in North Carolina, which finding is supported by the testimony of expert witness Stern.
>
> 26. That evidence in the record, including the "energy crisis" data collected under said plan or system, shows a need for a supplementary reduction in the rate level in addition to those changes set forth above, which finding is supported by the testimony of expert witness Stern.

27. That said "energy crisis" data reflect the results of the reduction in speed limits, the unavailability of gasoline for some time, and the continued lesser accessibility of gasoline to many because of increased costs, which findings are supported by the testimony of expert witness Stern.

* * *

29. That, taking the latest information available, including the "energy crisis" data referred to above, along with other relevant factors, such as the rate unemployment in North Carolina, demonstrates the need for a supplementary rate level reduction factor of five (5) percentage points for both bodily injury and property damage rates in addition to those changes set forth above, which reduction is a "one-step trend" resulting in a total rate level change indication of a 23.8% reduction in bodily injury rates and a 2.5% increase in property damage rates, which finding is supported by the testimony of expert witness Stern, who reached this conclusion based on all the business done by all companies in North Carolina.

30. That such a further 5% reduction is a conservative reduction which gives full consideration to the partially offsetting effect of inflation, which finding is supported by the testimony of expert witness Stern.

The factors to be considered by both the Commissioner and the Rate Office are set forth in G.S. 58-248 as follows:

> . . . The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.
>
> In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being

considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with rate filings.

It is, therefore, apparent that when a filing is made the ratemaker, must of necessity, estimate what will happen in the future. The natural guide is past experience and our statute specifically provides for consideration of factors relating to past experience.

In *Comr. of Insurance v. Automobile Rate Office, supra,* we held that G.S. 58-248.1 did not authorize the Commissioner to consider emergency considerations such as the energy crisis and enter an *interim* rate order based thereon because such action infringed upon the authority of the Rate Office to fix a just and adequate rate. Instant case differs from *Comr. of Insurance v. Automobile Rate Office, supra,* in that here we consider only the partial approval of a proposed annual filing pursuant to the provisions of G.S. 58-248.

[7] The language of G.S. 58-248 does not restrict the Commissioner's consideration to the statistical data furnished by the Rate Office and he may consider evidence from other sources if it is otherwise competent. *Comr. of Insurance v. Automobile Rate Office, supra.*

[8] We do not agree with the position of the Rate Office that the "fast track" evidence was *per se* inadmissible. Our conclusion is strengthened by the language contained in § 6 of the rules adopted by the Insurance Advisory Board pursuant to authority contained in G.S. 58-27.1. That section, which was in effect at the time of these hearings, provides:

> 6. Public hearings shall be conducted in an orderly but informal manner. *The hearing officer shall admit all evidence of any type having reasonable probative value,* and shall include in the evidence any relevant or material evidence which may be made available to him by any records of the Insurance Department or disclosed by any investigation or study of the problem by personnel of the Department. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. *Any evidence of the type upon which responsible persons are accustomed to rely in the*

conduct of insurance affairs shall be deemed to have reasonable probative value. A hearing may be continued when such continuation is, in the Commissioner's judgment, warranted.

We, therefore, turn to the question of whether the Commissioner's findings as to the supplementary 5% decrease in property damage rates were supported by material and substantial evidence.

[9] We agree with the conclusions of the Court of Appeals that there was no substantial and material evidence in this record to support the Commissioner's findings which resulted in a 5% supplementary reduction in the rate level for property damage insurance.

Initially we note that the amended filing of 2 January 1974 must have appreciably diminished the importance of the "fast track" data. This filing, based on statistical information as to the frequency of property damage claims, largely reflected the effect of the energy crisis. The Commissioner relied mainly upon the testimony of the witness Stern to support his findings. Stern's testimony, which he termed "qualitative information which should be looked upon with great care," was, in part, as follows:

> . . . [W]e looked at the latest data for the eleven months, comparing eleven months of 1974 compared with the eleven months of 1973, Exhibit ID 53, which indicated a substantial decrease in frequencies in bodily injury of thirteen percent and a property damage pure premium decrease of six percent. There are other relevant factors which affect the cost of insurance, or the occurrence of losses. The reduced—the reduction in the driving and the use of automobiles is not only affected by availability of gasoline, but also by the price of gasoline. Many people have to restrict their driving because of the high cost of gasoline compared with normal times, the years reflected by the accident year experience 1972 and '73, the early part of '73, because the accident year experience ends on June 30, 1973. Another important element that affects the exposure to road hazards is the economic condition of the country, particularly North Carolina. Today's newspaper reports that the unemployment rate in North Carolina is ten point six percent. It must be obvious that people who have to live on un-

> employment insurance benefits must be restricting many activities and driving should be one of the first ones to restrict. They are troubled by inflation and unemployment, now. It will also affect drinking habits. We know that driving after drinking is one of the very frequent causes of serious injury. Apparently people are unemployed, they won't go to the bar, they are lucky they can drink their beer at home, which means they won't drive after they have their beer. And I think prior recessions have shown that, that during a period of recession of reduced activity insurance experience does show an improvement. Now these are qualitative characteristics—we cannot quantify them for you, except for what we have already presented here. I conclude that taking all these factors together, a supplementary rate level reduction factor of five percentage points would be more than justified. . . .

The witness Stern stated that he considered the amended filing but he obviously based his conclusion that the 5% supplementary reduction was justified on the basis of the above-quoted evidence. To emphasize the lack of probative force in this evidence, we point to a few of the witness' questionable deductions. The witness used the complicated economic factor of unemployment figures which he had plucked from some newspaper account to support his conclusion that unemployment would keep people from drinking in bars in a state which does not allow legalized sale of liquor by the drink. He then reaches the dubious conclusion that a man who becomes intoxicated in his home will remain in his abode. His statement that the high cost of gasoline restricts driving is not supported by any evidence. In short, there was no material or substantial evidence in this record to support the Commissioner's findings relative to a 5% suplementary decrease in property damage rates.

The Rate Office further argues that the Commissioner erred by using a different methodology in trending past loss experience to a future date when he approved, in part, its proposed increase in the property damage rate.

On the basis of the changes in methodology, hereinfter discussed, the Commissioner made the following findings of fact:

> 9. That property damage pure premium for all companies writing private passenger automobile liability insurance in North Carolina for the annual periods ending at

the end of each quarter from June 30, 1971, through March 31, 1974, reflects an annual increase of 4.8% per year, based on an actuarially acceptable line of best fit method, which finding is supported by the testimony of expert witness Stern.

* * *

11. That a property damage pure premium trend factor of 1.108 provides an adequate property damage loss tend adjustment for the amended filing (derived from the finding of a 4.8% increase per year and a 2.25-year period), which finding is supported by the testimony of expert witness Stern.

[10] In the Rate Office filing, property damage insurance trends were measured separately for paid claim costs and paid claim frequency. The Commissioner chose instead to apply the trending factor to the composite of average paid claim cost and frequency or the average loss cost per automobile. This change in the Rate Office's trending procedure was based upon the following testimony of witness Stern:

> . . . [T]he way ISO does it and that's reflected in this amended filing, the trend is measured separately for average paid claim costs and average paid claim frequency, and then the two are combined in some manner. . . . In each case fitting the line to the actual data, you have to do some balance to the data—you have to stretch them or cut them and make them fit, so you're actually introducing two elements of possible error and that was statistical error, not wrongdoing, statistical error. My personal feeling is that a more straightforward method would be to combine claim frequency and claim cost into a quantity which we refer to as a pure premium. Pure premium is simply the average loss cost per car and the loss cost per car depends upon how much you pay on the average per claim and how many claims you have on the average per car. It is the most straightforward method of measuring really what it costs to insure cars, so I simply took the data shown in the filing for claim cost and claim frequency and I combined them into a pure premium, which is a simple arithmetic calculation of multiplying frequency by claim cost . . . .

[11] The Commissioner of Insurance is considered to be a specialist in the field of insurance and his projection of past

experience and present conditions into the future is assumed to be correct and proper if supported by substantial evidence. Expert testimony, otherwise competent, that a trend upward or downward may reasonably be expected to continue into the future is evidence of "reasonable and related factors" which the Commissioner may consider in making his projections. *The statute does not require that procedures and methods for trending loss experience for the future shall be frozen. See In re Filing by Fire Ins. Rating Bureau, supra.*

The expert witness' deduction that by combining two separate inexact calculations into a single one reduces the possibility of error is bolstered by common logic and constituted substantial evidence in support of the pertinent findings of fact and the minor alteration used by the Commissioner in the trending method.

[12] The Commissioner also deviated from the trending period used by the Rate Office in its amended filing. The Rate Office had employed a projection period extending to 1 March 1976. In lieu of that date, the Commissioner trended the loss experience only until 1 April 1975, which was the projected effective date of the proposed rate revisions. The only evidence justifying the selection of 1 April 1975 as the trending period cut-off date was the following testimony of witness Stern:

> As to why I selected the date of April 1, 1975 as the point to which to project my trend in the future, that would be approximately the date normally a rate revision would be effective if it is considered at this time and I did not want to go beyond and I don't think—suggest that you go beyond the effective date of the rate revision, because a new review based upon data for a later year is due on July 1, '75.

We believe it was unrealistic to assume that the annual rate filing which would become due on 1 July 1975 would be put into effect with such dispatch as to properly project more recent loss trends into the future. The very fact that we are now considering an amended annual filing first proposed over two years ago and that rates presently in existence are those based upon a 1971 filing, makes it apparent that the institution of proposed rate revisions is a process fraught with delay.

G.S. 58-248 requires that "the Commissioner shall give consideration to past and *prospective* loss experience . . . . "

[Emphasis ours.] This statutory provision contemplates a trending method which, on the basis of trends in past loss experience, projects the losses to be anticipated during the future period in which the proposed rates will be in effect. The trending period used by the witness Stern fails to accomplish this purpose.

[13] Appellees also object to the Commissioner's action in using a unity trend factor for the year of the energy crisis, contending that the energy crisis did not exist during the entire year. The effect of using the unity factor for that year was to give no consideration for that period for the Commissioner's projection as to property damage rates, thereby using a period of two and one-fourth years for his projection of such insurance rates.

The testimony of the Rate Office's expert witness Mr. Muetterties in respect to the factor was:

> . . . Mr. Stern uses a trend of unity—by unity that means really no trend upward or downward—A little over a year ago I remember sitting in some long lines for getting gas up in New Jersey, myself, and that my wife got tired of doing it and I had to do it a couple of times, but I don't remember that the period of the energy crisis was one year long, which Mr. Stern used as unity. I believe the period was a shorter period than that. There is a major and substantial difference between this. . . .

On the other hand, the expert witness Stern testified:

> . . . [H]owever, during that period there is that one year of the energy crisis; that is, the figures we have just referred to before, where we saw that there were substantial reductions in claim frequencies and in pure premiums. Therefore, I decided for the purpose of this exhibit to assume that we apply a unity trend factor for that one year —therefore, we get, instead of three and a quarter years, a projection for one and a quarter years—I'm sorry, for two and a quarter years, ...

The record also contains evidence that pure premium costs for property damage insurance dropped from $20.46 for the year 1973 to $19.26 for the year 1974 (the period trended at unity by the witness Stern), a reduction of 6%. Based upon this evidence and other evidence which the statute required the Commissioner to consider, he found:

7. That a period of 2.25 years is a reasonable period for computing a pure premium trend factor for the amended filing, which finding is supported by the testimony of expert witness Stern.

* * *

11. That a property damage pure premium trend factor of 1.108 provides an adequate property damage loss trend adjustment for the amended filing (derived from the finding of a 4.8% increase per year and a 2.25-year period), which finding is supported by the testimony of expert witness Stern.

* * *

20. That all of the factors, allowances, and adjustments supplied by expert witness Stern are reasonable, proper, and correct.

It is impossible for us to determine the exact effect of the unity factor for the year 1974 in trending property damage rates. However, the record discloses competent and relevant evidence tending to show that the pure premium costs for property damage insurance decreased during an eleven-month period of that year. "The pure premium is the amount allocated for the settlement of casualty losses, including loss adjustment expenses." *In re Filing by Automobile Rate Office, supra.*

The Commissioner elected to accept, as he may do, the evidence and the testimony of the witness Stern. Under these circumstances, it would seem that the insurance companies would have benefited by the omission of this period of time from the Commissioner's consideration of projected rates for property damage insurance.

Also, in trending loss experience into the future, the Commissioner declined to apply the trend factors to unallocated loss adjustment expenses. This change in the trending method is reflected in the following findings of fact:

12. That the factor applied to the combination of losses and allocated loss adjustment expenses to allow for unallocated loss adjustment expenses has over the years gone down, which means that the unallocated loss adjustment expenses did not rise at the same rate as the losses, and that including said factor in the losses before applying loss development and loss trend adjustments, as heretofore has

been done in North Carolina, has resulted in an excessive allowance for loss adjustment expenses and has produced a "cushion," i.e., an excessiveness, in the present rates, which finding is supported by the testimony of expert witness Stern.

13. That the proper way of treating unallocated loss adjustment expenses in the rate-making formula is to make an allowance for such expenses as an expense item with a trend adjustment for the effect of inflation on such expenses, instead of applying loss development or loss trend adjustments to such expenses (as has heretofore has been done in North Carolina), and that the "cushion" in the premium rates referred to in the preceding finding of fact would be adequate to absorb an inflationary trend in such expenses for the amended filing, which finding is supported by the testimony of expert witness Stern.

The Commissioner relied upon the following testimony of the witness Stern for support of these findings:

. . . The unallocated loss adjustment expenses historically have not followed the same trend as losses have shown. As a matter of fact, the factor over the years has gone down, which means that the unallocated loss adjustment expenses did not rise at the same rate as the losses and that is understandable. This is an overhead item. For example, if you have more claims—as you know, in any business you can absorb a certain amount of increase without changing your staff—conversely, if there are fewer claims, you're not going to fire five people just because last month there was no ice, so it's a more stable overhead expense.

* * *

. . . I conclude that it would be improper to apply either a loss development factor or a trend factor to this portion of the total rate structure . . . .

By not applying trend factors to the unallocated loss adjustment expenses, the Commissioner failed to provide for future inflationary increases in many expense items, such as salaries, rents, equipment, and supplies. He attemped to justify this by his finding that improper treatment of this item in previously implemented rate-making procedures had created a "cushion" which would adequately absorb future inflationary trends.

[14, 15] Rate-making is a process which envisions a projection of past experience into the future to provide for a reasonable profit and nothing more. However, such a prognostication can hardly be expected to achieve exact precision. Should hindsight reveal that rates validly instituted have failed to produce a reasonable profit, this would not warrant a recoupment of that deficit by an otherwise unjustified increase in future rates. This would constitute retroactive rate-making which this Court has expressly repudiated in another area of rate-making. *Utilities Comm. v. City of Durham,* 282 N.C. 308, 193 S.E. 2d 95. Further, the disapproval of a rate increase because of a "cushion" created by previously implemented and approved charges is not within the statutory authority granted the Commissioner by G.S. 58-248 to approve premium rates "for the future." The erroneous approval of past rates does not permit the disapproval of otherwise justified rates for the future. *See Utilities Comm. v. Edmisten, Atty. General,* 291 N.C. 451, 232 S.E. 2d 184.

We hold that the Commissioner properly made a finding, based upon substantial evidence, that "unallocated loss adjustment expenses did not rise at the same rate as the losses . . . . " However, he erred by taking into consideration past excess profits derived from previously approved and implemented rates.

[16] It is argued that the Commissioner's order is in violation of substantive constitutional provisions.

It is clear that the legislative intent in enacting Chapter 58 was to insure that the public be provided with insurance rates which are not "excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest." G.S. 58-248; G.S. 58-248.1.

In accord with due process, Chapter 58 provides for notice of hearing and full hearings. The Commissioner may act only with the specific statutory authority granted to him and his findings and order must be based upon substantial evidence. Chapter 58 further expressly provides that the Commissioner's decision may be revised, modified or remanded for further proceedings if the appellate court finds that the substantial rights of an appellant have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commissioner, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

We find nothing in the Commissioner's order which violates constitutional guarantees of due process or which subjects appellees to confiscatory rates.

[17] Finally, we consider whether the Commissioner's order was in violation of procedural constitutional provisions in that the Commissioner acted arbitrarily and capriciously and in the role of a consumer advocate.

A cursory examination of this record discloses that the proceedings between the Rate Office and the Commissioner of Insurance were adversary in nature. However, we must presume that both ultimately sought to establish insurance rates which were in the public interest. Suffice it to say that this record does not establish that the Commissioner acted arbitrarily or capriciously or that he assumed the role of consumer advocate in such a manner that his order violated constitutional procedural provisions.

This cause is remanded to the Court of Appeals with direction that it be remanded to the Commissioner of Insurance for proceedings in accord with this opinion.

Modified and remanded.

IN THE MATTER OF THE WILL OF BETTY FUTRELL RICKS, DECEASED

No. 87

(Filed 8 February 1977)

1. **Evidence § 11— dead man's statute — applicability to caveator and propounder**

A caveator or a propounder in a will contest is a "party" to whom the prohibitions and exceptions of the dead man's statute, G.S. 8-51, apply.

2. **Evidence § 11; Wills § 22— dead man's statute — communications with deceased — competency to show mental capacity**

A party or an interested witness may, notwithstanding G.S. 8-51, in an action to set aside a will, deed or other writing, testify to communications or conversations with a deceased to show the basis upon which the party or witness has formed an opinion regarding the mental capacity of the deceased, when he testifies to such an opinion, and when the lack of such capacity is a ground for setting aside the instrument.

3. **Evidence § 11; Wills § 22— dead man's statute — mental capacity and other issues presented — admissibility of transactions with deceased**

In actions to set aside written instruments executed by deceased persons on the ground of mental incapacity where other issues such as undue influence are raised by the evidence, and where testimony of an interested witness is offered relating to transactions or communications with the deceased, the following rules apply: (1) If the probative value of such testimony rests mostly on demonstrating the basis for the witness's opinion as to the deceased's mental state, it is admissible under appropriate limiting instructions notwithstanding the provisions of G.S. 8-51. (2) If the probative value of such testimony rests mostly on demonstrating the basis for such an opinion, it is admissible under appropriate limiting instructions even when the mental state of the deceased is relevant to both the mental capacity and undue influence issues. (3) If the probative value of such testimony rests mostly on its tendency to prove certain facts in issue relevant to issues other than the deceased's mental state, G.S. 8-51 and the hearsay rule render it inadmissible and limiting instructions will not cure the prejudice resulting from its admission.

4. **Evidence § 11; Wills § 22— dead man's statute — transactions with deceased — competency to show mental capacity**

The trial court in a caveat proceeding properly permitted the propounder to testify to certain personal transactions and communications between the witness and the deceased relating to the execution of the script sought to be propounded, under appropriate instructions that the testimony should be considered only as bearing upon the mental capacity of deceased, where the testimony was offered mostly for the purpose of showing the basis for the propounder's opinion

that deceased at the crucial time in question had the mental capacity to execute a will, the case was tried primarily on the issue of deceased's mental capacity, and evidence of undue influence was sparse.

5. **Evidence § 11; Wills § 22— statements by deceased — reasons for leaving home to son — admissibility to show mental capacity**

In a caveat proceeding, testimony by propounder's wife that some four days prior to the execution of the script in question the deceased stated to the witness that she wanted to leave her home to the propounder because the propounder's father had built it for him while he was in service was not inadmissible as hearsay but was admissible to show the basis upon which the witness expressed her opinion that deceased possessed the requisite testamentary capacity at the crucial time in question, since the thrust of the evidence was not so much to show why in fact the home was built but was to show the deceased's state of mind regarding her property and that she had a fixed purpose to dispose of it according to the instrument in question.

Chief Justice SHARP and Associate Justices HUSKINS and COPELAND dissent for the reasons stated by Brock, Chief Judge, in the opinion of the Court of Appeals in this case.

PROPOUNDER, in a caveat proceeding, appeals from a divided panel of the Court of Appeals. A majority of the panel (opinion by *Brock, C.J.*, concurred in by *Morris, J.)* determined to award a new trial to caveators who had appealed from a jury verdict and judgment in favor of propounder for an error assigned to *Tillery, J.*, judge presiding at the trial, concerning the admission of certain evidence. *Britt, J.*, dissented, and voted to let the verdict and judgment stand. The case is reported at 28 N.C. App. 649, 222 S.E. 2d 471 (1976). It was argued before us as No. 96, Spring Term 1976.

Johnson, Johnson & Johnson by Bruce C. Johnson, Attorneys for Propounder Appellant.

Weeks, Muse & Surles by T. Chandler Muse and Cameron S. Weeks, Attorneys for Caveator Appellees.

EXUM, Justice.

The principal question on this appeal is whether it was a violation of General Statute 8-51[1] and error prejudicial to the

[1] The statute provides in part: "Upon the trial of an action, or the hearing upon the merits of a special procee ing, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from . . . a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except where the executor . . . or person so deriving title or interest is examined in his own behalf, or the testimony of the . . . deceased person is given in evidence concerning the same transaction or communication."

caveators to permit the propounder to testify to certain personal transactions and communications between the witness and the deceased relating to the execution of the script sought to be propounded. A majority of the Court of Appeals' panel thought it was, on the ground that this testimony tended to prove "facts essential to establish the will as the voluntary act of the testator and rebut the charge of undue influence . . . . " The majority further ruled that it was impossible for the trial judge to remove this prejudice, as he attempted to do, by instructions directing the jury to consider this evidence only on the issue of the deceased's mental capacity. Judge Britt was of the opinion that admitting the testimony, if error, was not prejudicial inasmuch as "the case was tried primarily upon the issue of lack of mental capacity," the only evidence of undue influence, if any at all, being the very testimony about which the caveators complain. Our view of the case is more nearly like that of Judge Britt's and we reverse.

Betty Futrell Ricks, a resident of Northampton County, died 25 July 1974 survived by five daughters and one son. By writing dated 12 July 1973, purporting to be an attested written will, she sought to devise and bequeath all of her property to her son, Grady Ricks, who was also named executor. After the writing was probated in common form at the instance of Grady Ricks, his five sisters filed a caveat alleging that the writing was the product of the deceased's mental incapacity and undue influence exercised upon her by her son.

The caveat came on for trial at the 7 April 1975 Session of Northampton Superior Court. Four issues were submitted to the jury and answered as follows:

> "1. Was the paper writing propounded, dated the 12th day of July, 1973 executed by Betty Futrell Ricks, according to the formalities of the law required to make a valid Last Will and Testament?
>
> "Answer: Yes.
>
> "2. At the time of signing and executing said paper writing did said Betty Futrell Ricks have sufficient mental capacity to make and execute a valid and Last Will and Testament?
>
> "Answer: Yes.

"3. Was the execution of the paper writing propounded in this case procured by undue influence as alleged?

"Answer: No.

"4. Is the said paper writing referred to in Issue No. 1, propounded in this cause, and every part thereof, the Last Will and Testament of Betty Futrell Ricks, deceased?

"Answer: Yes."

The propounder and caveators stipulated that the proper answer to the first issue was "Yes" and the court so instructed the jury. Judgment on the verdict decreed that the writing offered for probate was the last will and testament of Betty Futrell Ricks.

The principal witnesses in the propounder's case in chief were the attorney who drew the will and his secretary who typed it. Both recalled the deceased and her son coming to the attorney's office together. The secretary could recall no conversation she had with either but did recall Mrs. Ricks asking her to witness the will after it was drawn. The attorney recalled that the propounder introduced his mother and said that she wanted the attorney to prepare her will; that Mrs. Ricks told him that she wanted to leave everything to her son and to appoint him executor; and that it was a "completely normal transaction and she seemed to be a completely normal person. It was nothing that struck me to indicate or arouse any suspicion that she was incompetent." He recalled that he prepared the will and on some later day the propounder and his mother returned for the purpose of executing it. It was his opinion that Mrs. Ricks on these occasions possessed the requisite testamentary capacity.

Caveators called some seventeen witnesses who testified regarding the deceased's mental capacity. All but three were either caveators or children of caveators. The caveators and their children all testified to a lack of testamentary capacity on the part of the deceased. Most of these witnesses related a dramatic decline in her mental acuity after she was injured in an automobile accident in July, 1972. According to these witnesses the deceased was mentally normal before this accident. After it, however, she would often become confused and disoriented, failed to recognize her children and grandchildren at times, and at times would not know where she lived or what she owned. There was testimony that the deceased was born 16 De-

cember 1891 and at the time of her death left surviving six children, seventeen grandchildren and sixteen great-grandchildren.

Three witnesses, unrelated to the family, gave similar opinions regarding her testamentary capacity. One was a phvsician who had treated the deceased for a fractured wrist on 6 November 1973 and who saw her periodically for five or six weeks thereafter. He last saw her on 1 January 1974. Another was the deceased's housekeeper, who worked in the deceased's home one day a week from the late summer of 1973 until May, 1974. A third was a friend of the family.

Evidence in rebuttal for the propounder consisted of the testimony of his daughter, his wife, and himself together with the minister at the church where the family attended, the family physician, and a close neighbor of the deceased. These witnesses were all of the opinion that the deceased at relevant times had sufficient testamentary capacity. The propounder's daughter was of the opinion that the deceased failed rapidly, mentally and physically, beginning in January, 1974, and that by May, 1974, she lacked the necessary capacity to make a will. The propounder's wife testified that on Sunday, 8 July 1973, the deceased told her that she wanted her son to have her house and lot. Then, over objection, she testified that the deceased related that her husband had built the house for their son while the son was in service during the Second World War, had stopped work on it for several months while the son was missing in action, and began work again after the son was determined to be safe. Without objection she testified that the deceased said, "When brother comes back from work which is 11:30, tell him I want to see him tomorrow morning. I want to make arrangements to make a will and talk it over with him."

The propounder then testified, in part, that as a result of his wife's relating this conversation to him he went to his mother's home the next day. Before he testified as to what transpired between him and his mother, the trial judge after a bench conference with attorneys instructed the jury:

> "[A]ny party who is interested in the outcome of a lawsuit such as this, that is, the Propounder . . . or the Caveators . . . cannot testify to transactions between themselves and Mrs. Ricks, the lady who is dead. They cannot testify to those transactions, that is for the purpose of proving the

facts which might have been recited in that transaction. They can, however, testify to conversations that they had with Mrs. Ricks solely for the purpose of offering evidence concerning her mental capacity, so when you hear any transaction or conversation between this witness, who is an interested party, and the Caveators also when you hear that testimony, you will keep in mind that you will only consider it as bearing upon what it might show with regard to the mental capacity of the late Mrs. Ricks. It is not for any other purpose. All right, with that instruction to the jury, the objection is overruled."

The propounder then proceeded to testify that his mother told him she wanted to make a will and to leave him the house and lot where she lived. (This property apparently constituted the bulk of her estate.) She asked him to suggest a lawyer. He did. She asked him to take her to the lawyer. He then returned home, called the lawyer's office and made an appointment for the next day. The next day he took his mother to the lawyer's office. His mother told the lawyer she wanted to make her will and asked if the lawyer would write it. The lawyer agreed to write it. The lawyer and his mother conferred as to her wishes about it. He took his mother back to the attorney's office on 12 July 1973 for the purpose of executing the will. The attorney then read the will to his mother. His mother read it and said that it was like she wanted it. She executed the instrument and the attorney and his secretary witnessed it at her request. His mother asked the attorney to keep the will for her and she paid him. After this testimony the trial judge again instructed the jury that they should not consider it for the purpose of proving "the facts therein recited but only as bearing upon the question of the mental capacity of Mrs. Ricks." The propounder was then asked whether based upon his "conversation and observations" of his mother during 1970-73 and *"especially July 12, 1973"* (emphasis added), he had an opinion regarding whether the deceased possessed each of the requisite elements of testamentary capacity on July 12, 1973. To each question he replied that he had an opinion. It was that his mother had the requisite mental capacity in all respects inquired about.

[1, 2] This is one of those cases in which the legal principles to a point are well established. The difficulty arises in applying them to the facts. It was early held that a caveator or a propounder in a will contest is a "party" to whom the prohibitions

and exceptions of General Statute 8-51 apply. *Pepper v. Broughton,* 80 N.C. 251 (1879). It is also the rule that a party or an interested witness may, notwithstanding General Statute 8-51, in an action to set aside a will, a deed or other writing, testify to communications or conversations with a deceased to show the basis upon which the party or witness has formed an opinion regarding the mental capacity of the deceased, when he testifies to such an opinion, and when the lack of such capacity is a ground for setting aside the instrument. *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634 (1950); *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388 (1946); *Rakestraw v. Pratt,* 160 N.C. 436, 76 S.E. 259 (1912); *McLeary v. Norment,* 84 N.C. 235 (1881). The reason for this rule was well put in the leading case, *McLeary v. Norment, supra* at 237-38:

> "But the conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body or mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must any conclusion of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. Would it not be competent to show an attempt at self-destruction? And do not foolish and irrational utterances equally tend to show the loss of reason when proceeding from the sane person? In either case, the conduct and the language may be feigned and insincere, but this will only require a more careful scrutiny of the evidence, and does not require its total rejection. The admissibility of the witness' opinion, resting as it necessarily must, upon past opportunities of observing one's conduct, requires in order to a correct estimate of the value of the opinion, an enquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded."

While this rule is difficult to reconcile logically with the language of the statute it is nevertheless firmly imbedded in our

law as a "rule of reason." *Cf. In re Will of Hall,* 252 N.C. 70, 77, 113 S.E. 2d 1, 6 (1960).

It has also been said that interested witnesses may not testify to transactions or communications with a deceased when these tend to show either the exercise of undue influence over him, *Hathaway v. Hathaway,* 91 N.C. 139 (1884), or the lack of it, *In re Will of Chisman,* 175 N.C. 420, 95 S.E. 769 (1918). In *Hathaway* the record[2] reveals that a devisee under an earlier instrument sought to testify that the deceased had told her with regard to a *later* instrument that "it was not her will, that she had made it because [a beneficiary under the later instrument] said that unless she gave him her property she might lie in the bed and die. I heard [this beneficiary] tell her so myself." The Court characterized the testimony as "not offered to show the want of legal capacity . . . disclosed by . . . erratic and unnatural acts and utterances . . . but *to prove facts, as such, asserted by the testatrix whereof her declarations are the only proof.*" 91 N.C. at 141. (Emphasis added.) It affirmed the trial court's ruling striking the testimony. In *Chisman,* according to the record, a daughter of the deceased and beneficiary of the script being propounded testified that in her opinion the deceased's "mind was all right as far as I could see . . . and continued so as long as she lived so far as I know. The night she died she was able to recognize us children and talked with us." Following brief testimony about the deceased's doctor and a visit to him by deceased, the witness testified that the deceased asked one Gilliam Brown if he "would get two gentlemen to witness her will." She was then asked, as appears in the opinion of the Court: "Q. What do you know about the preparation of this will, if anything?" Over objection she was permitted to testify: "She told me she had made a will willing me her property; that she had changed the first will . . . and that she copied this from the first will so that she would know it was written correctly." The Court characterized this last testimony as tending "directly to establish the will and to prove that it was the free and voluntary act of the testatrix and . . . to contradict the charge of undue influence . . . " and as being "not a casual conversation upon some indifferent subject, admitted . . . as a basis for forming an opinion upon the sanity of the testatrix, but the declarations constitute very vital evidence tending to

[2] Some of the details recounted in *Hathaway, Chisman,* and *In re Hinton, infra,* do not appear in the reported opinions but are taken from the records on file with the Court.

establish the will and to rebut the charge of undue influence." 175 N.C. at 422, 95 S.E. at 771. It held the admission of this testimony prejudicial error.

In *In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867 (1947), on the other hand, the caveator testified that the testatrix, her aunt, had told her that "they had papers made out that I would get what they had—if anything happened to me, my niece [the caveator] would get it." This declaration was inconsistent with the writing under attack which purported to devise the testatrix's property to a stranger to the blood. The Court said: "The purpose of this evidence was to lay, in part, the foundation for [the witness'] opinion that [the testatrix] was consciously incapable of making a will totally at variance with this declaration. . . . [T]he evidence is competent on the issue of mental incapacity. (Citations omitted.) At least its admission would not work a new trial according to our previous decision. *In re Will of Hinton* . . . . [T]he testimony of [another disinterested witness] quotes the same declaration of purpose without objection."

In *In re Hinton,* 180 N.C. 206, 104 S.E. 341 (1920), a caveat proceeding, the jury found both the existence of undue influence and mental incapacity. On propounders' appeal the Court found no error in the admission of the testimony of a disinherited caveator who, having given her opinion that deceased lacked testamentary capacity, testified that the deceased had said to her, on the occasion of the death of the witness' husband and son of deceased, "Don't be uneasy, I will see that you [the testifying caveator] and your children don't suffer," and had said to the witness' son [the deceased's grandson], "Yes, I will look out for you and take care of you." The witness was careful to state, however, that "what transpired . . . goes to the formation of my opinion as to his mental capacity." Before the witness so testified the trial judge instructed the jury: "There may be submitted to you an issue or question as to whether . . . the propounders procured the execution of the will by exercising undue influence over the mind of the testator. Whatever this witness may say must not be considered upon that issue, it is confined to the issue as to whether the testator had sufficient mental capacity to make a will at the time of the execution of the instrument." The Court, relying on the principle that evidence "competent for one purpose and not for another" may be properly admitted if instructions limiting it to the proper pur-

pose are given, found no error. The Court pointed out that when detailing conversations with a person for the purpose of demonstrating an opinion as to the person's mental state, a witness may at the same time be offering "proof of relevant facts." It said that evidence relevant to the issue of mental capacity should not be kept out on a general objection simply because it was also relevant to the issue of undue influence. The Court was of the opinion that an appropriate limiting instruction could and did solve the problem.

The transactions and communications with the deceased related in, respectively, *Hathaway, Chisman, Kestler,* and *Hinton,* seem at first to be quite similar. Close examination, however, reveals that the deceased's declarations in *Chisman* that she "had made a will . . . changed the first will . . . copied this from the first will . . . . " are statements of cognitive fact offered to prove the truth of what they assert. Likewise the deceased's declarations in *Hathaway* that she had made the contested instrument because of a veiled threat from the beneficiary therein is clearly a statement of fact the probative value of which rests on the truth of the declaration itself and not simply the fact that the declaration was made. Such testimony is hearsay and inadmissible without regard to General Statute 8-51. The declarations in *Kestler* and *Hinton,* however, are not so much statements of fact as they are indications of the declarant's state of mind and mental purposes which were inconsistent with the scripts sought to be propounded. Their probative value rests simply on the fact that they were made and not on the truth of anything they may assert. Given the exception to General Statute 8-51 carved out by *McLeary v. Norment, supra,* what seems to be operating in the later cases applying it is the hearsay rule itself.

Often the mental condition of the deceased in a caveat or other proceeding to set aside a written instrument bears on both undue influence and mental capacity issues. "But the question of undue influence and fraud is, in both the complaint and evidence, so tied up with the mental condition of the grantor . . . as to make that, perhaps, the strongest factor leading to the answer to the [fraud and undue influence] issue. Indeed, without it, the evidence of fraud and undue influence is, perhaps, too tenuous for consideration." *Goins v. McLoud, supra* at 658,

58 S.E. 2d at 637. This Court said in *In re Will of Thompson,* 248 N.C. 588, 594, 104 S.E. 2d 280, 285 (1958):

> "Because the strength or weakness of mind of a testator and his susceptibility to influence are important in determining whether undue influence was exerted, the mental and physical condition of Jerry M. Thompson, together with his age, less than two years prior to the signing by him of the challenged paper writing, is, under an issue of undue influence, a proper subject for consideration by the jury, and evidence tending to show such condition is admissible. (Citations omitted.) *This evidence was also competent on the second issue of mental capacity to make a will . . . .*" (Emphasis added.)

See also Smith v. Keller, 205 N.Y. 39, 98 N.E. 214 (1912). In these kinds of cases the same transactions and communications with a deceased tending to show his state of mind may tend at once to establish the existence of mental capacity and resoluteness and thereby negate undue influence, or to establish the existence of mental incapacity or weakness and thereby support the charge of undue influence.

Thus it seems an oversimplification of the rules to say that an interested witness may testify to transactions and communications with a deceased only if such testimony is considered on the mental capacity issue but not if it bears on the question of undue influence. The real distinction in the cases is whether the testimony is offered mostly to show the basis for the witnesses' opinion as to the deceased's mental condition or whether it is offered mostly to prove some other fact in issue. In the former instance the probative value of the testimony rests simply on the fact that the transactions or communications *occurred.* In the latter it rests on the truth of whatever assertions are contained in the transactions or communications related. In the former instance there is no hearsay involved and the testimony is generally admissible, while in the latter the hearsay nature of the testimony renders it inadmissible.

In *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1 (1960), a caveat in which the jury answered the issues of testamentary capacity and undue influence in favor of the propounders, testimony from a non-interested witness was admitted at trial to the effect that deceased had told the witness that she had had "quite a bit of trouble with a young man" named George Whit-

field; that she had bought him a Cadillac automobile, given him a deed to property in Hendersonville, had intended to marry him, had gotten a marriage license for that purpose but had been advised against the marriage by another man. Whitfield, the evidence showed, was a married man at the time. The trial court told the jury that it might consider this evidence as bearing on "the fact that [the deceased] seemed to have a transaction of that kind on her mind a good deal as it might tend to show a condition of her mind at the time . . . . But as to the exact details of what took place between [the deceased] and the young man George Whitfield . . . you will not consider them, and disregard them and erase them from your mind and do not permit them to influence you in your verdict." The caveators excepted to this instruction on the grounds that it tended to limit this evidence to the mental capacity issue and that it was error for the judge not to permit the jury to consider it on the undue influence issue. This Court, speaking through Clifton Moore, J., said, 252 N.C. at 81-82, 113 S.E. 2d at 9:

> "It is generally held that 'Declarations made either before or after the execution of the will, but not part of the *res gestae,* are mere hearsay and are not admissible as direct evidence of the exercise of fraud or undue influence. They may be received in evidence, however, to show the state and condition of the testator's mind. Thus, they may be admitted to prove or disprove his weakness of mind and consequent susceptibility to undue influence, or his feelings and attitude toward, and relations with, persons mentioned in or excluded from his will . . . . '
>
> "Our Court has not always followed the majority view as to admissibility and effect of testator's declarations with respect to the issue of undue influence. *In re Will of Ball,* 225, N.C. 91, 33 S.E. 2d 619. (Other citations omitted.) *In re Will of Ball, supra,* has a clear and clarifying discussion of this subject. There it is said: 'So then with us the rule comes to this. Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence.' "

The Court held that the trial judge's limiting instructions were not prejudicial to the caveators. It said, 252 N.C. at 82, 113 S.E. 2d at 10, that the deceased's declarations

> "are not substantive evidence of the truth of the transactions referred to by her, and as to these transactions themselves her declarations are hearsay. The court admitted the testimony . . . with respect thereto as bearing upon the state of testatrix's mind. This was proper and admission for any other purpose . . . would have been error. As already indicated, caveators got the benefit of this testimony under proper instructions."

Whitley v. Redden, 276 N.C. 263, 171 S.E. 2d 894 (1970), was a suit on two notes against the estate of the alleged maker. The defenses were lack of mental capacity to execute the notes, failure of consideration, and lack of due execution and delivery. The plaintiff and his assignor both testified to their opinion that the deceased had mental capacity to execute the notes. They also testified to certain declarations made to them by the deceased which tended to show the *reason for the execution of the notes, the consideration supporting them and their due execution and delivery.* The trial judge admitted this evidence and instructed the jury that it was offered solely for the purpose of showing the basis for the witnesses' opinion of the deceased's mental capacity. This Court held the admission of this evidence to be error, saying, through Branch, J., 276 N.C. at 272-73, 171 S.E. 2d at 901:

> "We conclude that North Carolina is one of those states which has a 'Dead Man's' statute and allows an interested witness, where there is an issue of mental capacity, to relate personal transactions and communications between the witness and a decedent or lunatic as a *basis for his opinion as to the mental capacity of the decedent or lunatic;* however, such evidence will be rejected when it is offered for the purpose of proving and does tend to prove vital and material *facts* which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them. (Emphasis the Court's.)
>
> "The rule set forth in the case of *In re Hinton,* 180 N.C. 206, 104 S.E. 341, that evidence is admissible over a general objection if it is competent for any purpose, is not

applicable to the testimony here challenged. *The challenged testimony was so directed and weighted towards proving facts essential to establishing plaintiff's claim, rather than the basis of witnesses' opinions as to sanity, that it became impossible for the trial court to effectively remove the prejudice to defendant by a limiting instruction.* Therefore, a limiting instruction by the court could not make the evidence admissible." (Emphasis added.)

The New York Court of Appeals applied similar reasoning in *Smith v. Keller, supra,* an action to set aside a will on the *sole* ground of undue influence. Caveators stipulated that the deceased possessed the requisite testamentary capacity. It said, 205 N.Y. at 46, 49-50, 98 N.E. at 216-17:

"The court ruled: 'The evidence of the mental state of the deceased is always taken on a question of undue influence. The declarations are not evidence of the fact contained in the statement, but the evidence is competent.' The rule as stated by the court has been often upheld. *(Matter of Woodward,* 167 N.Y. 28.) Evidence of acts and conversations of a deceased bearing upon her mental strength, is not incompetent simply because it bears upon some question other than that of the mental strength of the deceased. The difficulty in this case is that counsel for the plaintiff taking advantage of a rule correctly stated by the court proceeded to call many witnesses, and from them to elicit testimony bearing in a very slight degree, if at all, on the question of the mental strength of the testatrix, but in that way he obtained a large number of declarations by her subsequent to the date of the will which were well calculated to influence the jury, and which doubtless did influence the jury in determining the question submitted to it, as to whether the will was the free and voluntary act of the testatrix.

. . . .

"Questions to elicit the mental strength of a testator should be asked for that purpose and not for an incompetent and improper purpose. . . . *Efforts to obtain from witnesses conversations, including improper and incompetent statements of fact under the guise of showing the mental strength of a testatrix, should be and are condemned,* and where, as in this case, such effort has been repeated and continuous and the evidence so obtained is to a large extent relied upon

to show undue influence and is not a mere incident in the receipt of evidence for a proper purpose, it requires that the judgment should be reversed." (Emphasis added.)

[3] We conclude that in actions to set aside written instruments executed by deceased persons on the grounds of mental incapacity where other issues such as undue influence are raised by the evidence, and where testimony of an interested witness is offered relating to transactions or communications with the deceased, the foregoing authorities support the following propositions: (1) If the probative value of such testimony rests mostly on demonstrating the basis for the witness' opinion as to the deceased's mental state, it is admissible under appropriate limiting instructions notwithstanding the provisions of General Statute 8-51. (2) If the probative value of such testimony rests mostly on demonstrating the basis for such an opinion, it is admissible under appropriate limiting instructions even when the mental state of the deceased is relevant to both the mental capacity and undue influence issues. (3) If the probative value of such testimony rests mostly on its tendency to prove certain facts in issue relevant to issues other than the deceased's mental state, General Statute 8-51 and the hearsay rule render it inadmissible and limiting instructions will not cure the prejudice resulting from its admission.

[4] Applying these principles to the facts before us, we do not believe the admission under the limiting instructions here given of the challenged testimony of the propounder was error. The transactions and communications with the deceased which he related, considered in the context of his other testimony and other evidence in the case, seem clearly to have been offered mostly for the purpose of showing the basis for his opinion that his mother at the crucial time in question had the mental capacity to execute a will. The declarations or statements which he attributed to the deceased were not offered primarily to prove the truth of any assertion contained therein. Their probative value depends more on the fact that they were made. The declarations themselves are evidence of the deceased's strong and resolute mental state and firm purpose to do what she did.

The real battleground in this proceeding was the mental state of the deceased. The caveators claimed she was mentally weak, lacking in testamentary capacity, and easily led by the suggestions of others. The propounder claimed precisely the

opposite. The evidence of undue influence was sparse. If there was any at all, it consisted of the caveators' evidence of the deceased's weakened mental and physical condition, the results of the will itself, and the propounder's evidence of his own involvement in assisting his mother to get the will prepared. Unlike *Whitley v. Redden, supra,* there were no other issues in the case. Unlike *Chisman* and *Hathaway* the declarations of the deceased here related were not so much statements of fact which depended for their probative worth on the truth of the assertions contained therein but were more akin to those held properly admitted in *Kestler* and under proper limiting instructions in *Hinton.*

We note, furthermore, that testimony of similar import to the testimony of the propounder came in without objection through the lawyer who prepared the will, his secretary, and the propounder's wife. *See In re Will of Hinton, supra.*

[5] We now consider briefly another assignment of error raised by the caveators in the Court of Appeals and brought forward in their new brief filed here. The caveators contend that the trial court committed prejudicial error in allowing propounder's wife to testify to statements made to her by the deceased some four days before the execution of the script, concerning her reasons for wanting to leave her home to the propounder. These statements were to the effect that the propounder's father had built the house for him while he was in service, had stopped work on it while the propounder was listed as missing in action, and resumed construction when the propounder was later determined to be safe. This witness testified that the deceased on this occasion said, "That house was built for my son." Caveators contend that this testimony amounts to the admission of hearsay evidence and was prejudicial to them. Propounder contends that the evidence is admissible to show the basis upon which this witness expressed her opinion that at the crucial time in question the deceased possessed the requisite testamentary capacity and to show a resolute state of mind on the part of the deceased not likely to be susceptible to over-reaching on the part of others.

In the context of all the evidence presented, we are inclined to agree with the position of the propounder. It is true that insofar as the purpose of this evidence was to prove, in fact, the reason for the home's being built it was hearsay. We be-

lieve, however, that the thrust of this evidence was not so much to show why in fact the home was built but rather that the deceased herself was conscious of a reason, whether true or not. The thrust of this evidence, in other words, was to show the deceased's state of mind regarding her property and to show that she had a fixed purpose to dispose of it according to the instrument in question. Whether in fact the propounder's father built the house for him while he was in service is relatively unimportant in the context of this case. What is important is what the deceased thought about it as revealed by her statements on the subject. The evidence, in other words, was offered mostly for the purpose of revealing the deceased's state of mind. Its probative value rested mostly on the fact that deceased made the statements and not the truth of anything asserted in them. As such it was not hearsay and not error to admit it.

The last assignment of error brought forward by the caveators in their new brief is to the failure of the trial judge to allow their motion to set aside the verdict as being contrary to the weight of the evidence. Inasmuch as a ruling of this sort is within the sound discretion of the trial judge and the evidence in the case was, in fact, highly conflicting on the crucial issue of the deceased's mental capacity, we find no error on this point.

The verdict and judgment of the trial court are sustained. The decision of the Court of Appeals awarding a new trial is

Reversed.

Chief Justice SHARP and Associate Justices HUSKINS and COPELAND dissent for the reasons stated by BROCK, Chief Judge, in the opinion of the Court of Appeals in this case.

STATE OF NORTH CAROLINA v. HAROLD LEGETTE, AISO KNOWN AS KENNY BROWN, AND FORREST LEE WILSON, ALSO KNOWN AS JAMES LEE WILSON

No. 99

(Filed 8 February 1977)

1. Criminal Law § 66— pretrial photographic identification — impermissible suggestiveness

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground

only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

2. Criminal Law § 66— mistaken identification — factors

Factors to be considered in evaluating the likelihood of mistaken identification include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

3. Criminal Law § 66— in-court identification — pretrial photographic identification — no taint

The trial court properly denied defendants' motion to suppress an armed robbery victim's in-court identification on the ground that the identification was tainted by a pretrial photographic identification since the evidence tended to show that the witness viewed defendants for 5-7 minutes at the time of the crime; the crime occurred in broad daylight in a building well lighted with fluorescent lights; the witness was eight feet from one defendant and engaged in conversation with him; the witness observed the other defendant from a distance of 2-3 feet; the witness gave an accurate initial description of defendants; the witness showed a high level of certainty in making a final photographic identification of defendants; the witness's identification at trial was clear and unequivocal; and the time span involved in the identification was very short—4-5 hours between the crime and the photographic identification and less than two months from the date of the crime to date of trial.

4. Constitutional Law § 31; Criminal Law § 66— pretrial photographic identification — availability of photographs to defendant

While the better practice dictated that photographs used in a pretrial photographic identification should have been made available to the defense, failure to do so did not deny defendants the right to effective cross-examination; moreover, even assuming that the action of the trial judge was erroneous, where the identification of an accused is positive and certain and all other evidence points overwhelmingly to his guilt, such error is harmless beyond a reasonable doubt.

5. Constitutional Law § 21; Searches and Seizures § 1— warrantless seizure of item in plain view — no constitutional prohibition

The Constitution prohibits only unreasonable searches and seizures, and under circumstances requiring no search warrant because the contraband subject matter is in plain view, the constitutional immunity never arises.

6. Searches and Seizures § 1— pistol in plain view — warrantless seizure proper

If an item is in plain view of an officer who is at a place where he has a legal right to be, he may seize it without a warrant and the

item is properly admissible; therefore, a pistol was lawfully seized from defendants' automobile and properly admitted into evidence in a prosecution against them for armed robbery where an officer who arrived at the scene of defendants' arrest was standing beside defendants' car when he saw the butt of the pistol sticking out of a paper bag in the car and seized it.

7. **Searches and Seizures § 1— warrantless search of vehicle — propriety when probable cause exists**

The general rule is that, absent consent, a search warrant must accompany every search or seizure; however, a warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impractical to secure a search warrant.

8. **Searches and Seizures § 1— warrantless search of car — probable cause**

Officers had probable cause to arrest defendants and make a warrantless search of their car, and fruits of the search were admissible in a prosecution against defendants where the evidence tended to show that defendants and the car had been adequately described to the officers, and the officers had reason to believe that, since the robbery had recently occurred, the robbers would still be in possession of the gun and stolen money.

9. **Constitutional Law § 36— statutorily prescribed sentence — no cruel and unusual punishment**

A sentence which is within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional, and so long as a sentence is within statutory limits the punishment actually imposed by a trial judge is a discretionary matter.

10. **Constitutional Law § 36; Robbery § 6— armed robbery — punishment statute — constitutionality**

The punishment provisions for armed robbery set forth in G.S. 14-87 are constitutionally valid.

DEFENDANTS appeal from judgments of *Collier, J.*, 5 April 1975 Criminal Session, RICHMOND Superior Court. Docketed and argued in this Court as Case No. 160 at the Fall Term 1976.

Defendants were charged in separate bills of indictment, proper in form, with the armed robbery of H. Lewis Braswell on 16 February 1976 in Richmond County.

H. Lewis Braswell testified that he and his wife operated a combination grocery-fabric store about three miles north of Ellerbe on U.S. Highway 220 in Richmond County. On 16 February 1976 two black men, later identified as defendants, drove up in a green Plymouth and entered the Braswell store about

thirty seconds apart. Defendant Legette went into the cloth room, followed by Wilson. When Mr. Braswell went back to the cash register in the grocery store, Wilson followed him and asked for some men's socks. While the socks were being shown, Wilson stuck a .38 caliber revolver in Mr. Braswell's side and told him to be quiet. Mr. Braswell requested the robbers not to hurt him or his wife and stated they could have all the money. The sum of $128.70 was taken from the cash register in the cloth shop and $156.18 was taken from the cash register in the grocery store. Defendants also took a money bag containing $1,060. Mr. Braswell and his wife were then tied together, blindfolded and ordered to lie on the floor, which they did. The robbers left and within three to five minutes Mr. Braswell heard a familiar voice at the door, jumped up and saw defendant Wilson outside the window in the back yard. The green Plymouth was just pulling out slowly in front of the driveway. Mr. Braswell grabbed his shotgun from the storeroom, ran out the front door, fired one shot at the fleeing car and another at defendant Wilson who had just gone over the fence surrounding the premises.

The money bag containing $1,060 was later found across the road approximately 130 yards from the store. The robbery was reported to the sheriff by telephone. Shortly thereafter a truck driver stopped at the store and gave Mr. Braswell the license number of the green Plymouth involved in the robbery.

The truck driver, Eugene Allen Sparkman, testified that he saw a black male running down the road and a white man running after him with a shotgun. The black male ran to and entered an automobile bearing a blue and yellow Pennsylvania license plate, number 3X0979. Mr. Sparkman turned his truck around and drove to Mr. Braswell's store to give him that information.

Nathan Grant, a deputy sheriff of Richmond County, was on duty at the time of the robbery. He observed a 1968 black-over-green Plymouth bearing Pennsylvania license number 3X0979 and pulled in behind it. Another deputy pulled his car in front of the Plymouth and the two officers stopped the fleeing vehicle. Defendants were taken out of the Plymouth, placed under arrest and searched. Defendant Legette had $67.00 in his pockets and $60.00 in his billfold. Inside the Plymouth in plain view, scattered about the floorboard and seat of the car,

was $16.82 in loose change. The officers seized 27 quarters, 43 dimes, 77 nickels and 192 pennies, most of which was visible from the outside of the car. The butt end of a revolver handle was sticking out of a paper bag on the floorboard on the passenger side of the car. This gun was seized by the officers.

A key, later determined to open a lock on the icebox in Mr. Braswell's store, was found in the console of the green Plymouth.

Mr. Braswell testified that the robbery occurred in the afternoon; that the fluorescent lighting in the store was on; that he was able to see the face of each robber clearly, and that the two robbers were in the store and observed by him for five to seven minutes. Mr. Braswell testified there was no doubt in his mind that the two defendants are the men who robbed him. He based his identification "on how they appeared at the time they committed the robbery."

Harold Legette, alias Kenny Brown, testified that he was born in Richmond County but lived in Pennsylvania. On the date he was arrested he was in Richmond County to visit his mother and to attend a relative's funeral. Defendant Wilson and wife accompanied him. On the day of his arrest he and defendant Wilson, after unsuccessfully attempting to find his sister for a brief visit, left Wadesboro intending to proceed to U.S. 1 north and return to Pennsylvania. They came to an intersection where the road was blocked by many police officers. There they were stopped, searched and arrested. Defendant Legette said he had never seen Mr. Braswell at that time and had never been in his grocery store located north of Ellerbe on Highway 220. He asked the officers what his arrest was all about but received no reply. He did not see any pistol at the scene. He stated that he had seen defendant Wilson at his home in Pennsylvania with a key similar to the one offered in evidence and if that key fit Mr. Braswell's icebox it was merely a coincidence.

On cross-examination Legette testified that the license and registration for his car was issued in the name of Kenny Brown; that under that name he had been convicted of robbery, robbery by assault and purse snatching, and pled guilty to robbery and burglary in 1968. He stated that "there was a gun like that in my car" but I didn't go anywhere with it. He said they put defendant Wilson's wife on a bus and sent her back

to Pennsylvania and admitted that he had recently been released from prison but didn't know whether he was on parole or not.

Defendant Forrest Lee Wilson, alias James Lee Wilson, testified that he was twenty-six years of age and lived in Bristol, Pennsylvania. He accompanied defendant Legette to North Carolina. On the day of his arrest they were getting ready to return to Pennsylvania and went to Wadesboro to visit Legette's sister before leaving. They failed to find her and were driving toward U.S. 1 to go north when the officers stopped them. This defendant said there was some change in the console of the green Plymouth to be used for paying tolls on their return trip. He denied having ever owned a pistol and stated that the first time he saw the pistol allegedly taken from their car was at the police station.

On cross-examination this defendant said his correct name was Forrest James Wilson and that he had known Legette about eight years. He admitted that he had been tried and convicted for a number of crimes including "no more than two robberies." He said he pled guilty to burglary and resisting arrest in 1969 and to larceny and receiving stolen goods in 1969. He admitted that he had served time for a parole violation on worthless checks and forgery and was presently on parole in the State of Pennsylvania. He denied robbing Mr. and Mrs. Braswell.

The jury convicted each defendant of armed robbery, and each was sentenced to a term of not less than forty years nor more than life, less credit for time spent in jail awaiting trial. Defendants appealed to the Court of Appeals, and we ordered the case transferred to the Supreme Court for initial appellate review. Errors assigned will be discussed in the opinion.

Rufus L. Edmisten, Attorney General; William B. Ray, Assistant Attorney General; William W. Melvin, Deputy Attorney General, for the State of North Carolina.

Henry L. Kitchin, of the firm of Leath, Bynum, Kitchin & Neal, attorney for defendant appellant Legette; Charles B. Deane, Jr., of the firm of Jones & Deane, attorney for defendant appellant Wilson.

HUSKINS, Justice.

Defendants' first assignment of error is based on the dual contention that (1) their in-court identification by the witness

Braswell was tainted by pretrial photographic identification and (2) the court erred in denying defendants the opportunity to view the photographs in question. Defendants argue that the findings and conclusions to the contrary are erroneous and that their motion to suppress the in-court identification should have been allowed.

The evidence developed on voir dire tends to show that four or five hours after the robbery Deputy Sheriff Grant took about a dozen photographs of black males to the Braswell store. These photographs were given to Mr. Braswell in random order, and he was requested to select the pictures of the two men who robbed him. He had already been told that suspects had been apprehended. Mr. Braswell recognized defendant Legette the first time he saw his picture and selected defendant Wilson's picture on the third viewing of the photographs. The hesitancy with respect to Wilson apparently resulted from the fact that Wilson was wearing glasses in the photograph which he had not been wearing at the time of the robbery. Mr. Braswell stated: "There is no doubt in my mind that the two defendants present in the court are the same two that I observed in the store on that occasion. No one suggested that I should pick out these two defendants as being the ones that robbed me. I am basing my identification of the defendants, Legette and Wilson, today on how they appeared at the time they committed the robbery. My identification is not influenced or affected by having seen the photographs of them." Mrs. Braswell separately identified the picture of Legette but asked the police to show her a picture of Wilson without the glasses. When this was done she identified Wilson as the second robber. Defendants offered no evidence on voir dire.

At this point in the voir dire defendants moved that the photographs be produced for their inspection. The district attorney replied, "If I decide to try to introduce the photographs, I'd be happy to let them see them at that time." The trial judge made no formal ruling on the motion but stated that he would examine the photographs *in camera* and if he found anything improper, he would turn them over to defense counsel for examination. The photographs were never offered in evidence, either on voir dire or before the jury, and consequently were never shown to defense counsel.

The trial judge made findings of fact substantially in accord with Mr. Braswell's testimony, there being no evidence

offered to the contrary. Based on these findings the court made two conclusions of law, to wit: (1) The photographic evidence was not improperly suggestive and (2) the in-court identification of defendants by the witness Braswell was independent in origin and based on observation of defendants at the time of the robbery. The motion to suppress the in-court identifications was thereupon denied and the evidence was admitted for consideration by the jury.

Defendants protest the court's refusal to permit them to view the photographs and contend such action infringed upon their right of confrontation and denied them due process of law in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 19 and 23 of the Constitution of North Carolina.

[1] In *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), identification by photograph was expressly approved and the Court held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The *Simmons* test has been applied by this Court in many cases, including *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. McVay and Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970); *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970).

[2] Factors to be considered in evaluating the likelihood of mistaken identification include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Hunt,* 287 N.C. 360, 215 S.E. 2d 40 (1975); *State v. Henderson, supra.*

[3] Here, the trial judge found that the witness Braswell had ample opportunity to view defendants at the time of the crime. The robbery occurred during "broad daylight" in a building well lighted with fluorescent lights. Mr. Braswell was only eight feet from Legette and engaged in a conversation with him. He observed defendant Wilson from a distance of two to three feet. Both defendants were in Braswell's presence for five to seven minutes. All these findings are supported by clear, competent and convincing evidence and therefore are conclusive and binding on appellate courts in this State. *State v. Hunt, supra; State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris, supra.* The findings in turn support the conclusion that Braswell had ample opportunity to view the defendants. See *Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970), where the United States Supreme Court held that a fleeting but "real good look" at a defendant, illuminated by car headlights, was sufficient.

There is no contention that Braswell failed to give the defendants close scrutiny while they were in his presence, and defendants concede the accuracy of Braswell's initial description of them. Moreover, both Braswell and his wife showed a high level of certainty in making a final photographic identification of defendants. Even though both expressed some initial uncertainty as to defendant Wilson because he was wearing glasses in the picture but wearing none during the robbery, this indecision was followed by positive identification after viewing a picture of Wilson with the glasses removed. Finally, Mr. Braswell's identification at trial was clear and unequivocal. The time span involved in the identification was very short—four to five hours between the crime and the photographic identification and less than two months from the date of the crime to date of trial.

When the *Simmons* test and the factors enumerated in *Neil v. Biggers, supra,* are applied to the facts in this case, there is small chance indeed that the photographs viewed by the witness Braswell led to misidentification of defendants. We hold that defendants' motion to suppress the in-court identification was properly denied and the evidence properly admitted.

[4] The only remaining question under defendants' first assignment is whether defendants were denied due process and confrontation rights with respect to the in-court identification

by the refusal of the trial judge to permit them to examine the photographs. For the reasons which follow, we hold that they were not.

The right to confront and cross-examine one's accusers is central to an effective defense and a fair trial. *Greene v. McElroy,* 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 1400 (1959). Under the Fourteenth Amendment those Sixth Amendment rights are applicable to the states. *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968). It has been held to be "an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on 'a subject matter relevant to the witness' credibility.' " *Snyder v. Coiner,* 510 F. 2d 224 (4th Cir. 1975). Even a partial restraint of such right may, in some circumstances, effectively deny the right altogether. *United States v. Norman,* 402 F. 2d 73 (9th Cir. 1968). Moreover, where "the in-court identification is deemed admissible, defense counsel must be afforded the opportunity to cross-examine the prosecution upon any and all pretrial confrontations." *United States ex rel. Regazzini v. Brierley,* 321 F. Supp. 440 (W.D. Pa. 1970). Even so, on the facts in this case, we hold that defendants have not been denied the opportunity to cross-examine the witness Braswell. True, defense counsel were denied some assistance which the photographs used in the out-of-court identification might have provided. While the better practice dictates that those photographs should have been made available to the defense, failure to do so did not deny defendants the right to effective cross-examination. This conclusion is supported by the following language, dealing with a fact situation strikingly similar to the facts here, found in *Simmons v. United States, supra:*

> "Although the pictures might have been of some assistance to the defense, and although it doubtless would have been preferable for the Government to have labeled the pictures shown to each witness and kept them available for trial, we hold that in the circumstances the refusal of the District Court to order their production did not amount to an abuse of discretion. . . ."

Accord, United States v. Zurita, 369 F. 2d 474 (7th Cir. 1966), *cert. denied,* 386 U.S. 1023 (1967); *Ahlstedt v. United States,* 325 F. 2d 257 (5th Cir. 1963), *cert. denied,* 377 U.S. 968 (1964). We find this reasoning persuasive on the issue presented here.

Moreover, even assuming that the action of the trial judge was erroneous, we hold that where, as here, the identification of an accused is positive and certain and all other evidence points overwhelmingly to his guilt, such error is harmless beyond a reasonable doubt. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). We see no reasonable possibility that defendants' lack of opportunity to examine the photographs might have contributed to their conviction. Nor does it appear that a different result likely would have ensued had the trial court, as it should have done, permitted defense counsel to examine the photographs in question. Where no prejudice results the event is considered harmless. *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). Defendants' first assignment is overruled.

Defendants contend the trial judge erred in failing to suppress items of evidence seized from the defendants' green Plymouth at the time of their arrest. Their second assignment of error is based on this contention.

The court conducted a voir dire on the motion to suppress. Evidence on the voir dire reveals the following sequence of events relative to the challenged search and seizure. On the day of the robbery Deputy Sheriff Grant received a report of it over his radio. That report contained a description of the two suspects, a description of the car and its Pennsylvania license number. The report informed Deputy Grant that the suspects were armed with a revolver. Around 3 or 4 p.m. Deputy Grant spotted the suspects in the described car, radioed for assistance and, with the aid of another deputy's car, forced the suspects to stop. Defendants immediately got out of their car, whereupon, with drawn guns, Deputy Grant and Deputy Norton advised defendants they were under arrest. Defendant Legette submitted peacefully, while defendant Wilson struggled briefly with Deputy Norton. Meanwhile, Detective Sam Jarrell of the Rockingham City Police Department, having heard the report of the robbery, arrived on the scene. He saw the butt of a pistol handle sticking out of a paper bag in defendants' car and seized it. Inside the Plymouth in plain view, scattered about the floorboard and seat of the car, was a lot of loose change which Deputy Grant began to

pick up. In the course of that activity he found in the console of the Plymouth a key and a bill for some tires purchased in Georgia. It was later determined that the key fit and unlocked a lock on an icebox in Mr. Braswell's store.

Since the officers had no search warrant and defendants at no time consented to the search, defendants say the search was unlawful and the gun, the key and the bill inadmissible in evidence.

[5, 6] The Constitution prohibits only unreasonable searches and seizures. *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *Elkins v. United States,* 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960). Under circumstances requiring no search because the contraband subject matter is in plain view, the constitutional immunity never arises. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). If the item is in plain view of an officer who is at a place where he has a legal right to be, he may seize it without a warrant and the item is properly admissible. *Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *Ker v. California,* 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623 (1963); *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973). Here, there is ample evidence that the butt end of the pistol was readily visible to Officer Jarrell as he stood outside the Plymouth. The "plain view" doctrine has been applied by this Court in two recent cases with fact patterns nearly identical. See *State v. Smith,* 289 N.C. 143, 221 S.E. 2d 247 (1976), and *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971). Based on these authorities, we hold the pistol was lawfully seized and properly admitted into evidence.

Admission of the key and the bill for tires presents a different question because there is no evidence that these items were in plain view. Rather, testimony on voir dire indicates they were not and, in fact, were found during a general search of the car. Nevertheless, for reasons which follow, we hold those items were properly admitted.

[7] The general rule is that, absent consent, a search warrant must accompany every search or seizure. Even so, an exception to the warrant requirement has evolved in a tortuous line of decisions by the United States Supreme Court whereby a warrantless search of a vehicle capable of movement may be made by

officers when they have probable cause to search and exigent circumstances make it impractical to secure a search warrant. *See generally* Comment, Warrantless Searches and Seizures of Automobiles and the Supreme Court from *Carroll* to *Cardwell:* Inconsistently Through the Seamless Web, 53 N.C. L. Rev. 722, 726-747 (1975).

In *Carroll v. United States, supra,* the Court held a search to be valid where, although defendants were not arrested, probable cause existed to believe that the car contained contraband liquor and it was "not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970), involved a situation where, following a robbery, the police were given descriptions of four suspects and the car in which they fled. Shortly thereafter the suspects and the car were spotted and the suspects arrested. Police drove the car to the station and there, without obtaining a warrant, searched it. This search was upheld under the motor vehicle exception enunciated in *Carroll.* The Court said the police had probable cause to arrest the suspects and to search the car for guns and stolen money, stating that the car "could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search." The Court held that this exigent circumstance existed even after the car had been driven to the police station.

[8] On the facts before us in this case, we hold there was probable cause to arrest defendants and to search the car. Defendants and the car had been adequately described to the officers and they had reason to believe that, since the robbery had recently occurred, the robbers would still be in possession of the gun and the stolen money. The car certainly presented a "fleeting target" for a search. The fruits of the search were properly admitted into evidence.

Defendants' third assignment of error is grounded on the contention that the prosecution was permitted to establish essential elements of the crime by the use of leading questions. Only two questions are challenged. They are so innocuous that discussion of them is not required. This assignment is overruled.

Defendants except to the denial of their motions for judgment as of nonsuit and to set the verdicts aside. Their fourth and fifth assignments of error are grounded on these exceptions.

These motions are predicated on exclusion of the in-court identification and suppression of the items seized at the time of the arrest. Since the in-court identification was properly allowed and suppression of the items seized was properly denied, these motions must fail because they have no foundation to support them.

Defendants also object to a portion of the charge recapitulating the evidence with respect to the key and the tire bill. This alleged error was not brought to the attention of the trial judge before the jury retired and thus is deemed waived. *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971).

Defendants' final assignment of error is grounded on the contention that a sentence of forty years to life imprisonment for armed robbery is cruel and unusual punishment prohibited by both state and federal constitutions.

G.S. 14-87(a) provides that any person 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." Subsection (b) of this statute provides that any person who has been previously convicted of robbery with a firearm or other dangerous weapon, either in this State or in any other state or the District of Columbia, "upon conviction for a second or subsequent violation of G.S. 14-87(a), shall be guilty of a felony and shall be punished without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except such time as may be allowed as a result of good behavior . . . . "

[9] We have consistently held that a sentence which is within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854 (1967); *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849 (1967); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966). So long as a sentence is within statutory limits the punishment

actually imposed by a trial judge is a discretionary matter. *State v. Slade,* 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901 (1965).

[10] It is within the province of the General Assembly to prescribe maximum punishments which may be imposed upon those convicted of crime. It is not for us to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved. We hold the punishment provisions of G.S. 14-87 are constitutionally valid. The discretionary sentences imposed by the trial court will not be disturbed.

Prejudicial error has not been shown. The verdicts and judgments must therefore be upheld.

No error.

IN THE MATTER OF THE ESTATE OF JAMES L. MOORE, DECEASED

No. 80

(Filed 8 February 1977)

1. **Executors and Administrators § 1— right of testator to name executor — rights of person nominated**

A testator has the right to name the person who shall administer his estate after his death, provided his designate is not disqualified by law; similarly, the person he names as executor has the right to administer his estate, and he can be deprived of that right only by his refusal or neglect to probate the will or to take out letters, or by his inability or unsuitableness to execute the trust.

2. **Executors and Administrators § 1— statutory disqualifications**

Statutory specifications of disqualifications for service as a personal representative cannot be superseded by the general policy of the law to give effect to the desires of a testator.

3. **Executors and Administrators §§ 1, 5— nominated executor — disqualification for conflict of interest**

When it appears that the personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both, the testator's nominee is unsuitable and disqualified as a matter of law and should not be appointed, G.S. 28A-4-2; and when conditions arise after his appointment which will prevent him from

faithfully and impartially executing the duties which he has assumed, cause for removal exists.

4. **Executors and Administrators § 37— proceeding to disqualify nominated executor — taxing of costs and attorneys' fees**

In a proceeding to determine whether a testator's nominee is disqualified to serve as his executor, the nominee is a party to the will within the meaning of the statute permitting the court to award costs, including attorneys' fees, in a proceeding to fix the rights of a party to the will, G.S. 6-21(2).

5. **Executors and Administrators § 37— rejection of nominated executor — award of costs and attorneys' fees**

Albeit G.S. 6-21(2) authorizes the trial judge in his discretion to award costs, including attorneys' fees, in the instances specified therein, it is quite clear (1) that he should not award costs and attorneys' fees to an executor-designate whose claim for appointment is rejected unless the claim was reasonable, made in good faith, and *prima facie* in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law.

6. **Executors and Administrators §§ 1, 37; Appeal and Error § 68— disqualification of nominated executor — conflict of interest — law of the case — costs and attorney's fees**

The holding of the Court of Appeals that testator's nominee was legally disqualified to serve as executor because of a conflict of interest became the law of the case when the Supreme Court denied a petition for discretionary review of that decision, and because of this legal disqualification the nominee is not entitled to recover costs and attorney's fees in pressing his claim for appointment as executor.

7. **Executors and Administrators § 37— proceedings prior to probate of will — costs and attorney's fees of nominated executor**

Where a testator's widow filed with the clerk her petition to probate a 1965 will and for an order disqualifying testator's nominee as executor, and the nominee knew that the widow had in her possession a paper writing executed in 1973 which purported to be testator's last will and that he was not named as executor therein, the nominee was entitled to the advice and assistance of counsel up to the time the 1965 instrument was probated as testator's last will, and the court, in its discretion, could allow him to recover his necessary costs, including a reasonable fee for his attorney's services in responding to the widow's petition and in adverting the court to the existence of the 1973 paper writing.

8. **Executors and Administrators § 37— amount of attorney's fee — value of estate**

In determining the amount to be awarded as an attorney's fee for services rendered to a nominated executor, the court should evaluate the services rendered without reference to the value of the estate.

In re Moore

ON petition for discretionary review of the decision of the Court of Appeals (29 N.C. App. 589, 225 S.E. 2d 125 (1976)), reversing an order entered by *Collier, J.*, at the 27 October 1975 Civil Session of CABARRUS. This case was docketed and argued as Case No. 121, Fall Term 1976.

This proceeding was begun on 19 February 1974 when Eloise T. Moore, the widow of James L. Moore (Moore), who died 19 December 1973, filed with the clerk of the superior court a petition to probate a paper writing dated 10 October 1965 purporting to be the last will and testament of her deceased husband. In the document she was named sole beneficiary and Robert A. McClary (McClary) was named executor.

In the petition Mrs. Moore alleged, *inter alia*, that: (1) the approximate value of Moore's estate was $840,157.50, of which $833,000.00 was represented by a certificate of deposit of money received and notes receivable from a purported sale to Robert G. Hayes (Hayes) of 1,040 shares of the common stock of Kannapolis Publishing Company; (2) that at the time of the purported sale in August 1973 Moore lacked sufficient mental capacity to understand the nature and effect of the purported sale; (3) petitioner desired decedent's personal representative to institute an action for the rescission of said purported sale; (4) because of the personal and business relationship of McClary to Hayes (details alleged in the petition), his personal interests are so antagonistic to those of the estate and its sole beneficiary that they cannot be reconciled. Because of this conflict of interest Mrs. Moore prayed that the clerk not issue letters testamentary to him.

In response to the petition, filed 28 February 1974, McClary alleged he was informed that Mrs. Moore had in her possession another paper writing executed by Moore on 15 August 1973 which purports to be his last will; that pending its production and a judicial determination whether it should be probated, any ruling the court might make relating to his right to letters testamentary under the 1965 paper writing would be moot and premature. He prayed "that the proper paper writing be probated" as Moore's last will and that he granted leave to answer Mrs. Moore's petition thereafter.

In consequence of the information contained in McClary's response to Mrs. Moore's petition, the clerk of the superior court issued a subpoena to Gaither S. Walser, attorney for Mrs.

Moore, to produce the 1973 paper writing referred to therein. He delivered the document to the clerk "without prejudice to the right to contest the validity of the same." Whereupon the clerk declined to probate the 1965 paper writing pending a determination of the validity of the 1973 paper writing, which purported to be the last will of Moore. Thereafter, on 26 April 1974 Judge Robert M. Martin, judge presiding, entered an order directing the clerk, as judge of probate, to probate the paper writing dated 10 October 1965 as Moore's last will.

The 1973 paper writing is not in the record before us. However, we obtain the following information from the statement of facts in the opinion of the Court of Appeals on the first appeal of this case: "In August of 1973, Moore sold certain corporate stock in Kannapolis Publishing Company to Robert G. Hayes and executed another paper writing, dated 15 August 1973, purporting to be his will, not only leaving the majority of his estate to his wife, but also naming her as executrix." *In re Moore,* 25 N.C. App. 36, 37, 212 S.E. 2d 184, 185 (1975).

There was no exception or appeal from Judge Martin's order. On 9 May 1974 the clerk admitted the 1965 paper writing to probate as the last will of Moore. Upon the probate of the 1965 paper writing as Moore's last will, McClary immediately replied to Mrs. Moore's petition that he not be issued letters testamentary under it. He denied that any conflict of interest existed between the duties he would owe the estate and Hayes. He alleged that, pending his qualification as executor and his subsequent "investigation into all of the facts and circumstances of the administration of the estate of James L. Moore, it is premature and presumptuous to speculate on a conflict of interest"; that he is a licensed certified public accountant, subject to the ethics of his profession which he honors; and that as executor he would be subject to the dictates of the court, and "the petitioner would have an adequate remedy at law as to any possible impropriety on the part of the respondent."

After a plenary hearing upon McClary's application for letters testamentary (filed 8 May 1974) and Mrs. Moore's petition that such letters not be issued to him, the clerk found facts upon which he concluded that "there is no conflict of interest which legally disqualifies" McClary from serving as executor of the estate of Moore. On 22 August 1974 he signed an order that letters testamentary be issued to McClary upon his

taking the proper oath. The pertinent facts found by the clerk are summarized below:

McClary, age 50, had been a duly licensed certified public accountant since 1950 and headed his own accounting firm. Since 1955 he has been engaged on a year-to-year basis to prepare the annual financial statements, franchise and income tax returns of Central Distributing Company and its affiliate, Mainliner Oil Company, corporations engaged in the business of distributing oil in the Kannapolis area. McClary individually has prepared these annual statements and tax returns. Hayes is the president and chief executive officer of Central Distributing Company, and he is the individual with whom McClary has "made his oral contract for the accounting services to be rendered by him." At the time of the hearing McClary expected shortly to begin work for Central Distributing Company for the year ending 31 March 1974 and to complete this work by 15 June 1974. McClary discusses with Hayes any matters requiring discussion during the course of his accounting service to the Company. Hayes has never expressed any dissatisfaction with McClary's services.

McClary had assisted Moore in his financial affairs from about the year 1955 until the date of his death and had prepared all of his income tax returns. He did not participate in the transaction involving Moore's sale of the Publishing Company stock to Hayes, but Mrs. Moore informed him by telephone that the transaction had been consummated and that she was dissatisfied with it. McClary has never discussed the transaction with Hayes.

Mrs. Moore, as sole beneficiary of the estate, contends that at the time Hayes purchased Moore's Publishing Company stock Moore lacked sufficient mental capacity to understand the nature of the transaction and that an action should be instituted against Hayes for rescission. McClary testified on the hearing that upon his qualification as executor he would investigate the facts of the sale and if he found merit in Mrs. Moore's desire that an action to rescind the sale be instituted he would take such legal action.

Mrs. Moore excepted to the clerk's conclusions of law and to his order that letters testamentary issue to McClary and appealed to the superior court. Judge Long heard the appeal on 12 September 1974 and concluded "as a matter of law that the facts found by the Clerk establish a conflict of interest which legally disqualifies Robert A. McClary from qualifying and

serving as Executor." Whereupon he entered judgment reversing the order of the clerk that letters testamentary be issued to McClary as executor of Moore and remanding the cause to the clerk for the appointment of an administrator c.t.a. of the estate of James L. Moore.

Upon McClary's appeal, the Court of Appeals affirmed Judge Long's judgment. *In re Moore*, 25 N.C. App. 36, 212 S.E. 2d 184, *cert. denied* 6 May 1975, 287 N.C. 259, 214 S.E. 2d 340 (1975). Thereafter, on 25 May 1975, Jack E. Klass was appointed administrator c.t.a. of the estate of James L. Moore.

On 2 October 1975 McClary and his attorney, John Hugh Williams, under the provisions of G.S. 6-21(2), petitioned the presiding judge for the sum of $206.05 expended by McClary "for court matters" and a reasonable attorney's fee for Mr. Williams be taxed as a part of the costs incurred in the proceedings to determine the right of McClary to qualify as executor of the will of James L. Moore. In support of his motion for fees, Mr. Williams submitted an affidavit in which he stated that he had not kept "a completely accurate record" of the time devoted to the "assertion of McClary's rights under the will of James L. Moore," but he estimated it to be in excess of one hundred hours.

Judge Collier heard the petition on 27 October 1975 and "determined in his discretion that under the provisions of G.S. 6-21" McClary should be reimbursed for costs incurred in court proceedings in the amount of $206.05 and that "in view of the size of the estate with assets approximating $900,000.00 and the involved nature of the proceedings and the amount of time devoted thereto," the amount of $8,000.00 is "a fair and reasonable fee" to be allowed for services rendered by John Hugh Williams as attorney for McClary. Whereupon "in the discretion of the court" he ordered these sums taxed as a part of the court costs.

From the foregoing order Jack E. Klass, administrator c.t.a. of the estate of Moore appealed to the Court of Appeals, which vacated the order. We allowed the petition of McClary and Williams for discretionary review.

Williams, Willeford, Boger & Grady by Samuel F. Davis, Jr., and John Hugh Williams for petitioner appellant.

Jordan, Wright, Nichols, Caffrey & Hill by G. Marlin Evans and Walser, Brinkley, Walser & McGirt by Gaither S. Walser for respondent appellee.

SHARP, Chief Justice.

The trial court awarded McClary both "court expenses" and attorney's fees. As to the $206.05 "court expenses," the Court of Appeals held that since nothing in the record or order of the superior court indicated the nature of these "court expenses," it was unable to review their validity. It therefore vacated the allowance of this item. This holding we affirm without the necessity of discussion.

The remaining and more substantial question is whether McClary is entitled under G.S. 6-21(2) to have Moore's estate taxed for the legal expenses incurred by McClary in his unsuccessful litigation to secure his appointment as executor. The Court of Appeals held that attorney's fees could not be awarded in a proceeding to contest the appointment of an executor because such proceeding is not one "to fix the rights and duties of parties" under the will. Its rationale was that respondent "cannot be said to be litigating the rights and duties of executor as a party under the will in the very proceeding in which he is seeking to become executor."

McClary bases his claim to attorney's fees on G.S. 6-21 which provides in pertinent part:

"Costs in the following matters shall be taxed against either party or apportioned among the parties in the discretion of the Court:

. . . .

"(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or *fix the* rights and duties of parties thereunder (emphasis added) . . . .

. . . .

"The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow; . . . "

In view of the premise on which the Court of Appeals based its decision, we first consider the question, is a proceeding to determine whether a testator's nominee is disqualified to serve as his executor one to "fix the rights" of a party to the will? In

doing so we make reference to the following established principles:

[1] A testator has the right to name the person who shall administer his estate after his death, provided his designate is not disqualified by law. G.S. 28A-4-2 and G.S. 28A-9-1 (1976). *See In re Will of Johnson,* 233 N.C. 570, 574, 65 S.E. 2d 12, 15 (1951); 33 C.J.S. *Executors and Administrators* § 22a (1942). Similarly, the person he names as executor has the right to administer the estate, and he can be deprived of that right only by his refusal or neglect to probate the will or to take out letters, or by his inability or unsuitableness to execute the trust. 33 C.J.S., *supra* at § 22 d. *See Yount v. Yount,* 258 N.C. 236, 238, 128 S.E. 2d 613, 615 (1962). It is therefore the right of a person named in the will as executor to present the will for probate and to insist upon his appointment. In so doing he is presumably carrying out the expressed wish of the testator. However, the nominee is not required to assert his right under the will; the law authorizes any person named as executor in a duly probated will to renounce that office in the manner specified in G.S. 28A-5-1 (1976) (formerly G.S. 28-13(1966)).

[2, 3] A testator's selection of his executor is not to be set aside lightly. The decedent who names his executor has taken pains not to leave the selection of his personal representative to chance or to the choice of others; so we may suppose he had his reasons for the selection he made. However, statutory specifications of disqualifications for service as a personal representative cannot be superseded by the "broad general policy of the law which gives effect to the desires of a testator and sees that his intentions are carried out so far as they can be ascertained." *In re Russell's Estate,* 43 Cal. App. 2d 319, 324, 110 P. 2d 718, 721 (1941). For instance, when it appears that the personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both, the testator's nominee is unsuitable and disqualified as a matter of law. This is especially true where the conflict is one which the testator did not know or foresee. *See In re Keske's Estate,* 18 Wis. 2d 47, 117 N.W. 2d 575 (1962); *In re Stewart's Estate,* 139 Mont. 295, 363 P. 2d 161 (1961). Under such circumstances he should not be appointed, G.S. 28A-4-2 (1976) (formerly G.S. 28-8 (1966)); and, when conditions arise after his appointment which will prevent him from faithfully and impartially execut-

ing the duties which he has assumed, cause for removal exists. G.S. 28A-9-1 (1976) (formerly G.S. 28-32 (1966)); *In re Will of Covington,* 252 N.C. 551, 114 S.E. 2d 261 (1960). Obviously the clerk should refuse to issue letters testamentary for the same cause he is empowered to revoke them. *In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839 (1923).

[4, 5] Since McClary, as the executor named in Moore's will is a person to whom the testator delegated duties thereunder, we hold that in a proceeding to determine his right to qualify as executor he is a *party* within the meaning of G.S. 6-21(2). However, when an executor's right to qualify is contested and judicially denied, whether the court will exercise its discretion to award costs, including attorney's fees incurred in his unsuccessful litigation will depend in each case upon the grounds for the opposition and the reasonableness of his resistance to it, his good faith in pressing his appointment, and whether his efforts were in the interest of the estate. *See* 31 Am. Jur. 2d *Executors and Administrators* § 542 (1967). In a contest over the right of letters testamentary, as in a contest over letters of administration, if the contest is not in the interest of the estate generally, but only in the interest of the contestants, no allowance will be made out of an estate for costs and attorneys fees, incurred. *See* Annot., 90 A.L.R 101, 102 (1934); *Horton v. Horton,* 158 Md. 626, 149 A. 552 (1930).

In *In re Will of Slade,* 214 N.C. 361, 199 S.E. 290 (1938), the Court allowed costs and fees to heirs who had unsuccessfully caveated a will; in *Mariner v. Bateman,* 4 N.C. 350 (1816), to executors who unsuccessfully sought to resist the probate of a second will which deprived them of their office. However, in *Slade,* the Court found that the action of the caveators was "apt and proper" (214 N.C. at 362, 199 S.E. at 290); in *Mariner v. Bateman, supra,* the conduct of the complainants "was such as might reasonably have been expected from executors who were disposed to do their duty." 4 N.C. at 351. In both cases the contentions of the losing party were arguably correct; their efforts bona fide; and, if they had prevailed, presumably the result would have been to prevent the assets of the estate from being distributed contrary to the testator's intent. *See also Overman v. Lanier,* 157 N.C. 544, 549, 73 S.E. 192, 194 (1911).

In jurisdictions where the trial judges lack the discretionary, statutory authority granted to the trial judges of this State

by G.S. 6-21(2) the clear weight of authority supports the following statement: "Where the costs and expenses with which it is sought to charge a decedent's estate were incurred in behalf of one whose claim to the appointment is rejected, either upon the original application or in proceedings for the revocation of his letters, it would seem clear that the estate cannot be charged with such costs and expenses." 90 A.L.R., *supra* at 110.

McClary contends that his efforts to qualify as executor were in the interest of the estate because the testator had manifested his desire that he be appointed. The peculiar facts of this case, however, neutralize this contention. The conflict between McClary's interests and those of the estate, which Mrs. Moore alleged and the court found to exist in 1974, was not present in October 1965 when Moore executed his will. The conflict arose out of a business transaction between Moore and Hayes in August 1973. At that time, according to Mrs. Moore's contentions, Moore lacked the mental capacity to contract and one of the first duties to devolve upon his personal representative would be to institute an action in behalf of the estate to rescind the contract of sale he made with Hayes. We think it is safe to say that, whatever his mental condition, Moore would have been the last person to anticipate that his executor would be called upon to bring an action on the ground of his mental incapacity to rescind a sale he had made. Moore, therefore, could not have been cognizant of the conflict of interest which the allegations of his lack of mental capacity would create for his named executor in 1973. Thus, it would be impossible to say that Moore intended McClary to serve as executor notwithstanding the conflict of interest which developed.

[5] Albeit G.S. 6-21(2) authorizes the trial judge in his discretion to award costs, including attorneys' fees, in the instances specified therein, it is quite clear (1) that he should not award costs and attorneys' fees to an executor-designate whose claim for appointment is rejected unless the claim was reasonable, made in good faith, and prima facie in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law. A designate who "has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration," is disqualified as a matter of law. G.S. 28A-9-1(a)(4).

The facts pertinent to this controversy were found by the clerk and are set out in the preliminary statement herein. Judge Long concluded "as a matter of law that the facts found by the Clerk establish a conflict of interest which legally disqualifies Robert A. McClary from qualifying and serving as Executor. . . . " Upon McClary's appeal from the judgment of the superior court directing the clerk to appoint an administrator c.t.a. of Moore's estate, the Court of Appeals affirmed Judge Long's order. In an opinion by Judge Morris that court said:

"We fail to see how respondent can act impartially as executor when, as here, one of his first duties will be to decide whether to sue the president and chief executive officer of a firm, for which he has performed services as a certified public accountant for approximately 19 years. Especially when a decision to bring suit might endanger respondent's chances of future employment by the firm, the possibility that his decision to bring suit will be influenced by his own personal interests is great. One cannot represent his own interest and at the same time represent those of another which are in conflict with his own with fairness and impartiality to either. Even if respondent actually brings suit on behalf of the estate, his position would be such as to make him amenable to suggestions of failure to prosecute the action fully because of his relationship with Hayes. Construing the language of G.S. 28-32 broadly, we conclude that it is not necessary to show an actual conflict of interest to justify a refusal to issue letters of administration; it is sufficient that the likelihood of a conflict is shown." *In re Moore*, 25 N.C. App. 36, 40, 212 S.E. 2d 184, 187 (1975).

[6] We denied McClary's petition for discretionary review of the decision of the Court of Appeals on 6 May 1976. At that time its holding that McClary was legally disqualified to serve as executor of Moore's estate became the law of this case. We hold, therefore, that because of this legal disqualification he is not entitled to recover costs and attorney's fees in pressing his claim for appointment as executor under Moore's will. McClary did, however, perform one duty which he owed Moore's estate as the executor named in his 1965 will, and he is entitled to recover such costs, including *reasonable* attorney's fees, as can be allocated to that performance.

[7] When Mrs. Moore filed with the clerk her petition to probate the 1965 will and for an order disqualifying McClary

as executor, she made no reference therein to the existence of the "paperwriting dated August 15, 1973, purporting to be a will of the said James L. Moore." Notice of Mrs. Moore's petition having been served upon McClary by the sheriff, he very properly responded to it. In his response, as it was his duty to do under the circumstances, he notified the clerk he was informed and believed that Mrs. Moore had in her possession a subsequent paper writing executed in the year 1973 which purported to be Moore's last will. *See* G.S. 31-15 (1976). Since McClary knew of the existence of the 1973 instrument it is not unreasonable to assume that he also knew he was not the executor named therein. In his brief he says that he first responded to Mrs. Moore's petition by "calling to the court's attention a subsequent 1973 will which named the widow as Executrix and sole beneficiary."

Under these somewhat unusual circumstances McClary was entitled to the advice and assistance of counsel up to the time the 1965 instrument was probated as the last will of Moore. It follows that the court, in its discretion, could allow him to recover his necessary costs, including a reasonable fee for his attorney's services in responding to the petition which was served upon him on 19 February 1974 and in adverting the court to the existence of the 1973 paper writing. Services rendered by counsel after the probate of the 1965 will were rendered in the interest of McClary and not the estate. Accordingly, this cause is returned to the Court of Appeals for remand to the Superior Court of Cabarrus County so that the court may reconsider McClary's motion for reimbursement of costs expended, provided they are properly itemized, and for an allowance of reasonable attorney's fees.

[8] In view of Judge Collier's recital in the order which is the subject of this appeal, that he fixed $8,000.00 as "a fair and reasonable fee" for McClary's attorney "in view of the size of the estate with assets approximating $900,000, and the involved nature of the proceedings and amount of time devoted thereto," we are constrained to point out that the size of the estate bears no relation to the value of the services rendered in this proceeding. In the event reasonable attorney's fees are awarded McClary's counsel, the court will evaluate the services rendered prior to the probate of the 1965 will without reference to the value of the estate.

The decision of the Court of Appeals, in accordance with this opinion, is modified and affirmed.

Modified and affirmed.

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

No. 91

(Filed 8 February 1977)

1. **Insurance § 116— fire insurance rates — deemer provision — public hearing**

When the "deemer" provision of G.S. 58-131.1 is construed *in pari materia* with the public hearing requirement of G.S. 58-27.2(a), no public hearing is required for the deemer provision to be operative, but a public hearing is a prerequisite to valid action by the Commissioner of Insurance to avoid automatic operation of the deemer provision by approving or disapproving the proposed rate in writing within 60 days after its submission.

2. **Insurance § 116— fire insurance rates — deemer provision — public hearing — due process**

When the deemer provision is construed *in pari materia* with statutes calling for a public hearing, it functions in conjunction with such requirements to provide procedural due process in rate adjustment proceedings by preventing arbitrary and unreasonable delays which wreck the delicate balance of the rate-making process.

3. **Insurance § 116— automobile physical damage rate filing — disapproval without hearing — rates deemed approved**

Disapproval of a proposed rate revision for automobile physical damage insurance by the Commissioner of Insurance 59 days after it was filed was invalid because no public hearing had been held, and the proposed rates were deemed approved 60 days after the initial filing.

4. **Insurance § 116— proposed rates — setting of hearing — effect on "deemer" provision**

Insurance Commissioner's action in setting a hearing date on proposed insurance rates did not toll the running of the 60-day period of the "deemer" statute.

5. **Insurance § 116— fire insurance rates — deemer provision — temporary approval of proposed revision**

Where the deemer provision is triggered by the failure of the Commissioner of Insurance validly to approve or disapprove a proposed

rate adjustment, it operates only as a temporary approval pending valid action by the Commissioner as contemplated by G.S. 58-27.1(c) and G.S. 58-27.2(a).

6. Insurance § 116— fire insurance rate filing — burden of proof

There is no presumption that a rate filing by the Fire Insurance Rating Bureau is proper; rather, the burden is upon the Bureau to show that the proposed rate schedule is fair and reasonable and that it does not discriminate unfairly between risks.

7. Insurance § 116— fire insurance rates — determination of unreasonableness — necessity for findings and conclusions

Where the Commissioner of Insurance enters an order that proposed rates are unreasonable, unfairly discriminatory or not in the public interest, G.S. 58-9.4 requires that such order be based on findings of fact and conclusions of law.

8. Insurance § 116— fire insurance rate filing — action by Insurance Commissioner — necessity for findings and conclusions

The Commissioner of Insurance may disapprove a fire insurance rate filing on the ground that it is not supported by material and substantial evidence, but in doing so, it is incumbent upon the Commissioner to make findings of fact which specifically point out the absence of, or deficiencies in, the evidence produced in support of the filing, and these findings must be supported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b)(5).

9. Insurance § 116— automobile physical damage rates — trend adjustment for claim frequency

There was no evidence to support a finding that omission of data on trend adjustment for claim frequency constituted a defect in an automobile physical damage insurance rate filing where the only testimony concerning the relevancy of the trend adjustment was to the effect that claim frequency for physical damage coverage tends to remain relatively constant from year to year.

10. Insurance § 116— automobile physical damage rates — countrywide data

The evidence did not support a finding that an automobile physical damage insurance rate filing was defective because certain portions of the filing relied upon countrywide data rather than North Carolina data exclusively where in every instance there was uncontradicted testimony that the countrywide data is representative of intrastate experience and thus has validity with respect to North Carolina ratemaking.

11. Insurance § 116— automobile physical damage rates — data from selected N. C. companies

The evidence did not support a finding by the Commissioner of Insurance that portions of an automobile physical damage rate filing were defective because they relied solely on data taken from certain

selected North Carolina companies rather than from all companies operating in North Carolina where the controverted segment of the filing was supported by countrywide data which was properly considered in light of uncontradicted testimony that the tendency is for expense provisions in particular states to be very close to the countrywide expense provisions, and the data from selected North Carolina companies was offered merely to support the countrywide expense data and to show that the countrywide expense data was not out of line with North Carolina experience.

12. Insurance § 116—automobile physical damage rates — absence of loss and premium data for preceding year

Conclusion by the Commissioner of Insurance that a 21 July 1975 automobile physical damage rate filing was defective was not supported by a finding that the loss and premium data for automobile physical damage insurance in North Carolina for 1974 was required to be filed with the Insurance Services Office by 15 February 1975 but was not included with the filing, where the uncontradicted evidence showed that such data was not included because tabulation of the data had not been completed when the filing was made, and there was no evidence of bad faith or unnecessary delay in the tabulation of this data.

13. Insurance § 116— automobile physical damage rates — fair and reasonable profit

Finding by the Commissioner of Insurance that the Fire Bureau failed to produce sufficient evidence that five percent is a fair and reasonable profit for automobile physical damage insurance was unsupported by material and substantial evidence where uncontradicted testimony indicates that, at present and in the past, five percent is and has been generally accepted as a fair and reasonable profit.

14. Insurance § 116— automobile physical damage rates — erroneous disapproval of filing

Since the conclusion of the Commissioner of Insurance that an automobile physical damage rate filing was improper and the rates proposed therein were unreasonable, unfairly discriminatory and not in the public interest was supported only by conclusory findings of fact which, in turn, were unsupported by material and substantial evidence in view of the entire record as submitted, the order of the Commissioner did not constitute a valid disapproval of the rate filing so as to supersede the rates which had been deemed approved prior to the hearing on the filing.

PLAINTIFF and defendant appeal from decision of the Court of Appeals, 30 N.C. App. 487, 228 S.E. 2d 261 (1976). Docketed and argued in this Court as Case No. 146 at the Fall Term 1976.

On 21 July 1975 the North Carolina Fire Insurance Rating Bureau (Bureau) filed with the Commissioner of Insurance (Commissioner) a proposed rate revision for the Automobile

Physical Damage Insurance Program. The proposal contained experience data for all insurance companies in North Carolina for the years 1972 and 1973, as well as state-wide rate level indications for rate level revisions for both private passenger and commercial vehicles.

On 18 September 1975, fifty-nine days after the filing, the Commissioner notified the Bureau by letter that the filing had been received and was disapproved. This was done without notice and without an opportunity for the Bureau to be heard. In the same letter the Commissioner scheduled a hearing on the filing for 28 October 1975. Prior to that hearing the Bureau published a notice to the public on 22 October 1975 that the scheduled hearing on October 28 would be conducted for the purpose of "investigating the adequacy and fairness of existing premiums and rates of Automobile Physical Damage Insurance Policies."

The scheduled hearing was duly conducted on 28 and 30 October 1975. The Bureau offered numerous exhibits and called six witnesses, most of whom were specialists and experts in the field of insurance, to explain and justify the proposed rate revisions. The testimony of these witnesses tends to show: (1) that there has been no rate increase for automoblie vehicle damage coverage since December 1969; (2) that from December 1969 to June 1975 the automobile repair costs index rose 53 percent; (3) that the July 1975 rate level for automobile physical damage insurance was 19.9 percent below the 1954 rate level; (4) that incurred losses and expenses have been and are increasing; (5) that based on the latest statistics available the insurance industry loss and expense ratios exceed 100 percent; and (6) that the filing utilized generally accepted rate-making procedures and is the same as used in the last approved filing.

Except for an exhibit containing an order allowing a 15 percent downward deviation from the present rate level for the North Carolina Farm Bureau Mutual Insurance Company for the lines of coverage involved in the hearing, no evidence was offered by or on behalf of the Insurance Department or anyone else in opposition to the proposed rates.

On 6 November 1975 the Commissioner entered an order disapproving the Bureau's proposed rate revisions, leaving in effect the existing rates for Automobile Physical Damage Insurance. From this order the Bureau appealed to the Court of Appeals.

The Court of Appeals, with Martin, J., dissenting, held: (1) That the "deemer provision" of G.S. 58-131.1 "will not operate to automatically approve a filing of proposed rates in the absence of a hearing if such hearing is required by G.S. 58-27.2(a)"; and (2) that the Commissioner erred in disapproving the rate revisions proposed in the 21 July 1975 filing in that the Bureau produced substantial evidence of (a) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (b) the reasonably anticipated operating expenses in the same period, and (c) the percentage of earned premiums which will constitute a fair and reasonable profit in that period, and there is no evidence in the record to support the Commissioner's conclusion to the contrary. The Bureau appealed from that part of the decision which defused the "deemer provision" of G.S. 58-131.1, and the Commissioner appealed from that portion which holds that he erred in disapproving the proposed rate revisions. Each assigns errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, and Hunter & Wharton, by John V. Hunter III, for plaintiff.

Joyner & Howison by Walton K. Joyner for defendant.

HUSKINS, Justice.

We first turn to the contention of the Rating Bureau that the proposed rates were "deemed" approved under G.S. 58-131.1 upon failure of the Commissioner, in writing, to disapprove the rates within 60 days after submission.

G.S. 58-131.1, codified from Chapter 380 of the 1945 Session Laws, reads as follows:

> "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. Provided, that a rate or premium used or charged in accordance with a schedule, classification, or rating method or underwriting rule or bylaw or regulation previously approved by the Commissioner need not be specifically 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."

In clear language this statute provides that a proposed rate is deemed approved if the Commissioner does not act within 60 days after the submission of the proposal to disapprove it in writing. Operation of the "deemer" provision can be averted only by the approval or disapproval of the Commissioner within 60 days.

The Commissioner contends, however, that G.S. 58-27.1(c) and G.S. 58-27.2(a) require public hearings on proposed rate adjustments before the Commissioner may act upon the proposal and therefore a proposed change in rates cannot be "deemed approved" upon the lapse of 60 days when there has been no public hearing. The cited statutes provide in pertinent part as follows:

"The insurance advisory board shall . . . promulgate rules and regulations to provide for the holding of public hearings before the Commissioner of Insurance . . . on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing." G.S. 58-27.1(c).

"Whenever any statutory or licensed insurance rating bureau or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the Commissioner, such bureau or company shall file its proposed change and supporting data with the Commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board. . . . " G.S. 58-27.2(a).

Pursuant to the quoted statutes the insurance advisory board adopted the following regulations:

"1. Any rate adjustment or proposal involving a general revision of an existing rating schedule which the Com-

missioner 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."

See Comr. of Insurance v. Rating Bureau, 291 N.C. 55, 229 S.E. 2d 268 (1976).

The Commissioner argues that inaction which activates the deemer provision of G.S. 58-131.1 is, in reality, "action" on his part because it results in approval of the proposed rates. Therefore, he reasons, a public hearing is required before the deemer provision can be triggered. This ingenious argument sets the mandates of the deemer provision in direct conflict with the public hearing provisions and, the Commissioner notes, since the statutory requirement for a public hearing is the more recent enactment of the Legislature, to the extent of any conflict between the deemer and the hearing provisions, the latter must prevail. This principle of statutory construction is sound, *Comr. of Insurance v. Rating Bureau, supra,* but it is also true that statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975); *Person v. Garrett, Comr. of Motor Vehicles,* 280 N.C. 163, 184 S.E. 2d 873 (1971); *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688 (1960). *See* 7 Strong's N. C. Index 2d, Statutes § 5 and cases there cited. Any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent. *Comr. of Insurance v. Automobile Rate Office, supra; Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410 (1951). With these rules of statutory construction in mind, we turn to the allegedly conflicting statutes to determine whether the deemer provision is viable in the absence of a public hearing.

[1] Close examination of the public hearing requirement, G.S. 58-27.2(a), and the deemer provision, G.S. 58-131.1, reveals that the two statutes create no irreconcilable conflict. For the reasons which follow, we hold that, correctly construed, the two statutes are not in conflict and may be harmonized to give effect to each.

In establishing the rate-making procedures, the Legislature provided three methods by which the Commissioner may dispose of proposed rate changes, to wit: (1) He may approve the proposed rate adjustment; (2) he may disapprove it; or (3) he may do neither for 60 days and the proposal is thereupon deemed approved. G.S. 58-131.1. To avoid the automatic operation of the deemer provision, the Commissioner must approve or disapprove the proposal in writing within 60 days after submission. Approval or disapproval necessarily contemplates *action* by the Commissioner, and a public hearing is required prior to such action upon a proposed material rate change. G.S. 58-27.2(a).

Rate adjustment proposals may be *temporarily* resolved by the third alternative left to the Commissioner by the General Assembly. When no action is taken upon a proposed rate adjustment within 60 days after submission, the law provides that the proposal "shall be deemed approved." This deemer provision does not require a hearing. A hearing is prerequisite to valid action by the Commissioner, whereas no action by the Commissioner automatically triggers the deemer provision.

[2] Moreover, when the deemer provision is construed *in pari materia* with the statutes calling for a public hearing, it functions in conjunction with such requirements to provide procedural due process in rate adjustment proceedings.

A primary consideration of the Legislature in adopting the rate-making scheme contained in Chapter 58 of the General Statutes was to ensure that rates fair to both the insured and the insurer be established. G.S. 58-131.2. For this reason it adopted requirements that material rate adjustments may be implemented only after a full hearing on the merits. Such a requirement, standing alone, cannot ensure fair rates because factors influencing rates may, and do, frequently change. It is therefore important that the rate-making process be not only fair but also prompt. The records of recent cases before this Court reveal instances where not only proposed rate increases but also proposed *rate reductions* have been arbitrarily delayed so long that the proposals became obsolete before any action thereon was taken by the Commissioner. See, for example, *Comr. of Insurance v. Rating Bureau, supra.*

Thus the deemer provision is addressed to the problem of promptness. By requiring action within 60 days, it prevents arbi-

trary and unreasonable delays which wreck the delicate balance of the rate-making process. By encouraging prompt hearings and active investigation by the Commissioner, the "deemer" acts as a necessary catalyst to the system and thus, rather than being in conflict with the hearing requirement, is a necessary adjunct to it.

[3] Applying these legal principles to the facts before us, we hold that under the deemer provision of G.S. 58-131.1, the proposed rates were deemed approved on 19 September 1975, 60 days after the initial filing. The Commissioner's disapproval on 18 September 1975 was invalid because no public hearing had been held.

[4] Similarly, we find no merit in the contention of the Commissioner that his action in setting a hearing date tolled the running of the 60-day period. Nothing in the statute suggests such interpretation. The plain language of the deemer provision compels a contrary conclusion.

If conducting the required public hearing within 60 days of the filing taxes the Commissioner's time, G.S. 58-27.1(c), and the rules adopted by the Insurance Advisory Board pursuant thereto, permit the hearing to be held before the Commissioner or "any person employed by the Insurance Department authorized by the Commissioner to act in his stead."

[5] We must now determine the status of the proposed rates which were deemed approved on 19 September 1975. Since the "deemer" provision operates in conjunction with the hearing provisions, it cannot stand alone as a final resolution of the proposal. Final resolution comes only after valid approval or disapproval by the Commissioner. We hold, therefore, that where, as here, the deemer provision is triggered by failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operates only as a temporary approval pending valid action by the Commissioner as contemplated by G.S. 58-27.1(c) and G.S. 58-27.2(a). Thus, in the present case, the Bureau is lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision until such time as a valid final order is entered by the Commissioner—either in this proceeding or in a subsequent filing.

We now turn to the question whether the hearings finally conducted in October 1975 and the subsequent order of the Com-

missioner dated 6 November 1975 constitute a valid disapproval of the Bureau's proposal, superseding the rates deemed approved on 19 September 1975.

The Rating Bureau was organized "for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance . . . on property or risks located in this State." G.S. 58-127. Since changes in external circumstances and conditions force periodic revision of established rates, the Legislature has prescribed procedures to facilitate necessary changes. There are two methods by which changes in premium rates may be put into effect. It is the first of these with which we are presently concerned, *i.e.*, "the Bureau may file with the Commissioner of Insurance, for approval by him, a proposal for such change, with an increase or a decrease. G.S. 58-131.1." *Comr. of Insurance v. Rating Bureau, supra.*

[6, 7] A mere filing is not sufficient but is subject to approval by the Commissioner. There is no presumption that a rate filing by the Bureau is proper. Rather, "the burden is upon the Bureau to show that the rate schedule proposed by it is 'fair and reasonable' and that it does not discriminate unfairly between risks." *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 165 S.E. 2d 207 (1969). It follows that where the Bureau has not produced substantial evidence to support its filing, the Commissioner is authorized, and it is his duty, to enter an order disapproving the filing. *See* G.S. 58-9; G.S. 58-127; G.S. 58-131.1. Any such order or decision is subject to review by the courts as provided in G.S. 58-9.4, *et seq.* Where, as here, the Commissioner enters an order that the proposed rates are unreasonable, unfairly discriminatory or not in the public interest, G.S. 58-9.4 *requires* that such order be based on findings of fact and conclusions of law.

In setting out the extent of judicial review, the Legislature provided in G.S. 58-9.6(b) that:

> "The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appel-

lants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

* * * *

(5) Unsupported by material and substantial evidence in view of the entire record as submitted. . . . "

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Comr. of Insurance v. Automobile Rate Office, supra.*

[8] Thus when the Rating Bureau makes a filing the Commissioner may disapprove that filing on the ground that it is not supported by material and substantial evidence. In doing so, it is incumbent upon the Commissioner to make findings of fact which specifically point out the absence of, or deficiencies in, the evidence produced in support of the filing. These findings must be supported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b)(5).

In his order of 6 November 1975 the Commissioner disapproved the filing of the Rating Office. The order is apparently based on Conclusion of Law No. 5 that "[t]he filing is improper and the rates proposed therein are unwarranted, unreasonable, improper, unfairly discriminatory, and not in the public interest." Such conclusion of law, if based on adequate findings of fact which are supported by competent evidence, will support the order of the Commissioner. We now examine the findings of fact upon which this conclusion of law is based.

The Commissioner makes the following findings of fact in support of his Conclusion of Law No. 5:

* * * *

"5. The filing contained no trend adjustment for changes in claim frequencies.

6. Portions of the filing were not supported by North Carolina data, but instead relied solely on countrywide data.

7. Other portions of the filing were not supported by data from all the companies actually in operation in automobile physical damage insurance in North Carolina, but instead relied solely on data from certain selected companies.

8. Loss and premium data for automobile physical damage insurance in North Carolina for the year ending December 31, 1974 was required to be filed with Insurance Services Office by February 15, 1975, but was not included in this filing made on July 21, 1975.

9. The Fire Bureau failed to produce substantial evidence upon which the Commissioner could make specific findings of fact as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percentage of earned premiums which will constitute a fair and reasonable profit in that period.

10. The Fire Bureau failed to produce sufficient evidence to support a conclusion that 5% is a fair and reasonable profit for automobile physical damage insurance in North Carolina at this time.

11. The Fire Bureau failed to show that the rates that it proposed in this filing are fair and reasonable or that said rates will produce a profit which is fair and reasonable."

We now turn to the question whether these findings support the conclusion and, if so, whether the findings themselves are supported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b).

[9] It is conceded that the filing contained no trend adjustment for claim frequencies. Does the absence of this data constitute a defect in the Bureau filing? The only testimony concerning the relevancy of the trend adjustment is that of witness Biondi who stated: "We believe, based upon information that we have looked at in the past, that claim frequency for physical damage coverage tends to remain relatively constant from year to year. . . . Claim frequency is something that Insurance Services Office monitors for all lines. In past years, Insurance Services Office has never noticed an appreciable trend in claim frequency in automobile physical damage. Therefore, we have never used the trend factor for claim frequency." Thus, there is no evidence to support a conclusion that omission of data on trend adjustment for claim frequency constituted a defect in the filing. It follows that Finding of Fact No. 5 is irrelevant and

affords no support for the Commissioner's Conclusion of Law No. 5.

[10] As to Finding of Fact No. 6, it is again admitted by the Bureau that certain portions of the filing relied upon countrywide data rather than North Carolina data exclusively. The Commissioner's finding does not specify the "portions" of the filing with which he is concerned. Nevertheless, we have examined the portions where countrywide data was used, particularly with reference to (1) the use of the factor 1.145 to increase particular losses to reflect incurred losses and loss adjustment expense, (2) loss repair costs trend information supplied by the U. S. Bureau of Labor Statistics, and (3) expense data obtained from Insurance Services Office member companies. In every instance there is testimony that the countrywide data is representative of intrastate experience and thus has validity with respect to North Carolina rate-making. In no instance is there any testimony to the contrary. Therefore it is apparent that this finding provides no support for the Commissioner's Conclusion of Law No. 5.

[11] By his Finding of Fact No. 7 the Commissioner finds that portions of the filing relied solely on data taken from certain selected North Carolina companies rather than from all companies operating in North Carolina. Evidence of record indicates the controverted segment of the filing was supported by countrywide data which was properly considered in light of the testimony of the witness Biondi that "the tendency is for expense provisions in particular states . . . to be very close to the countrywide expense provisions. In my opinion, there would be no significant gain in accuracy to have a special call for North Carolina expense experience in physical damage. I have never seen a special call for North Carolina." *There is no evidence to the contrary.* Moreover, data from selected North Carolina companies was apparently offered merely to support the countrywide data and to show the Commissioner, when he came to weigh and evaluate the evidence, that countrywide expense data was not out of line with North Carolina experience. Thus the record reveals that Finding of Fact No. 7 is not supported by material and substantial evidence and therefore can provide no support for the Commissioner's Conclusion of Law No. 5.

[12] As to Finding of Fact No. 8, the uncontradicted evidence is that the loss and premium data for automobile physical dam-

age insurance in North Carolina for the year ending 31 December 1974, although filed with Insurance Services Office on 15 February 1975, was not included in this filing because tabulation of the data had not been completed when this filing was made on 21 July 1975. "In making this tabulation, individual companies report to Insurance Services Office unit records of premiums for each policy that is written. This unit record will tell Insurance Services Office that amount of premium on that policy. We get these unit records to produce the statistics. We not only combine the records, but we also divide the data into the various classes that are generally used for rate-making. We add the data on a unit-by-unit basis to insure to the greatest extent possible that the data is completely accurate. This procedure takes time, and for that reason, we do not have the entire year of 1974 available yet." There is no evidence of bad faith or unnecessary delay in the tabulation of this data. It necessarily follows that finding No. 8, although correct on its face as a naked statement, is irrelevant and cannot undergird the Commissioner's Conclusion of Law No. 5.

With respect to Finding of Fact No. 9, it is unquestionably true that the Bureau is required to produce substantial evidence as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percentage of earned premiums which will constitute a fair and reasonable profit in that period. *In re Filing by Fire Insurance Rating Bureau, supra.* Whether this finding is accurate in light of the entire record is another matter.

The Commissioner does not specify how or why the evidence offered is regarded as insubstantial. It appears that this finding is based primarily on the assumption that those items of evidence offered in support of findings 5 through 8, and rejected, should be disregarded. Thus finding No. 9 is in reality a summation of previous findings 5 through 8, and there is no material and substantial evidence in the record to support it. To the contrary, our examination of the entire record as submitted discloses substantial evidence upon which the Commissioner could have made a finding to the contrary.

[13] With respect to finding No. 10, the Commissioner finds that the Fire Bureau failed to produce sufficient evidence that 5 percent is a fair and reasonable profit for automobile physical

damage insurance. The evidence in the record on this subject indicates that, at present and in the past, 5 percent is and has been generally accepted as a fair and reasonable profit. *This testimony is uncontradicted.* Under these circumstances the evidence is ordinarily regarded as competent and sufficient to establish the profit figure. *See In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971). The Commissioner's finding to the contrary is unsupported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b). Finding of Fact No. 11 is a further repetitious summation of matters already discussed.

[14] Since the Commissioner's Conclusion of Law No. 5 contained in his order of 6 November 1975 is supported only by conclusory findings of fact which, in turn, are unsupported by material and substantial evidence in view of the entire record as submitted, we hold that the order of the Commissioner does not constitute a valid disapproval of the Bureau's filing so as to supersede the rates deemed approved on 19 September 1975.

For the reasons stated, that portion of the decision of the Court of Appeals holding the deemer provision inoperative for lack of a public hearing is reversed, and that portion holding invalid the Commissioner's order of 6 November 1975 is affirmed.

As to defendant's appeal—reversed.

As to plaintiff's appeal—affirmed.

JERRY W. WHITTEN v. BOB KING'S AMC/JEEP, INC. AND R. L. KING, JR.

No. 96

(Filed 8 February 1977)

1. Rules of Civil Procedure §§ 15, 56— pleadings amended to conform to evidence — amendment not precluded by summary judgment

Where the evidence presented at a hearing upon a motion for summary judgment would justify an amendment to the pleadings, such amendment should not be precluded by entry of summary judgment; indeed, in proper cases it is desirable to treat the pleading as though it were amended to conform to the evidence presented at the hearing.

2. Corporations § 25; Rules of Civil Procedure § 15— corporation's adoption of contract — complaint deemed amended to conform to evidence

Although plaintiff's complaint did not specifically allege that corporate defendant adopted a contract made on its behalf by the individual defendant, evidence presented at the summary judgment hearing supported this theory, and the complaint should be treated as amended to conform to the evidence.

3. Corporations § 25— contract prior to incorporation — adoption by corporation

A corporation cannot ratify a contract made on its behalf prior to its incorporation, since it could not have authorized the contract at that time; however, the corporation adopts the contract and becomes bound by its terms if it accepts the benefits of the contract with knowledge of its provisions.

4. Corporations §§ 8, 9, 25— contract by president and general manager — adoption by corporation — notice — knowledge of provisions

Evidence was sufficient to show that corporate defendant adopted a contract made on its behalf prior to incorporation where such evidence tended to show that corporate defendant accepted the benefits of the contract by using the $5000 advanced by plaintiff as part of its initial capitalization, and at no time did corporate defendant attempt to repudiate the contract benefits previously obtained; moreover, the corporation accepted the benefits with knowledge of the provisions of the contract where the individual defendant, who made the contract with plaintiff, became the president and general manager of the corporate defendant and later became the sole shareholder of the corporation.

5. Corporations § 8— notice to president as notice to corporation

It is recognized in this jurisdiction that notice to the president of a corporation is notice to the corporation.

6. Corporations § 7— knowledge of promoters — promoters who become stockholders — knowledge imputed to corporation

The knowledge of promoters generally is not imputed to a corporation; an exception may exist where those promoters become directors and stockholders or controlling stockholders in the corporation.

7. Contracts § 27— conflicting evidence on crucial issue — summary judgment improper

The trial court erred in granting defendants' motions for summary judgment where plaintiff presented evidence that an agreement between him and individual defendant was intended as a purchase of stock in the corporation to be thereafter formed, while corporate defendant offered evidence tending to show that the agreement contemplated nothing more than a loan by plaintiff to individual defendant, and the written memorandum of the agreement was ambiguous as to the true intent of the parties.

ON *certiorari* to review the decision of the Court of Appeals reported in 30 N.C. App. 161, 226 S.E. 2d 530. This case was docketed and argued in the Supreme Court as No. 153, Fall Term 1976.

Plaintiff instituted an action to recover the value of 25% of the stock in defendant corporation or in the alternative to compel the transfer to him of 25% of the outstanding stock in said corporation. Plaintiff alleged that on 4 November 1968 he and individual defendant entered into a written agreement which provided:

LETTER

To Whom it may concern:

This is to verify that Jerry W. Whitten did invest five thousand dollars in Triangle Motor Sales Inc. This money was loaned to R. L. King, Jr. until such time as stock could be issued in the company which will be after American Motor Sales Corp. has been bought out. This money & any or all interest at 6% annually or dividends which would be due if this stock were in effect at present time. This to be based on a percentage of the capital which was used to start operation of Triangle Motor Sales Inc. May 1968. The interest or dividends will be used to purchase further interest in the company if Mr. Whitten so desires. This holds no responsibility over Mr. King personally but only to the Corporation of Triangle Motor Sales Inc.

s/ R. L. KING, JR.
Pres.
Triangle Motor Sales Inc.

The complaint further alleged that the loan to corporate defendant by American Motor Sales Corporation had been satisfied in August 1974 and that plaintiff had made demand on defendants for the issuance of stock due him or for the payment of the sum of $95,000, the value of the stock to which he was entitled. He thereafter filed an amended complaint setting forth an alternative cause of action which, in summary, alleged that defendant King exceeded his authority in entering into the contract on 4 November 1968 and thereby became personally liable to execute the obligations of the contract.

Each defendant filed a separate answer. Corporate defendant responded that the proposed agreement was not a stock agreement but was only a memorandum of a loan agreement between plaintiff and individual defendant. Corporate defendant further alleged that if it should be determined that the writing was a stock agreement, then individual defendant acted outside the scope of his authority and his lack of authority was known to plaintiff.

Defendant King denied liability on the basis of the specific language in the last sentence of the above-quoted writing.

Defendants each filed a motion for summary judgment supported by defendant King's affidavit which, in summary, averred that: Neither he nor the corporate defendant had ever entered into a stock purchase agreement with plaintiff. The transaction was only a loan to the corporation and there was no intention to impose liability on defendant King. When the writing was signed by him on 4 November 1968, he was the president and general manager of Triangle Motor Sales, Inc., corporate defendant's predecessor in interest, but at that time all of the voting stock was owned by American Motors. He had no authority to bind the corporation to issue stock and this fact was known to plaintiff. By deposition defendant King further stated:

> I am R. L. King, Jr. . . . and am President and general manager of Bob King's AMC/Jeep, Inc. I have served as President and general manager since May of 1968, the date of the incorporation of the original business. . . .
>
> . . . I originally talked with Mr. Whitten regarding the creation of the corporation in January or February of 1968. I don't recall exactly what was said in the conversation. . . . In February, March or April of 1968, Mr. Whitten did give me $5,000, which I deposited into my bank account. In May I took the money along with some of my own money and the money we had borrowed to start the company and put it into a company account, the account of Triangle Motor Sales, Inc. At that time I put $15,000 of my money into the account along with Mr. Whitten's $5,000 and the $100,000 we borrowed from American Motors and Commercial Credit. . . . The American Motors' loan had no time limit for its repayment, it has been repaid having been paid off in February of 1974.

Plaintiff filed an affidavit in which he stated that in the early months of 1968 he agreed with defendant King to invest $5,000 in an automobile business to be incorporated in Winston-Salem as a franchise dealer for American Motors. In return he was to receive a 25% interest in the business and stock representing this interest would be issued to him when American Motors had been paid off for a loan to the corporation secured by all of the voting stock. He borrowed $5,000 at 10% interest and delivered this sum to defendant King. His deposition was also before the court and this deposition was consistent with his affidavit. We quote excerpts from the deposition which tend to clarify plaintiff's position:

> . . . [T]he contract, a copy of which is attached to the Complaint and marked Exhibit "A," was written. This was the first written agreement that we had and is the only agreement in writing that I had with the company. At the time the contract was written, Bob King's AMC/Jeep, (Triangle Motor Sales, Inc.) was a dealer owned corporation, owned by American Motors. . . . Mr. King drew the contract himself. . . .
>
> . . . I gave $5,000 directly to Mr. King in March of 1968, pursuant to our prior discussions to invest in the business. We had previously agreed that I would be a stockholder but a silent stockholder. . . .

On 17 November 1975 Judge Seay allowed defendants' motions for summary judgment and dismissed the action on its merits. Plaintiff appealed and the Court of Appeals affirmed as to corporate defendant, vacated the judgment as to defendant King, and remanded the cause for further proceedings. Both plaintiff and defendant King petitioned for discretionary review pursuant to G.S. 7A-31. We allowed plaintiff's petition. Defendant's petition was denied.

Henry C. Frenck for plaintiff.

White and Crumpler, by Fred G. Crumpler, Jr. and G. Edgar Parker, for defendant.

BRANCH, Justice.

The sole question before us is whether the Court of Appeals erred in concluding that the trial judge properly allowed the

motion for summary judgment in favor of the corporate defendant, Bob King's AMC/Jeep, Inc.

The entry of summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The burden of establishing the absence of any genuine issue as to a material fact rests on the moving party. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392. If the other party opposes the motion with evidentiary materials which indicate the existence of a genuine issue of material fact, or if the movant's own supporting materials suggest the existence of such an issue, then the motion must be denied. *Kidd v. Early, supra.*

Plaintiff alleged in both his original complaint and his amended complaint that *"on or about the 4th day of November, 1968* the plaintiff and the defendant corporation through its president R. L. King, Jr., *entered into a contract* for the sale and transfer of stock. . . ." [Emphasis added.] However, all the evidence presented at the hearing on the motion for summary judgment tends to show that the alleged agreement (whether it be plaintiff's version or defendant's version) was orally entered into prior to the acknowledged date of incorporation of Triangle Motor Sales, Inc. in May of 1968. The written contract of 4 November 1968 was merely a memorandum reflecting the terms of that prior agreement. The deposition of plaintiff reveals the following pertinent information:

> . . . I gave $5,000 directly to Mr. King in March of 1968, pursuant to our prior discussions to invest in the business. We had previously agreed that I would be a stockholder but a silent stockholder.
>
> * * *
>
> . . . In November of 1968 he reduced this agreement to writing which is Exhibit "A", attached to the Complaint filed herein.

The deposition testimony of individual defendant is consistent with this chronology of events:

> . . . In February of 1968 we discussed his coming to Winston to work for me. . . . At that time we did talk about Mr. Whitten investing in the corporation, about him loan-

ing me money for a business. . . . He agreed to loan me $5,000. . . . In February, March or April of 1968, Mr. Whitten did give me $5,000, which I deposited into my bank account.

* * *

. . . Prior to the statement [Exhibit "A"] we had only a verbal agreement. When Mr. Whitten gave me the $5,000, he had never had anything in writing. He subsequently asked me to prepare this statement. We had previously agreed that he was going to loan me $5,000. We reduced the agreement to writing. . . .

[1, 2] Although the complaint did not specifically allege that corporate defendant adopted the contract made on its behalf, we are of the opinion that the evidence presented at the hearing supported this theory.

It is recognized by case law and leading treatises that where the evidence presented at a hearing upon a motion for summary judgment would justify an amendment to the pleadings, such amendment should not be precluded by entry of summary judgment. Indeed, in proper cases it is desirable to treat the pleading as though it were amended to conform to the evidence presented at the hearing. *Freeman v. Marine Midland Bank-New York,* 494 F. 2d 1334; *Rossiter v. Vogel,* 134 F. 2d 908; 6 Moore's Federal Practice ¶ 56.10 (2d ed. 1976); Wright & Miller, Federal Practice and Procedure: Civil § 2738. *See also Bank v. Gillespie,* 291 N.C. 303, 230 S.E. 2d 375. Under the facts of instant case, it is both proper and desirable that the complaint be treated as amended to conform to the evidence. We hasten to add that it is the better procedure at all stages of a trial to require a formal amendment to the pleadings.

[3] A corporation cannot ratify a contract made on its behalf prior to its incorporation, since it could not have authorized the contract at that time. However, the corporation adopts the contract and becomes bound by its terms, if it accepts the benefits of the contract with knowledge of its provisions. *Smith v. Ford Motor Co.,* 289 N.C. 71, 221 S.E. 2d 282; *McCrillis v. Enterprises,* 270 N.C. 637, 155 S.E. 2d 281; Robinson, North Carolina Corp. Law § 2-4 (2d ed. 1974); 18 Am. Jur. 2d, Corporations § 122.

[4] There can be no doubt that corporate defendant accepted the benefits of the contract between plaintiff and individual

defendant when the $5,000 advanced by plaintiff was used as a part of its initial capitalization. At no time has corporate defendant attempted to repudiate the contract benefits previously obtained. Rather, it has retained plaintiff's initial contribution as a part of its working capital at all times prior to the institution of this action. Nevertheless, before a corporation can be held to have adopted a prior contract of its promoter, it must not only appear that it has accepted the benefits of the contract, but also that it did so with knowledge of its provisions. *McCrillis v. Enterprises, supra.* It is our opinion that in instant case the corporation accepted the benefits with knowledge of the provisions of the contract.

[5] It is recognized in this jurisdiction that notice to the president of a corporation is notice to the corporation. *Patterson v. Henrietta Mills,* 219 N.C. 7, 12 S.E. 2d 686.

The facts of this case disclose that from the formation of the corporation defendant King was its president and general manager. He received the money from plaintiff and placed it in the corporate account as soon as the account was opened.

[6] Assuming, *arguendo,* that such notice to the president and general manager was not sufficient to impute knowledge to the corporation, we find another basis for our conclusion that the corporation was fixed with notice. In 18 Am. Jur. 2d, Corporations § 123, we find the following pertinent statement:

> As a rule, the knowledge of the promoters cannot be imputed to the corporation, although an exception to the rule may exist in a case where the promoters become directors and stockholders in the corporation or are the controlling stockholders.

See also Federal Land Value Ins. Co. v. Taylor, 56 F. 2d 351.

In instant case the deposition of plaintiff, which was offered in opposition to the motion for summary judgment, contained the following testimony:

> . . . In October of 1974 Mr. King was trying to buy a boat from me and I asked him whether American Motors had been paid off and Mr. King responded that they had and he was trying to work out a deal where he would be able to pay my percentage of the company, Mr. King delivered a check to me for $1,000, dated August 16, 1974, and two

months prior to that date he told me American Motors had been paid off. That would be in June of 1974.

* * *

At the time Mr. King gave me the $1,000 check, he just said this was going to be a start of the money that I was due. He never told me how much I was due. He said he hadn't had a chance to figure out yet. He told me that he hadn't had a opportunity to consult the bookkeeper and he would get the net worth of the business and then pay me. . . .

[4] There was evidence that in October of 1974, when corporate defendant still retained and used the benefits of plaintiff's performance under the prior contract, the loan to American Motors had been fully repaid, at which time all stock in corporate defendant was transferred to individual defendant. At that point the sole shareholder, president and general manager of the corporation had complete knowledge of the provisions of the contract and such knowledge, therefore, became the knowledge of the corporation.

[7] Plaintiff has presented evidence which tends to show that the agreement made in early 1968 between him and individual defendant was intended as a purchase of stock in the corporation to be thereafter formed. On the other hand, corporate defendant has offered evidence tending to show that the agreement contemplated nothing more than a loan by plaintiff to individual defendant. The written memorandum of that agreement is ambiguous as to the true intent of the parties. The heart of a contract is the intention of the parties. *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453. Since the evidence presented by both sides in this case is diametrically opposed on this crucial issue, the motion for summary judgment should have been denied.

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 Superior Court of Forsyth County with an order that the entry of summary judgment be vacated and that there be a trial on the issues raised by the pleadings and evidence.

Reversed and remanded.

WACHOVIA REALTY INVESTMENTS, BUCK NICKEL, ROBERT H. PEASE, CHARLES G. REAVIS, JR., ROBERT E. SMITH, EVERETT C. SPELMAN, SR., EDWARD H. WARNER, CALDER W. WOMBLE AND BLAND W. WORLEY, TRUSTEES v. HOUSING, INC., C. P. ROBINSON, JR., AND BETTY LYNN WILSON ROBINSON v. C. P. ROBINSON, JR.

No. 60

(Filed 7 March 1977)

1. **Bills and Notes § 20— action on note — summary judgment — retention of claim for set-off**

The superior court erred in rendering summary judgment for plaintiff for the alleged unpaid balance due upon a note while retaining for hearing and determination defendant's claim that it is entitled to a set-off or credit in approximately the same amount, since if there remains a substantial controversy as to the right of defendant to such credit, there also remains such controversy as to the amount plaintiff is entitled to recover from defendant; however, the existence of this material fact would not have precluded the superior court from rendering summary judgment determining that defendant was liable to plaintiff for whatever amount remained due and owing upon the note after all proper credits had been allowed if there was no material issue of fact concerning the matters defendant alleged as bases for its claim that plaintiff released it from all liability and if such uncontroverted facts were insufficient to establish the alleged release.

2. **Appeal and Error § 6; Execution § 6— money judgment — substantial right of debtor — procedures for staying execution**

The existence of procedures under G.S. 1-269 and G.S. 1-289 for staying execution upon a money judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor since the procedures, even if successful, require the judgment debtor to incur substantial expense.

3. **Appeal and Error § 6— order affecting substantial right — appeal**

While the court's order rendering summary judgment for plaintiff for the alleged unpaid balance of a note and retaining for hearing and determination defendant's claim that it was entitled to a set-off or credit was not a final judgment by virtue of G.S. 1A-1, Rule 54, the judgment affected a substantial right of defendant and was appealable by virtue of G.S. 1-277 and G.S. 7A-27(d) where execution was entered to enforce the judgment, and supplemental proceedings in execution were instituted and an order was entered by the clerk declaring the judgment a lien upon funds allegedly owed to defendant.

4. **Contracts § 19— novation — insufficient showing**

The record did not support corporate defendant's contention that it was released from liability on its note to plaintiff by a novation

which substituted its shareholder as principal debtor where the facts not in dispute, including the agreement between defendant's two shareholders relied on by defendant to establish its alleged release by plaintiff, show neither an assumption by one shareholder of defendant's liability on the note to plaintiff nor plaintiff's intent to accept any promise by the shareholder in lieu of the promise by defendant.

5. **Bills and Notes § 14— assumption of note — extension of time for payment — provision prohibiting release of original debtor**

Even if an agreement between corporate defendant's two shareholders constituted an assumption of defendant's note to plaintiff by one shareholder and a conversion of defendant's liability from that of principal debtor to that of surety, a provision in the note that all parties to the note agree to remain bound until the principal and interest are paid in full notwithstanding any extensions of time for payment would prevent an extension of time granted to the shareholder from releasing defendant from its obligation as surety.

6. **Mortgages and Deeds of Trust § 9— release of part of land from lien — no release of debtor**

Defendant was not released from liability on its note to plaintiff under G.S. 45-45.1(2) or (4) because of plaintiff's release of a portion of the secured property from the lien of the deed of trust upon its sale to a municipal housing authority after an agreement between defendant's two stockholders that one stockholder would complete a housing project on the secured property without cost to defendant, since the statutes contemplate a sale of unencumbered real estate to a "grantee" thereof, and there was no sale and conveyance of the property to the stockholder who completed the housing project; nor was defendant released from liability on the note by the fact that defendant was not credited on its note with the entire amount of the sales price of the released property, but that some $450,000 "went" to the stockholder who completed the housing project, where the stockholder had been given the power of attorney to act for defendant, the sale of the released property and collection and disbursement of the proceeds thereof were made by the stockholder as attorney in fact for defendant, and nothing in the record indicates that the stockholder exceeded his authority or that the $450,000 which "went" to him was applied or used otherwise than in accord with the knowledge of and the authority given by defendant.

7. **Mortgages and Deeds of Trust § 32— foreclosure sale — purchase by secured creditor — profit from resale — evidence of fair value**

When the holder of a note secured by a deed of trust purchases the secured property at a foreclosure sale conducted pursuant to a power of sale contained in the deed of trust, neither G.S. 45-21.36 nor any principle of law entitles the debtor to have credited upon the note whatever profit such purchaser may realize upon a subsequent sale of the property; however, the statute entitles the debtor to credit for the fair value of the property at the time of the sale, and such subsequent sale would be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it de-

pending upon other circumstances such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made.

8. **Mortgages and Deeds of Trust § 32— foreclosure sale — purchase by secured creditor — resale for higher price — determination of fair value**

In an action to recover the balance due on a note to plaintiff secured by a deed of trust on land being developed as a housing project after the secured property was purchased by plaintiff at a foreclosure sale conducted pursuant to the power of sale contained in the deed of trust, a genuine issue of material fact was presented as to the amount, if any, which should be credited upon the note by reason of plaintiff's purchase of the property at the foreclosure sale for less than its fair value where there was undisputed evidence that the trustee conveyed the property to plaintiff's nominee on 14 November 1972, and plaintiff's nominee conveyed the property on 29 November 1972 to a municipal housing authority for an amount substantially in excess of the bid placed by plaintiff at the foreclosure sale, and there was evidence tending to show that at the time of the foreclosure plaintiff knew that it could probably dispose of the property upon completion of the housing project in accordance with a contract defendant had with the housing authority for sale of the property upon completion.

ON *certiorari* to the Court of Appeals to review its decision, reported in 28 N.C. App. 385, 221 S.E. 2d 381, dismissing the appeal of Housing, Inc., from *Walker, J.*, at the 16 June 1975 Session of FORSYTH. This case was docketed and argued as No. 13 at the Fall Term 1976.

Wachovia Realty Investments, an unincorporated business trust organized under the laws of South Carolina, brought this action against Housing, Inc., C. P. Robinson, Jr., and his wife, Betty Lynn Wilson Robinson, to recover $203,794.24, plus interest, alleged to be the balance due and owing upon a note made to it by Housing, Inc., payment of which was guaranteed by the two individual defendants. The complaint alleges that the note was secured by a deed of trust upon real estate owned by Housing, Inc., which deed of trust was foreclosed, and that the proceeds of the foreclosure sale were applied to the then unpaid balance of the note, leaving still due and owing to the plaintiff the sum prayed for.

Housing, Inc., filed its answer to the complaint and its third party complaint against C. P. Robinson, Jr., alleging, as to him, that he contracted to indemnify Housing, Inc., and, as a result thereof, in the event that Housing, Inc., is liable to the

plaintiff by reason of the things alleged in the complaint, Housing, Inc., is entitled to indemnification from C. P. Robinson, Jr.

As to the complaint against it, Housing, Inc., admitted its execution of the note and deed of trust given to secure the same and the foreclosure of the deed of trust, but it alleged that, through a novation, it was released by the plaintiff from all obligation upon the note. For further defenses Housing, Inc., alleged that: (1) By reason of certain alleged incidents in the conduct of the foreclosure sale and subsequent transfers of the property to and by the nominee of the plaintiff, Housing, Inc., was entitled to a further credit of $207,225 over and above the amount credited to the note as the purported proceeds of the foreclosure sale; (2) the plaintiff consented to an alleged contract between C. P. Robinson, Jr., and his former business associate and, thereby, released Housing, Inc., from its obligation upon the note and, if Housing, Inc., was not thereby released by the plaintiff, its obligation upon the note was converted to that of a surety for C. P. Robinson, Jr., who became primarily liable; (3) the plaintiff by granting extensions of time to C. P. Robinson, Jr., without the consent of Housing, Inc., released Housing, Inc., from its said obligation as surety; (4) other actions of the plaintiff released Housing, Inc., from its obligation as surety for C. P. Robinson, Jr., and (5) the note was given for a loan for the purpose of purchasing and developing real property, which the plaintiff at all times knew, and, by reason of G.S. 45-21.38, the plaintiff is not entitled to recover a deficiency judgment upon the note.

Following the filing and answering of a long series of interrogatories and requests for admissions, both the plaintiff and Housing, Inc., moved for summary judgment, alleging there is no genuine issue of fact presented. In the alternative, the plaintiff moved that, if its motion for summary judgment should be denied, the court ascertain what material facts are in actual controversy and enter its order directing such further proceedings as might be deemed just. Housing, Inc., also prayed that, if its motion for summary judgment be denied, it be granted partial summary judgment by virtue of its alleged entitlement to a set-off by reason of the manner in which the foreclosure of the deed of trust was conducted and the sale thereat of the property to the nominee of the plaintiff for less than its true value. Both motions for summary judgment were supported by affidavits and briefs filed with the Superior Court.

The Superior Court denied the motion of Housing, Inc., for summary judgment and allowed the motion of the plaintiff therefor, stating in its judgment:

> "[T]he Court having considered the matters submitted to it * * * and having found that there is no genuine issue as to any material fact to be submitted to the trial court with respect to the liability of the defendants to the plaintiffs, *save and except the question of setoff,* and that the plaintiffs should be granted a Judgment against the defendants on the issue of the liability of the defendants to the plaintiffs, and that the matter should be retained for trial on the issue of setoff and upon the issues raised by the defendant Housing, Inc. alleging right to indemnification by the defendant, C. P. Robinson, Jr., but that the plaintiffs are entitled to a Judgment as a matter of law for the deficiency amount due on the note held by the plaintiffs; (Emphasis added.)
>
> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Motion of the plaintiffs for summary judgment is granted and that the plaintiffs shall have and recover of the defendants the sum of $204,603.55, together with interest thereon from the date of this Judgment, and it is
>
> "FURTHER ORDERED, ADJUDGED AND DECREED that this cause shall be retained upon the docket of this Court for determination of what amount, if any, are the defendants entitled to as a setoff pursuant to Section 45-21.36 of the North Carolina General Statutes and for determination as to the rights, if any, of the defendant Housing, Inc. to indemnification by the defendant C. P. Robinson, Jr."

By stipulation of the parties in the record, it appears that C. P. Robinson, Jr., and Betty Lynn Robinson, his wife, filed answer to the plaintiff's complaint, that the plaintiff moved for summary judgment against them and such judgment was entered against them from which neither of these defendants appealed.

Following the entry of the judgment, an execution was issued thereon commanding the Sheriff to satisfy the judgment in favor of the plaintiff for the principal sum of $204,603.55. The Sheriff returned the execution with a notation that no

property was found in his county to satisfy the same. Thereupon, upon the plaintiff's petition, supplemental proceedings in execution were initiated against Housing, Inc. Therein, Housing, Inc., was ordered to appear, through an appropriate officer or other representative, before the Clerk to answer under oath all proper questions concerning matters set forth in the petition of the plaintiff and was forbidden to make any transfer of certain amounts alleged by the plaintiff to be receivable by it from the Housing Authority of the City of Winston-Salem, and a lien was imposed by the order of the Clerk upon all such funds in favor of the plaintiff for the satisfaction of the judgment.

Subsequently, the examination of the officer or other representative of Housing, Inc., was continued until further notice. Upon appeal by Housing, Inc., to the Court of Appeals, that court dismissed the appeal on the ground that the judgment of the Superior Court "was no final judgment" as provided in G.S. 1A-1, Rule 54(b), and is not appealable. The Court of Appeals was of the opinion that although, pursuant to Rule 54(b) it may have "limited power to allow appellate review of a Rule 54 interlocutory order" by certiorari, such authority "should be exercised sparingly in extraordinary circumstances to avoid a harsh result" and should not be exercised under the circumstances of this case. The Court of Appeals noted that Housing, Inc., had filed in the Court of Appeals a petition for stay of execution which was denied because of Housing, Inc.'s failure to comply with Rule 23 of the Rules of Appellate Procedure. The Court of Appeals also said: "The defendant, Housing, could have moved for stay of execution in the trial court under Rule 62(g), or, in the alternative, on the ground that execution was improvidently issued because the judgment was interlocutory and not final and the defendant may now move in the trial court for withdrawal of the execution issued on an interlocutory judgment."

Womble, Carlyle, Sandridge & Rice, by W. P. Sandridge, Jr., for Plaintiff.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and O. Max Gardner III for Defendant.

LAKE, Justice.

[1] The Superior Court was clearly in error in rendering summary judgment for a specified amount, the alleged unpaid

balance due upon the note, while retaining for hearing and determination the claim of Housing, Inc., that it is entitled to a set-off or credit in approximately the same amount. If, as the Superior Court found, there remains a substantial controversy to be determined as to the right of Housing, Inc., to such credit, it is obvious that there remains such controversy as to the amount the plaintiff is entitled to recover from Housing, Inc. This being true, summary judgment for the amount so in controversy could not properly be entered. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

The existence of this material of fact would, of course, not preclude the Superior Court from rendering summary judgment determining that Housing, Inc., is liable to the plaintiff for whatever amount may remain due and owing upon the note after all proper credits have been allowed, if there is no material issue of fact concerning the matters which Housing, Inc., has alleged as bases for its claim that the plaintiff released it from all liability and if such uncontroverted facts are insufficient to establish the alleged release.

[2] It is equally clear that the entry of the judgment that the plaintiff have and recover of Housing, Inc., $204,603.55 affects a substantial right of Housing, Inc. Execution has been entered to enforce this judgment. Supplemental proceedings in execution have been instituted and an order has been entered by the Clerk of the Superior Court declaring the judgment a lien upon funds alleged to be owing to Housing, Inc., from the Housing Authority of the City of Winston-Salem. As the Court of Appeals observed in its opinion, G.S. 1-269 and G.S. 1-289 provide for a stay of execution upon a money judgment, provided the judgment debtor gives a bond or makes a deposit, and G.S. 1A-1, Rule 62(g), authorizes the court which rendered the judgment to stay its enforcement, pending its determination of other aspects of the litigation, upon such conditions as that court deems necessary to secure the benefit of the judgment to the judgment creditor. Either of those procedures would, however, even if successful, require Housing, Inc., to incur substantial expense. Thus, the existence of those procedures for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor.

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, whether made in or out of session, which affects a substantial right claimed in any action or proceeding * * * ."

G.S. 7A-27(d) provides:

"From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which affects a substantial right * * * appeal lies of right directly to the Court of Appeals."

These statutes were not repealed or nullified by the enactment of Chapter 1A of the General Statutes prescribing the presently effective Rules of Civil Procedure. In *Highway Commission v. Nuckles*, 271 N.C. 1, 13, 155 S.E. 2d 772 (1967), this Court, speaking through Justice Sharp, now Chief Justice, said: "Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable." In *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E. 2d 30 (1975), speaking through Justice Huskins, we said: "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." See also: *Currin v. Smith*, 270 N.C. 108, 153 S.E. 2d 821 (1967); *Steele v. Hauling Co.*, 260 N.C. 486, 133 S.E. 2d 197 (1963).

[3] By virtue of G.S. 1A-1, Rule 54, the judgment rendered by the Superior Court was not a final judgment, but by virtue of G.S. 1-277 and G.S. 7A-27(d) it is, nevertheless, appealable and the Court of Appeals was in error in dismissing the appeal of Housing, Inc., without passing upon the merits thereof. In its brief in this Court, the plaintiff-appellee agrees that the judgment of the Superior Court is appealable and requests this Court to consider the appeal on its merits and affirm the judgment of the Superior Court, or, if not, to provide guidance to the trial court, and to the parties, as to what genuine issues of material fact requires disposition by the Superior Court.

[4] We turn now to the contention of Housing, Inc., that it has been released from all liability upon the note and, therefore,

the Superior Court was in error in granting the motion of the plaintiff for summary judgment in any amount and in denying the motion of Housing, Inc., for summary judgment.

The first alleged basis for this contention is that Robinson and Johnson, the only stockholders of Housing, Inc., entered into an agreement on 23 February 1971 for a separation of their numerous business interests, to which agreement the plaintiff consented and by which Robinson assumed the duty to pay the construction loan evidenced by the note here in suit. Housing, Inc., asserts that this agreement constituted "a novation in substituting C. P. Robinson Construction Company in the place of Housing, Inc., thereby releasing Housing, Inc., from its obligations under the construction loan documents."

The following facts with reference to this matter are not in dispute:

1. On 6 May 1970, Housing, Inc., executed the note in suit for the principal sum of $3,624,220, secured by a deed of trust upon certain real estate known as North Hills in Winston-Salem, which land Housing, Inc., then owned and proposed to develop as a housing project for sale, in Phases I to VIII as completed, to the Housing Authority of Winston-Salem.

2. At the time the note was made, Robinson and Johnson were the only shareholders of Housing, Inc., each owning one-half of the outstanding capital stock, and they were jointly interested in a number of other business interests and development projects.

3. Contemporaneously with the execution of the note, Robinson, Johnson and their wives executed to the plaintiff, jointly and severally, an unconditional guaranty of payment of the note, the guarantors agreeing therein to remain bound, notwithstanding indulgences or extensions of time granted to the borrower and notwithstanding the surrender of any security held for the payment of the debt.

4. Substantially contemporaneously with the execution of the note, Housing, Inc., entered into a contract with C. P. Robinson Construction Company, of which Robinson was the sole shareholder, for the construction by that company of the North Hills project.

5. The agreement of 23 February 1971 between Robinson and Johnson provided in the portions thereof pertinent to this controversy:

"WHEREAS, it appears that the debts of Housing, Inc., *(not including certain mortgage obligations* and an obligation on North Hills of $21,680.00) amount to $516,071.94, a schedule of which prepared by the accountant is attached hereto.

"NOW, THEREFORE, it is agreed *between the parties* as follows:

"(2) That Robinson *shall complete the project* known as North Hills in Winston-Salem, North Carolina, *without expense to Housing, Inc.* and shall receive *as consideration therefor* all sales proceeds arising therefrom *after discharging the existing construction loan* and all bills unpaid in connection with the project.

* * *

"(5) As a condition to the transfer of the foregoing assets [properties not relating to this litigation], Robinson shall assume and pay obligations now owed by Housing, Inc. the aggregate amount of which shall be one-half of the amount arrived at by subtracting from total *non-mortgage* liabilities of $516,071.94 the following four items [items not related to this litigation.]

* * *

"The obligations assumed by Robinson under the terms of this paragraph shall include the note in favor of Commercial and Farmers Bank at Rural Hall, North Carolina. The balance of the funds payable under the provisions of this Paragraph 5 shall be paid by assuming other obligations designated by the accountant." (Emphasis added.)

6. At all times legal title to the North Hills properties remained in Housing, Inc., except that Phases I through V were conveyed, when completed, to the Housing Authority of the City of Winston-Salem by deeds from Housing, Inc. (and were then released from the deed of trust by the plaintiff), and the rest of the properties were conveyed by the trustee in the deed of trust to the purchaser at a foreclosure sale conducted by him in 1972.

It is obvious, upon the face of the agreement of 23 February 1971 between Robinson and Johnson, that it did not constitute an assumption by Robinson of liability for the payment of the note in suit. With reference to the North Hills project, Robinson simply contracted to complete the project without further expense to Housing, Inc. This is a far cry from an assumption by him of personal liablity for the payment of the note for $3,624,220, previously guaranteed by him, and a release by Robinson of Housing, Inc., from the latter's obligation to indemnify him in event he was required, under his guaranty, to pay the note. Robinson's undertaking to complete the project, at most, merely released Housing, Inc., from its obligation under its construction contract with C. P. Robinson Construction Company, with which contract the plaintiff had no connection. In consideration for this, the Robinson-Johnson agreement provided that Robinson would be entitled to all proceeds of sales of the North Hills properties "after discharging the existing construction loan" and other bills. That is, the agreement provided that the proceeds of such sales by Housing, Inc., would be applied first to the payment of those obligations of Housing, Inc., and Robinson's compensation for completing the contract would be contingent upon there being some surplus of such proceeds over such obligations. This is a far cry from a conveyance of the North Hills properties to Robinson by Housing, Inc.

The only obligations of Housing, Inc., which this Robinson-Johnson agreement declared that Robinson assumed were certain "nonmortgage liabilities" owed by Housing, Inc., less certain specified credits not related to the North Hills project.

Thus, the facts not in dispute, including the precise agreement relied upon by Housing, Inc., to establish its alleged release by the plaintiff, show no assumption of the note by Robinson and no conveyance by Housing, Inc., of the properties to him.

It is also undisputed that, substantially contemporaneously with the Robinson-Johnson agreement, Housing, Inc., executed its power of attorney to Robinson giving him the authority "to do all things necessary on behalf of Housing, Incorporated, to complete the obligations of Housing, Incorporated, in connection with" the North Hills project, including the authority to convey the property and to execute all documents in connection with the performance of the obligations of Housing, Inc., to receive

funds payable to Housing, Inc., and to make payments required to be made by it. The fact that the plaintiff was informed of the Robinson-Johnson agreement and of the power of attorney granted to Robinson by Housing, Inc., and consented thereto, does not show an intent by the plaintiff to release Housing, Inc., from liability on its note held by the plaintiff.

We find in the undisputed facts not the slightest basis for the contention of Housing, Inc., that the Robinson-Johnson agreement of 23 February 1971 (assuming the plaintiff consented thereto) constituted a novation whereby the original obligation of Housing, Inc., to the holder of the note was discharged and a new contract was substituted therefor. As this Court, speaking through Chief Justice Winborne, said in *Tomberlin v. Long,* 250 N.C. 640, 109 S.E. 2d 365 (1959):

> "In this connection 'Novation may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished. * * * The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract * * * .' 66 C.J.S., Novation, secs. 1 and 3.
>
> " 'Novation implies the extinguishment of one obligation by the substitution of another.' *Walters v. Rogers,* 198 N.C. 210, 151 S.E. 188; *Turner v. Turner,* 242 N.C. 533, 83 S.E. 2d 245; *Bank v. Supply Co.,* 226 N.C. 416, 38 S.E. 2d 503.
>
> " 'Ordinarily, as stated in *Growers Exchange v. Hartman,* 220 N.C. 30, 16 S.E. 2d 398, in opinion by Devin, J., later C.J.' In order to constitute a novation a transaction must have been so intended by the parties."

Obviously, the maker of a note cannot escape liability thereon by agreeing with a third party to transfer such liability to him, and even the assumption of the obligation by such third party does not discharge the maker from liability to the holder of the note unless the holder consented to the release of the maker in exchange for the undertaking of the third party. As this Court said in *Lowe v. Jackson,* 263 N.C. 634, 140 S.E. 2d 1 (1965), speaking through Chief Justice Denny:

> "There is nothing in the agreement executed by Porter Lowe that tends to show an intention on his part to do

anything more than to assume the indebtedness outstanding against the property he purchased from his co-plaintiff.

"' * * * [A] debt assumption agreement by the purchaser of the equity of redemption is not a novation of the mortgage note, there being no element of a further consideration passing between the parties or a substitution of a new for an old or subsisting debt. As between the mortgagor and his grantee assuming the debt, the mortgagor is a surety. But as between the mortgagor and the mortgagee he remains primarily liable for the mortgage debt when the mortgagee does not accept or rely upon the debt assumption agreement, even though the mortgagee accepts from the purchaser of the equity partial payments on the note and extends the time of payment without notice to the mortgagor. And the mortgagee, upon default may either sue *in rem* by foreclosure, or *in personam* on the note against the mortgagor and against the purchaser of the equity of redemption on a contract made for the mortgagee's benefit. * * * .' Strong's North Carolina Index, Vol. 3, Mortgages and Deeds of Trust, § 15; *Bank v. Whitehurst,* 213 N.C. 302, 165 S.E. 793; *Brown v. Turner,* 202 N.C. 227, 162 S.E. 608."

[4] As above noted, nothing whatever in the undisputed facts, or in any other showing by Housing, Inc., indicates either an assumption by Robinson of Housing, Inc.'s, liability upon the note to the plaintiff or the plaintiff's intent to accept any promise by Robinson in lieu of the promise by Housing, Inc. Consequently, nothing in the record supports the contention of Housing, Inc., that it was released from liability upon the note in suit by a novation.

[6] Housing, Inc., next contends that it was released from liability upon the note by reason of the fact that, after the making of the Robinson-Johnson agreement, Phases I through V of the North Hills development were conveyed to the Housing Authority of the City of Winston-Salem and were released from the deed of trust by the plaintiff, for which properties the Housing Authority paid a total of $2,873,636, of which amount $2,413,427.39 was credited upon the note by the plaintiff and approximately $450,000 "went to Robinson." It is not contended that the Housing Authority of the City of Winston-Salem paid less for Phases I through V than the agreed price therefor

specified in the contract between it and Housing, Inc., which contract was in effect at the time of and was a basis for the making of the loan by the plaintiff to Housing, Inc., nor is it contended that such price was less than the fair value of these properties. Housing, Inc., having contracted to sell these properties and having conveyed them to the purchaser by its deed (presumably executed in its name by the holder of its power of attorney), cannot complain of the plaintiff for having joined in such conveyance for the purpose of releasing the properties from the lien of the deed of trust. Without such release it, obviously, could not have sold the properties in performance of its contract with the Housing Authority. Its contention is that to the extent of the $450,000 which "went to Robinson," the plaintiff has released properties improperly and has, thereby, released Housing, Inc., from liability upon the note, at least to the extent of the $450,000.

Housing, Inc., also contends that it has been released from all liability upon the note by reason of the fact that, following the agreement between Robinson and Johnson, the plaintiff "granted to C. P. Robinson, Jr., a binding extension of time (from February 11, 1972 to November 1, 1972) within which to repay the loan." In its answers to interrogatories, the plaintiff concedes that "an extension of the due date was made extending the due date from February 11, 1972 to November 1, 1972." In its brief, the plaintiff asserts that such extension was granted to Housing, Inc., through Robinson as its attorney in fact under the above mentioned power of attorney granted to him by Housing, Inc.

In support of its claim that it has been released from liability on the note by the above mentioned release of security and by the above mentioned extension of time for payment, Housing, Inc., relies upon G.S. 45-45.1 which provides:

> "*Except where otherwise provided* in the mortgage or deed of trust or *in the note* or other instrument secured thereby, or except where the mortgagor, or grantor of a deed of trust otherwise consents:
>
> "(1) Whenever real property which is encumbered by a mortgage or deed of trust *is sold* and the *grantee assumes* and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust gives the grantee a legally binding extension of

time, or releases the grantee from liability on the obligation, the mortgagor or grantor of the deed of trust is released from any further liability on the obligation.

"(2) Whenever real property which is encumbered by a mortgage or deed of trust *is sold* and the *grantee assumes* and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust or trustee acting in his behalf releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater." (Emphasis added.)

[Paragraphs (3) and (4) are identical with the above quoted paragraphs, except that Paragraph (3) and Paragraph (4) relate to sales of encumbered property subject to the encumbrance.]

This statute does not support the contention of Housing, Inc. So far as the alleged agreement to extend time for payment is concerned, it is a sufficient answer that the note made by Housing, Inc., to the plaintiff expressly provides:

"All parties to this note, including endorsers, sureties, and guarantors, if any, hereby waive presentment for payment, demand, protest, notice of nonpayment or dishonor and of protest, and any and all other notices and demands whatsoever, and agree to remain bound until the principal and interest are paid in full *notwithstanding any extensions of time for payment which may be granted,* even though the period of extension be indefinite, and notwithstanding any inaction by, or failure to assert any legal right available to, the holder of this note." (Emphasis added.)

[5] Thus, even if the Robinson-Johnson agreement had constituted an assumption of the note by Robinson, and a conversion of the liability of Housing, Inc., from that of principal debtor to that of surety, which, as above noted, it did not, the express provision in the note would prevent an extension of time granted to Robinson from releasing Housing, Inc., its obligation as surety.

It is likewise true that the alleged release of the mortgaged property, above mentioned, would not effect a release of Housing, Inc., from its liability mentioned upon the note.

[6] Paragraphs (2) and (4) of G.S. 45-45.1 contemplate a sale of encumbered real estate to a "grantee" thereof. The Robinson-Johnson agreement, upon which Housing, Inc., relies, and other undisputed facts in the record, show conclusively that there was no sale and conveyance of the North Hills properties to Robinson. The title thereto remained in Housing, Inc. It granted to Robinson its power of attorney to receive payments due it, to make payments due by it and to execute conveyances and other documents necessary to complete the development and sale of the North Hills project. Thus, the conveyance of Phases I through V to the Housing Authority of the City of Winston-Salem, the collection of the proceeds thereof and the disbursement of the proceeds thereof were made by Robinson as attorney in fact of Housing, Inc. Nothing in the record indicates that in these matters Robinson exceeded his authority from Housing, Inc., or that the $450,000 which "went" to him was applied or used otherwise than in accord with the knowledge of and the authority given by Housing, Inc.

We, therefore, conclude that nothing in this record would support a finding that Housing, Inc., has been released and discharged from liability on its note by reason of a novation, an extension of time for payment, or a release of any part of the property from the lien of the deed of trust.

[8] The final contention of Housing, Inc., is that, even though it has not been released from all liability upon its note, it is entitled to a substantial credit thereon by reason of alleged improprieties in the foreclosure of the deed of trust securing the note.

It is undisputed that the substitute trustee in the deed of trust offered the property for sale at public auction, under the power of sale contained in the deed of trust, on 30 October 1972, at which sale the plaintiff was the highest bidder at the price of $1,000,000; on 14 November 1972, the substitute trustee conveyed the property to the nominee of the plaintiff and the net proceeds of the sale were credited by the plaintiff to the balance alleged to be then due upon the note; and on 29 November 1972 (the deed being recorded 12 December 1972), the nominee of the plaintiff conveyed the property to the Housing Authority

of the City of Winston-Salem for an amount substantially in excess of the bid placed by the plaintiff at the trustee's foreclosure sale. Housing, Inc., contends that it is entitled to a credit upon the note equal to the full amount so received by the plaintiff's nominee from the Housing Authority.

The properties so sold consisted primarily of Phases VI through VIII of the North Hills project. Housing, Inc., alleges that, under its original contract with the Housing Authority, these, upon completion, were to be conveyed to the Housing Authority for a total of $1,152,225 and, pursuant to such contract, there was also due it for "extras" and "retainage" an additional $55,000, so that the total of $1,207,225 should have been credited upon the note rather than the $991,007 which was so credited by the plaintiff as the net proceeds of the foreclosure sale. To its response to the plaintiff's interrogatories, Housing, Inc., attached the closing statement concerning the sale from the plaintiff's nominee to the Housing Authority. This closing statement showed the plaintiff's nominee sold the properties to the Housing Authority for $1,153,225, to which sale price certain adjustments were made reducing the net payment by the Housing Authority to $1,117,560.66.

In support of its motion for summary judgment, the plaintiff filed an affidavit of Archie C. Walker, Vice President and Chief Staff Attorney of its nominee, to this effect: At the time the properties purchased at the foreclosure sale were resold by the plaintiff's nominee to the Housing Authority, the contemplated construction thereon had not been completed; the plaintiff and the Housing Authority then entered into a contract for the conveyance of the property to the Housing Authority for $1,149,612, this being the original sale price for the completed properties specified in the contract between the Housing Authority and Housing, Inc., less an item of $3,613 pursuant to a "change order"; the plaintiff promised in such contract to complete the construction at its expense; the plaintiff did complete such construction at the cost to it of $57,300.51 and incurred certain other expenses in connection with such sale to the Housing Authority; and at no time prior to such conveyance to the Housing Authority did *the plaintiff* have "a firm contract with Housing Authority" for the sale to the Authority of these properties.

In its motion for summary judgment, Housing, Inc., asserted:

> "That pursuant to the foreclosure of the Deed of Trust as described in Plaintiff's Complaint the Plaintiff as mortgagee purchased said property at the foreclosure sale; that the amount of the bid of the mortgagee at said foreclosure sale was substantially less than its true value; * * * and the Defendant, Housing, Inc., [is] entitled to an offset against the amount claimed in the Plaintiff's Complaint that said offset should be measured by the true value of said property at the time of the foreclosure sale less the amount bid by the Plaintiff, mortgagee, at the foreclosure sale."

The deposition of Archie C. Walker was to the effect that while the amount of the bid placed may have been influenced by the potential for selling the property to the Housing Authority, that was not the only consideration, the main consideration being the market value of the property if the purchaser had to resell it on the open market. His deposition further stated: The loan would not have been made originally but for the fact that Housing, Inc., had the contract with the Housing Authority for the purchase of the property upon completion, a copy of which contract was given to the plaintiff before the loan was made; in his opinion, the determination of the amount to be bid for the property at the foreclosure sale did not take into account the possibility of a resale to the Housing Authority; the plaintiff was not legally obligated to sell the property to the Housing Authority; prior to the foreclosure, he knew that the Housing Authority had made efforts to get the project completed and at the time of the foreclosure he understood that an indication had been made that the plaintiff probably could dispose of the property to the Housing Authority under the original contract.

The deposition of Mr. Browder, the substitute trustee who conducted the foreclosure sale, was to the effect that, as of the time of the foreclosure sale, he knew of the probability that, if the plaintiff, through its nominee, acquired title at the foreclosure sale, it would be able to complete the project and sell it to the Housing Authority pursuant to the contract which Housing, Inc., had with the Housing Authority. Mr. Browder's law firm represented both the Housing Authority and the plaintiff, generally.

The plaintiff's contention is that, at the time of the foreclosure sale, Phases VI through VIII had not been completed and the plaintiff had no contract with the Housing Authority to purchase the properties until after the plaintiff became the highest bidder at the foreclosure sale. It contends that, after it so became the highest bidder at the foreclosure sale, the plaintiff agreed with the Housing Authority to complete the construction and to do other specifed things and, thereupon, the conveyance to the Housing Authority was made.

G.S. 45-21.36 provides:

> *"Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.*—When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was *fairly worth the amount of the debt* secured by it at the time and place of sale *or that the amount bid was substantially less than its true value,* and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part * * * ." (Emphasis added.)

In *Loan Corporation by Trust Co.,* 210 N.C. 29, 185 S.E. 482 (1936), aff'd 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552 (1937), the plaintiff sued for a deficiency judgment upon a note secured by a deed of trust which was foreclosed by exercise of the power of sale contained therein, at which sale the defendant alleged the land was purchased for the benefit of the plaintiff holder of the note for an amount less than the fair value. The jury having found that at the time of the foreclosure sale the property was fairly worth more than the amount due upon the note, a judgment was entered that the plaintiff recover nothing. This was affirmed on appeal to this Court which

held that the foregoing statute is not a violation of the Obligation of Contracts Clause of the United States Constitution, or of other provisions of the Federal and State Constitutions relied upon by the plaintiff, the Court saying:

> "The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, *without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court.* In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property." (Emphasis added.)

The fair value, as of the date of the foreclosure sale, of the properties conveyed to the nominee of the plaintiff pursuant to such sale is, therefore, a material fact with reference to the amount, if any, which the plaintiff is entitled to recover from the defendant upon the note in suit. Obviously, this is a fact which is here in controversy and which must be determined by the court.

[7] The foregoing statute does not forbid the holder of the note secured by a deed of trust to purchase the property at a foreclosure sale conducted pursuant to the power of sale contained in the deed of trust, nor does it entitle the debtor to have credited upon the note whatever profit such purchaser may realize upon a subsequent sale of the property. There is no principle of law, apart from this statute, which entitles the debtor

to such credit simply by reason of such subsequent sale of the property at a price greater than the bid at the foreclosure sale. See: *McKnight v. United States,* 259 F. 2d 540 (9th Cir. 1958); *General Auto Truck Co. v. Rust,* 88 F. 2d 774 (D.C. Cir. 1936); *Gehlert v. Smiley,* 114 S.W. 2d 1029 (Mo. 1937). Such subsequent sale would simply be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it depending upon other circumstances such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made.

[8] The Superior Court properly retained the present matter upon its docket for a determination of the amount, if any, which should be credited upon the note by reason of the plaintiff's having purchased the property for less than its fair value at the foreclosure sale.

G.S. 1A-1, Rule 56(c), provides with reference to the granting of a motion for summary judgment:

> "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. * * *."

There being no genuine issue of any material fact with reference to the claim of Housing, Inc., that it has been released from all liability upon the note by (1) a novation, (2) an extension of time granted for the payment of the note, or (3) a release of the encumbered property from the lien of the deed of trust, and it appearing, as a matter of law, from the uncontroverted facts, that no such release occurred, it was not error for the Superior Court to deny the motion of Housing, Inc., for summary judgment, nor was it error to grant summary judgment that Housing, Inc., is liable upon the note for the unpaid balance thereof, if any, after all proper credits have been allowed. It was error to grant summary judgment in favor of the plaintiff for a specified amount, the amount of the credit upon the note to which Housing, Inc., is entitled, by reason of

the plaintiff's having purchased the property at the foreclosure sale for less than its then fair value, being at issue. *Kessing v. Mortgage Corp., supra.*

The burden was upon the plaintiff to establish the lack of any material issue of fact with reference to the amount recoverable by it. *Railway Co. v. Werner Industries,* 286 N.C. 89, 209 S.E. 2d 734 (1974); *Zimmerman v. Hogg and Allen, supra; Savings & Loan Assoc. v. Trust Co.,* 282 N.C. 44, 191 S.E. 2d 683 (1972); *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). This it has not done.

This action is, therefore, remanded to the Court of Appeals for the entry of an order by it further remanding the action to the Superior Court with instructions that the judgment of the Superior Court entered on 17 June 1975 be vacated and a new judgment be entered granting the motion of the plaintiff for summary judgment that the defendant, Housing, Inc., is liable to the plaintiff for the balance of principal and interest due upon the note in suit, after crediting upon the note the excess, if any, of the fair value at the time of the foreclosure sale of the property sold thereat over and above the amount of the plaintiff's bid at such sale, and retaining the cause upon the docket of the Superior Court for determination of the amount of such credit and for further determination of the right, if any, of the defendant Housing, Inc., to indemnification by the defendant, C. P. Robinson, Jr.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL EDWARD MADDEN AND CHARLES BRUCE KEETEN

No. 27

(Filed 7 March 1977)

1. **Criminal Law § 92— defendants charged with same crime — motion for separate trials — denial proper**

The trial court did not err in denying the motion of one of the defendants for a separate trial, since the two defendants were duly charged in separate indictments with the same crime, their defenses

were not antagonistic, and neither attempted to incriminate the other defendant.

2. **Jury § 7; Constitutional Law § 36— jurors' death penalty views — death penalty invalidated during trial — no new trial**

In a first degree murder prosecution where the State successfully challenged jurors who were unalterably opposed to the death penalty, the decision of the U. S. Supreme Court rendered during the course of the trial that imposition of the death penalty under the laws of N. C., then in effect, would violate the XIV Amendment to the U. S. Constitution did not transform the sustaining of the State's challenges to those prospective jurors into a valid basis for granting defendants a new trial.

3. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty invalidated during trial — fair trial**

In a first degree murder prosecution defendants' contention that they were denied a fair trial because the U. S. Supreme Court decision declaring the death penalty as applied in N. C. unconstitutional became known after counsel for one defendant had concluded his jury argument but prior to the jury argument by counsel for the other defendant was without merit.

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

The trial court in a first degree murder prosecution did not err in permitting the State to introduce in evidence two photographs of the victim's body at the crime scene, since photographs, though gruesome, which fairly portray a scene observed by a witness and which can be used to illustrate his testimony may be admitted in evidence.

5. **Criminal Law § 89— corroborative testimony — admissibility**

The trial court did not err in admitting testimony of a witness concerning statements made by one of the perpetrators of the crime to her on the morning after the crime with reference to the details thereof and the participation of the two defendants therein, since the evidence was admitted for the purpose of corroborating the perpetrator who had previously testified, and the court sustained objections to those parts of the witness's testimony which added details not contained in the previous testimony of the perpetrator.

6. **Criminal Law §§ 35, 73— crime committed by another — hearsay testimony**

In a first degree murder prosecution statements by third persons to an investigating officer concerning their involvement in the crime under investigation or the involvement of persons other than defendants constituted hearsay, and such statements were not admissible as declarations against interest.

7. **Criminal Law § 89— corroborative testimony — admissibility**

Evidence showing that defendant, on the day after the alleged robbery and murder, purchased and paid for an automobile with coins

and bills, such as would be likely to have been in the cash register of the robbed store, he having admitted that he was unemployed and had no funds as recently as a week before and had received in the meantime less than $100, was corroborative of a witness's earlier testimony and was competent to show circumstances indicating defendant's guilt of the crime with which he was charged.

8. **Criminal Law § 106— accomplice testimony — sufficiency to establish guilt**

While the testimony of an accomplice is to be considered with great care by the jury, its credibility is for the jury and, if it is believed by them and found by them sufficient to establish the guilt of the accused beyond a reasonable doubt, it will support a conviction.

APPEAL by defendants from *Thornburg, J.*, at the 2 July 1976 Schedule "A" Criminal Session of MECKLENBURG.

Upon an indictment, proper in form, each defendant was found guilty of murder in the first degree and sentenced to imprisonment for life.

At approximately 11:30 p.m. on 30 December 1974, Lawrence Edward McGinnis, Jr., was found lying face down on the floor of the storage room of the Kwik-Pik store on Idlewild Road in Mecklenburg County, of which store he was the manager. His hands were tied behind his back and he was dead, the cause of death being two gunshot wounds in the back of his head. There was a third gunshot wound on his shoulder. No one else was in the store.

At approximately 10:53 p.m., Sylvia Russell had arrived at the store and attempted to enter it to make a purchase. She observed a pale blue or green van in the store parking lot and a "huddle" of men inside the store, part of the lights of which had been turned off. As she parked her car beside the van, the men inside the store "scattered out" and one of them picked up a mop and started mopping the floor. Another, a blond man, met her at the door and, as she was attempting to enter the store, locked it and refused to let her enter. She asked two or three times for permission to come in and purchase cigarettes but he shook his head "with a mean look" and she left. On 31 January 1975, a police officer requested her to ride around with him to see if she would recognize anyone. They rode through a number of service stations in the course of about an hour and a half. At one of these she recognized Jack Payne as the man whom she had faced through the glass door of the Kwik-Pik

store and so identified him to the officer. She also identified him in court and identified a photograph of a pale blue or green van owned by Payne and Keeten as similar to the one she had observed in the parking lot of the store.

No wallet was found on the body of McGinnis. On 5 January 1975, his wallet was found in a ditch, not far from the Kwik-Pik store.

Payne was arrested after he was so identified by Mrs. Russell. He is a first cousin to the two defendants, who are half brothers. On 30 December 1974, he lived with the defendant Keeten, a woman named Kathy Woods and her two infant daughters. He and the two defendants were then unemployed. Payne made a detailed statement to the investigating police officers and an agreement was reached whereby he would be permitted to plead guilty to second degree murder in exchange of his testimony against the present defendants. Substantially in accordance with his statement given to the investigating officers, he testified to the following effect:

Keeten told Payne of plans which Keeten and Madden had for robbing the Kwik-Pik store and invited Payne to participate in the robbery, which Payne agreed to do. On the night of 30 December 1974, Keeten and Payne drove over to Madden's house in the van. Madden joined them and they went to a lounge for something to drink. There, they planned the robbery, including the tying up of whoever was working in the store. Keeten said they might have to kill somebody.

They then went to the store, entered it and told the clerk (McGinnis), "This is a holdup." Keeten and Payne took McGinnis to the back room and Madden started going through the cash register. They ordered McGinnis to lie down on his stomach, which he did, and Payne took the keys and went to lock the front door of the store. As he was doing so, he observed a car pulling up and told Madden someone was coming. Madden got a mop and pretended to be mopping the floor. A lady came to the door of the store and wanted cigarettes but Payne told her the store was closed and she left. Payne then tied the hands of McGinnis with a drawstring from Payne's army field coat. Keeten and Madden each had a pistol, Keeten's being a .22 caliber and Madden's a .38. (In the opinion of the medical examiner who conducted an autopsy upon the body of McGinnis, the wounds in the head were caused by small caliber

bullets, probably a .22.) Keeten took McGinnis' wallet. Keeten then gave Payne the keys to the van and told him to get it ready to leave. Payne then went to the van and started it. While Payne was so seated in the van, he observed Keeten and Madden going into the back room of the store but heard no shots. The motor of the van was very noisy.

As they drove home Payne expressed the hope that the lady who had come to the door of the store did not recognize them and Keeten said had he known of the lady's presence at the door he would not have shot McGinnis. At Madden's home they divided the money, Payne giving $100.00 of his share to Keeten to help pay for a car they were going to buy. The next morning Payne read in the newspaper about the robbery and murder and told Kathy Woods what had happened the previous night.

Following his arrest, Payne was taken to the police station and informed of his rights. In his statement, made thereafter to the investigating officers, he said that, in the presence of Payne and Madden's wife, Keeten had made the statement that when he fired his pistol he "aimed low." In testifying on cross-examination, Payne said he recalled Keeten's statement as being that he had "aimed high" when he fired the gun.

David Scott Payne, brother of Jack Payne, testified that Jack Payne, prior to his arrest, told him about the robbery and had said that they went in to rob the place, put the store employee in the back room and Mike (Madden) started mopping the floor when a lady came to the door and saw them.

Kathy Woods testified that she lived with Payne and Keeten and, on the evening of 30 December 1974, the two men left in the van, returning after midnight. They came into the house together, Payne pulled money from his pocket and laid it on the table and "they said that they had robbed the Kwik-Pik." They then proceeded to count the money out and put it in piles and Payne gave Keeten some money "to go toward the car." The following morning Payne and Kathy Woods read about the robbery in the newspaper and Payne told her it was correct that "the boy had been shot." He also told her that he, Madden and Keeten went into the store, pretended to be customers, held up the clerk and took him back into the storage room. He further told her that as he went to lock the door a woman came to the door and asked for a pack of cigarettes

but he told her the store was closed and locked the door, whereupon she returned to her car and left. He told her that he "tied the boy's hands behind his back, and he was laying on the floor." Payne further told her that Keeten took a wallet from McGinnis.

Each defendant testified in his own behalf and denied that either he or the other defendant had any participation in the robbery and murder, each testifying that he and the other defendant spent the evening together at Madden's house and at a poolroom. Each testified that Payne and Keeten arrived at Madden's home in the van at approximately 8:30 p.m. on 30 December 1974, that shortly thereafter Payne left alone in the van and returned therein to Madden's home at approximately 11:30 p.m., after which Payne and Keeten returned to their home and there (according to Keeten), Payne gave Keeten some money, neither defendant having been with Payne at any time between Payne's departure from Madden's home and his return thereto. Each denied any knowledge of the robbery-murder, other than what he had read about it and what had been told to him. Keeten denied making any statement to anyone that he fired a gun or aimed either high or low at McGinnis.

The defendants introduced other evidence designed to show their own good characters and to discredit Payne's and to contradict his statements concerning the division of money on the evening of 30 December 1974 and the alleged comment by Keeten that he had "aimed high" or "aimed low" at McGinnis. Keeten testified that he bought and paid cash for a car some time prior to 30 December 1974.

In rebuttal, the State offered the testimony of Ronald Bailey, who testified that, on 1 January 1975, he sold an automobile to Keeten for $250.00 and received in payment cash in the form of coins and bills of varying denominations.

When the trial of the defendants began, the law of North Carolina provided that the punishment for murder in the first degree was death by asphyxiation. Prospective jurors were examined on voir dire concerning their views on capital punishment and were told that if the jury returned a verdict of guilty of murder in the first degree against either or both defendants, the defendant so convicted would be sentenced to death.

After the completion of the argument to the jury by counsel for Keeten, the court took the customary noon recess. Dur-

ing that recess, 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, was announced. The court stated to counsel, out of the presence of the jury, that, by virtue of this decision, the death penalty could not be imposed upon these defendants and stated that he would instruct the jury that, in event of a verdict of guilty (the alternatives submitted to the jury being, "guilty of murder in the first degree" and "not guilty"), the maximum punishment would be life imprisonment and stated that he would permit the attorneys so to argue.

Keeten's attorney requested a further instruction that this development "does not change the measure of proof or quantum of proof necessary" and that the jury be instructed "that if they could not have found them guilty beyond a reasonable doubt and sentenced them to the death penalty, that they could not find them guilty by the same measure of proof to be sentenced to life imprisonment." Thereupon, the jury returned and counsel for Madden made his argument. The record does not indicate that counsel for Keeten requested permission to address the jury further in behalf of his client.

Concerning this development, the court instructed the jury:

> "Also, Members of the Jury, during the course of this trial the Supreme Court of the United States has rendered a decision which holds that the death penalty as applied in North Carolina is unconstitutional. Therefore, if these defendants, or either of them, are convicted of murder in the first degree, then the punishment will be life imprisonment. I instruct you, however, that the measure of proof has not changed. That is to say that if you could not convict the defendants on the evidence presented in this trial, if the penalty had been death, then you could not convict the defendants because of the fact that the penalty has changed during the course of this trial."

The defendants' Assignment of Error No. 3 is:

> "The prejudice and harm caused the defendants by selecting the jury and trying the case on one theory of law and having the law changed at the conclusion of the trial."

Upon appeal, counsel for Keeten did not file a separate brief but adopted that filed by counsel for Madden and confined his oral argument to the contention that, as a result of

the above mentioned decision of the United States Supreme Court, the case was converted from a capital to a non-capital case after he had completed his argument to the jury.

Rufus L. Edmisten, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the State.

Nelson M. Casstevens, Jr., for defendant Madden.

Arthur Goodman, Jr., for defendant Keeten.

LAKE, Justice.

[1] There was no error in the denial of the motion of Madden for a separate trial. The two defendants were duly charged in separate indictments with the same crime. The State proceeded upon the theory that the murder, with which they were charged, was committed in the course of a robbery committed by them jointly. Their defenses were not antagonistic. On the contrary, each testified in support of their joint alibi. Neither, in his testimony or other evidence, attempted to incriminate the other defendant. This assignment of error is overruled. G.S. 15A-926; *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975); *State v. Overman,* 269 N.C. 453, 466, 153 S.E. 2d 44 (1967); *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962); *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128 (1959); *State v. Combs,* 200 N.C. 671, 158 S.E. 252 (1931).

[2] The defendants are not entitled to a new trial by reason of the sustaining of the State's challenges to jurors who, on voir dire, stated that they were opposed to the death penalty and under no circumstances, regardless of the evidence introduced by the State, would they vote to convict if such conviction would result in the imposition of the death penalty. At the time the jury was being selected, the State was seeking the death penalty pursuant to the then established law of North Carolina. It is conceded by the defendants that the sustaining of the challenges to these jurors met the test established in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and in numerous decisions of this Court. *State v. Bock,* 288 N.C. 145, 217 S.E. 2d 513 (1975); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). The fact that between the empaneling of the jury and the return of the verdict, the Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976), determined that

the imposition of the death penalty under the laws of North Carolina, then in effect, would violate the Fourteenth Amendment to the Constitution of the United States did not transform the sustaining of these challenges to prospective jurors into a valid basis for granting these defendants a new trial.

Prior to the inception of this case, decisions of this Court established the right of counsel for the State and counsel for the defendant charged with a capital crime to examine any prospective juror, tendered to him for voir dire, concerning the attitude of such juror toward capital punishment. *State v. Bock, supra; State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974). The then unsuspected error of counsel, in so advising prospective jurors as to the punishment which would be imposed upon these defendants in event of their conviction of first degree murder, was corrected by the charge of the court, upon the court's learning of the decision of the Supreme Court of the United States in *North Carolina v. Woodson, supra.*

The defendants do not contend that the jurors voted to convict under the impression that the defendants would be sentenced to death. Their contention is quite to the contrary; namely, that the jurors were improperly excused because they were unwilling to have any part in the infliction of the death penalty and would not return a verdict of guilty which would have resulted therein. Thus, they contend that the exclusion of these prospective jurors, plus the subsequent instruction that the death penalty would not be inflicted, resulted in a trial jury unlawfully predisposed to convict the defendants of a crime for which the punishment was not death, but life imprisonment.

This contention of the defendants is wholly speculative and without merit. In the first place, it is speculative as to whether any of the eight jurors, excused because of their opposition to the death penalty, would have survived other challenges by either the State or one of the defendants. Secondly, nothing in the record, or in common experience of which we may take judicial notice, indicates that any prospective juror, so excused, had any scruple against convicting a defendant upon the charge of first degree murder, when the evidence satisfied such juror of his guilt thereof beyond a reasonable doubt, had such prospective juror been told, as the trial jury in this case was told, that the penalty to be imposed upon such conviction would be imprisonment for life. We are aware of no plausible

basis for the assertion that a juror, who has no conscientious objection to the imposition of the death penalty for the offense of murder committed in the perpetration of a robbery, would be more easily convinced of guilt beyond a reasonable doubt than would a juror having conscientious objection to the death penalty but no objection to a sentence to life imprisonment for such offense. This contention was met and rejected by the Supreme Court of the United States in *Witherspoon v. Illinois, supra.* It was also rejected by this Court in *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). See also: *Bumper v. North Carolina,* 391 U.S. 543, 545, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968); *People v. Rhinehard,* 107 Cal. Rptr. 34, 507 P. 2d 642 (1973); *Commonwealth v. McAlister,* 365 Mass. 454, 313 N.E. 2d 113 (1974); *Commonwealth v. Martin,* 348 A. 2d 391 (Pa. 1975).

The defendants do not suggest that any member of the trial jury was not competent to serve. The defendants closely examined each of these jurors and expressed satisfaction with him or her, after first challenging successfully numerous other prospective jurors. The record does not indicate that either defendant exhausted the peremptory challenges allowed him by the law of this State. See: *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729 (1970); *State v. Bock, supra.*

As this Court, speaking through Justice Higgins, said in *State v. Peele,* 274 N.C. 106, 113, 161 S.E. 2d 568 (1968), cert. den., 393 U.S. 1042:

> "Each party to a trial is entitled to a fair and unbiased jury. Each may challenge for cause a juror who is prejudiced against him. A party's right is not to select a juror prejudiced in his favor, but to reject one prejudiced against him."

As the defendants concede in their briefs, this Court has, both before and after the decision of the Supreme Court of the United States in *North Carolina v. Woodson, supra,* rejected the contention that a trial jury, selected as was the one that convicted these defendants, is improperly constituted, so as to entitle the defendant, convicted and sentenced to imprisonment, to a new trial. *State v. Montgomery,* 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976); *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976); *State*

v. Phifer, 290 N.C. 203, 225 S.E. 2d 786 (1976). This assignment of error is overruled.

[3] The defendants next contend that they were denied a fair trial because the decision of the Supreme Court of the United States in *North Carolina v. Woodson, supra,* became known after counsel for Keeten had concluded his argument to the jury and prior to the argument to the jury by counsel for Madden. Nothing in the record, brief or oral argument by counsel for Keeten suggests that he requested permission of the trial court to resume his argument to the jury after it became known that the death penalty would not be imposed in event of a verdict of guilty of murder in the first degree. The record shows that, in the absence of the jury, when the trial court determined, on the basis of information received through the news media, that the death penalty could not be constitutionally imposed in this case, he informed counsel that he would instruct the jury that, in event of a verdict of guilty, the maximum punishment would be life imprisonment and that he would permit the attorneys so to argue. Counsel for Keeten thereupon requested only an instruction that "this does not change the measure of proof or quantum of proof necessary," and "that the jury be specifically instructed that if they could not have found them guilty beyond a resonable doubt and sentenced them to the death penalty, that they could not find them guilty by the same measure of proof to be sentenced to life imprisonment." This instruction, in a more grammatical form, was given. Counsel for Madden, interposing no objection to the proposed (and given) instructions concerning the punishment to be inflicted in event the jury returned a verdict of guilty of murder in the first degree, then proceeded with his argument to the jury.

This precise contention was rejected by the Court of Appeals of Washington in *State v. Trevino,* 10 Wash. App. 89, 516 P. 2d 779 (1973), following the decision of the Supreme Court of the United States in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

The decision of the Supreme Court of the United States with reference to the constitutionality of the death penalty did not alter the charge against the defendants. They remained on trial on the charge of murder perpetrated in the commission of a robbery, which is first degree murder under the law of this State. The jury was specifically instructed as to each defendant

that it must return a verdict of not guilty unless the State had convinced it beyond a reasonable doubt that such defendant had committed each element of the offense charged. We reject as utterly without foundation the defendants' implied contention that, upon learning that the death penalty could not be imposed, the jury relaxed and voted to convict without considering the evidence with the care it would otherwise have given it. We must presume that the jury, mindful of its own oath and responsibility, understood, accepted and applied the court's proper instruction with reference to the State's burden of proof and the meaning of "reasonable doubt." *State v. Ray,* 212 N.C. 725, 194 S.E. 482 (1937). This assignment of error is overruled.

[4] There is no merit in the contention of the defendants that the court committed error in permitting the State to introduce in evidence two photographs of the body of McGinnis, as it lay on the floor of the storage room. We have said many times that photographs, though gruesome, which fairly portray a scene observed by a witness and which can be used to illustrate his testimony may be admitted in evidence. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967). The use of two photographs, though similar, for this purpose is not excessive. *State v. Cutshall, supra.* This assignment of error is overruled.

[5] We find no error in the rulings of the trial court concerning the admission of testimony of Kathy Woods concerning the statements by Payne to her the morning after the alleged robbery and murder with reference to the details thereof and the participation of the two defendants therein, this evidence being admitted for the purpose of corroborating Payne who had previously testified.

When Kathy Woods first began to testify as to what Payne told her, counsel for Keeten objected "to this whole line." This general objection was properly overruled since such testimony as was then in question would have been admissible for corroboration of Payne.

Thereupon, in response to the question, "What did Jack Payne tell you about the events of the 30th of December, 1974,

at the Kwik-Pik on Idlewild Road?" the witness responded that Payne told her that Keetan and Madden "had been watching the Kwik-Pik on Idlewild Road for approximately a week" to learn about the closing procedures at the store. The court, on its own motion, interrupted, sustained the objection and ordered that testimony stricken, telling the jury not to consider it at any point in its deliberations. Thereupon, counsel for both defendants moved for a mistrial, which was denied.

The court then, in the absence of the jury, instructed the witness to confine her testimony in response to the question to "any statement that was made about what occurred at the Kwik-Pik only." She was instructed not to talk about "stake-outs and so forth" and to start "from where they pulled up to the Kwik-Pik." The jury was then returned to the courtroom and the District Attorney repeated the question. Objection by counsel for each defendant was overruled. The jury was instructed, "This evidence is offered and admitted for the sole purpose of corroborating or strengthening the testimony of the witness, William Jackson Payne, Jr., if you find that it does or tends to do so. It may not be considered by you for any other purpose."

The witness then proceeded to testify as to the statement made to her by Payne the morning after the alleged robbery when she related that Payne had said that Madden, in walking over to the beer case in the store, "was really trying to look in behind the cooler to see if anybody was in the back room." Counsel for each defendant moved to strike that portion of the answer and this motion was allowed. Again, the court instructed the jury not to consider this statement "at any point in their deliberation." Again, motions for mistrial were denied.

The witness then proceeded to testify as to what Payne had told her concerning the details of the robbery. In the course of doing so, she said Payne told her that, as he walked back into the storage room, he heard Keeten ask McGinnis how much money he had in his wallet and McGinnis say in response, "None," following which Keeten bent down to get the wallet and found therein $60.00 and asked McGinnis why McGinnis had lied. The witness then said (still purporting to paraphrase Payne's statement to her), "and he got kinda mad and when the McGinins boy told him—" At that point, counsel for each defendant objected "to that," and the court replied, "Sustained, Members of the Jury."

The defendants then moved to strike the entire testimony of Kathy Woods and renewed their motions for mistrial. These motions were denied and the direct testimony of the witness ended. The attorney for each defendant then cross-examined her, attacking her moral character for the obvious purpose of discrediting her as a witness.

Assuming that the final objection to the testimony of Kathy Woods related, not merely to what she was about to say when interrupted but to her testimony concerning Payne's statement about the taking by Keeten of the wallet and the amount of money found therein, we find no basis for a new trial in any of the rulings of the court concerning the testimony of this witness. In each instance, when the testimony of Kathy Woods added details not contained in the previous testimony of Payne, the trial court sustained the objection. Although in the last instance the court did not specifically instruct the jury not to consider the statement, his ruling, "Sustained, Members of the Jury," could hardly have been misunderstood by the jurors in view of his virtually contemporaneous express instructions that prior statements by Kathy Woods were not to be considered by them in their deliberations.

As stated by Justice Sharp, now Chief Justice, in *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354 (1963):

> "If a prior statement of a witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce this 'new' evidence under a claim of corroboration * * * However, if the previous statements offered in corroboration are generally consistent with the witness' 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."

The case of *State v. Warren,* 289 N.C. 551, 223 S.E. 2d 317 (1976), relied upon by the defendants, is distinguishable. There, the supposedly corroborating testimony went beyond the previous testimony of the witness to be corroborated and was admitted in evidence, there having been no objection or motion to strike. Here, on the contrary, the alleged "new" evidence was not admitted. For the same reason, *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83 (1967), is also distinguishable

from the present case. Furthermore, in the Fowler case, the objectionable testimony was not simply new, but actually contradicted the testimony it was offered to corroborate.

Furthermore, the testimony of Payne did show that prior to his joining the two defendants in the robbery, the two defendants had formulated plans for the robbery and told him of them. Payne's testimony further disclosed that Keeten took a wallet from McGinnis, the wallet being subsequently found in a ditch not far from the Kwik-Pik store. Payne testified that Keeten asked McGinnis if he had any money and McGinnis replied that he did not, but Keeten "took his wallet out."

To be admissible as corroborative evidence, testimony of a prior statement by the witness sought to be corroborated does not have to be precisely identical to such prior testimony of that witness. Slight variations between the testimony of such witness and the prior statement by him offered to corroborate it do not render the latter evidence incompetent. The testimony offered to corroborate is competent if it does so substantially. *State v. Westbrook, supra; State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Brooks, supra; State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960); *State v. Walker,* 226 N.C. 458, 38 S.E. 2d 531 (1946). We find no such variance between the testimony of Payne and the testimony of Kathy Woods, admitted into evidence, as would make the latter testimony incompetent. This assignment of error is overruled.

[6] Officer C. A. Hearne of the Mecklenburg County Police Department, called as a witness for the defendant Keeten, testified that he investigated the robbery and murder here in question and, in the course of his investigation, interviewed certain Negro suspects named Bobby Lee Wall and Gerald Edward Jones, among others. When asked if they had confessed to this robbery and murder, the court sustained the State's objections. In the trial court the defendant Madden argued:

> "Your Honor, I think his answer to the question would be admissible for the purposes of not proving the truth of the matter asserted therein, *and I do not tender it to prove the truth of the matter asserted therein.* I tender it to show that on frequent occasions during the investigation of this crime, that many people, for whatever reason they may have had, have admitted being involved in it or have admitted the murder of Eddie McGinnis, and not to

prove that someone else did it but to prove that there are people who, for whatever reason they may have, would confess to a police officer something that is totally and completely unfounded as far as this officer is concerned." (Emphasis added.)

Officer Hearne was then permitted to state for the record, in the absence of the jury, that he did talk with Gerald Edward Jones at the State Prison in Raleigh, where Jones was, and apparently still is, incarcerated. In that interview Jones gave Officer Hearne a written statement to the effect that he and two companions, Walter Harris and Norman Anthony, held up the Kwik-Pik store on the night in question and, in the course of the holdup, the clerk of the store was shot and was put in the back of the store. A week later Officer Hearne again interviewed Jones in the offices of the State Bureau of Investigation in Raleigh and Jones gave Officer Hearne another written statement on which he said that he, Harris and Anthony, on the night in question, held up another store and then, while riding around looking for a second store to rob, came to the Kwik-Pik store on Idlewild Road and there, soon after entering the store parking lot, saw two other Negro men inside the store, these being identified as Billy Huntley and Otho Lowe, and, while so parked in the parking lot of the store, they observed these men scuffling with the clerk, who "got on the floor" and observed the men pull the clerk to the back of the store, whereupon Jones heard "at least two shots" and saw Lowe run out of the front door "trying to cover up a short shotgun," following which Jones and his companions departed. Clearly, the second statement contradicted the first and was neither a confession by Jones nor a statement against his interest.

Officer Hearne, in the course of his investigation, also obtained from Donald Taylor and Bobby Wall written statements tending to implicate Billy Huntley in the robbery and murder in question. Another officer, also investigating the matter, interviewed Earl Brown and obtained a statement from him implicating Huntley and Lowe in the robbery and murder. These statements were neither confessions nor statements against the interest of the declarant.

None of these men was called as a witness by the defendants or subpoenaed by them and it was not shown that any of them was not available to subpoena.

Obviously, all such statements made to the witness Hearne by these individuals constituted hearsay. The defendants contend that they are, nevertheless, admissible as declarations against interest. The precise question was passed upon by this Court in *State v. English,* 201 N.C. 295, 159 S.E. 318 (1931), in which the Court held, "The voluntary confession of a third party, made to officers of the law, that he killed the deceased, detailing the circumstances," was not competent evidence in behalf of the defendant charged with the murder. In that case, this Court reviewed and rejected authorities to the contrary now relied upon by the defendants. Furthermore, a prerequisite to the admission of hearsay on the ground that the statement constitutes a declaration against interest is that "the declarant must be dead or, for some other reason, unavailable as a witness." Stansbury, North Carolina Evidence (Brandis Rev.), § 147. It is not here shown that the maker of any of the statements in question was not available as a witness.

Furthermore, of all the statements in question, only the first one made by Gerald Jones implicated the declarant in the robbery and murder here in question, and it is directly in conflict with his second statement to Officer Hearne. Both statements by Jones are in direct conflict with the testimony of Mrs. Russell, the customer who identified Payne, in court, as the man who blocked her entrance into the store, and with Payne's own testimony that he did so while the holdup was in progress. While this conflict would not, of itself, make the statements by Jones incompetent, it renders it almost inconceivable that the jury would have believed the statement of Jones, even if it had been admitted into evidence. This assignment of error is overruled.

[7] The defendants next contend that it was error to permit the State to introduce the evidence of Ronald Eugene Bailey to rebut the testimony of Keeten. Keeten had testified on cross-examination by the State that, as of 30 December 1974, he had been unemployed for almost 30 days, that in November he had received from Payne $200.00 which was part of the proceeds of another theft by Payne, and with the $200.00 he had paid rent, purchased groceries and "some stuff for Christmas," thus spending all of that money. He further testified that he did not have any of that money after Christmas Day and did not receive any money for Christmas from his mother or anybody else, nor did he receive any money from Jack Payne. Prior to

January 1, he did some odd jobs for which he received less than $100.00. He purchased a 1955 Chevrolet automobile for $200.00, paying for it "with cash money in bills," this being "several days before" the transfer of the title to him on 1 January 1975.

In rebuttal, the State introduced the testimony of Ronald Eugene Bailey, the seller of the car, who testified that he sold it to Keeten for $250.00 and Keeten paid him on 1 January 1975, the payment being made as follows: "Five dollars worth of quarters, approximately between 50 and 75 one dollar bills, a few fives, tens, a couple of twenties, and a fifty."

This was not a contradiction of Keeten upon a collateral matter for the purpose of impeaching his credibility as a witness. It was evidence that corroborated Payne's testimony that Keeten participated in and shared the proceeds of the robbery in question. In *State v. Long,* 280 N.C. 633, 640, 187 S.E. 2d 47 (1972), speaking through Justice Huskins, we said, "The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible."

Clearly, evidence showing that the defendant, on the day after the alleged robbery and murder, purchased and paid for an automobile with coins and bills, such as would be likely to have been in the cash register of the robbed store, he having admitted that he was unemployed and had no funds as recently as a week before and had received in the meantime less than $100.00, would be competent to show circumstances indicating his guilt of the crime with which he is charged. We find no merit in this assignment of error and it is overruled.

[8] The final assignment of error argued by the defendants in their brief is the denial of their motion to dismiss as of nonsuit. This assignment is clearly without merit and is overruled. While, as the trial court instructed the jury, the testimony of an accomplice is to be considered with great care by the jury, its credibility is for the jury and, if it is believed by them and found by them sufficient to establish the guilt of the accused beyond a reasonable doubt, it will support a conviction. *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660 (1967). It is also well established that, upon a motion for judgment of nonsuit, the evidence by

the State is to be deemed true and is to be considered in the light most favorable to the State. *State v. McKenna,* 289 N.C. 668, 683, 224 S.E. 2d 537 (1976); *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969).

The defendants have expressly abandoned in their brief their assignment of error relating to the charge of the court concerning the law as to accomplices. In this they were well advised. We have carefully examined this and other portions of the charge and find no error therein.

No error.

STATE OF NORTH CAROLINA v. WILLIAM BRADY TILLEY AND HAROLD GLENWOOD JORDAN

No. 86

(Filed 7 March 1977)

1. **Criminal Law § 79— acts and declarations of co-conspirators**

When the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to the conspiracy in furtherance of its objectives are admissible against the other members regardless of their presence or absence at the time the acts and declarations were done or uttered.

2. **Criminal Law § 79— acts and declarations of co-conspirators — establishment of conspiracy — order of proof**

While ideally the State should first establish a *prima facie* case for the existence of a conspiracy with extrinsic evidence and then tender the declarations and acts of the conspirators linking them to the criminal venture, this order of proof is not always feasible and can be altered.

3. **Criminal Law § 79— acts of co-conspirators — absence of defendant**

Where the State established a *prima facie* case of conspiracy by defendants and another to commit an assault with a firearm, the actions of one defendant and a co-conspirator in borrowing the keys to a car and the exchange of conversation accompanying such actions during the pendency and in furtherance of the conspiracy were admissible against both defendants, although one defendant was absent during such actions and conversation.

4. Criminal Law § 79— acts before or after conspiracy — admissibility

Acts done by a co-conspirator before or after the conspiracy which were not intended as declarations are not hearsay and thus are competent evidence if relevant.

5. Criminal Law § 79— co-conspirator's act of carrying pistol — admissibility

In a prosecution for murder and conspiracy to commit an assault with a firearm, the trial court properly admitted testimony that witnesses observed defendants' co-conspirator carrying a .25 caliber pistol during the day and evening of the murder, although these acts of the co-conspirator occurred before the conspiracy was entered, since the acts of carrying a pistol were not intended as declarations, and the testimony was within the knowledge of the witnesses and was not hearsay.

6. Criminal Law §§ 73, 79— acts of witness after conspiracy terminated — admissibility

In a prosecution for conspiracy to commit an assault with a firearm and murder resulting from the conspiracy, a witness's testimony of her own knowledge that she threw an accomplice's pistol away was properly admitted since it was probative and not hearsay, notwithstanding she threw the pistol away after termination of the conspiracy and out of the presence of defendants.

7. Criminal Law § 73— requests by defendant — res gestae

Requests by one defendant and a co-conspirator that the witness drive the co-conspirator home, made immediately after a murder resulting from the conspiracy, were admissible as part of the *res gestae*.

8. Criminal Law §§ 48, 77— admissions and admissions by silence

A conversation some two weeks after a murder in which defendants asked the witness what an SBI agent had asked her about the murder and what she had told him was admissible as an admission against those defendants who participated in the conversation and as an admission by silence against non-participating defendants who were present; furthermore, the admission of testimony as to the conversation was not prejudicial to defendants since the conversation was not inconsistent with defendants' innocence.

9. Criminal Law §§ 15, 92— publicity of accomplice's trial — motions for continuance, change of venue, and severance

In a prosecution for murder and conspiracy to commit a felonious assault, the trial court did not abuse its discretion in the denial of defendants' motions for a continuance, a change of venue and separate trials because of publicity surrounding the separate trial of a co-conspirator one week earlier where newspaper articles of the co-conspirator's trial were not inaccurate or inflammatory, and no juror objectionable to defendants was allowed to sit on the jury.

10. **Criminal Law § 102— jury argument — failure to contradict State's case**

The district attorney's remarks directed at the failure of defendants to produce exculpatory evidence or to contradict the State's case did not constitute an impermissible comment on the failure of defendants to take the stand.

11. **Criminal Law § 102— jury argument — speculation — no argument outside record**

The district attorney's speculation that the murder victim's wife could have given more damaging testimony in this trial was arguably a reasonable inference to be drawn from the evidence and did not constitute an argument outside the record by innuendo concerning testimony by the victim's wife at an earlier trial of defendants' accomplice.

12. **Criminal Law § 102— jury argument — constitutional rights of victim and defendants**

The district attorney's argument that the murder victim would still be alive if his rights "had been observed to the extent that we are now undertaking to observe these defendants' rights" was within permissible bounds.

13. **Criminal Law §§ 52, 57— expert testimony — use of "probably" or "could have"**

An expert on gun residue tests could properly testify that a defendant "probably" or "could have" fired a gun within a short time prior to the administration of the test to him.

14. **Homicide § 21; Conspiracy § 6— first degree murder — conspiracy to assault with firearm — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on issues of defendants' guilt of first degree murder and conspiracy to commit an assault with a firearm where it tended to show that the victim went with defendants to a party at the trailer of defendants' accomplice; the accomplice was armed with a .25 caliber pistol; defendants took the victim home and an argument occurred; defendants returned to the trailer and they and the accomplice borrowed a car and left again; shortly thereafter a car matching the description of the borrowed car, by sight and sound of horn, pulled up in front of the victim's trailer and its horn was blown; voices and the closing of a trunk lid were heard; the victim ran from the trailer and was shot with a shotgun and the accomplice's .25 caliber pistol, causing his death; shortly thereafter the accomplice hid a shotgun under a mattress at his father's house; and tests showed that one defendant had probably fired a gun during the night of the crimes.

DEFENDANTS appeal pursuant to G.S. 7A-27(a) from judgments of *Wood, J.*, 29 September 1975 Session, STOKES Superior Court. Defendants' convictions of conspiracy to commit a felonious assault with a firearm were certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) on 26

February 1976. This case was docketed and argued as No. 85, Spring Term 1976.

On indictments proper in form, defendants were charged with first degree murder and conspiracy to commit a felonious assault with a firearm. Defendants were convicted of second degree murder and conspiracy and sentenced to life imprisonment for the murder and ten years imprisonment for the conspiracy. J. V. Smith, the third defendant, was tried separately a week earlier and convicted of first degree murder and conspiracy. That case was affirmed in *State v. Smith,* 290 N.C. 148, 226 S.E. 2d 10 (1976).

Evidence for the State tended to show that Gail Bullins, Willia Dean Hicks and J. V. Smith drove to Smith's trailer on Highway 704 near Walnut Cove early on the evening of 24 January 1975 in Smith's black Chevrolet Monte Carlo automobile. Over the next several hours, David Willard, Larry Hodge, Julia Pruitt, Winfred Hall (the deceased) and the defendants, Harold Jordan and Brady Tilley, arrived at the trailer. No one present remembered the exact order in which they came. People began to drink, and a party developed. Although the party apparently was amicable, several persons testified that J. V. Smith was openly carrying a pearl handle .25 caliber automatic pistol.

Around 9 p.m., Gail Bullins, who had been drinking heavily, attempted to walk across the living room. When she fell down, Larry Hodge helped her up and escorted her to the bedroom of Smith's trailer where they both went to bed. At approximately 10:30 p.m. Harold Jordan and Brady Tilley left the party to take Winfred Hall home. They returned shortly from that errand and after a few minutes Tilley and Smith went into the bedroom. Smith asked Hodge if they could borrow Hodge's car. Hodge owned a white 1962 Chevrolet Impala with a red stripe down the side. The car had six tail lights and double headlights. Smith indicated that Tilley would drive. Hodge told them where his keys were and a few minutes later he heard a car drive off. He testified that the next morning his car was not in the same position that it had been in when he parked it the night before. Julia Pruitt testified that Smith, Tilley, and Jordan left the trailer around 11:00 p.m.

Mr. and Mrs. Hall lived in a trailer park on Wards Road off Highway 704, about one mile from Smith's trailer. Hall left

the trailer on the morning of 24 January 1975 with Harold Jordan. He returned that night around 6:00 p.m. with Jordan and Tilley, but stayed at home for only five minutes and left again. Harold Jordan brought him back around 10:30 p.m. Mrs. Hall had the television turned on so she could not understand the content of the conversation, but she could hear loud voices outside after Jordan drove up. Hall walked in the trailer and began to pace back and forth in the living room. He appeared intoxicated and looked mad.

Shortly after 11:00 p.m. he undressed and promptly fell asleep. His wife remained awake and heard a car pull up in the parking lot around 11:30 p.m. The automobile was an older model white car with a stripe down the side. Neighbors in the trailer park noted the car had dual headlights and six tail lights. The car sounded its horn twice. Mrs. Hall described it as "a real funny sounding horn." (Mrs. Hall later identified Larry Hodge's car horn as sounding exactly like the horn she heard on the night of the murder. Hodge testified that his horn was malfunctioning that night and thus sounded different from other car horns.) Mrs. Hall heard a trunk lid close and loud voices. Winfred Hall awoke and looked out the window several times. He appeared "scared" and started to leave the trailer. He stopped, pulled on his pants, and then ran out.

Mrs. Hall heard the car start to back up. She then heard three shots. A bullet came through the bedroom wall of her trailer. She ran outside and found her husband lying in the parking lot. He had been shot under the heart with a shotgun. His only words were, "They shot me." Winfred Hall died en route to the hospital.

Meanwhile, Smith, Tilley and Jordan re-entered Smith's trailer. Tilley asked Julia Pruitt if she would drive J. V. Smith to the home of Edgar Smith, J. V. Smith's father. She did so and observed a shotgun lying on the back seat of Smith's car. (No one else who had been in Smith's car earlier in the day had seen this weapon.) Smith took the shotgun from the car and placed it under the mattress of his father's bed. Smith and Pruitt then rejoined Tilley and Jordan at the trailer.

The next day, investigating officers recovered two shell casings from the parking lot and a bullet from the Hall trailer. The shell casings were definitely identified as having been fired from J. V. Smith's .25 caliber pistol. It was determined that

the bullet could have been fired from the same gun. The same day, an S.B.I. special agent took gunshot residue wipings from the hands of Brady Tilley and Harold Jordan. Analysis of those wipings revealed that Tilley had probably fired a gun within the past twelve hours. The tests were inconclusive as to Jordan.

The day after the shooting, Smith gave his pearl handled pistol to Julia Pruitt and she hid it in her trailer. A week later she placed it in a brown paper bag and threw it into a pasture behind her house. Later she assisted law enforcement officers in its recovery.

Two weeks after the shooting, Smith, Tilley and Jordan paid a visit to Gail Bullins. They inquired as to what S.B.I. Agent Terry Johnson had asked her about the murder and what she had told him.

The defendants presented no evidence.

Other facts necessary to the decision will be related in the opinion.

Attorney General Rufus L. Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

Malcolm B. Grandy for William Brady Tilley, defendant.

A. D. Folger, Jr., George T. Fulp, and Ronald M. Price for Harold Glenwood Jordan, defendant.

COPELAND, Justice.

Appellants' first assignment of error relates to the admission in evidence of certain incriminating statements and actions which were made out of the presence of one or both of the defendants. Although defendants stress their absence on these occasions, we find this factor to be irrelevant to the determination of the admissibility of the challenged evidence. At the core of defendants' objections is the hearsay rule. When declarations and acts intended as declarations are offered for the purpose of proving the truth of the matters asserted therein and depend for their probative value on the competency and credibility of an out-of-court declarant, they are classified hearsay and are usually inadmissible. 1 Stansbury's N. C. Evidence, § 138 (Brandis Rev. 1973).

But where the proferred testimony consists of extra-judicial declarations offered for the purpose of proving the truth of the matters stated, it is admissible in the face of a hearsay objection if the declarations were made by a party to a criminal conspiracy during the course of and in pursuit of the goals of the illegal scheme. *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969); 2 Stansbury's N. C. Evidence, § 173 (Brandis Rev. 1973).

The rule allowing into evidence statements by a co-conspirator is not an exception to the hearsay rule under the rules of evidence. Incriminating statements or acts are admissible against the declarant or actor as an admission not violating the hearsay rule because the declarant or actor cannot be heard to complain about not having a right to cross-examine himself. By a rule of substantive law, vicarious liability for the same acts and declarations is extended to the declarant or actor's co-conspirators. 2 Stansbury's N. C. Evidence, §§ 167, 168, 173 (Brandis Rev. 1973); IV Wigmore on Evidence, §§ 1048, 1079 (Chadbourn Rev. 1942).

[1] According to the general rule, when the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members *regardless* of their presence or absence at the time the acts and declarations were done or uttered. *State v. Conrad, supra, see State v. Branch, supra; State v. Lea,* 203 N.C. 13, 164 S.E. 737 (1932). Before the acts or declarations of one conspirator can be considered as evidence against his co-conspirators, there must be a showing that "(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." *State v. Lee,* 277 N.C. 205, 213, 176 S.E. 2d 765, 769-70 (1970); *State v. Conrad, supra* at 348, 168 S.E. 2d at 43.

[2] The conspiracy must be established independently of the declarations or acts sought to be admitted. *State v. Wells,* 219 N.C. 354, 13 S.E. 2d 613 (1941); *Bryce v. Butler,* 70 N.C. 585 (1874). Ideally, the State should first establish a *prima facie* case for the existence of the conspiracy with extrinsic evidence and then tender the declarations and acts of the conspirators linking them to the criminal venture. This order of proof is not always feasible and can be altered. "Sometimes for the sake

of convenience the *acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy,* the prosecutor undertaking to furnish such proof in a subsequent state of the cause." *State v. Jackson,* 82 N.C. 565, 568 (1880). "Because of the nature of the offense courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence. '[A]nd if at the close of the evidence every constituent of the offense charged is proved the verdict rested thereon will not be disturbed. . . .' (Citations omitted.)" *State v. Conrad, supra* at 347, 168 S.E. 2d at 43.

[3] Applying these principles to the separate assignments of error raised by the defendants, we find no error in the admission of the challenged evidence. We believe the prosecution sufficiently established a *prima facie* case of conspiracy on the part of defendants Jordan, Tilley and Smith to assault Winfred Hall with a firearm by evidence other than that now challenged. The exact moment when the three conspirators agreed on their evil scheme cannot be fixed with any certainty; however, it seems clear that the agreement had been reached by the time Harold Jordan and Brady Tilley returned to J. V. Smith's trailer after taking Hall home. At that point, J. V. Smith and Brady Tilley went into the bedroom of the trailer and borrowed the keys to Larry Hodge's car. This action and the exchange of conversation accompanying it were made during the pendency and in furtherance of the conspiracy and so were admissible equally against Brady Tilley and Harold Jordan. *State v. Branch, supra; State v. Conrad, supra.* Harold Jordan's absence during this period is irrelevant to the admissibility of this evidence against him. Defendants' exceptions 19-30, 36-37 are overruled.

[5] Defendants object to testimony by numerous witnesses that they observed J. V. Smith carrying and brandishing a pearl handled, .25 caliber, automatic pistol during the day and evening of the murder. The objection is premised on the fact that these acts of co-conspirator Smith were before the conspiracy was entered, not in furtherance of its illegal design, and out of the presence of defendants Tilley and Jordan. While all these assertions are true, they are irrelevant.

We have said on numerous occasions, without clarification, that "a different rule applies to acts and declarations made

before the conspiracy was formed or after it terminated. Prior or subsequent acts or declarations are admissible only against him who committed the acts or made the declarations." *State v. Conrad, supra* at 348, 168 S.E. 2d at 43; *accord, State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Lee, supra.* On the facts of the present case it is appropriate to examine the rules which apply to acts or declarations of a conspirator committed or said outside the pendency of the conspiracy.

[4] It does not necessarily follow that these acts or declarations are always inadmissible. *Acts* done by a co-conspirator before or after the conspiracy, which were not intended as declarations, are not hearsay and thus are competent evidence, assuming their relevance. *Anderson v. United States,* 417 U.S. 211, 41 L.Ed. 2d 20, 94 S.Ct. 2253 (1974); *Lutwak v. United States,* 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953). Any statements in our cases that may have indicated that acts by co-conspirators outside the pendency of a conspiracy are inadmissible, are not applicable to acts not intended as a means of expression.

Relevant declarations or admissions by one conspirator not made during the life of the conspiracy or in furtherance of its objectives are admissible "only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration." *Lutwak v. United States, supra* at 619, 97 L.Ed. at 604, 73 S.Ct. at 490.

[5] Smith's act in carrying a pistol was not intended as a declaration. Hence it matters not whether the prosecution had established a *prima facie* case for the existence of the conspiracy at all times that Smith was seen with the gun. This evidence was within the personal knowledge of the testifying witnesses and was not hearsay. Defendants' exceptions 14-18 are overruled.

[6] Similarly, Julia Pruitt's testimony that she later threw this gun away in the pasture behind her trailer was admissible. Of her own knowledge, she explained how she gained possession of Smith's pistol, disposed of it and later led law enforcement officers to it. *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323 (1951). Her evidence was probative and not hearsay. The fact that she threw the pistol away after termination of the conspiracy and that she did so out of the presence of the defendants is irrelevant. Defendants' exceptions 47-49 and 52-53 are overruled.

The conspiracy exception to the hearsay rule is strictly limited to those acts and declarations made before success, failure or abandonment has terminated the conspiracy. *Krulewitch v. United States*, 336 U.S. 440, 93 L.Ed. 790, 336 S.Ct. 716 (1949); *State v. Branch, supra;* Annot., 4 A.L.R. 3d 671, 678 (1965). Moreover, it has been held that absent special allegation and proof, the courts will not allow into evidence statements that were made after the attainment of the criminal project on the theory that there existed a secondary and continuing conspiracy to conceal the fact of the first crime. *Krulewitch v. United States, supra; Lutwak v. United States, supra;* Annot., 4 A.L.R. 3d 671, 746 (1965).

[7] However, several jurisdictions have recognized a *res gestae* exception to the above stated rule for declarations and acts made immediately following the achievement of the goal of the conspiracy. Annot., 4 A.L.R. 3d 671, 737. *See State v. Wells, supra* (dictum supports this exception). And, as noted earlier, *actions* performed after the termination of a conspiracy are admissible against all the conspirators if they are probative and not meant as declarations. *Anderson v. United States, supra; Lutwak v. United States, supra.* Hence we find no error in allowing into evidence testimony that J. V. Smith and Julia Pruitt took a shotgun to Smith's father's house immediately after the murder. The only *declarations* made at this time were requests by Smith and Tilley that Julia Pruitt drive Smith to his father's home. These declarations, following immediately on the heels of the murder, qualified as part of the *res gestae* and were not, in any event, prejudicial. Defendants' exceptions 31-35, 39-45, 50, 58-60 are overruled.

[8] The conversation that J. V. Smith, Brady Tilley and Harold Jordan had with Gail Bullins two weeks after the shooting was too remote in time from the termination of the conspiracy to come within the *res gestae* exception. However, there is evidence that all the defendants were present and able to hear and understand this discussion. Thus, assuming this conversation had been inculpatory, it was admissible as an admission against those defendants who participated in the conversation and as an admission by silence against non-participating defendants. *Lutwak v. United States, supra;* 2 *Stansbury's* N. C. Evidence, §§ 167, 179 (Brandis Rev. 1973).

However, we believe this evidence was not prejudicial. *State v. Branch, supra.* Gail Bullins and these defendants were

good friends. Their conversation with her was not necessarily incriminating. Defendants merely asked her the same questions that any friend, knowing of her involvement in the police investigation, might have asked. She admitted other friends had made similar inquiries. Thus, this evidence was not inconsistent with defendants' innocence and defense counsel properly cross-examined on this point. Defendants' exceptions 55-56A along with Assignment of Error No. 5 are overruled.

[9] Defendants' next assignments of error concern the failure of the trial court to order a continuance, a change of venue and separate trials. All of these matters were within the sound discretion of the trial judge, and his decision will not be reversed on appeal absent a showing of abuse. *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976) (continuance); *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976) (change of venue); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972) (severance).

The common thread uniting these exceptions is defendants' contention that they were unable to obtain a fair trial due to extensive and prejudicial publicity surrounding the separate trial of J. V. Smith held one week prior to defendants' trial. To support their contention defendants have attached copies of numerous newspaper articles covering that earlier trial. We have carefully examined these exhibits. None of the articles are inaccurate or inflammatory.

Defendants were allowed extensive opportunity for *voir dire* examination of potential jurors. The record reveals that the court excused twenty-eight veniremen for cause. Defendant Tilley excused one venireman on peremptory challenge; defendant Jordan excused nine. The record does not reveal that either defendant requested the court to remove a venireman for cause who eventually sat on the impaneled jury. In short, no juror objectionable to the defendants was allowed to sit on the jury.

> "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. (Citations omitted.)" *State v. Harding, supra* at 227, 230 S.E. 2d at 400.

We find no error in the court's refusal to grant defendants' motions. Assignments of Error Nos. 2, 3 and 4 are overruled.

[10] Defendants next complain that the prosecution improperly commented on the failure of the defendants to take the stand. Such a comment, if made, would have been improper. *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537 (1952); G.S. 8-54.

> "It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. . . . Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom." *State v. Monk, supra* at 515, 212 S.E. 2d at 130-31.

The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case. "[W]hile defendant's failure to testify is not the subject of comment or consideration, the jury, in weighing the credibility of the evidence offered by the State may consider the fact that it is uncontradicted . . . or unrebutted by evidence available to defendant." *State v. Bryant,* 236 N.C. 745, 747, 73 S.E. 2d 791, 792 (1953); *see State v. Jenks,* 184 N.C. 660, 113 S.E. 783 (1922); *State v. Costner,* 127 N.C. 566, 37 S.E. 326 (1900); *State v. Kiger,* 115 N.C. 746, 20 S.E. 456 (1894); *State v. Johnston,* 88 N.C. 623 (1883).

To discuss each of defendants' numerous exceptions in this regard would be pointless. Exception 92 is typical. The district attorney stated that defendants' plea of not guilty denied the State's case and placed the burden of proof upon the State. The district attorney then argued, "but not a single word of it (the State's evidence) is contradicted, and there is a lot of difference between denying it and contradicting." This comment and the prosecutor's other remarks along this line were directed at the defendants' failure to produce witnesses who could exculpate them or contradict the State's case. As the cases previously cited make clear, such arguments, when supported by the evidence, are not improper. They are not an impermissible commentary on the defendants' failure to take the stand and personally contradict the testimony of the State's witnesses. *State v. Johnston, supra.*

Defendants also object to the State's comment on the failure of Edgar Smith to testify. This exception is frivolous. Edgar Smith was not a defendant and thus, defendants' right not to testify was not commented upon. The State is free to point out the failure of the defendants to produce available witnesses.

In *State v. Kiger, supra,* barrels of brandy which had been stolen from the complaining witness were found near the house of the defendant's brother, Jack Kiger. Extensive circumstantial evidence linked the defendant to the theft. The court held there was no error in allowing the prosecutor to argue, "Your brother Jack Kiger knows whether you brought that brandy to his house. He is here in the courthouse. Why, if you did not carry it there and conceal it, did you not show it by him?" *State v. Kiger, supra* at 749, 20 S.E. at 457. We cannot distinguish this argument from the district attorney's reference in the present case to Edgar Smith's failure to exculpate his son.

[11] Defendants maintain that the State argued outside the record by innuendo concerning Mrs. Hall's testimony at the earlier trial of defendant J. V. Smith. We note that defendants failed to object to the district attorney's arguments before verdict as required by the general rule in order to preserve their exceptions. The general rule obtains unless, in a capital case, "the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. (Citations omitted.)" *State v. Alford,* 289 N.C. 372, 384, 222 S.E. 2d 222, 230 (1976).

We agree that the prosecutor's remarks verge on impermissible "traveling outside the record." *State v. Monk, supra.* However, after careful review, we find the district attorney's arguments were substantially in accord with the evidence in the case and not unduly prejudicial so as to warrant a new trial. The district attorney never referred directly or indirectly to the Smith trial and he accurately described Mrs. Hall's testimony in the present case. The prosecutor's *speculation* that Mrs. Hall could have given more damaging testimony in this trial was arguably a reasonable inference to be drawn from the facts and was not a case of the prosecutor "injecting into his argument facts of his own knowledge or other facts not included in the evidence." *State v. Monk, supra* at 515, 212 S.E. 2d at 131.

[12] Defendants claim the district attorney also improperly referred to the constitutional rights that must be scrupulously afforded a criminal defendant.

Once again, defendants neglected to raise a timely objection to this argument. The gist of the district attorney's argument is summed up by his statement that, "If Winfred Hall's rights had been observed to the extent that we are now undertaking to observe these defendants' rights, Winfred Hall would be alive." We feel the argument by the district attorney was within permissible bounds. It would be a different matter if the district attorney had argued or even suggested that defendants were hiding behind these constitutional protections in order to shield their guilt. The district attorney did not make that argument, however. Assignments of Error Nos. 13, 14 and 16 are overruled.

[13] Defendants' next contention, that the State's expert witness R. D. Cone, could only state his opinion as to whether the defendants had positively fired a gun on the night of 24 January 1974, or not at all, is unsupported by authority. Defendants' failure to substantiate their claim is unsurprising since this Court has long held that an expert witness may state his opinion that certain events probably happened or probably caused certain results. *Lockwood v. McCaskill*, 262 N.C. 6€3, 138 S.E. 2d 541 (1964). Moreover, we have specifically he'd that this expert, Cone (who is a frequent witness for the State on the result of gunshot residue tests designed and examined by him), may give his opinion that a suspect "probably" or "could have" fired a gun within a short time prior to the administration of the test. *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974). Assignment of Error No. 11 is overruled.

Defendants' claim the trial judge erred in his recapitulation of the evidence and in his instructions to the jury. This Court has repeatedly held that:

> "[a] charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. (Citations omitted.) If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. (Citation omitted.) Furthermore, insubstantial technical errors which could not have affected the result

> will not be held prejudicial. (Citation omitted.) The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. (Citations omitted.)" *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E. 2d 476, 479 (1971).

Defendants complain that portions of the judge's remarks, although correct, were confusing and apt to mislead the jury. We have carefully studied the judge's instructions and his recapitulation of the evidence and have found them to be clear and correct. We do not believe that any jurors could have been misled. Defendants' Assignments of Error Nos. 15, 17, 18 and 20 are overruled. Nor do we find that the trial judge expressed any opinion as to the weight or credibility of any of the evidence during the trial. Assignment of Error No. 6 is without merit and overruled.

[14] Finally, defendants question the sufficiency of the evidence to go to the jury. Considering the evidence, as we must, in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, we conclude there was sufficient evidence to withstand a motion for nonsuit. *State v. Cousin*, 291 N.C. 413, 230 S.E. 2d 518 (1976); *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976).

Viewed in this light, the evidence tells the following tale: Winfred Hall went with the defendants to a party at the trailer of J. V. Smith on the night of 24 January 1974. On that day, Smith was seen armed with a .25 caliber automatic pistol. Alcohol was consumed at the party, and Hall was brought home around 11:00 p.m. by Tilley and Jordan. An argument apparently occurred between them after he was let out of the vehicle. This encounter so upset Hall that he paced the living room floor of his trailer after entering. Tilley and Jordan returned to Smith's trailer. The three then borrowed Larry Hodge's car and left again. Around this time, a car matching the description of Hodge's car, by sight and sound of horn, pulled up in front of Hall's trailer and blew its horn. Voices and the closing of a trunk lid were heard. Hall jumped out of bed and ran out of the trailer. He was shot at with a shotgun and Smith's .25 caliber automatic pistol by the occupants of the car. He died from buckshot wounds. Shortly thereafter J. V. Smith hid a shotgun under a mattress at his father's house. Tests showed that Brady

Tilley had probably fired a gun during the night of 24 January 1974. This evidence was sufficient to submit to the jury the charges of first degree murder and conspiracy to commit an assault with a firearm. Assignment of Error No. 12 is overruled.

The defendants' briefs have other assignments of error. We have examined all of these and find no merit in any of them. In addition, due to the serious nature of this case, we have searched the record for errors other than those assigned by the defendants and have found none.

In the trial we find

No error.

STATE OF NORTH CAROLINA EX REL. DOROTHEA DIX HOSPITAL v. EARL WILLIAM DAVIS AND LEONARD MASSEY, GUARDIAN OF EARL WILLIAM DAVIS

No. 81

(Filed 7 March 1977)

1. **Insane Persons § 5— mental patients — payment of costs of care — applicability to criminally insane**

G.S. 143-117, providing that all persons admitted to Dorothea Dix Hospital are required to pay for the cost of their care, applies to any person confined to a State institution (as defined in that statute), regardless of the origin of the commitment; therefore, defendant, confined to Dorothea Dix Hospital as a mentally ill criminal, could be required to pay the actual cost of his care, treatment, training and maintenance while so confined.

2. **Insane Persons § 5— defendant mentally incompetent to stand trial — hospitalization for defendant's benefit — costs charged to defendant**

The State could collect from defendant the costs of his care and maintenance at Dorothea Dix Hospital during various periods between 18 March 1967, the date on which defendant was deemed mentally incompetent to stand trial, and 7 January 1972, the date on which defendant was transferred to Madison County for trial, since such confinement was essentially for the benefit of the defendant and not the public.

3. **Insane Persons § 5; Constitutional Law § 20— criminally insane charged with cost of care — prisoners not charged with cost of confinement — no denial of equal protection**

There was no constitutional impediment to the State's recovery of the actual cost of defendant's confinement and treatment at Dorothea

Dix Hospital from the date of his acquittal of the charge of murder by reason of insanity until the date on which defendant was found to be sane and no longer dangerous to himself or society, since defendant, acquitted by reason of insanity, was not a criminal and was not confined as punishment for the commission of a crime, and so requiring defendant to pay for his maintenance when prisoners were not required to do so did not deny defendant the equal protection of the law under the XIV Amendment to the U. S. Constitution.

4. **Insane Persons § 5— defendant determined sane — continued confinement — defendant charged with costs — no error**

Defendant's contention that his confinement in Dorothea Dix Hospital after a superior court judge found as a fact that defendant was sane and posed no danger to himself or society was illegal and that he therefore should not have to pay for the cost of his care and treatment at that institution subsequent to the judge's finding is without merit, since the judge found that defendant's illness was in remission, and it was for the trial judge to determine what relief was appropriate.

5. **Insane Persons § 5; Constitutional Law § 21— criminally insane defendant — cost of care charged to defendant — no deprivation of property without just compensation**

To require defendant, who was charged with murder but acquitted by reason of insanity, to pay the cost of his confinement to a mental health care facility in actuality would require him to pay for services rendered to and received by him, and would not amount to an unconstitutional deprivation of his property without just compensation.

6. **Taxation § 2— nonuniform taxation — tax defined**

A tax within the meaning of the constitutional prohibition against nonuniformity of taxation is a charge levied and collected as a contribution to the maintenance of the general government, and it is imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue.

7. **Insane Persons § 5; Taxation § 2— care of criminally insane — costs charged to insane person — no tax**

To require defendant, who was committed to a State mental health institution through the criminal justice system, to pay for the actual cost of his care, treatment and maintenance before and after his acquittal by reason of insanity did not subject defendant to an unequal tax to support the general welfare, since the charges in this case were not made for the support of the government, nor were they related to or limited by the necessities of government.

8. **Constitutional Law § 7— delegation of legislative power — prerequisites**

The General Assembly may not delegate its legislative authority to other departments of government or to subordinate administrative agencies; however, once the legislature has declared the policy to be adhered to by the administrative agency, the framework of the law to be followed, and the standards to be used in applying the law,

the authority to make factual determinations in applying the law may be delegated to an agency.

9. **Constitutional Law § 7; Insane Persons § 5— confinement of mentally ill — determination of costs charged to patients — no delegation of legislative power**

Statutes authorizing the board of trustees or directors of Dorothea Dix Hospital to charge patients of the hospital for the actual cost of their care, treatment, maintenance and training do not amount to the improper delegation of authority by the legislature, since the General Assembly has clearly stated its policy—that all those who are financially able shall pay for their maintenance; the only determinations to be made by the board of directors are of a factual nature—the "actual cost" of care and who is financially able to pay; and the statutes furnish sufficient guidelines to assist in these determinations. G.S. 143-118; G.S. 143-118.1; G.S. 143-120.

10. **Constitutional Law § 24; Insane Persons § 5— mental patient — payment of costs of care — due process**

Defendant who was required to pay the actual cost of his care and treatment at a State mental health care facility was not denied due process on the ground that he should have been entitled to an administrative hearing to challenge the determination of the hospital board as to the proper charge for his care and treatment, since defendant could have raised that issue and an issue as to his ability to pay in his answer to plaintiff's complaint, but he failed to do so.

ON petition for discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals, reported in 27 N.C. App. 479, 219 S.E. 2d 660, which reversed summary judgment for defendant entered by *Godwin, J.*, on 30 December 1974. This case was docketed and argued as No. 49 at the Spring Term 1976.

Plaintiff, the State of North Carolina on behalf of Dorothea Dix Hospital, brought this action on 6 March 1974, pursuant to G.S. 143-121, to recover from Earl William Davis and his guardian, Leonard Massey, $21,005, the cost of maintaining defendant Davis in Dorothea Dix during various periods of confinement from 18 March 1967 to 30 November 1973. Defendant answered the allegations contained in plaintiff's complaint by denying liability and alleging that the statutes under which plaintiff was proceeding were unconstitutional.

Both parties moved for summary judgment. At the hearing on these motions, verified pleadings were introduced which tended to show that during 1966 defendant was charged in Madison County with the murder of his wife. On 13 January

1967, he was committed to Dorothea Dix for a psychiatric evaluation to determine his competency to stand trial. This commitment resulted in a finding that he was incompetent to stand trial. Thereafter, defendant was returned twice to Madison County for trial; however, on both occasions he was returned to Dorothea Dix prior to being tried. On 7 January 1972, defendant was returned to Madison County and was tried for the murder of his wife. He was found not guilty by reason of insanity. Because of evidence at trial tending to establish that defendant suffered from schizophrenia, paranoid type, at the time of the commission of the crime, defendant was committed to Dorothea Dix and remained there at least until 30 November 1973.

After considering the verified pleadings of both parties, the trial judge granted defendant's motion for summary judgment. This judgment was based upon a finding that the statutes under which plaintiff had proceeded were unconstitutional and therefore void. From this judgment, plaintiff appealed and the Court of Appeals reversed. We granted defendant's petition for discretionary review.

On 16 April 1975, Judge Godwin signed an order dismissing the action as to defendant Leonard Massey, guardian of Earl William Davis, and ordering that Davis be permitted to prosecute this action in his own name.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Parks H. Icenhour for plaintiff appellee.

Joseph B. Huff for defendant appellant.

MOORE, Justice.

Defendant Davis's appeal raises two basic questions. First, does G.S. 143-117, which requires "[a]ll persons admitted to Dorothea Dix Hospital . . . to pay the actual cost of their care, treatment, training and maintenance . . . ," apply to persons who were committed to the hospital under the provisions of Article 11, Chapter 122, of the North Carolina General Statutes (as it appeared in the 1964 Replacement Volume and the 1973 Cumulative Supplement to that volume)? Secondly, if so, does

such application comport with the Constitution of the United States and the Constitution of North Carolina?

Defendant first argues that since he was initially committed to Dorothea Dix under Article 11, Chapter 122, of the North Carolina General Statutes, entitled "Mentally Ill Criminals," the State may not collect the sum which it contends is due. Defendant bases this argument upon the contention that Article 11, Chapter 122, of the General Statutes is the sole source of law governing the rights and obligations of those persons who enter State institutions through the criminal justice system, and that the statute (G.S. 143-117) requiring patients to pay for their maintenance applies only to civilly committed patients. Therefore, since there is no provision in Article 11, Chapter 122, requiring one to pay for his maintenance and care, defendant argues that the State is without any right to demand such payments.

We believe that Article 11, Chapter 122, relates primarily to the procedures for committing and discharging persons who, because of their criminal tendencies, are committed to State institutions. We are unable to find any indication that Article 11 was intended to constitute the entire body of law governing persons who enter State institutions by way of the criminal justice system. To the contrary, it would appear that the legislature has intended that all persons entering State institutions, whether voluntarily or involuntarily committed, be required to pay for their confinement to the extent they are able to do so. In pertinent part, G.S. 143-117 provides:

> "*All persons* admitted to Dorothea Dix Hospital . . . are hereby required to pay the actual cost of their care, treatment, training and maintenance at such institutions." (Emphasis added.)

As was said in *State v. LeVien,* 209 A. 2d 97, 101 (N.J. 1965):

> "One whose route to a charitable institution has been tainted by a criminal proceeding occupies neither a unique nor a preferred position. . . . The Legislature did not intend to exempt from liability for maintenance 'criminal' patients while requiring civil patients to bear this financial obligation. Such a result would be illogical and inequitable."

[1] Accordingly, we hold that G.S. 143-117 applies to any person confined to a State institution (as defined in that statute),

regardless of the origin of the commitment. Thus, under our statutes, we hold that defendant may be required to pay the actual cost of his care, treatment, training and maintenance while confined to Dorothea Dix.

Defendant next contends that a person who is involuntarily committed to a mental hospital through the criminal justice system may not be required, under the United States or North Carolina Constitutions, to pay the cost of his treatment and maintenance. He bases this argument upon the premise that a person committed to a mental institution through the criminal justice system is, in all fundamental respects, a prisoner. Thus, by requiring him to pay for his maintenance when prisoners are not required to do so, he is denied the equal protection of the law under the Fourteenth Amendment to the United States Constitution and has been deprived of his property other than by the "law of the land" under Article I, Section 19, of the Constitution of North Carolina. Because of the facts of this case, we will discuss this argument in three parts: (1) the period of confinement between defendant's being found incompetent to stand trial and the time of trial; (2) the period of time between acquittal by reason of insanity and 29 September 1972—the date on which defendant was found to be sane and no longer dangerous to himself or society; and (3) the period of time between 29 September 1972 and 30 November 1973.

[2] The period of confinement of a defendant in a mental institution between his being declared incompetent to stand trial and the date of trial is essentially for the benefit of the defendant. A defendant so confined has been found incompetent to stand trial because of an inability to effectively assist in his defense or to properly assert his rights at trial. His confinement, while of some benefit to the public, is primarily concerned with restoring a defendant's mental condition to such a state that he will be able to receive a fair trial and fully protect his constitutional rights. A case directly in point on this issue is *In re Estate of Schneider,* 277 N.E. 2d 870 (Ill. 1971), wherein the state sued to collect for the care and maintenance in a state mental hospital of a defendant who had been found incompetent to stand trial. The Illinois Supreme Court held that:

> " . . . The proceeding to determine whether one is competent to stand trial is primarily for the protection of his constitutional rights to due process and for his benefit—

not for the protection of the public. The proceeding is distinct and apart from the criminal proceeding. [Citations omitted.]" 277 N.E. 2d at 872. *See also State v. Kosiorek,* 259 A. 2d 151 (Conn. Cir. Ct. 1969); *Briskman v. Central State Hospital,* 264 S.W. 2d 270 (Ky. App. 1954); *State v. Griffith,* 36 N.E. 2d 489 (Ohio App. 1941).

We find the reasoning stated above to be sound. We hold, therefore, that the State may collect from defendant those amounts which represent the various periods during which defendant was confined between 18 March 1967 (the date on which defendant was deemed incompetent to stand trial) and 7 January 1972 (the date on which defendant was transferred to Madison County for trial).

[3] With respect to the period of time from defendant's acquittal by reason of insanity to 29 September 1972, we are of the opinion that the State may collect from defendant those amounts representing the "actual cost" of his confinement and treatment. In *In re Boyett,* 136 N.C. 415, 48 S.E. 789 (1904), this Court held that when insanity is proved, it constitutes a total defense to the charges, and that upon a finding of insanity at the time of the commission of the offense, a defendant is entitled to an acquittal. Such a defendant is entitled to be released immediately if it is shown that his mental health has been restored. Otherwise, the defendant is properly committed to an institution for treatment until such time as his mental health has been restored. As was stated in *In re Tew,* 280 N.C. 612, 618, 187 S.E. 2d 13, 17 (1972): " . . . The commitment of such a person following an acquittal is imposed for the protection of society and the individual confined—not as punishment for crime. [Citations omitted.]" Further, upon acquittal by reason of insanity, a defendant is no longer a "criminal." The jury's verdict has exonerated him from all criminal liability.

The position that a defendant found not guilty by reason of insanity is not a "criminal" and may be required to pay for his maintenance in a mental institution comports with the decisions of other jurisdictions which have passed upon this issue. For example, in *Department of Mental Health v. Pauling,* 265 N.E. 2d 159 (Ill. 1970), defendant was found not guilty of attempted murder by reason of insanity. Pursuant to statute, he was committed to the state mental hospital. The state sued for compensation for defendant's confinement. Defendant ar-

gued, as does defendant in present case, that to require insane persons acquitted of their crimes by reason of insanity to pay for their confinement, while not requiring such payments from prisoners actually convicted, was a denial of the equal protection of the law. The court held that defendants acquitted by reason of insanity were not "criminals" and were not confined as punishment for the commission of a crime. Rather, those persons were confined solely as a result of their insanity, precisely the same reason that a civilly committed person would be confined. Hence, the court held that there was no violation of equal protection in the case and the state could properly recover from the defendant. For other cases permitting such recovery, *see State v. Estate of Burnell,* 439 P. 2d 38 (Colo. 1968); *State v. Griffith, supra; Commonwealth v. Evans,* 98 A. 722 (Pa. 1916). We find these decisions dispositive of the case at bar and hold that there is no constitutional impediment to the collection of the sums sought by the State for this period of confinement.

[4] Several months after defendant was acquitted of murder, he petitioned for a writ of habeas corpus. After a hearing in the matter before Judge Ervin, an order was entered on 29 September 1972 in which it was found as a fact that defendant "has a diagnosis of schizophrenia paranoid type, now in remission. . . . " Although Judge Ervin further found that Davis was "now sane and no longer dangerous either to himself or to society," he refused to order Davis's unconditional release upon a finding that Dr. Rollins of Dorothea Dix Hospital did not recommend such a release. Rather, Davis was granted a "conditional and probationary release" which allowed him to leave the grounds of Dix Hospital between the hours of 6:00 a.m. and 11:00 p.m. for the purpose of "enhancing and facilitating his rehabilitation program."

Defendant insists that his confinement, after Judge Ervin found as a fact that defendant was sane and posed no danger to himself or society, is illegal. Therefore, defendant urges that he may not be required to pay for his care and maintenance subsequent to Judge Ervin's order. The legality of defendant's confinement is not properly before this Court, since defendant did not appeal Judge Ervin's order, and we do not pass upon this contention.

Defendant's situation is, however, remarkably similar to that of the petitioner in *In re Tew, supra.* In *Tew,* petitioner

had been acquitted of the murder of his wife by reason of insanity. Later, he applied for a writ of habeas corpus. In his order, the judge presiding over the habeas corpus hearing found that "Petitioner has now been restored to his right mind, is now sane, and his mental condition is not now such as to render him dangerous to himself or other persons," and that "Petitioner has had symptoms of paranoia, which are now in remission; and the Superintendent of Dorothea Dix Hospital does not recommend his unconditional release." Upon these findings, the judge ordered a conditional release similar to the one granted to defendant by Judge Ervin in present case. This Court, approving the granting of a conditional probationary release, refused to order Tew's immediate unconditional release and also declined to instruct the trial judge to order Tew's release even if he once again found Tew to be sane and harmless. Tew's paranoia, like that of defendant in instant case, was merely in remission. "The term 'remission' at best means the temporary recovery, perhaps a temporary, partial recovery." *In re Rosenfield*, 157 F. Supp. 18, 22 (D.D.C. 1957). A remission is an "[a]batement of the symptoms and signs of a disorder or disease. The abatement may be partial or complete." Hinsie & Campbell, Psychiatric Dictionary 641 (4th ed. 1970). Under such circumstances, it is for the trial judge, after weighing all the evidence, to decide what relief is appropriate.

On the record before this Court, we are unable to hold that Judge Ervin's order granting a conditional release was without authority, unjustified or otherwise illegal. *In re Tew, supra.* Defendant's paranoia, which had apparently caused him to commit a murder, was not, as a matter of law, fully cured at the time of Judge Ervin's order. It was only temporarily or partially abated. Hence, we are of the opinion that defendant must pay the charges which have accrued since 29 September 1972, as well as the charges incurred before that date.

The position adopted by this Court in the case at bar is in accord with the better reasoned decisions of other jurisdictions that neither persons accused of crime but who are incompetent to stand trial, nor persons acquitted of a crime by reason of insanity are "criminals." Persons in the first class are presumptively innocent. Persons in the second class are conclusively innocent. The confinement of persons to mental institutions both prior to trial and after acquittal by reason of insanity is for the benefit of the patient. The status of such a

person is the same as any other individual who has not been convicted of a crime but who has been committed to a mental institution. We find the cases cited by defendant which hold contrary to the position of this Court to be persuasive but not controlling of the disposition of instant case. *See Ollerton v. Diamenti,* 521 P. 2d 899 (Utah 1974); *Robb v. Estate of Brown,* 518 S.W. 2d 729 (Mo. App. 1974); *Department of Mental Hygiene v. Hawley,* 379 P. 2d 22 (Cal. 1963).

[5] Defendant further contends that to require him to pay the cost of his confinement would be an unconstitutional deprivation of his property without just compensation. After acquittal by reason of insanity, a former defendant is committed to a state hospital to protect society from an individual who has previously demonstrated a capacity to break the law, and for treatment of that individual to restore his mental health so that he may be returned to society. Such an individual, while not criminally responsible for his actions, may not be released from confinement until his reason is restored and he no longer poses a danger to himself or others. The State has assumed the responsibility of providing care to such persons and the legislature has declared that the State may be permitted to recover the actual cost of such care from all persons receiving it. The patient who is required to pay the "actual cost" of his treatment is, in actuality, paying for services rendered to and received by him. We fail to see how this constitutes a deprivation of property without just compensation. The patient receives treatment in return for his payments. This holding is in line with those cases from other jurisdictions which have decided the issue. *See* Annot., 20 A.L.R. 3d 363 § 10 (1968), for a collection of these decisions.

[6, 7] Defendant further contends that he and other persons committed to mental institutions through the criminal justice system are subject to an unequal tax to support the general welfare. A tax within the meaning of the constitutional prohibition against nonuniformity of taxation is a charge "levied and collected as a contribution to the maintenance of the general government . . . . [It is] imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue . . . . " *Tarboro v. Forbes,* 185 N.C. 59, 62, 116 S.E. 81, 82 (1923). *See also Raleigh v. Public School System,* 223 N.C. 316, 26 S.E. 2d 591 (1943). The charges under consideration in present case are not made for the support of

the government, nor are they related to or limited by the necessities of government. They represent the actual cost of the care, treatment and maintenance of a particular patient. *See Kough v. Hoehler,* 109 N.E. 2d 177 (Ill. 1952). It is not unequal or unjust taxation, "nor taxation at all, to require a man to be supported out of his own estate." *In re Yturburru's Estate,* 66 P. 729 (Cal. 1901).

Accordingly, we find no merit in defendant's contentions that the statutes requiring him to pay the actual cost of his care, maintenance, training and treatment during the times pertinent to the case at bar (a) are unconstitutional, under either the United States or North Carolina Constitutions; (b) are a taking of defendant's property without just compensation; or (c) are an improper tax for the general welfare. We conclude that prior to trial defendant was confined for his own benefit in an effort to ensure that he received a fair trial and was able to assist in his defense. Upon being found not guilty by reason of insanity, he was acquitted of all criminal charges arising out of the murder of his wife. In no sense was defendant a "criminal," and his commitment was not based upon any violation of the criminal law. His rights were substantially the same as any other mental patient who had been committed to a State institution, *see Jackson v. Indiana,* 406 U.S. 715, 32 L.Ed. 2d 435, 92 S.Ct. 1845 (1972), and he was free to be released upon restoration of his mental health. The status of such a person is vastly different from the status of a prisoner who is confined for a specified period of time as punishment for a past transgression. The fact that defendant was found to be "sane and not dangerous to himself or others" does not mandate that he be released. The fact that defendant's commitment originated in the criminal justice system has no effect upon his rights. Conversely, the origin of his commitment has no effect upon the obligations arising from his confinement—one of which is to pay for his treatment, if able.

Defendant next contends that G.S. 143-118, -118.1 and -120 are improper delegations of authority by the legislature to the board of trustees or directors of the hospital. He further argues that the statutes deny a patient due process of law in that the patient is not given notice or an opportunity to be heard before the board of trustees on the issues of whether the patient is able to pay for his confinement and whether the

"actual cost" of confinement, as computed under G.S. 143-118, is correct.

[8] In *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E. 2d 517 (1973), we held that the General Assembly may not delegate its legislative authority to other departments of government or to subordinate administrative agencies. However, once the legislature has declared the policy to be adhered to by the administrative agency; the framework of the law to be followed; and the standards to be used in applying the law, the authority to make factual determinations in applying the law may be delegated to an agency. *See also Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E. 2d 141 (1974); *Turnpike Authority v. Pine Island*, 265 N.C. 109, 143 S.E. 2d 319 (1965); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953).

[9] In present case, G.S. 143-117 declares the legislative policy that all persons admitted to our State institutions be required to pay for the actual cost of their care, treatment, maintenance and training. G.S. 143-118 sets forth the guidelines to be followed by the board and empowers it to fix the actual cost of maintaining an individual in a State institution. G.S. 143-118.1 and -120 empower the board to make a factual determination of whether a patient (or such other persons as may be legally responsible for the patient) is financially able to pay.

Under the statutes, the General Assembly has clearly stated its policy—that all those who are financially able shall pay for their maintenance. The only determinations to be made by the board are of a factual nature—the "actual cost" of care and who is financially able to pay. The statutes furnish sufficient guidelines to assist in these determinations. Thus, we hold that the General Assembly has properly delegated the powers conferred under G.S. 143-118, -118.1 and -120 to the board of trustees or directors of Dorothea Dix Hospital.

[10] Finally, defendant contends he has been denied due process on the ground that he should be entitled to an administrative hearing in which he can present evidence and otherwise challenge the determination of the hospital board as to the proper charge to be assessed for his care, treatment and custody.

> " 'The law of the land' and 'due process of law' provisions of the North Carolina and U. S. Constitutions require

notice and an opportunity to be heard before a citizen may be deprived of his property. [Citations omitted.]" *McMillan v. Robeson County*, 262 N.C. 413, 417, 137 S.E. 2d 105, 108 (1964).

Further, as was stated by the United States Supreme Court in *Phillips v. Commissioner*, 283 U.S. 589, 596-97, 75 L.Ed. 1289, 1297, 51 S.Ct. 608, 611 (1931): "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate. [Citations omitted.]" *See also Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed. 2d 406, 94 S.Ct. 1895 (1974); *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594, 94 L.Ed. 1088, 70 S.Ct. 870 (1950).

In instant case, defendant was given an opportunity to contest the board's determination of the "actual cost" of his confinement and an opportunity to contest the board's finding that he was financially able to pay. Defendant could have specifically raised these issues in his answer to plaintiff's complaint by way of a denial, or as an affirmative defense, or in some other manner through which the issue would be placed before the trial court. This he did not do. Defendant was thus given the opportunity to be heard on any and all issues raised by plaintiff's complaint and to have a judicial determination of his liability prior to his being required to pay the amounts alleged to be due. This is a sufficient judicial inquiry into the matter to satisfy due process of law and to obviate the necessity of a hearing before the board of trustees or directors of the hospital. Hence, we find no merit in defendant's contention that he was entitled to an administrative hearing or that he was denied due process.

Since defendant offered no evidence contesting the determination of "actual cost" under G.S. 143-118, we do not pass upon the constitutionality of the apparent restrictions on admissible evidence contained in the statute.

For the reasons stated, the decision of the Court of Appeals is affirmed and this action is remanded to that court with direction that it remand to the Superior Court of Wake County with instruction that the summary judgment in favor of defendant entered on 30 December 1974 be vacated.

Affirmed.

STATE OF NORTH CAROLINA v. BENNY STALEY

No. 67

(Filed 7 March 1977)

1. **Criminal Law § 99— remarks by trial court — test of prejudice**

The test of prejudice resulting from a trial judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness's credibility or as to any fact to be determined by the jury, not the judge's motive in making the remarks.

2. **Criminal Law § 99— expression of opinion by court — general tone of hostility**

Even if it cannot be said that a judge's remark or comment is prejudicial in itself, a new trial must be allowed where an examination of the record indicates a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice.

3. **Criminal Law § 99— remark by trial court — consideration of entire record — expression of opinion**

While the trial court's remark during cross-examination of a State's witness that "I think it is obvious what the facts are," when considered in the immediate context, may have signified only that the witness's answer to a question to which objection was sustained was obvious, the remark constituted an expression of opinion in violation of G.S. 1-180 when viewed with the court's erroneous reprimand to defense counsel for his speech-making, his demeaning of defense counsel by inviting the solicitor to make a speech himself, his failure to rule on a number of defendant's objections, and the frequency and pattern of the court's interrogation of witnesses.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, reported without opinion at 28 N.C. App. 730, 223 S.E. 2d 410 (1976), which found no error in the trial before *Wood, J.*, at the 23 June 1975 Session of WILKES Superior Court. This case was docketed and argued as No. 62, Fall Term 1976.

Defendant was tried and convicted of the crimes of felonious larceny, safecracking and felonious breaking and entering. On appeal, in a terse opinion without elaboration, the Court of Appeals concluded there was no merit in any of defendant's thirteen assignments of error.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General for the State.

Franklin Smith, Attorney for defendant appellant.

EXUM, Justice.

We allowed further review to determine whether certain remarks made by the trial judge during cross-examination of a state's witness constituted an expression of opinion upon the evidence in violation of General Statute 1-180. We are of the opinion that, by these remarks, the court inadvertently communicated to the jury an attitude prejudicially antagonistic to defendant's case and that a new trial is consequently required.

This Court has been consistently vigilant to protect the right of every criminal defendant to the assistance of counsel at a trial " 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' *State v. Carter,* 233 N.C. 581, 583, 65 S.E. 2d 9, 10," *State v. Lynch,* 279 N.C. 1, 10, 181 S.E. 2d 561, 567 (1971). Recognizing the threat posed to an unbiased consideration of the evidence by the weight and credence inevitably accorded by the jury to their perception of the trial judge's opinion of the case, the Legislature very early provided a statutory safeguard. As currently embodied in General Statute 1-180, this legislative prohibition dictates that "No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury . . . . "

While referring explicitly only to the charge, the statute has always been interpreted to forbid "the expression of any opinion or even an intimation by the judge, at any time during the course of the trial, which might be calculated to prejudice either party." *State v. Smith,* 240 N.C. 99, 101, 81 S.E. 2d 263, 265 (1954) ; *State v. Bryant,* 189 N.C. 112, 126 S.E. 107 (1925) ; *State v. Cook,* 162 N.C. 586, 77 S.E. 759 (1913).

Of course, it is the presiding judge's responsibility to control the examination and cross-examination of witnesses in order to assure orderly and expeditious proceedings and to protect witnesses from extended, unnecessary or abusive interrogation. *State v. Lynch, supra.* On the other hand, the strength of the attorney's role as advocate is crucial to the success of our judicial system: his duty vigorously to represent his client requires him "to present everything admissible that favors his client and to scrutinize by cross-examination everything unfavorable." Annot., 62 A.L.R. 2d 166, 237 (1958), *quoted in State v. Lynch, supra* at 10, 181 S.E. 2d at 567.

As we recognized in *State v. Lynch*, the sometimes conflicting responsibilities of the trial judge, who labors under the pressure of a crowded docket, and of counsel seeking to present his client's case thoroughly and in the light most favorable to him inevitably result frequently in feelings of tension on both sides. The judge may be harassed by the lawyer's objections and exceptions; the attorney may feel bullied by the court's rulings against him. Rather heated interchanges may result from this conflict. Nevertheless, both should remain conscious of their unanimity of purpose in the high goal of ensuring that the jury be informed fully, instructed properly, and permitted to render a fair and unbiased verdict. For a thorough treatment of this subject, *see* N. Dorsen and L. Friedman, *Disorder in the Court* (1973).

We recognize that both the trial judge and the lawyer are human and that quite heated conversations may ensue with the preservation nonetheless of strict impartiality on the one hand and consistent respect on the other. Nevertheless, the judge should recognize that he occupies a position exalted in the eyes of the jury, who must view him as an expert in the appraisal of testimony presented and in the perception of its truth or falsehood by virtue of his legal training and experience on the bench. Any expression as to the merits of the case, or any intimation of contempt for a party or for counsel may be highly deleterious to that party's position in the eyes of the jury. As the Court stated in *Withers v. Lane*, 144 N.C. 184, 188, 56 S.E. 855, 856 (1907), the judge

> "may clearly indicate to a jury what impression the testimony has made upon his mind or what deductions should be made therefrom, without expressly stating his opinion upon the facts. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result will follow the use of language or a form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *S. v. Dancy*, 78 N.C., 437; *S. v. Jones*, 67 N.C., 285. It can make no difference in what way the opinion of the judge is conveyed to the jury, whether directly or indirectly. The act forbids an intimation of his opinion in any and every form, the intent of the law being that each of the

> parties shall have an equal and a fair chance before the jury. Construing this statute, *Judge Nash* said: 'We all know how earnestly, in general, juries seek to ascertain the opinion of the judge who is trying a cause upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. . . . ' *Nash v. Morton,* 48 N.C., 3."

There is another danger in the trial judge's overly vehement response to counsel's questions or objections. The United States Court of Appeals for the Second Circuit has observed:

> "While the trial judge should be permitted considerable attitude [sic] in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. A less experienced advocate might well have trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial, and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony." *United States v. Ah Kee Eng,* 241 F. 2d 157, 161 (1957).

Thus, the judge

> "should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Withers v. Lane, supra* at 191-92, 56 S.E. at 857-58.

This standard applies "regardless of how unreasonable or improbable the defendant's story" may be. *State v. Taylor,* 243 N.C. 688, 690, 91 S.E. 2d 924, 925 (1956). The weight and credibility of the evidence must be left strictly to the jury. *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1966).

The crucial exchange to be considered in the trial of this defendant occurred during cross-examination of Kyle Gentry, Chief of Police of North Wilkesboro, who testified for the state in corroboration of the testimony of two earlier witnesses, Mike Jarvis and Mike Berrong. Jarvis and Berrong, both claiming to have been defendant's accomplices, had given their accounts of the crimes committed, implicating defendant. Chief Gentry's testimony tended to establish that the earlier out-of-court statements made to him by these two witnesses were consistent with their in-court testimony. Defendant attempted to establish alibi as his defense. In their immediate context, the remarks of Judge Wood claimed to be prejudicial occurred as follows:

"Q. [Mr. Smith, defendant's counsel] Now, Chief, you were not present on this occasion when this happened?

"A. No sir.

"Q. And you have no independent personal knowledge of any of the evidence in the case, do you?

"A. No sir.

"Q. And the only testimony you are relating to the court here is what this young man Mike Berrong related to you and you say the Jarvis statement wasn't any different?

"A. Yes.

"Q. Now, if these boys are not telling the truth about this matter, then what you say wouldn't be true either would it?

"State objects. Sustained.

"MR. SMITH: May I have his answer put in the record, your Honor?

"State objects.

"THE COURT: You may whisper your answer in the record.

"THE COURT: I think the answer is obvious. I am going to let you make a speech to the jury and you can tell the jury that Mr. Smith. Of course, if these boys weren't telling the truth, it didn't happen, didn't happen the way they say it was the court will take judicial notice of that.

"MR. SMITH: I just wanted the witness to answer the question for me.

"THE COURT: Yes, I understand what you wanted. Now, Mr. Solicitor, do you want to make a speech to the jury?

"MR. ASHBURN: Your Honor, it is not time.

"THE COURT: In order to equalize things here.

"MR. ASHBURN: No sir, it would be improper.

"THE COURT: All right, go ahead, I am going to let you cross examine him, but I told you a half dozen times not to make speeches to the jury. It is out of order.

"MR. SMITH: Your Honor, I just simply asked him about what these boys told him.

"THE COURT: I will let you cross examine him.

"THE COURT: *Ladies and gentlemen if these witnesses are not telling the truth, then the court, I THINK IT IS OBVIOUS WHAT THE FACTS ARE. NOW, I HAVE MADE YOUR SPEECH AGAIN FOR YOU.*" (Emphasis added.)

[1, 2] It is true that in the immediate context the emphasized portion of the court's rejoinder may signify only that the witness' answer is obvious: that if Jarvis and Berrong are lying, Chief Gentry's testimony is not probative of the state's case. The statements must, however, be considered in the context of the entire record, since the test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury. *State v. Freeman,* 280 N.C. 622, 628, 187 S.E. 2d 59, 63 (1972); *see State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975). The effect on the jury of the remark and not the judge's motive in making it, is determinative. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1966); *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568 (1951); *Withers v. Lane, supra.* Even if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice. If so, a new trial must be allowed. *State v. Frazier,*

278 N.C. 458, 180 S.E. 2d 128 (1971); *see Withers v. Lane, supra.*

In examining the record, we are cognizant of the fallacy of imputing a certainty of meaning and significance to the written word. This Court has before recognized the wisdom of Justice Holmes' observation in *Towne v. Eisner*, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." But as we concluded in *State v. Frazier, supra* at 458, 460, 180 S.E. 2d at 130, "we can only read the record and adjudge by reason and deduction whether the remarks assigned as error were so disparaging in their effect that they could reasonably be said to have prejudiced the defendant."

The record reveals several factors which lead us to the conclusion that defendant's case was probably prejudiced by the court's remarks.

The trial judge played an unusually active interrogational role during presentation of the state's evidence. The record reveals 21 questions asked witnesses by the court during direct examination by the State; in contrast, only one question was asked a witness during defense cross-examination; only two during direct examination by defendant; and none on cross-examination by the state. The state's case in chief occupies 27 pages of the record; defendant's case in chief likewise occupies 27 pages. The questions posed by the trial court are legitimate questions, and the prerogative of the judge to participate in examination of witnesses has long been recognized. *State v. Freeman, supra; State v. Frazier, supra; State v. Smith, supra.*

> "[T]he law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. 'If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error.' *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968)." *State v. Frazier, supra* at 463, 180 S.E. 2d at 132.

The manner and substance of the judge's questions, we note, are entirely proper and free from prejudicial implications. Their

frequency and pattern, when considered alone, seem likewise properly within the trial judge's discretion in supervising the proceedings. However, considered as part of the background for the judge's later remarks concluded by the statement "I think it is obvious what the facts are," which occurred during cross-examination of the state's last witness, the frequency of questioning during the state's presentation may well have contributed in some measure to the jury's perception of a bias toward the state. Such a perception might easily result in an interpretation by the jury of the quoted interchange as an expression of the judge's opinion on the weight of the evidence and the credibility of the state's witnesses.

Perhaps more prejudicial was the court's repeated failure to rule on objections made by defense counsel. The record reveals that the court was silent as to one-quarter of defendant's objections—of 43 objections made by defense counsel, 13 were unanswered. In contrast only one of the state's 19 objections was unanswered by the court.

We believe this case is distinguishable from *State v. Lynch, supra,* where the court instructed the court reporter to enter an "overruled" each time defense counsel objected, and then disregarded 38 objections. As in *Lynch,* the record discloses very little merit in the objections ignored; likewise in this case, counsel exhibited a high degree of respect for the presiding judge. However, we held in *Lynch,* "The clear implication was that there could be no merit in any objection defendant's counsel might make or that defendant was so obviously guilty his objections were a waste of the court's time." While this reasoning applies in part to the case at bar, the absence here of a specific instruction to the court reporter indicating the court's intent to disregard objections and the comparatively few objections involved lend doubt to a conclusion that the court's silence in response to defendant's objections might reasonably lead in itself to any inference by the jury of the judge's opinion. Taken in context, however, the court's unresponsiveness may have contributed to the likelihood of a prejudicial interpretation of the court's later remarks. Furthermore as a matter of practice counsel is entitled to an explicit ruling on each objection interposed.

The record also reveals that the court's admonishment to defense counsel, "I told you a half dozen times not to make

speeches to the jury," was erroneous. In the cross-examination of state's witness Mike Berrong, the following exchange took place:

"Q. You say they were quarreling and fighting when you arrived, is that right?

"A. Yes.

"Q. I thought you got through telling the jury . . .

"State objects. Sustained.

"THE COURT: You can ask him questions.

"MR. SMITH: I have not finished.

"THE COURT: I sustained the objection.

"Q. Didn't you just tell the ladies and gentlemen—

"THE COURT: I sustain the objection.

"MR. SMITH: May I have my question put in the record?

"THE COURT: Just go ahead and ask the question. I will let you ask the question, but I am not going to let you make a statement.

"Q. Didn't you tell the ladies and gentlemen of the jury that when you arrived that Staley drove up about the same time?

"State objects. Overruled."

Very shortly thereafter, in defense counsel's attempt to cross-examine Berrong concerning a threatening statement allegedly made to him by defendant at "J. C. Ellis' place," this colloquy occurred:

"Q. You said something about having to do about what was said to you down at J. C. Ellis', who was present at that time?

"State objects.

"THE COURT: Mr. Smith, I will let you make your speech to the jury later on, but if you want to make a statement, I will give the solicitor the same opportunity to make a statement in rebuttal, either way, you want to approach

it. I will let you ask questions, and I will let you have free access to this witness to cross examine."

These were the only occasions on which defense counsel was reprimanded for speech-making. In the context, therefore, the judge's inadvertently erroneous assessment of the frequency of his warnings possibly imbued his remarks with a tone of ridicule.

[3] We are unable to avoid the conclusion that the first exchange set out above between defense counsel and the trial judge constituted an expression of opinion by the judge in violation of section 1-180 when viewed in context of the entire trial. The judge's declaration that "I think it is obvious what the facts are," coupled with his erroneous reprimand to counsel for his speech-making, his invitation to the solicitor to make a speech himself, which, though perhaps intended as innocent good humor, must have been demeaning to defense counsel, the failure to rule on a number of defendant's objections and the frequency and pattern of the court's interrogation of witnesses seem to have led cumulatively to a reasonable probability of the conveyance to the jury of an opinion of the trial judge deleterious to defendant's case.

It is argued that any opinion of the trial judge conveyed to the jury must have been non-prejudicial in light of the weight of evidence pointing to defendant's guilt. Not intending to abrogate the harmless error doctrine, we nevertheless respond by recognizing the merit in Justice Frankfurter's statement in *Bollenbach v. United States,* 326 U.S. 607, 614-15 (1946):

> "[I]t may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . .
>
> . . . .
>
> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justi-

fiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Because our resolution of this issue requires a new trial, we find it unnecessary to decide the further assignments of error presented on this appeal. The assignments remaining are of little merit and are unlikely to recur.

The case is remanded to the Court of Appeals with directions to remand to the Superior Court of Wilkes County for further proceedings in accordance with this opinion.

New trial.

STATE OF NORTH CAROLINA v. JOHNNY BLUE McKENZIE

No. 64

(Filed 7 March 1977)

1. **Criminal Law § 26; Judgments § 37— acquittal — no subsequent litigation of issue previously decided**

The acquittal of a defendant even in district court precludes the State from relitigating in a subsequent prosecution any issue necessarily decided in favor of the defendant in the former acquittal, and defendant has the burden of demonstrating the proposition.

2. **Automobiles 113; Criminal Law § 26— double jeopardy — failure to raise in trial court — waiver — no issue on appeal**

The double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court; therefore, in a prosecution in superior court for involuntary manslaughter arising from an automobile accident, the State could not properly rely on defendant's driving while under the influence of intoxicants in violation of G.S. 20-138(a) when defendant had been earlier acquitted of this offense in district court, but defendant's failure to raise properly at trial his former district court acquittal as a bar to any proceeding in the superior court amounted to a waiver of the double jeopardy defense he would otherwise have had.

3. **Automobiles § 113— manslaughter resulting from automobile accident — sufficiency of evidence**

In a prosecution for manslaughter arising out of an automobile accident, evidence was sufficient to be submitted to the jury where it tended to show that defendant was driving on a clear and dry night

on a two-lane stretch of road which continued straight ahead of him for several hundred feet; deceased was riding a bicycle on the road in defendant's lane of travel; the bike was equipped with a headlight and rear reflectors; defendant admitted having consumed four beers; witnesses smelled alcohol on his breath and a breathalyzer test yielded a result of .10 percent blood alcohol by weight; defendant testified that he did not have time to apply his brakes before the accident because he failed to see deceased until he was within six feet of him, his attention having been directed at two passing cars; and defendant admitted several previous motor vehicle violation convictions, including reckless driving, speeding, and driving under the influence.

4. Automobiles § 114— manslaughter arising from automobile accident — jury instructions

In a prosecution for manslaughter arising out of an automobile accident, the trial court's instruction to the jury as to their finding "beyond a reasonable doubt that . . . the defendant intentionally or recklessly operated a vehicle on the public highway of this State and that when he did so he was under the influence of intoxicating liquor" was not erroneous in that it failed to define "under the influence" or to indicate evidence supporting "careless and reckless operation," since the court had earlier instructed correctly as to the meaning of "driving under the influence" and had linked the evidence to the pertinent statutory language on reckless driving.

5. Automobiles § 114; Criminal Law § 168— jury instructions — error favorable to defendant

Error of the trial court in defining driving under the influence as operating a vehicle "after having consumed such quantity of intoxicating liquor as to cause him to lose his normal faculties, either his mental or physical," was favorable to defendant.

APPEAL under General Statute 7A-30(2) from the decision of the Court of Appeals (opinion by Hedrick, J., concurred in by Brock, C.J., Clark, J., dissenting), 29 N.C. App. 524, 225 S.E. 2d 151 (1976), finding no error in the judgment of *Rousseau, J.*, entered 5 November 1975, MOORE County Superior Court. This case was docketed and argued as No. 53, Fall Term 1976.

Rufus L. Edmisten, Attorney General, by Jesse C. Brake, Associate Attorney, for the State.

Dock G. Smith, Jr., and Richard Roose, attorneys for defendant appellant.

EXUM, Justice.

The most significant issue on this appeal is whether on a prosecution in superior court for involuntary manslaughter

arising from an automobile accident, the state may rely on defendant's driving while under the influence of intoxicants in violation of General Statute 20-138(a) when defendant had been earlier acquitted of this offense in the district court. The Court of Appeals answered the issue affirmatively. We disagree. We note, however, that defendant did not properly raise at trial his former district court acquittal as a bar to any proceeding in the superior court. He therefore waived the double jeopardy defense he would otherwise have had. While we agree with defendant's substantive position on the issue presented we conclude nevertheless that there was no error in his trial.

Defendant was originally charged in district court with operating a motor vehicle on the public highway while under the influence of intoxicating liquor in violation of General Statute 20-138(a). The charge arose out of an automobile accident on 11 July 1975 in which the automobile defendant was operating struck and killed one John Chriscoe, a bicyclist. In district court he was convicted of operating a motor vehicle with a blood alcohol content of .10 percent, a violation of General Statute 20-138(b) and by statute, a lesser included offense of driving under the influence. G.S. 20-138(b). The conviction of the lesser offense constituted an acquittal in the district court of the greater offense. *See State v. Miller*, 272 N.C. 243, 158 S.E. 2d 47 (1967); *State v. Broome*, 269 N.C. 661, 153 S.E. 2d 384 (1967); G.S. 15-170. Defendant appealed his conviction to superior court for trial *de novo*. An indictment having also been returned in superior court charging him with involuntary manslaughter, the two cases were consolidated for trial. The jury returned a verdict of guilty in both cases and defendant was sentenced to not less than three nor more than five years imprisonment.

Two of defendant's assignments of error are directed to the denial of his motion for judgment of nonsuit at the close of the state's evidence and at the close of all the evidence, his motion to set aside the verdict as being contrary to the weight of the evidence, and his motion for a new trial for errors committed. Other assignments claim error in certain jury instructions.

Several assignments of error directed to the jury instructions present defendant's main contention that it was error for the court to allow the jury to consider whether defendant vio-

lated General Statute 20-138(a) in the manslaughter case. In its charge to the jury on involuntary manslaughter, the court instructed on possible violations of several safety statutes, including General Statute 20-138(a) (driving under the influence of intoxicating liquor) and General Statute 20-140(c) (operating a motor vehicle on a public highway "after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle"). No objection was made at trial to any instruction given, nor is there any indication in the record that any instruction other than those given was requested. Exceptions were taken and error assigned on appeal to those portions of the charge relating to General Statute 20-138(a) but no exception is addressed to the charge as it relates to General Statute 20-140(c). (The evidence required to convict under one would necessarily be similar, if not identical, to that required to convict under the other.)

In his argument that his acquittal of a violation of General Statute 20-138(a) should foreclose submission of that statute to the jury as a potential gravamen for the involuntary manslaughter charge, defendant relies upon the constitutional protection against double jeopardy as it may embody the doctrine of res judicata and collateral estoppel. In his dissenting opinion, Judge Clark of the Court of Appeals relied on *State v. Heitter*, 57 Del. 595, 203 A. 2d 69, 9 A.L.R. 3d 195 (Del. 1964), a case much like that at bar, in which a former acquittal by a justice of the peace of two statutory misdemeanors of reckless driving and driving while intoxicated was held to bar prosecution for manslaughter upon counts in the indictment alleging *those* acts. The manslaughter prosecution on other counts was held not to be barred. The Supreme Court of Delaware held in *Heitter* that "[i]t is a well-settled rule of law that the doctrine of res judicata is available to a defendant in a criminal proceeding," 203 A. 2d at 71, *citing Sealfon v. United States*, 332 U.S. 575, 578 (1948) and *United States v. Oppenheimer*, 242 U.S. 85 (1916). The Court went farther still, rejecting an older rule set forth in *State v. Simmons*, 9 Terry 166, 48 Del. 166, 99 A. 2d 401 (1953) that there was "no actual 'jeopardy' since the magistrate in the first trial did not have jurisdiction over the manslaughter charge" as "an excessively rigid interpretation of the meaning of the word jeopardy." 203 A. 2d at 73. The Court further noted that the test of applicability of double jeopardy depends not only upon whether the second prosecution arose from the same transaction as the first, but "whether or

not the evidence in support of the original charge is absolutely essential to support a conviction of the second charge." *Id.* at 72. An annotation at 9 A.L.R. 3d 203 points out the variances in the law at the time of *Heitter*, noting the increasingly frequent application of *res judicata* principles, including the doctrine of collateral estoppel, in criminal proceedings. This Court seems to have recognized the doctrine but concluded it was not applicable to the facts before it in *State v. Midgett*, 214 N.C. 107, 198 S.E. 613 (1938).

As predicted in the annotation at 9 A.L.R. 3d 203, the United States Supreme Court thereafter held the Double Jeopardy Clause of the Fifth Amendment to be enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). Thereafter the Supreme Court held that the Double Jeopardy Clause entitled defendants in state criminal proceedings to the benefit of the collateral estoppel doctrine. *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, the Supreme Court held defendant's prior acquittal of robbing one victim barred his later prosecution for robbing another victim in the same occurrence where the record of the first trial disclosed defendant's identity as one of the perpetrators to be the sole material issue. The Court said collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. The Court observed further, *id.* at 444:

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estop-

pel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

It concluded then that the "established rule of federal law"—the doctrine of collateral estoppel—"is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445.

[1] In light of these decisions, particularly *Ashe v. Swenson,* it seems to us that the acquittal of a defendant even in district court precludes the state from relitigating in a subsequent prosecution any issue *necessarily* decided in favor of the defendant in the former acquittal. Sometimes it is difficult to ascertain whether on a general verdict the issue in question was necessarily decided in favor of defendant. As the Supreme Court in *Ashe* noted, it may require an examination of the entire record of the earlier proceeding. The burden of demonstrating this crucial proposition is, as we shall show, upon the defendant. The warrant and judgment in the district court proceeding lead inescapably to the conclusion that the issue of whether defendant on the occasion in question was "under the influence" was necessarily answered in his favor in the district court trial. Defendant, however, never brought this proposition to the attention of the superior court at any stage of the proceedings in that court.

The procedure required in criminal trials to assert a double jeopardy defense is well established, both in North Carolina and in other state and federal courts. *See, e.g.,* 4 Strong, N. C. Index 3d, Criminal Law § 26.1; Annot., 9 A.L.R. 3d 203; 22 C.J.S., Criminal Law § 277; 21 Am. Jur. 2d, Criminal Law § 473. The general rule is that the defense of double jeopardy is not jurisdictional. *See, e.g., People v. Superior Court,* 31 Cal. Rptr. 710, 217 Cal. App. 2d 517 (1963); *Barker v. Sacks,* 173 Ohio St. 413, 183 N.E. 2d 385, *cert. denied,* 371 U.S. 898 (1962). It is a defense personal to the defendant. *State v. Hopkins,* 279 N.C. 473, 183 S.E. 2d 657 (1971). If he is to take advantage of it on appeal, he must first properly raise it before the trial court. Failure to do so precludes reliance on the defense on appeal. *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898 (1946); *see also State v. Hopkins, supra.* Generally the defense is raised by a special plea, *State v. Baldwin, supra,* upon which the defendant carries the burden. *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971). This Court noted in *Cutshall* that ab-

sence of such a plea and evidence to support it constituted an abandonment of this defense; but because the conviction there was of a capital offense, the Court nevertheless considered it.

[2] The essence of these decisions is that the double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.

> "The plea of res judicata should be made in the trial court at the earliest opportunity. Attention is called to the fact that under modern rules of practice it is required in some jurisdictions that matters of double jeopardy and res judicata or collateral estoppel must be raised before trial. In any event the defense of res judicata is waived unless properly raised in the trial court.
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> . . . .
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> "Where the doctrine of collateral estoppel precludes the relitigation in a subsequent criminal prosecution of questions decided by a former judgment in a criminal case, defense attorney . . . should seasonably object to the introduction of evidence bearing on the question of fact previously decided." Annot., 9 A.L.R. 3d at 227, 228.

No plea of double jeopardy was entered in the case at bar. No argument was made in the trial court on that issue, nor is any objection or any motion revealed by the record asserting the defense. As far as the record reveals, the trial court was wholly unaware of defendant's reliance on such a defense or of the potential effect of defendant's acquittal in district court on the charge of driving under the influence in violation of General Statute 20-138(a).

We recognize that the record indicates some likelihood defendant was not informed prior to trial that this issue would be raised once more in superior court to support the involuntary manslaughter charge. The indictment certainly failed to so inform him. Nevertheless, as defendant became aware of the foundation for the state's case against him, it was incumbent upon him to raise the double jeopardy defense in time for the trial judge to have acted upon it. In *State v. Bockman*, 344 Mo. 80, 124 S.W. 2d 1205 (1939), for example, the defendant was likewise uninformed as to a potential double jeopardy issue until the trial was underway. The court held that defendant's

motion during trial for mistrial pending determination of an appeal then pending from his prior conviction was sufficient to preserve the defendant's protection against double jeopardy.

Since defendant here did not timely assert his reliance on this defense at trial it was not error for the trial court to instruct the jury on General Statute 20-138(a) in its charge on involuntary manslaughter.

[3] We next consider defendant's contention that the court erred in failing to grant his motion for nonsuit. This assignment of error is directed to the sufficiency of the evidence. The record discloses the following evidence to support the state's case: Defendant was driving at night on a two-lane stretch of road which continued straight ahead of him for several hundred feet. Deceased was riding a bicycle on the road in defendant's lane of travel. The bike was equipped with a headlight and rear reflectors. Although no witness knew whether the headlight was operating at the time, one witness did observe the glow of the rear reflector shortly before the accident. The night was clear and dry and defendant's car was in excellent condition. Defendant admitted having consumed four beers. Witnesses smelled alcohol on his breath and a breathalyzer test yielded a result of .10 percent blood alcohol by weight. Witnesses testified that he was unsteady on his feet after the accident, was emotionally distraught and leaned on his car. Swerve marks at the scene indicated a path of travel leading from the right to the left lane and back again. There were 66 feet of tire marks and gouge marks. Defendant testified he did not have time to apply his brakes before the accident because he failed to see deceased until he was within 6 feet of him, his attention having been directed at two passing cars, but that he did swerve his car. He did not stop for about 500 feet after the accident, having "frozen" at the wheel. The accident apparently took place approximately at the driveway of the home of Lloyd Chriscoe, uncle of the deceased. Bloodstains were found 231 feet to the north and the bicycle was found 562 feet to the north of the home. The speed limit was 55 mph, and defendant stated to an officer at the scene that he was traveling "not more than 5 to 10 miles of the speed limit." Defendant admitted several previous motor vehicle violation convictions, including reckless driving, speeding, and driving under the influence.

On motion for nonsuit, the Court must consider the evidence in the light most favorable to the state, which is entitled

to every reasonable intendment and every reasonable inference. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). The evidence in this case is clearly sufficient to permit a jury to find defendant guilty of criminal negligence. This assignment is overruled.

A motion to set aside the verdict is addressed to the discretion of the trial court and will not be reviewed in the absence of abuse of discretion, which we do not find here. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

[4] Defendant next contends that the court prejudicially erred in other instructions to the jury not already discussed. One portion of the charge objected to on appeal is the passage charging the jury as to their finding "beyond a reasonable doubt that . . . the defendant intentionally or recklessly operated a vehicle on the public highway of this state and that when he did so he was under the influence of intoxicating liquor." Defendant claims the instruction fails to define "under the influence" or to indicate evidence supporting "careless and reckless operation." These contentions are without merit since the court had earlier instructed correctly as to the meaning of "driving under the influence" and had linked the evidence to the pertinent statutory language on reckless driving. It is axiomatic that jury instructions must be construed contextually; segregated portions will not support reversal on appeal where the charge as a whole is free from prejudicial error. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972); *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). Where the court has correctly defined a term, the failure to repeat the definition is not grounds for exception. *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969); *State v. Davis*, 265 N.C. 720, 145 S.E. 2d 7 (1965), *cert. denied*, 384 U.S. 907 (1966).

The organization used by the court in the manslaughter charge involved separate explication of each statutory violation supported by the evidence, followed by a more general instruction tying these separate passages together and reminding the jury that they should return a verdict of guilty of involuntary manslaughter if they found beyond a reasonable doubt that defendant committed one of those violations intentionally or recklessly thereby proximately causing decedent's death. *See* N.C.P.I.-Crim. 206.55. In its entirety the charge is correct.

[5] Defendant's assignment of error number 6 relates to an incorrect definition of driving under the influence, to wit, operating a vehicle "after having consumed such quantity of intoxicating liquor as to cause him to lose his normal faculties, either his mental or physical." Although a correct instruction should have included the "appreciable impairment" test, *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688 (1946); *see Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970), which was correctly stated in the court's earlier definition of "under the influence," the omission of this language is, if anything, favorable to defendant. This charge seems to mean that defendant must "lose his normal faculties" *altogether* in order to be in violation of the statute. We fail to perceive any prejudice to defendant. A new trial will not be awarded for error favorable to defendant. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978 (1964); *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955).

Finally, defendant contends the court erred in failing to explain the presumption raised by the breathalyzer results, citing *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967) and *State v. Jent*, 270 N.C. 652, 155 S.E. 2d 171 (1967), where charges were erroneous concerning the presumption. We note that defendant here requested no instruction. No mention of the presumption was made in the charge. There was, therefore, no occasion to explain it.

We have examined all of defendant's assignments of error and find them to be of no merit.

While we do not agree with the reasoning employed by the Court of Appeals, its judgment finding no error is

Affirmed.

STATE OF NORTH CAROLINA v. RONALD EARL JENKINS

No. 5

(Filed 7 March 1977)

1. Criminal Law § 75— admissibility of confession — waiver of counsel

Defendant's confession was properly admitted in evidence where the court made findings consistent with the State's evidence on *voir*

dire that defendant was given the *Miranda* warnings before interrogation, defendant stated he did not want an attorney and thereafter made an oral statement, and defendant signed a written waiver of his rights before signing a typewritten confession, and where the court found that defendant's testimony that he stated that he wanted a lawyer and signed the written waiver of his rights without reading it because he thought he was getting a lawyer was not believable.

2. **Criminal Law § 76— voluntariness of confession — determination by judge**

The trial court did not err in failing to instruct the jury as to the law relating to the voluntariness of defendant's confession since voluntariness is for determination by the judge unassisted by the jury.

3. **Criminal Law §§ 33, 75— credibility of confession — manner of securing defendant during transportation to this State**

The manner in which defendant was secured while being transported from Florida to North Carolina was a fact so remote in time and place from defendant's confession that its admission would have carried little weight as a circumstance affecting the credibility of the confession, and the exclusion of such evidence was not prejudicial, where defendant went to bed shortly after arriving at a jail in North Carolina at 4:45 a.m. and slept until 12:00 noon, defendant was then taken to the sheriff's office for interrogation, and defendant's written confession was not signed until 4:00 p.m.

4. **Criminal Law §§ 23, 89— prior inconsistent statements — plea negotiations**

The district attorney's cross-examination of defendant about prior inconsistent statements made in the presence of the district attorney, the sheriff and defendant's former counsel did not violate G.S. 15A-1025 where the record does not reveal that any evidence of plea negotiations *as such* was offered into evidence.

5. **Criminal Law § 35— motive of others to commit the crime**

In this prosecution for armed robbery, the trial court did not err in refusing to permit defendant to cross-examine the victim about a prior incident at the victim's restaurant involving his refusal to sell beer to two intoxicated individuals for the purpose of showing that other persons might have had a motive to rob the victim, since evidence tending to show that someone else committed the crime is not admissible unless it points directly to the guilt of the third party.

6. **Criminal Law §§ 33, 66— credibility of identification — others meeting description of defendant**

The trial court did not err in refusing to permit defendant to testify for the purpose of discrediting a robbery victim's identification of him that he knew of other black males living in the town where the crime occurred who were about his size and had goatees, since the probative value of the testimony was so weak that it should not have been allowed to distract the jury's attention from material matters.

7. **Criminal Law §§ 6, 132— intoxication and unconsciousness — jury's disregard of instructions — motion for new trial**

The trial court in an armed robbery case did not abuse its discretion in refusing to set aside the verdict of guilty on the ground that in view of the abundant evidence as to defendant's intoxication and unconsciousness, it is manifest that the jury totally disregarded the court's instructions on those defenses, since defendant's evidence of intoxication and unconsciousness was refuted by testimony of the victim and his wife concerning defendant's actions at the time of the crime and by defendant's confession which disclosed that he, with other persons, planned beforehand and carried out the robbery.

8. **Constitutional Law § 36; Robbery § 6— life imprisonment for armed robbery — constitutionality**

Judgment imposing on defendant a sentence of life imprisonment for armed robbery does not constitute cruel and unusual punishment.

9. **Constitutional Law § 20; Robbery § 6— sentence for armed robbery — discretion of court — equal protection**

A defendant sentenced to life imprisonment for armed robbery was not denied equal protection of the laws because of the wide range of discretion allowed the trial judge under G.S. 14-87(a).

APPEAL by defendant from *Fountain, J.*, 12 April 1976 Session of HERTFORD Superior Court. Defendant was charged with armed robbery to which he entered a plea of not guilty.

The State's evidence, in substance, was as follows:

Walter G. Liverman testified that on 8 November 1975 he closed his grill in Murfreesboro, North Carolina, between 1:30 and 1:45 a.m. and proceeded to his home. He was carrying a cash box which contained approximately $1,100. He drove his automobile into his lighted carport which had a "stoop" upon which a door opened into the house. Mr. Liverman placed his cash box on the concrete steps leading into the house and locked his automobile. He heard his dog barking and as he started toward the backyard he heard steps behind him. When he turned he saw defendant Ronald Earl Jenkins coming toward him with a pistol. Defendant said "this is a holdup" and before Mr. Liverman could raise his hands, defendant shot him three times. One bullet entered his chin and exited through his jaw. One struck him near his nose and exited through the back of his neck and the third bullet pierced his finger. Before he lapsed into unconsciousness the witness saw defendant take his cash box and flee. The witness further testified that Ronald Earl Jenkins' mother, Bernice Jenkins, had worked for him for fifteen years and that he had known Ronald since he was a small boy.

Mrs. Janet Warren Liverman testified that she was awakened by the barking of their boxer dog and shortly thereafter she heard three shots. She went to her bedroom window and saw a man whom she did not recognize. A second man passed within three yards of her window and when she called out to him, he fired two shots toward her. When he turned and fired the shots, she recognized this person as defendant Ronald Earl Jenkins. Without objection both Mr. and Mrs. Liverman positively identified defendant as the man who shot and robbed Mr. Liverman. Both these witnesses stated that they did not immediately tell the police that they recognized defendant because they were afraid.

The State also offered evidence of a confesssion which will be discussed in the opinion.

Defendant testified that he had known the Livermans all of his life and had occasionally worked for them. On the night of 7 November 1975 and the early morning hours of 8 November 1975 he had been drinking beer, liquor and vodka and smoking marijuana. He recalled that he had accompanied Teresa Bird and Peggy High, students at Chowan College, to their dormitory at about 1:00 a.m. Shortly thereafter he passed out and remembered nothing else until the next morning. Defendant denied going to the Liverman residence or having any knowledge of the robbery until the next day. He was questioned concerning the Liverman robbery by police officers on Sunday, 9 November 1975, and left for Florida that night. He remained in Florida until he was arrested and brought back to Winton on 19 December 1975. He stated that he went to Florida because the local police were trying to implicate him in the Liverman robbery because of his past record.

Cherry Ball and Peggy High testified that they saw defendant on the night of 7 November 1975 and that he was highly intoxicated. He left one of the Chowan College girls' dormatories at 1:00 a.m. on 8 November 1975, that being the hour at which all male persons were required to leave. Ardell Brooks, defendant's sister, testified that she saw defendant on the night of 8 November 1975 and he was highly intoxicated at that time. Defendant's mother, Bernice Jenkins, also testified that she saw defendant at about 12:30 a.m. on that night and he was under the influence. The testimony of defendant's other witnesses was either cumulative or irrelevant.

The jury returned a verdict of guilty as charged and Judge Fountain imposed a sentence of life imprisonment.

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

Bruce C. Johnson, for defendant.

BRANCH, Justice.

[1] Defendant contends that the trial judge erred by admitting the written statement or confession purportedly signed by defendant on 19 December 1975.

Hertford County Sheriff James Baker was questioned concerning a statement made by defendant and upon defendant's objection the jury was excused and a *voir dire* hearing was held.

Sheriff Baker testified that defendant was brought to the Hertford County jail from Florida during the early morning hours of 19 December 1975. At noon on that day he had his deputies bring defendant to the courthouse. He read the *Miranda* warnings to defendant and specifically asked him if he wanted a lawyer, to which defendant replied, "not at this time." Defendant then made an oral statement and the Sheriff sent for Chief Wheeler of the Murfreesboro Police Department. Upon Chief Wheeler's arrival defendant was again warned of his rights and he then signed a waiver of rights. Sheriff Baker stated that he talked with defendant for about thirty minutes before he made the oral statement and at that time defendant appeared to be normal. No one made any promises to defendant nor was defendant threatened in any way. Defendant actually signed the written waiver of rights at 3:30 p.m. and signed the typewritten confession at 4:00 p.m. During the period between 12:00 and the signing of these writings, defendant was also booked, fingerprinted and certain required reports were made out by police officers. The written waiver of rights was a repetition of the *Miranda* warnings. It contained a statement that defendant understood his rights and that he affirmatively waived presence of counsel. The essence of his written confession was that defendant, Travis Watford, Brynell Askew and Kenneth Hall went to Mr. Liverman's home at about 1:50 a.m. on 8 November 1975 for the purpose of robbing him. Defendant stated that Hall gave him a pistol as he left the automobile and

that during his confrontation with Mr. Liverman he panicked and fired the pistol. He then took the money box and ran. Upon hearing someone call from the house, he shot toward the house. He and his companions went to a motel in Virginia where the money was divided. One of his companions brought him back to Murfreesboro in the early hours of the morning.

Defendant, testifying on *voir dire*, stated that he was brought from Florida by local officers and that during the trip he was handcuffed and wore chains. They arrived at Winton at about 4:45 a.m. on 19 December 1975 and he was placed in the Hertford County jail. He was awakened at noon on that day and carried to the courthouse. He testified that the Sheriff asked him if he wanted a lawyer and he replied that he did. He was handed the written waiver of rights and he signed it without reading it because he thought he was getting a lawyer. He did not sign the written confession and the signature appearing on that writing was not his own. On cross-examination defendant stated that he was twenty years old and that he could read and write. He had received a general education diploma. He admitted that his "rights" had been read to him on several other occasions in Hertford County.

Judge Fountain found facts consistent with the State's evidence and concluded:

> . . . [T]hat such statement, if any, as made by the defendant on the 19th day of December, 1975, was freely, knowingly and voluntarily made after knowingly, voluntarily and expressly waiving his right to counsel and his right to remain silent. Finally, the Court, while having considered all defendant's evidence which is in conflict with the Court's findings, finds it is not believable and for that reason along with the other findings concludes that the defendant's objection should be and it is overruled.

It is well settled in this jurisdiction that when an in-custody confession is challenged the trial judge must conduct a *voir dire* hearing to determine whether the confession was voluntarily made. When the *voir dire* evidence is conflicting, as here, the trial judge must weigh the credibility of the witnesses, resolve the contradictions and the conflicts, and make appropriate findings of fact. When supported by competent evidence his findings are conclusive on appeal. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371; *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844;

State v. Morris, 279 N.C. 477, 183 S.E. 2d 634. Here there was ample, competent evidence to support the trial judge's findings which in turn support his conclusions and ruling. The trial judge properly admitted defendant's confession.

[2] Neither do we find merit in defendant's contention that the trial judge erred by failing to instruct the jury as to the law relating to the voluntariness of defendant's confession. The language contained in *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833, supports our conclusion. There Justice Bobbitt (later Chief Justice), speaking for the Court, stated:

> . . . In *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, Higgins, J., in accordance with decisions cited in the quotation from *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, said: "According to our practice the question whether a confession is voluntary is determined in a preliminary inquiry before the trial judge." After such preliminary inquiry has been conducted, the approved practice is for the judge, in the absence of the jury, to make findings of fact. These findings are made only for one purpose, namely, to show the basis for the judge's decision as to the admissibility of the proffered testimony. *They are not for consideration by the jury and should not be referred to in the jury's presence.*
>
> If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.

[3] Defendant argues that the trial judge erred in refusing to permit him to testify as to how he was secured while being transported from Miami, Florida, to the Hertford County jail in Winton, North Carolina.

During the course of direct examination defendant testified that after being apprehended in Miami, Florida, he was driven back to Winton, North Carolina, and arrived at the jail there at about 4:45 a.m. on 19 December 1975. Only two stops were made during this trip. At this point he was asked how he was secured while traveling and objection to this question was sustained. The record reveals that defendant would have responded that he was secured by handcuffs and waist chains and leg shackles. He contends that this evidence was admissible as bearing upon the weight and credibilty to be given to the purported confession made by him following this return trip to North Carolina.

Further testimony of defendant reveals that shortly after arriving at the jail at 4:45 a.m. he went to bed and slept until 12:00 noon. During this period of approximately seven hours, he was awakened only twice, at which times he was offered breakfast and lunch. When finally awakened at 12:00 noon, defendant was taken to the Sheriff's office for interrogation. The evidence reveals that the written confession was not signed until about 4:00 p.m.

It is true that "[o]nce a confession is admitted, *weight* and *credibility* are entirely for the jury; and the defendant may introduce evidence designed to persuade the jury . . . that *it was made under such circumstances* as to deprive it of credibility." [Emphasis added.] 2 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 187, pp. 88-89; *State v. Barber*, 268 N.C. 509, 151 S.E. 2d 51. However, we are of the opinion that the manner in which defendant was secured while returning to North Carolina was a fact so remote in time and place from the actual confession that its admission would have carried little weight as a circumstance affecting the credibility of the statement. Certainly in light of the other strong evidence presented by the State, we do not think that the admission of this evidence would have changed the verdict of the jury.

[4] Defendant assigns as error the failure of the trial judge to immediately stop the prosecutor's cross-examination concerning certain extrajudicial statements made by defendant in the prosecutor's presence.

Defendant stated on direct examination that he knew nothing about the charged crime. Upon cross-examination the following exchange took place:

"Q. Mr. Jenkins, let me ask you this. Do you remember sitting in that back room right in there with your lawyer, with Sheriff Baker and me when you offered to volunteer to go to Virginia to find the steel box that you took from Mr. Liverman?

MR. JOHNSON: Objection.

THE COURT: Overruled.

EXCEPTION NO. 9

MR. JOHNSON: Request the jury be instructed.

THE COURT: Instructed in what way?

MR. JOHNSON: To disregard what Mr. Burgwyn said.

THE COURT: Overruled.

EXCEPTION NO. 10

A. No, sir.

Q. Do you deny that?

A. Yes, sir, I do."

There were two or three other similar questions and like answers. After taking a recess the trial judge instructed the jury:

THE COURT: Ladies and gentlemen, the objection that Mr. Johnson has made is sustained and in view of that I am going to reinstruct you that you will disregard any questions that have been asked the defendant about any conference with the District Attorney or his then attorney, Mr. Herbin, or anyone else at the time Mr. Burgwyn was asking him about just before this ten-minute recess. Disregard it. Don't consider it for any purpose. Obviously, the questions asked do not constitute evidence so you will disregard the questions as well as any reference to that. . . .

It is well settled that when a defendant takes the witness stand he may be impeached as any other witness. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140; *State v. McKinnon*, 223 N.C. 160, 25 S.E. 2d 606. One of the ways he may be impeached

is by showing prior extrajudicial statements inconsistent with his testimony at trial. 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 46, p. 128; *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773. However, defendant strenuously argues that the challenged cross-examination was precluded by the provisions of G.S. 15A-1025 which provides:

> The fact that the defendant or his counsel and the solicitor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The language of this statute clearly states its purpose. This record does not reveal that any evidence of plea negotiations *as such* was offered into evidence. In fact, the record shows that the District Attorney unequivocally stated that he had never discussed a plea at all with defendant's then counsel Mr. Herbin, or the defendant. It is true that it could be inferred that the District Attorney, defense counsel and the Sheriff *might* have been discussing the disposition of this case. However, it is just as reasonable to infer that defendant had, in fact, made the confession admitted into evidence and that the District Attorney was exploring the possibility of using defendant as a witness in cases against his alleged accomplices when this inconsistent statement was purportedly made. Even had the statements been made during a plea-bargaining session, we do not think that the District Attorney's questions, which tended to impeach defendant's testimony by showing a contradictory statement, would violate the provisions of the statute unless the *fact* of plea bargaining was revealed. The trial judge's instruction to the jury to disregard the questions also tended to cure any possible prejudice to defendant.

This assignment of error is overruled.

[5] Defendant next assigns as error the exclusion of certain testimony sought to be elicited by him on cross-examination of the prosecuting witness.

Defense counsel attempted to question the prosecuting witness, Walter Liverman, about an incident occurring in the spring or summer of 1975 at his restaurant. Objections to these questions were sustained by the trial judge. The record reveals that if the witness had been allowed to answer the questions,

he would have testified that he recalled an earlier incident involving his refusal to sell beer to two intoxicated individuals.

It is defendant's contention that evidence of this prior incident suggests that other persons might have had a motive to rob Mr. Liverman, thus making it less likely that defendant committed the robbery. A similar argument was considered and rejected in *State v. Smith,* 211 N.C. 93, 189 S.E. 175, wherein this Court stated:

> While under certain circumstances it has been held by this Court competent for the defendant to introduce evidence tending to show that someone else than he committed the crime charged, *S. v. Davis,* 77 N.C., 483, it is well settled that such evidence is not admissible unless it points directly to the guilt of the third party, evidence which does no more than create an inference or conjecture as to such guilt is inadmissible.
>
> . . . To the same effect is Wharton's Criminal Evidence (11th Ed.), Vol. 1, par. 274, p. 349, where it is said: "In any event, before such testimony can be received, there must be such proof of connection with the crime or such a train of facts or circumstances as tends to point out someone other than the accused as the guilty party. Remote acts, disconnected from and outside of the crime itself, cannot be separately proved for such a purpose."

In *State v. Lambert,* 93 N.C. 618, it was held that the trial judge properly excluded evidence tending to show only that a third person had *a motive* to commit the crime with which the defendant was charged.

Although the testimony which defendant sought to elicit on cross-examination was properly excluded, we note that a complete account of the same incident was later received into evidence from another witness. It is well established that any error in the exclusion of evidence is cured when other evidence of similar import is subsequently admitted. *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60; *State v. Edmondson,* 283 N.C. 533, 196 S.E. 2d 505; 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 30, p. 79.

[6] Defendant also contends that the trial judge erred by refusing to allow him to testify that he knew of other black males living in Murfreesboro who were about his size and had goatees.

This testimony, he argues, was relevant in that it would have discredited the prosecuting witnesses' identification of defendant.

"Evidence may have *some* tendency to prove a fact and still be inadmissible because its probative force is so weak that to receive it would confuse the issues, unfairly surprise the opponent, or unduly prolong the trial." 1 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 77, p. 236. While the testimony offered by defendant may have some slight relevance, we feel its probative value is so weak that it should not have been allowed to distract the jury's attention from material matters. The trial judge, therefore, correctly excluded this evidence.

[7] Defendant next contends that the trial judge erred by failing to grant his motions to set aside the verdict and grant a new trial. He does not attack the trial judge's instructions as to intoxication and unconsciousness. Rather, he takes the position that the trial judge abused his discretion in denying the motions because, in view of the abundant evidence as to drunkenness and unconsciousness, it is manifest that the jury totally disregarded his instructions as to those defenses. These motions are, in effect, motions to set aside the verdict as being contrary to the greater weight of the evidence.

A motion to set aside a verdict as being contrary to the greater weight of the evidence is addressed to the trial judge's sound discretion and his ruling thereon will be upheld absent a showing of abuse of discretion. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335; *State v. Mason,* 279 N.C. 435, 183 S.E. 2d 661.

Admittedly there were numerous defense witnesses who stated that defendant was in a highly intoxicated condition on the morning of 8 November 1975. On the other hand, defendant's confession which was admitted into evidence discloses that he, with other persons, planned beforehand and carried out the robbery of Mr. Liverman. The testimony of Mr. and Mrs. Liverman concerning defendant's actions while on their premises strongly refutes defendant's evidence of intoxication and unconsciousness. Under these circumstances, no abuse of discretion on the part of the trial judge appears.

[8] Finally, defendant takes the position that the judgment imposing a life sentence should be vacated because it constituted cruel and unusual punishment and denied defendant equal protection of the laws in violation of the Eighth and Fourteenth

Amendments to the United States Constitution and in violation of Article I, §§ 19 and 27 of the North Carolina Constitution.

We have held in a host of cases that when the punishment does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Cameron,* 284 N.C. 165, 200 S.E. 2d 186; *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34; *State v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654.

[9] Defendant's argument that he was denied equal protection of the laws because of the wide range of discretion allowed the trial judge under G.S. 14-87(a) is without merit. The Legislature has granted a wide discretion to the trained presiding judge who has had the opportunity to hear the facts, observe the parties to the proceeding and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the statutory limits. The use of this discretionary power by the trial judge is not a denial of equal protection of the laws. *Howard v. Fleming,* 191 U.S. 126, 48 L.Ed. 121, 24 S.Ct. 49; *Bratton v. Sigler,* 235 F. Supp. 448; *State v. Victorian,* 332 So. 2d 220. Even were we inclined to enter upon a journey of legislative policy making, this case would provide a sorry vehicle. Here defendant, while engaged in a planned armed robbery, at short range put three bullets into a victim who offered no visible resistance and after completing the robbery fired two bullets toward a person within her own dwelling. Defendant's past record furnished no basis for leniency. We think that Judge Fountain was well justified in imposing the maximum sentence provided by the statute.

This record shows that defendant had the benefit of a fairly conducted trial free of prejudicial error.

No error.

WILLA INA BRONDUM v. DONALD ALVIN COX

No. 72

(Filed 7 March 1977)

1. **Divorce and Alimony § 1; Constitutional Law § 26— wife domiciled in Hawaii — divorce granted in Hawaii — full faith and credit**

Where plaintiff wife was domiciled in Hawaii and defendant husband had left that state with no intent to return thereto and with the intent to make his home in N. C., which he did, the State of Hawaii had jurisdiction to entertain plaintiff's divorce action and to grant her the divorce prayed for; therefore, that part of the Hawaii judgment must be given full faith and credit by the courts of N. C.

2. **Divorce and Alimony § 22— child in Hawaii — custody — jurisdiction of Hawaii court**

A Hawaii court had jurisdiction to award custody of a child present in that state to plaintiff mother.

3. **Divorce and Alimony § 1— divorce action in Hawaii — defendant domiciled in N. C. — no judgment in personam**

A judgment *in personam* could not properly be entered against defendant by a Hawaii court in plaintiff's action for divorce, since defendant was not domiciled in Hawaii at any of the times required by Hawaii statute for personal judgment to be rendered against an absent defendant.

4. **Judgments § 35— conclusiveness of judgment**

A judgment rendered by a court having jurisdiction to do so estops the parties to the action as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward.

5. **Divorce and Alimony § 22— establishment of paternity — obligation to support child — judgment in personam**

A judgment establishing the status of paternity necessarily fixes upon the adjudicated father a personal obligation for the support of the minor child; therefore, such judgment is one *in personam* and can be rendered only by a court having jurisdiction over the person of defendant.

6. **Constitutional Law § 26; Divorce and Alimony § 23— foreign judgment determining paternity — no in personam jurisdiction — no full faith and credit**

The courts of N. C. were not required to give full faith and credit to the determination by a Hawaii court that defendant was the father of plaintiff's child or to an order of the Hawaii court purporting to fix the amount which the defendant must pay for support of his alleged minor child, since the determination and order amounted to adjudications *in personam*, and the Hawaii court did not have *in personam* jurisdiction over defendant.

APPEAL by plaintiff from the decision of the Court of Appeals, reported in 30 N.C. App. 35, 226 S.E. 2d 193, reversing judgment by *Gentry, D.J.*, entered 2 October 1975 in the District Court of GUILFORD County, Judge Morris dissenting. This case was docketed and argued as No. 72 at the Fall Term 1976.

The plaintiff and defendant were married in Honolulu, Hawaii, 14 January 1968. The defendant, a native of North Carolina, was then in the United States Air Force and was stationed in Guam. Upon his discharge from the Air Force, they lived in California for a few months and, in February 1969, moved to Greensboro, North Carolina, where the defendant was employed. They lived there until February 1971. At that time they returned to Hawaii for the purpose of settling the estates of the plaintiff's parents, both of whom had then recently died. According to the testimony of the defendant, this return to Hawaii was not with the intent of remaining there permanently but only for so long as was necessary to settle the estates of of the plaintiff's parents. Domestic difficulties developed and, in August 1973, the defendant, knowing the plaintiff was pregnant, returned to North Carolina, since which time he has continued to reside and to be employed in North Carolina and has not returned to Hawaii.

On 11 September 1973, a daughter, Noelani May Cox was born to the plaintiff. The defendant contends that he is not the father of this child.

On 24 September 1973, the plaintiff filed suit for a divorce in the State of Hawaii, seeking in that action judgment for absolute divorce and an order requiring the defendant to make monthly payments for her support and for the support of the child, providing for custody of the child and providing for a division of the property of the parties and the payment by the defendant of a fee to her attorneys. The Hawaii court entered an order that service of the summons, complaint and related papers be made upon the defendant by registered or certified mail and ordered that actual receipt by the defendant of such papers be equivalent to personal service upon him. These suit papers were served upon the defendant in North Carolina by registered mail. The defendant filed no pleading in the Hawaii divorce action, did not appear therein and was not represented therein by counsel.

On 21 August 1974, the Hawaii court entered judgment in the wife's action for divorce in which the plaintiff was granted an absolute divorce and custody of "the minor child of the parties, subject to defendant's rights of reasonable visitation," and it was adjudged that the name and birth date "of the minor child of the parties" are as follows: "Noelani May Cox, September 11, 1973." This judgment also appointed a commissioner to sell and transfer the assets of the parties, directed the defendant to pay any remaining balance of indebtedness of the parties after the application of the proceeds of such assets and ordered the defendant to pay to the plaintiff, through the Chief Clerk of the Court, $100.00 per month for the support, maintenance and education of the child.

On 3 April 1975, the plaintiff filed in the Family Court of the First Circuit in the State of Hawaii a complaint for support, alleging that she is the ex-wife of the defendant; that she resides at a designated address in Hawaii; that the plaintiff is the mother and the defendant is the father of Noelani May Cox, born September 11, 1973; that the child is entitled to support from the defendant under the provisions of the Hawaii Uniform Reciprocal Enforcement of Support Act, Hawaii Revised Statutes, Chapter 576, a copy of which was attached to the complaint; that the defendant has refused and neglected to provide such support; that the defendant now resides in Greensboro, North Carolina; and that North Carolina has enacted a law substantially similar and reciprocal to the Hawaii Uniform Reciprocal Enforcement of Support Act. The prayer of the complaint was for an order for support directed to the defendant. The above mentioned divorce decree was attached to and made a part of this complaint.

On 14 April 1975, the Hawaii complaint for support, with attached exhibits, was filed in the District Court of Guilford County and on the following day summons was issued by that court and was served upon the defendant. The defendant filed answer in the District Court denying that he is the father of the child and admitting he has not provided support for her. In his answer the defendant prays that the court order a blood grouping test pursuant to G.S. 8-50.1 and that the court deny the relief prayed for in the complaint. The defendant demanded a jury trial on the issue of paternity and filed his motion pursuant to G.S. 1A-1, Rule 35, for the entry of an order requiring

the plaintiff, defendant and the child to submit to a blood grouping test pursuant to G.S. 8-50.1.

The matter came on for a hearing before the District Court upon the motion of the defendant for the blood grouping test and upon his demand for a jury trial on the issue of paternity. At this hearing no evidence was introduced by the plaintiff other than the above mentioned papers filed in the Hawaii court and the decree of divorce, above mentioned, entered by that court in which the Hawaii court found that it had jurisdiction to enter such decree and directed the defendant to make payments for the support of the child as above stated. The defendant appeared in the District Court and testified as above set forth.

The District Court made findings of fact, including findings as to the marriage, divorce, residence of the defendant, the entry of the Hawaii divorce action, service of the suit papers therein upon the defendant by registered mail, the failure of the defendant to appear in the Hawaii action, the hearing thereof and the entry of the decree therein, all as above set forth, the institution by the plaintiff in the Family Court of Hawaii of the present action under Hawaii's Uniform Reciprocal Enforcement of Support Act, the forwarding of the papers therein to the District Court of Guilford County, the issuance of summons by the District Court, service thereof upon the defendant, together with a copy of the Hawaii complaint, the filing of the above mentioned answer by the defendant and the filing of his said motions for a blood test and for a jury trial. The District Court concluded upon these findings as follows:

"1. The court in the Hawaii divorce action did not have *in personam* jurisdiction over defendant.

"2. The court in the Hawaii divorce action did have *in rem* jurisdiction to enter a divorce decree entitled to full faith and credit in North Carolina.

"3. The court in the Hawaii divorce action did have *in rem* jurisdiction to enter a custody order with respect to Noelani May Cox and said order is entitled to full faith and credit in North Carolina.

"4. Because the court in the Hawaii divorce custody action had *in rem* jurisdiction as to those matters, and because the issue of paternity was inextricably bound up

in the determination of these items, the finding of the Hawaii court as to the paternity of Noelani May Cox is conclusive as to the defendant, is entitled to full faith and credit in North Carolina, and may not be litigated by the defendant in North Carolina.

"5. Because the defendant is bound by the findings of a Hawaii court in the Hawaii divorce action, and because the Uniform Reciprocal Enforcement of Support Act does not permit a trial by jury, a trial by jury on the issue of paternity is precluded."

The District Court, therefore, adjudged that the defendant's motion for a blood grouping test be denied and that his motion for a jury trial be denied.

From the entry of this order the defendant appealed to the Court of Appeals, which, Judge Morris dissenting, reversed the judgment of the District Court in both respects.

Rufus L. Edmisten, Attorney General, by Parks H. Icenhour, Assistant Attorney General, and David D. Ward, Associate Attorney, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by William W. Jordan and Janet L. Covey for defendant appellee.

LAKE, Justice.

The plaintiff instituted her action for divorce in the Family Court of Hawaii on 24 September 1973. She alleged in her complaint: "Either or each party has been domiciled or has been physically present in this State for a continuous period of at least one year and the Plaintiff has been domiciled or has been physically present in this Circuit for a continuous period of at least three months next preceding this application for divorce." The summons and complaint in that action were served upon the defendant in North Carolina by registered mail. The defendant so concedes. Thus, he had actual notice of the pendency of the proceeding in Hawaii and of the allegations of the complaint and the prayer for relief contained therein. He filed no responsive pleading and made no appearance in that action. The Hawaii court thereupon entered judgment in which it "adjudged and decreed that: (1) A decree of absolute divorce is hereby granted to Plaintiff * * * . (2) Plaintiff is awarded the care, custody and control of the minor child * * * of the parties * * *.

(3) The name and birth date of the minor child of the parties are as follows: * * * Noelani May Cox * * * September 11, 1973."

Prior to the institution of the divorce action, the defendant had left the State of Hawaii with no intent to return thereto and with the intent to make his home in North Carolina, which he did and has continued to do. He has not denied that the plaintiff wife was domiciled in the State of Hawaii at the time the divorce action was instituted by her.

In the Restatement of Judgments, § 33, Comment a, it is said:

> "A State can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the State and the other is domiciled outside the State, if the spouse who is not domiciled within the State has consented that the other spouse acquire a separate home, or by his or her misconduct has ceased to have the right to object to the acquisition of such separate home, or is personally subject to the jurisdiction of the State which grants the divorce; or if the State is the last State in which the spouses were domiciled together as man and wife."

In the Restatement of Conflict of Laws, 2d, § 72, it is stated:

> "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage."

[1] Clearly, under the circumstances of this case, the State of Hawaii had jurisdiction to entertain the plaintiff's divorce action and to grant her the divorce prayed for. This part of the Hawaii judgment must, therefore, be given full faith and credit by the courts of North Carolina. *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). Defendant does not, in the present proceeding, deny the validity of the Hawaii divorce, as such.

[2] Again, "A state has power to exercise judicial jurisdiction to determine the custody" of a child who is present in the state, Restatement of Conflict of Laws, 2d, § 79. Thus, the Hawaii

court had jurisdiction to award the custody of Noelani May Cox to the plaintiff mother, but that is a different matter from a determination that the defendant is the father of the child and, therefore, has responsibility for her support.

As an incident to the divorce decree, the Hawaii court "adjudged" the plaintiff's daughter, Noelani May Cox, the child "of the parties"; that is, the child of the defendant as she was alleged to be in the complaint served upon the defendant in North Carolina by registered mail. The question is whether the Hawaii court has jurisdiction to render this part of its judgment. If so, it too must be given full faith and credit by the courts of North Carolina, otherwise not.

[3] In the divorce action the Hawaii court did not have jurisdiction over the person of the defendant. At the time that action was instituted, the defendant was not domiciled in or physically present in the State of Hawaii. Hawaii Revised Statutes, § 580-3.5, provides:

> "*Personal judgment against absent defendant.* In any proceeding in the family court, the court shall have the power to render a personal judgment against a party who is outside of this State and over whom jurisdiction is acquired by service of process [by registered mail] if the party was personally served with a copy of the summons or order to show cause and complaint or other pleading upon which the judgment is based *and* if the party was a domiciliary of this State (1) at the time that the cause of action which is the subject of the proceeding arose, or (2) at the time of the commencement of the proceeding, or (3) at the time of service." (Emphasis added.)

Since the defendant was not domiciled in Hawaii at either of the times so specified in the statute, a judgment in personam could not properly be entered against him by the Hawaii court in the plaintiff's action for divorce. Thus, if the adjudication that Noelani May Cox is the child of the defendant was a judgment in personam, that portion of the Hawaii judgment is void for want of jurisdiction and is not entitled to full faith and credit in the courts of this State. If, on the other hand, this adjudication was a judgment in rem, the Hawaii court did have jurisdiction to render it and it must be given full faith and credit in the courts of North Carolina.

[4] This portion of the judgment rendered by the Hawaii court was an adjudication of the status of the child in relation to the defendant. Obviously, by virtue of the allegations of the complaint and the prayer for relief contained therein, the defendant had actual notice that the question of the child's status in relation to him was before the Hawaii court for determination and had ample opportunity to be heard in that court in opposition to the contention of the plaintiff with reference thereto. A judgment rendered by a court having jurisdiction to do so estops the parties to the action "as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822 (1940). This well established rule has been applied in other jurisdictions to determinations of paternity in divorce proceedings in which the husband and alleged father did not appear or did not contest his paternity of the child. *Garcia v. Garcia*, 148 Cal. App. 2d 147, 306 P. 2d 80 (1957); *Peercy v. Peercy*, 154 Colo. 575, 392 P. 2d 609 (1964); *Farmer v. Farmer*, 177 Kan. 657, 281 P. 2d 1075 (1955); *Byrd v. Travelers Insurance Co.*, 275 S.W. 2d 861 (Tex. Civ. App. 1955). In our opinion, this is a correct application of the rule. Thus, if the Hawaii court had jurisdiction to determine the status of the child in relation to the defendant, its determination thereof would be binding upon the defendant in the courts of this State, notwithstanding his failure to appear and to contest the issue of paternity.

Nothing else appearing, the liability of a man for the support of a child born to his wife and conceived during coverture may be determined in and as an incidental feature of an action brought by the wife for divorce in a court having jurisdiction to grant such divorce. However, the right to support is the right of the child, and the mother's action for a divorce can confer upon the court no greater jurisdiction to determine the status of the child in relation to the husband than would an action brought by the child to establish such status.

In *Hartford v. Superior Court for the County of Los Angeles*, 47 Cal. 2d 477, 304 P. 2d 1 (1956), an illegitimate child domiciled in California sued for a declaration that the defendant, domiciled in New York, was his father, the mother of the child being dead. The summons and complaint in the California action was served upon the defendant by publication and by

personal service in New York. The defendant moved to quash the service, which motion the trial court denied. On appeal the Supreme Court of California reversed, saying through Justice Traynor:

> "Defendant contends that the relief sought is necessarily a personal judgment against him and that since he is not a California domiciliary * * * it would deny him due process of law to sustain the service of process made outside the state. * * *
>
> "[The California Code of Civil Procedure, § 417 provided that the court had power to render a personal judgment only if the defendant was personally served *and was a resident of California* at the time of the commencement of the action or at the time of service.]
>
> "Plaintiff contends that since the purpose of the proceeding is only to establish the status of the parties as parent and child, it is a proceeding in rem and that therefore personal service within the state is not required * * *. We do not believe, however, that because the present proceeding is concerned solely with status it must necessarily be classified as a proceeding in rem, particularly if such a classification would result in making the judgment binding as to the status of the parties in subsequent litigation between them or others. The purpose of the particular action brought under Civil Code section 231 must be considered to determine how it should be characterized.
>
> "That section provides for declarations of both the existence and nonexistence of the relation of parent and child by birth or adoption, and a distinction may reasonably be drawn between a proceeding to establish that the defendant is not the plaintiff's parent and one to establish that he is. By analogy to the rule applicable to ex parte divorces, it could reasonably be contended that the state may adjudicate the nonexistence of the parent-child relationship between its domiciliary and a person not subject to its jurisdiction if adequate notice is provided. [Citations omitted.] The severing of a relationship or an adjudication that it never existed for the purpose of establishing the parties' freedom from it in the future is not the same thing, however, as creating it or establishing its present existence. * * * Basically the difference is between the state's power

to insulate its domiciliary from a relationship with one not within its jurisdiction and its lack of power to reach out and fasten a relationship upon a person over whom it has no jurisdiction. [Citations omitted.]

"Plaintiff correctly concedes that if the purposes of the present action were to enforce a duty of support or some other personal obligation growing out of the parent-child relationship, personal jurisdiction over defendant would be essential. [Citations omitted.] This requirement cannot be avoided by limiting the relief sought to a binding adjudication of the parties' status, since such an adjudication would prevent relitigation of the basic issue on which defendant's personal obligations to plaintiff must rest and to that extent would necessarily constitute a personal judgment against him. [Citations omitted.]

* * *

"Since under the circumstances of this case, personal jurisdiction over defendant is essential for such action, the service upon him outside the state was ineffective."

In *Watkins v. Watkins,* 194 Tenn. 621, 254 S.W. 2d 735 (1953), the court held that jurisdiction over the person of the defendant is essential to a judgment on a motion by the wife in a divorce action to determine the status of her children for the purpose of their future support in the event the husband should return to the jurisdiction of the court. In *Neill v. Ridner,* 286 N.E. 2d 427 (Ind., 1972), the court said that a paternity action is an action in personam. To the same effect see, *In Re Hindi,* 71 Ariz. 17, 222 P. 2d 991 (1950) and *State v. Murphy,* 354 S.W. 2d 42 (Mo., 1962). In a lengthy note entitled "Developments in the Law-State Court Jurisdiction," in 73 Harv. L. Rev. 909, at page 979, it is said:

"*Paternity.*—For jurisdictional purposes the action of paternity has been uniformly treated very much like the ordinary tort action. * * * Although the paternity plaintiff has occasionally argued that jurisdiction should be assumed ex parte, that contention has been universally rejected even by courts which have found no difficulty in sustaining ex parte jurisdiction over divorce, on the ground that there exists a fundamental difference between actions such as divorce which merely sever a personal status—although they may continue preexisting obligations—and

actions like paternity which impose new affirmative duties and obligations. * * * Because of the extremely harsh and unfair consequences of an erroneous judgment, jurisdiction in paternity cases should be allowed only upon compliance with the general criteria of fairness and convenience applicable to other types of personal actions considered above."

[5, 6] A judgment establishing the status of paternity necessarily fixes upon the adjudicated father a personal obligation for the support of the minor child. We, therefore, conclude that such judgment is one in personam and can be rendered only by a court having jurisdiction over the person of the defendant. It would, of course, be true that the order of the Hawaii court purporting to fix the amount which the defendant must pay for the support of his alleged minor child is a judgment in personam which the courts of this State are not required to give full faith and credit since the Hawaii court did not have jurisdiction over the person of the defendant. Since the Hawaii court's adjudication of paternity, if given full faith and credit, is a final determination of the defendant's personal liability, though the amount to be paid remains undetermined, we conclude that it also is an adjudication in personam.

It follows that the courts of this State are not required to give full faith and credit to the determination by the Family Court of Hawaii that the defendant is the father of Noelani May Cox. In the present action brought under the Uniform Reciprocal Enforcement of Support Act, G.S. Chapter 52A, the issue of paternity may be relitigated and, in that relitigation, the defendant is entitled to an order directing that the mother and child submit to a blood grouping test as provided in G.S. 8-50.1. If it be determined that the defendant is the father of the child, the duty of support is that provided in G.S. 52A-8.

We find no error in the judgment of the Court of Appeals reversing the denial by the District Court of the defendant's motion for a blood grouping test and his motion for a trial by jury.

Affirmed.

STATE OF NORTH CAROLINA v. AUDWIN BRENT JACKSON

No. 1

(Filed 7 March 1977)

1. **Criminal Law § 76— motion to suppress evidence — voir dire hearing — findings of fact**

Upon a motion to suppress evidence, the proper procedure is for the judge, in the absence of the jury, to hear the evidence and make findings of fact upon which the admissibility of the allegedly incompetent evidence depends, and his findings of fact, if supported by competent evidence, are conclusive on appeal.

2. **Criminal Law § 76— admissibility of in-custody statements — sufficiency of evidence to support findings**

The evidence on *voir dire* supported findings by the trial court that defendant was not coerced into making in-custody statements, was not harassed or abused, and was fully advised of his constitutional rights, that any statements he may have made were made at a time when his physical and mental faculties were unimpaired, and that such statements were made freely, voluntarily and understandingly.

APPEAL by defendant from *McKinnon, J.*, at the January 1976 Criminal Session of WAKE.

Upon an indictment, proper in form, the defendant was tried for the murder of Kirk Dugger Jones. He was found guilty of murder in the first degree and the record shows that he was sentenced to death, but it appears both from the brief of the defendant and the brief of the State that, following the decision of the Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976), that sentence was vacated and a sentence to imprisonment for life was substituted therefor.

The record on appeal does not show any of the evidence introduced before the jury, nor does it contain any part of the instructions of the trial judge to the jury.

The defendant was represented at his trial, and at the pretrial hearing of his motion to suppress certain evidence, by counsel employed by his mother. Upon appeal he was represented by the same counsel, pursuant to appointment by the court.

There are only two assignments of error, both of which relate to the denial of his pretrial motion to suppress evidence,

this motion being heard before and denied by Bailey, J. These assignments of error are as follows:

"1. The Court erred in making the following findings of fact * * * as the same finds [sic] no support in the evidence:

'However, the Court finds as a fact that the defendant, Jackson, was not * * * coerced into making any statement of any sort, was in no ways [sic] harassed or abused, that he was fully warned of his constitutional rights, and to the extent he made any statement, that he made the statement at a time when his physical and mental faculties were unimpaired and that such statements were freely, voluntarily and understandingly made * * *.'

"The Court erred in admitting into evidence inculpatory statements said to have been made by the defendant to the investigating police officers of Raleigh; to Mr. DeSoto, representative for McDonald's; to Mr. Crumpler, Assistant District Attorney, for the reasons: they were made after refusal to allow him to consult with counsel; were obtained by trickery, artifice and fraud and were coerced and involuntary, all in violation of his rights as provided by the Due Process Clause of the 14th Amendment to the Constitution of the United States, and Article I, Section 19, of the Constitution of the State of North Carolina."

The only evidence set forth in the record on appeal is that offered before Bailey, J., upon the defendant's motion to suppress. From this it appears that the manager of a McDonald's Restaurant in Raleigh was shot and killed in the course of a hold-up as he was preparing to close the restaurant on 17 May 1975. Acting upon information received, police officers discovered near the restaurant, hidden under a quantity of straw, a pistol and a bag containing rolls of coins apparently taken from the restaurant. The officers maintained surveillance over this area and some time later the defendant and a female companion drove up and were observed to approach the pile of straw and to begin to dig into it. They were thereupon arrested. Officers searching the home of the defendant's mother, with whom he lived, the search being with her consent, found therein a box of pistol bullets of the same caliber as the pistol found under the straw. At the time of his arrest, the defendant was

16 years of age and lived with his mother in a part of the City of Raleigh which was a substantial distance from the place where the pistol and money were found. When arrested, he told the officers that his purpose in coming to that place was to get some straw. While in custody, the defendant made to Mr. Crumpler, Assistant District Attorney, and to Mr. DeSoto, Security Officer for the McDonald Restaurant chain, statements to the effect that he and a companion went to the restaurant for the purpose of robbing it, the companion having a pistol for which the defendant supplied bullets and, during the course of the robbery, the companion shot and killed the manager of the restaurant. Presumably, evidence of these oral statements by the defendant was introduced before the jury, Judge Bailey having denied the pretrial motion to suppress.

At the hearing upon his motion to suppress, the defendant testified to the following effect:

Following his arrest he was handcuffed, carried to the police station, fingerprinted and interrogated by police officers. He requested permission to use the telephone but there was no response to his request. Because the defendant did not cooperate with the officer taking his fingerprints, that officer mashed his hand "too hard," telling him he was not there to play, another struck him on the head with a pair of handcuffs and they cursed and threatened him, telling him he would have to let them take his fingerprints to prove his innocence. When the defendant's mother came to the jail, he did not tell her about being struck because he did not want to "upset her." He kept stating to the officers that he was innocent. The officers were armed and he was afraid he was going to be beaten. He signed a waiver of his right to counsel and an acknowledgment that he had been advised of his constitutional rights without reading it.

To all of the officers' interrogations the defendant replied, "I don't have no comment about nothing; I don't have nothing to say." The officers told him they knew he had killed the murder victim because they had his partner, and the girl who was with him at the time of his arrest had signed a statement to the effect that they were there to pick up some money. They also told him that if he did not say anything about it, that would be used against him in court. Nevertheless, the defendant testified: "I never made any statement to Mr. Brinson [the

investigating officer] involving myself in the crime. I never told Mr. DeSoto [the security officer for the McDonald Restaurant chain] that I committed this crime. After talking to Officer Brinson, I didn't talk to anyone."

Mr. DeSoto offered the defendant coffee, a Coca-Cola and cigarettes but the defendant said he did not want anything. Again, the defendant testified, "I never made a statement to Mr. DeSoto that I was involved in this thing." Mr. DeSoto told him they knew the defendant "did it," so the defendant "might as well admit to it and tell who pulled the trigger" and the District Attorney could "take it out easy" on the defendant.

After Mr. DeSoto left the room, Mr. Crumpler, the Assistant District Attorney, came in. The defendant said to him, "I don't have no comment about the crime, I don't know anything about it." Mr. Crumpler said he was going to hang the defendant but the defendant replied, "I don't have no comments." Again, the defendant testified, "I made no comments of any sort either to Mr. DeSoto or Mr. Crumpler."

The defendant told Mr. Crumpler he wanted to see his lawyer. Mr. Crumpler, in reply, told the defendant that his mother was "out there" and asked if he wanted to see her. The defendant replied, "That would be all right but I want to see my lawyer too." The defendant continued to refuse to make any comment about the alleged crime and Mr. Crumpler said he was going to prosecute the case and was going to try his best to send the defendant to death row. Nevertheless, the defendant "didn't say anything about the crime."

At the hearing of the motion to suppress, the State's evidence was to the following effect:

Detective Sergeant Williams of the Raleigh Police Department testified:

He talked to the defendant while he was in custody. First, he advised the defendant of his constitutional rights, reading to him and giving him a written statement of these (as set forth in *Miranda v. Arizona,* 384 U.S. 436), which the defendant read and a waiver of which he also read and signed. Thereafter, Mr. Williams asked the defendant concerning his connection with the robbery and murder and the defendant denied any knowledge of these. The defendant did not complain to Mr. Williams, the superior of the other officers conducting the investigation,

of being struck on the head with handcuffs. The defendant appeared to be sober, not affected by any drug, intelligent and in full possession of his faculties.

Detective Brinson of the Raleigh Police Department, the principal investigator in the case, testified:

The defendant was not handcuffed while Detective Brinson talked with him. Detective Brinson was armed and the other officers assisting him were probably armed also. He was present when the defendant signed the waiver of his constitutional rights, which waiver Mr. Brinson read to him. No one threatened him or told him he had to sign it. The defendant was coherent, neat and clean and normal in appearance. Prior to talking to him, Mr. Brinson had received information through a confidential informer that the defendant was a participant in the robbery of the restaurant and had actually done the killing. At no time did the defendant request to leave the interrogation room, to use the telephone, to stop the interrogation, to get an attorney, to call or see his mother or to be given anything to eat or drink. At no time did Mr. Brinson make any promise or threat to the defendant, or strike him with handcuffs or otherwise. The defendant made no incriminating statement to Mr. Brinson.

Mr. Richard DeSoto, Security Officer for the McDonald's Restaurant chain, testified:

With the permission of the investigating police officers, but not at their request, he talked to the defendant, they being alone in the interrogation room. He informed the defendant that he was connected with the McDonald Corporation and had been sent to Raleigh to assist the police in the investigation of the murder. He did not tell him it would be better for him to cooperate with the police and the District Attorney. He offered the defendant coffee and a Coca-Cola, which the defendant declined.

He informed the defendant that an Assistant District Attorney (Mr. Crumpler) was present in the police station and advised the defendant to talk to him if the defendant "had any facts in the case that would help him." He told the defendant that if the defendant was not the person who had pulled the trigger, he might wish to tell that to the District Attorney. The defendant then asked Mr. DeSoto what the word "accessory"

meant and Mr. DeSoto advised him that an accessory would probably be charged "the same as the person that pulled the trigger." Mr. DeSoto never told the defendant that the District Attorney would "make a deal with him." He told the defendant that the District Attorney "would abide by whatever word he said * * * and if he said he would use anything against him it would be that way also."

In response to Mr. DeSoto's inquiry, the defendant stated that his companion pulled the trigger and that when the defendant last saw the manager of the restaurant, the manager was "lying on the floor in the back of the store," the defendant being "outside the doorway." The defendant said that his companion had shot the manager so as "to leave no witnesses." He refused to identify his companion.

Mr. DeSoto promised the defendant absolutely nothing. He did not threaten the defendant and never touched him. The defendant was not handcuffed and Mr. DeSoto was not armed. The defendant did not appear to be under the influence of alcohol or drugs and indicated that he felt all right and had never used drugs. He was coherent, asked intelligent questions and appeared to be in control of his mental and physical faculties.

The defendant seemed to be very knowledgeable as to what he was doing and to be taking care of himself very well. He did not request Mr. DeSoto to call a lawyer or request that he be permitted to use the telephone. He showed no sign whatever of having been abused and made no comment whatever with reference to any abuse.

Assistant District Attorney Crumpler testified:

Having been advised that the defendant wanted to talk to him, he talked with the defendant, identifying himself as an Assistant District Attorney. He was alone with the defendant in the interrogation room. He told the defendant to disregard anything that anybody else might have told him about benefits that he might gain from talking to Mr. Crumpler. He further told the defendant no promises could be made to him except by Mr. Crumpler and that he was not about to make him any promises. Mr. Crumpler then "took out a waiver form" and advised the defendant "of his constitutional rights," reading those rights to him and asking him if he understood each one, in some

instances explaining the right. The defendant stated that he understood each of those rights and that he did not want to have an attorney present while Mr. Crumpler was talking to him. At no time did Mr. Crumpler raise his voice to the defendant, speak harshly to him, abuse him, threaten him or make him any promises.

After the defendant made a statement to Mr. Crumpler, the defendant asked some questions about "plea bargaining," which Mr. Crumpler answered. At no time did Mr. Crumpler tell the defendant that he would enter into any plea bargaining arrangement with the defendant. On the contrary, he told the defendant that "at this particular point" he was not going to do any dealing of any kind whatsoever.

The defendant did not appear to be under the influence of drugs or liquor. He seemed normal physically, complained of no injuries or mistreatment, spoke in an intelligent manner and was coherent and unemotional. He seemed to Mr. Crumpler "to be self-assured, almost to the point of being cocky." He seemed "to know exactly what he was doing, quite confident of himself," and impressed Mr. Crumpler as being much more mature than a 16 year old, which Mr. Crumpler knew him to be. He never said anything to Mr. Crumpler about wishing to make a telephone call or to have a lawyer present. Mr. Crumpler advised him that he could have a lawyer, his mother or anyone else with him during the questioning and advised him that any statement he made could be used against him in court.

The defendant told Mr. Crumpler that he and his companion went to McDonald's for the purpose of robbing it, that the other man shot the manager and the defendant was surprised at the shooting, though he had furnished the bullets for the gun, which was a .38 caliber revolver, and had handled the gun so that his fingerprints might be on it.

Rufus L. Edmisten, Attorney General, by Ben G. Irons II, Associate Attorney, for the State.

Charles V. Bell for defendant.

LAKE, Justice.

[1, 2] It is well settled that, upon a motion to suppress evidence, the proper procedure is for the judge, in the absence of the jury, to hear the evidence and make findings of fact upon

which the admissibility of the allegedly incompetent evidence depends. His findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, cert. den., 386 U.S. 911 (1967); *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965). Quite obviously, the findings of fact made by Judge Bailey, which the defendant assigns as error, were amply supported by competent evidence. There is, therefore, no merit in this assignment of error.

The record on appeal does not indicate whether the defendant testified before the jury in his own behalf or, if so, whether he then adhered to his denial that he made the incriminating statements attributed to him by Mr. DeSoto and Mr. Crumpler. If he did so testify before the jury, this conflict between his testimony and that of the witnesses for the State, assuming that they testified before the jury as to the making of such statements by the defendant, simply raised a question of fact for the jury which determined that matter in favor of the State.

The findings of fact made by Judge Bailey concerning the voluntary nature of the statements made by the defendant to Mr. DeSoto and Mr. Crumpler being conclusive upon appeal, there was no error in admitting the inculpatory statements by the defendant into evidence before the jury, assuming that they were so admitted. Consequently, there is no merit in the defendant's second assignment of error.

No error.

LARRY P. INSCOE v. DeROSE INDUSTRIES, INC. AND CONTINENTAL CASUALTY CO.

No. 95

(Filed 7 March 1977)

1. Master and Servant § 57— workmen's compensation — injury not occasioned by intoxication

Evidence was sufficient to support the finding by the Industrial Commission that plaintiff's injury was not occasioned by the intoxication of the plaintiff where the evidence tended to show that plaintiff was driving about 55 mph in the southbound lane of a two-lane road

when he saw a car approaching him in his lane of travel; plaintiff had only a few seconds to make a movement to avoid a collision; plaintiff moved into the northbound lane, but the approaching car returned to its proper lane of travel and collided with plaintiff's vehicle; and plaintiff and the driver of the other vehicle in the collision were given breathalyzer tests after the accident, and both registered a blood alcohol level of greater than .10%.

2. Master and Servant § 63— workmen's compensation — injury on the highway — accident arising out of and in the course of employment

Evidence was sufficient to support the conclusion of the Industrial Commission that the accident in question arose out of and in the course of plaintiff's employment where such evidence tended to show that plaintiff was employed as a serviceman by defendant and that he kept his own hours; plaintiff frequently worked on Saturdays; the accident occurred on a Saturday; and at the time of the accident, plaintiff was on his way to complete a job which he had begun earlier for his employer.

Justice LAKE dissents.

ON petition for discretionary review of the decision of the Court of Appeals reported in 30 N.C. App. 1, 226 S.E. 2d 201 (1976) (opinion by *Morris, J., Vaughn, J.,* and *Clark, J.,* concurring), which affirmed the order of the North Carolina Industrial Commission entered 21 July 1975, awarding compensation to the plaintiff. This case was docketed and argued as No. 152, Fall Term, 1976.

The evidence for the plaintiff before the Industrial Commission tended to show that on 29 September 1973, plaintiff was employed as a serviceman to repair mobile homes manufactured and sold by the defendant (employer), who furnished plaintiff tools and a company van to go to and from jobs away from the plant. The vehicle was kept at plaintiff's home and was to be used only in connection with his work. Plaintiff kept his own account of the time he spent working and was paid on the basis of his records. Plaintiff was authorized to and did frequently work on Saturdays when the need arose. He had previously been convicted of operating a motor vehicle under the influence of intoxicating beverages and on 29 September 1973 had a limited driving permit whereby he was allowed to drive while at work during daylight hours, Monday through Saturday only.

Sometime before 29 September 1973, plaintiff had installed some carpet in a mobile home for a customer of the defendant at Lawson's Mobile Home Park on Highway 321 between Gas-

tonia, North Carolina and Clover, South Carolina. Before he completed the job he ran out of molding. On 29 September 1973, he found some molding while cleaning his truck and decided to finish the job.

Because he needed someone to assist him, he went to Bessemer City and picked up Silvo Falls, another of defendant's employees. There was contradicting evidence as to whether plaintiff drank two beers in Bessemer City or whether he had consumed some beer at home earlier in the day. Plaintiff and Falls left in the van from the plaintiff's home traveling south on Highway No. 161 in the direction of Lawson's Mobile Home Park. Plaintiff's wife followed in a station wagon because there were only two seats in the van. She went along to look at a mobile home that she was interested in buying in the same trailer park.

Plaintiff was driving about 55 miles per hour. As he was coming out of a curve, about two miles south of Kings Mountain on Highway No. 161, the plaintiff saw a car headed north in his lane of travel (southbound lane). The highway at this point was straight and level for a distance of one-fourth to one-half a mile. It was still daylight around 7 p.m. and the weather was clear. The approaching vehicle, a Toyota with six occupants, was traveling at an estimated speed of 70 to 80 miles per hour. As the Toyota approached, plaintiff applied his brakes and tried to go around the other vehicle by pulling into the northbound (his left hand) lane. Shortly thereafter, the oncoming vehicle returned to its proper lane of travel and collided with plaintiff's vehicle.

As a result of the accident, plaintiff's back was broken and he was left permanently paralyzed from his waist down.

The defendant's evidence tended to show that the plaintiff was given a breathalyzer test at the hospital almost two hours after the collision and registered a .15% blood alcohol level by weight. No other sobriety tests were administered to him. Expert testimony indicated that a breathalyzer reading of .10% or greater would mean the person was under the influence of alcohol at the time of the test. The officers who performed the test testified that plaintiff smelled strongly of alcohol, mumbled when he talked, and had a flushed face and red eyes. Plaintiff was arrested at the hospital for driving under the influence of intoxicating beverages.

David Orville Houck, the driver of the Toyota, testified that the plaintiff had originally been in the northbound lane of travel as he came out of the curve. Houck shifted to the southbound lane just as plaintiff moved to the same lane. Houck then returned to his proper lane (northbound) at about the same time the plaintiff shifted to that lane and thereafter, the collision ensued.

Houck and a group of companions had been riding around in the Toyota drinking intoxicating beverages all Saturday afternoon before the accident. Houck registered a .14% blood alcohol level on the breathalyzer test and was also charged with driving under the influence of intoxicating beverages.

According to the investigating highway patrolman, the collision occurred in the northbound lane. The road at the point of the accident had a four feet rough asphalt shoulder and beyond it a twelve to thirteen feet dirt and grass shoulder on either side. While at the hospital, both Mr. and Mrs. Inscoe told the officer that, at the time of the accident, Mr. Inscoe "was taking the truck somewhere south and that she was going to pick him up."

Mr. Inscoe signed an insurance form dated 19 November 1973 on which boxes were checked by a typewriter indicating that the accident did not occur while the claimant was at work and that no claim was being made for Workmen's Compensation. It appeared that defendant's agents had selected the claim form and filled it out before submitting it to the plaintiff for his signature.

The Deputy Commissioner of the North Carolina Industrial Commission determined that the plaintiff " . . . was intoxicated at the time of his injury on 29 September 1973, and said accident and resulting injury was occasioned by his intoxication," and thereupon denied plaintiff's claim for compensation.

Plaintiff appealed to the Full Commission, which received no additional evidence. In reversing the Deputy Commissioner's decision, the Full Commission adopted as its own the stipulations and findings of fact of the Deputy Commissioner except for amending findings of fact numbered 9, 14, and 15 to read as follows:

> "9. . . . plaintiff met an on-coming car headed north on Highway 161. The highway at this point is straight and

level for a distance of one-fourth to one-half mile. It was daylight, and the weather was clear. The approaching car was traveling at a high rate of speed and was in plaintiff's lane of travel. When the on-coming vehicle did not return to its proper lane of travel, plaintiff applied his brakes and tried to go around the other vehicle by pulling into the northbound lane. The other vehicle then returned to its proper lane of travel and collided with plaintiff's vehicle which was still in the northbound lane.

"14. Plaintiff's blood alcohol level was .15% approximately two hours after the accident which gave rise to his injuries. Plaintiff was intoxicated at the time of the accident. . . . However, said accident and injury were not occasioned by his intoxication.

"15. Plaintiff sustained the injuries complained of by accident arising out of and in the course of his employment."

Other pertinent facts will be set out in the opinion.

Carl W. Howard for plaintiff appellee.

Jones, Hewson & Woolard by Harry C. Hewson and R. G. Spratt III for defendant appellant.

COPELAND, Justice.

At the time of the collision, G.S. 97-12 provided in relevant part as follows:

"No compensation shall be payable if the injury or death was *occasioned by* the intoxication of the employee. . . . The burden of proof shall be upon him who claims an exception or forfeiture under this section." (Emphasis supplied.)

This statute was amended by the 1975 General Assembly to read as follows:

"No compensation shall be payable if the injury or death to the employee was *proximately caused by* . . . [h]is intoxication. . . . The burden of proof shall be on him who claims an exemption or forfeiture under this section." (Emphasis supplied.)

Defendant contended before the North Carolina Industrial Commission and the Court of Appeals that it was error under former G.S. 97-12 to allow benefits to the claimant under the facts of this case. The Court of Appeals affirmed the award of the Industrial Commission on the basis of the facts in the record and went on to hold that G.S. 97-12 requires denial of compensation only when the claimant's intoxication was *the sole* proximate cause of the accident and resulting injuries, rather than *a* proximate cause.

We believe the Court of Appeals prematurely decided an issue not properly presented. There is no reason to reach the question of whether the "occasioned by" language of G.S. 97-12 contemplates that intoxication must be *a* or *the sole* proximate cause of the accident before benefits are forfeited. We think the Industrial Commission could reasonably have concluded that plaintiff's intoxication was not a cause of the accident.

The following general principles have been laid down by this Court in Workmen's Compensation cases.

> "Under the Workmen's Compensation Act the Industrial Commission is made the fact-finding body, and the rule is, as fixed by statute and the uniform decisions of this Court, that the findings of fact made by the Commission are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence. G.S. 97-86 (Citations omitted.) This is so, even though the record may support a contrary finding of fact. (Citations omitted.)" *Rice v. Chair Co.*, 238 N.C. 121, 124, 76 S.E. 2d 311, 313 (1953).
>
> "The Workmen's Compensation Act, G.S. 97-86, vests the Industrial Commission with full authority to find essential facts. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. (Citations omitted.) The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. (Citation omitted.)" *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E. 2d 272, 274 (1965).

"In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision. (Citations omitted.)" *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E. 2d 760, 762 (1950).

The appellate courts of this State have dealt with the intoxication defense in several cases. In *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 101, 189 S.E. 2d 769, 771 (1972), the Court of Appeals correctly noted that:

"G.S. 97-12 does not require the Commissioner to find whether the employee was intoxicated or not as a matter of law. This statute does not provide for forfeiture of benefits if an employee was intoxicated at the time of the injury, but only if the injury or death 'was occasioned by the intoxication.' The Commissioner made the required finding for compensation . . . which . . . was supported by ample competent evidence."

The Court of Appeals further explained that:

"Although there was contradictory evidence, the Commissioner found that the injuries and death [of the claimant were] 'not occasioned by intoxication.' . . . 'By making an award in this case the Commission has found that the defendants failed to carry the burden of proof that the plaintiff's injury was caused by his intoxication, and we are bound by such finding.' " *Lassiter v. Town of Chapel Hill, supra* at 101, 189 S.E. 2d at 771, citing, *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 556, 162 S.E. 2d 119, 121 (1968).

In the *Yates* case, *supra,* also decided by the Court of Appeals, the claimant's car left the highway in a curve and struck a tree on a dark and foggy night. In spite of the evidence that immediately after the wreck a whiskey bottle and two beer cans were found in the plaintiff's car, the Industrial Commission found the plaintiff's accident was not "occasioned by intoxication." In that case the Court of Appeals decided it was bound by this finding.

In a case of this Court similar to the one at bar, *Gant v. Crouch,* 243 N.C. 604, 91 S.E. 2d 705 (1956), the evidence for the plaintiff tended to show that the plaintiff's truck was forced off a very narrow mountain road by other traffic and that the shoulder of the road gave way, causing the vehicle to turn over and roll down the mountainside killing plaintiff's intestate. In that case there was a conflict in the evidence as to whether the accident causing the death of the employee was due to his intoxication or to traffic forcing his vehicle from the road. The Industrial Commission (in a 2-1 decision) found the accident was not occasioned by the employee's intoxication. Justice Higgins, speaking for our Court, said:

> " 'There was competent evidence to support the contention of both plaintiff and defendant upon this question, but the Commission having found as a fact that the accident in which the plaintiff was injured was not occasioned by his intoxication, the Judge of the Superior Court was bound by such finding, and we are likewise bound.' " *Gant v. Crouch, supra* at 607-8, 91 S.E. 2d at 707, citing, *Brooks v. Carolina Rim & Wheel Co.,* 213 N.C. 518, 519, 196 S.E. 835, 836 (1938).

In *Brooks v. Carolina Rim & Wheel Co., supra,* the facts were somewhat similar to those in the instant case. The plaintiff was injured in a two-car collision on the highway. While he admitted having taken a "jigger" of whiskey about four or five hours before the accident, the plaintiff denied the accident was occasioned by his intoxication. Our Court determined in that case it was bound by the Commission's finding that the accident was not occasioned by intoxication, even though there was competent evidence to support the defendant's contentions.

When the aggrieved party appeals to an appellate court from a decision of the Full Commission on the theory that the underlying findings of fact of the Full Commission are not supported by competent evidence, the appellate courts do not retry the facts. *Moses v. Bartholomew,* 238 N.C. 714, 78 S.E. 2d 923 (1953). It is the duty of the appellate court to determine whether, in any reasonable view of the evidence before the Commission, it is sufficient to support the critical findings necessary for a compensation award. *Keller v. Electric Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342 (1963).

[1] Analyzing the evidence before the Industrial Commission on the issue of causation, we believe the facts presented would have justified a finding for either the plaintiff or the defendant. The Commission has found the facts and determined that the accident was not *occasioned by* the intoxication of the plaintiff. The plaintiff had no more than fifteen to twenty seconds in which to decide whether to continue straight ahead, turn to the right or to the left. Had he turned to the right he could have safely stopped the van on the shoulder of the road. He elected to turn to the left and thus, in retrospect, exercised bad judgment. It is axiomatic that hindsight is far superior to foresight. With the burden of proof resting on the defendant, the Industrial Commission was justified in concluding that even though plaintiff was intoxicated, his intoxication was not responsible for his bad judgment. Considering the speeds of the two cars and the short distance involved, the accident might have happened in any event. The evidence reasonably supports the view that plaintiff's state of intoxication was neither *the sole* or *a* proximate cause of the accident. Defendant's assignment of error is overruled.

[2] Next, defendant contends the Industrial Commission and the Court of Appeals erred in concluding that the accident arose out of and in the course of plaintiff's employment.

Once again, conflicting evidence in the record would have permitted the Industrial Commission to find for either party. Plaintiff's evidence tended to show that he was employed as a serviceman by the defendant and that he kept his own hours. It further showed that for the past few months plaintiff had worked every Saturday except one. On this occasion plaintiff testified that he was on his way to Lawson's Mobile Home Park to complete some carpet work on a mobile home that he had commenced earlier.

The Industrial Commission has found the facts to support its conclusions of law that the plaintiff suffered injury by accident arising out of and in the course of his employment and these findings are amply supported by facts in the record. When the findings of the Industrial Commission are supported by competent evidence, they are conclusive on appeal. *Stubblefield v. Watson Electrical Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882 (1970).

For the reasons stated in this opinion the result reached by the Court of Appeals is

Affirmed.

Justice LAKE dissents.

STATE OF NORTH CAROLINA v. WILLIAM WELDON STEWART

No. 94

(Filed 7 March 1977)

1. **Homicide § 19— bad conduct or immorality of decedent — inadmissibility**

The trial court in a homicide case properly excluded testimony that the two victims were operating an illegal liquor business and possibly a house of prostitution since defendant relied on the defense of alibi, not self-defense, and the excluded testimony did not purport to show a violent and dangerous reputation.

2. **Criminal Law § 105— offer of evidence by defendant — waiver of prior nonsuit motion**

Since defendant offered evidence at the trial he waived his right to urge as error on appeal the denial of his motion to dismiss interposed at the close of the State's evidence; however, his motion for nonsuit at the close of all the evidence draws into question the sufficiency of all of the evidence to go to the jury.

3. **Homicide § 18— premeditation and deliberation — circumstantial evidence**

Premeditation and deliberation may be inferred from circumstantial evidence.

4. **Homicide § 18— premeditation and deliberation — circumstances to consider**

Among the circumstances to be considered in determining whether a murder was committed with premeditation and deliberation are (1) want of provocation, (2) the conduct of the accused before and after the killing, (3) threats and declarations of the accused, (4) the use of grossly excessive force or the dealing of lethal blows after the deceased has been felled.

5. **Homicide § 21— premeditation and deliberation — sufficiency of evidence**

The State's evidence of premeditation and deliberation was sufficient to carry two charges against defendant for first degree murder to the jury where it tended to show that defendant's son cut himself

with a knife when one victim told him to leave because she was too old for him; the victim, defendant and defendant's son thereafter had a long talk at the victim's house; defendant was armed with a .38 pistol at that time; the victim drove defendant's son to his mother's house; when the son later refused to go home with defendant, defendant stated, "If you don't, I am going to go down there and pump six bullets in them"; defendant thereafter entered the house of the victims, shot one victim four times, shot the second victim three times, doused their bodies with gasoline and set them on fire; after the killings defendant left the .38 caliber pistol and three empty cartridges with his brother-in-law and stated that he had just killed one victim, shot the other victim in the head, and threw gas on them and set them afire.

6. **Criminal Law § 69— exclusion of telephone conversation — absence of prejudice**

In this prosecution for first degree murder, defendant was not prejudiced by the exclusion of a telephone conversation in which deceased told defendant's wife that she wanted to tell defendant that his son had cut himself and planned to kill himself since the testimony merely established a reason for the appearance of defendant near deceased's home on the afternoon of the murder, his presence there was later established by other testimony, and the telephone conversation was in no way exculpatory.

7. **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 charge on the lesser included offense of manslaughter where the State's evidence tended to show that defendant entered the house of the victims, shot one victim four times and the other victim three times, doused their bodies with kerosene and set their bodies on fire, and where defendant relied on the defense of alibi and produced no evidence tending to rebut the State's evidence with respect to the nature of the crime.

8. **Constitutional Law § 36; Homicide § 31— first degree murder — substitution of life imprisonment for death penalty**

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

DEFENDANT appeals from judgments of *Martin (Perry), J.*, 26 April 1976 Special Criminal Session, HARNETT Superior Court. Docketed and argued in this Court as Case No. 150 at the Fall Term 1976.

Defendant was charged in separate bills of indictment with the first degree murder of Dorothy Jean Tolar Jordan, Case No. 75-CR-8792, and Thelma Maynor Whitehead, Case No. 75-CR-8793, on 29 September 1975 in Harnett County. The cases were consolidated for trial.

The State's evidence tends to show that about 8:30 p.m. on 29 September 1975 three young men saw a black car, described as a 1973 or 1974 model Thunderbird, leaving the yard of the victims Dorothy Jean Tolar Jordan and Thelma Maynor Whitehead. It was dark at the time and these young men could see fire coming from the windows of the Dorothy Jean Tolar Jordan dwelling. The fire was reported at 8:45 p.m.

Firemen arrived on the scene and found the bodies of Dorothy Jean Tolar Jordan and Thelma Maynor Whitehead on the floor. Mrs. Whitehead was dead and Mrs. Jordan died a short time later. There was a strong odor of a flammable substance that smelled like kerosene in the house and both bodies were badly burned. An autopsy performed on Thelma Whitehead revealed three bullet wounds—one in the top of the head, the second and third in the right upper portion of the abdomen. All three bullets were recovered. An autopsy on Mrs. Jordan revealed four gunshot wounds—in the left temple, left upper abdomen, the left wrist and the right forearm. One bullet was recovered from the right arm while the other three had exited the body.

The State's evidence further tends to show that at about 8:35 p.m. on the night of 29 September 1975 defendant went to the home of Fred Hall, a man he had known for many years and who had just recently married defendant's sister. He handed Mr. Hall a .38 caliber pistol and some empty cartridges. He told Mr. Hall: "I just killed old Jean Tolar . . . and there stood Thelma Whitehead, tow-pow right in the top of her head." Then he told Mr. Hall he threw gasoline on their bodies and set them on fire, adding, "I went down there during the day this afternoon . . . I saw blood on my boy's clothes . . . I told them people a long time ago if they ever messed my boy up down there that I'd go back down there and kill them all." Defendant then stated he was going to the auction and drove away in a black car.

The gun and cartridges were recovered by the State Bureau of Investigation. The weapon was offered in evidence as State's Exhibit 29, and the evidence of ballistics experts tends to show that the cartridges had been fired in that weapon and that the bullets recovered from the body of each victim were also fired from State's Exhibit 29.

Evidence for defendant tends to show that on 29 September 1975 defendant's neighbor Yvonne Rainer had the keys to

defendant's Thunderbird which was parked in the yard; that Mrs. Rainer went to defendant's home between 6 and 7 p.m. and saw defendant leave the house in his blue Ford truck around 6:00-6:30 wearing a white T-shirt, white pants, brown London Fog and a brown hunting cap. This neighbor next saw defendant about 10:30 p.m.

Defendant's sister testified that she went to an auction about 7:30 p.m. on the night in question and stayed until 8:50 p.m.; that defendant's Thunderbird was parked at his home when she left; that defendant was seen at the auction by many people. Other defense witnesses testified that they saw defendant at the auction between 7:30 and 9:30 p.m. on 29 September 1975. Defendant himself did not testify.

The trial judge submitted as permissible verdicts in each case (1) guilty of murder in the first degree, (2) guilty of murder in the second degree, or (3) not guilty. The jury found defendant guilty of murder in the first degree in the Dorothy Jean Tolar Jordan case (No. 75-CR-8792) and guilty of murder in the second degree in the Thelma Maynor Whitehead case (No. 75-CR-8793). Defendant was sentenced to death in the Jordan case and to life imprisonment in the Whitehead case. Errors assigned on appeal will be discussed in the opinion.

Rufus L. Edmisten, Attorney General; M. E. Rich, Jr., Deputy Attorney General; James E. Scarbrough, Associate Attorney, for the State of North Carolina.

D. K. Stewart, attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant sought to elicit testimony that the two victims were operating an illegal liquor business and possibly a house of prostitution. Exclusion of such evidence constitutes defendant's first assignment of error.

It is generally recognized that in a prosecution for homicide where defendant pleads self-defense, evidence that the deceased was "a violent and dangerous fighting man" is admissible if such propensity was known to defendant or if the evidence in the case is wholly circumstantial. *State v. Morgan*, 245 N.C. 215, 95 S.E. 2d 507 (1956). *See also* 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 106 and cases cited. Such evi-

dence *must* be restricted to the character of the deceased for violent action—the general bad conduct or immorality of the decedent may not be proved. *State v. Hodgin,* 210 N.C. 371, 186 S.E. 495 (1936). Thus in *State v. Taylor,* 213 N.C. 521, 196 S.E. 832 (1938), testimony relating to the "bad reputation of deceased's house 'for drinking and frolicking parties'" was properly excluded.

In upholding the exclusion of testimony relating to the homosexuality of the decedent in *State v. Hodgin, supra,* this Court quoted with approval the following statement from Chamberlayne, Modern Law of Evidence § 3295:

> "That the deceased in a case of homicide was a violent, turbulent man, may, on the other hand, be shown by the accused under a plea of self-defense, *but not the fact that he was engaged in selling whiskey, was unchaste or that he was a drinking man where there was no evidence that he had been drinking on the occasion in question.*" (Emphasis added.)

Here, defendant pleads alibi, not self-defense, and the evidence proffered does not purport to show a violent and dangerous reputation. Therefore, under long-standing rules of evidence, defendant's first assignment of error is overruled.

Defendant contends the State failed to prove premeditation and deliberation and assigns as error the denial of his motions to dismiss at the close of the State's evidence and at the close of all the evidence.

[2] Since defendant offered evidence at the trial he waived his right to urge as error on appeal the denial of his motion to dismiss interposed at the close of the State's evidence. G.S. 15-173; *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Nevertheless, his motion for nonsuit at the close of all the evidence draws into question the sufficiency of all of the evidence to go to the jury. G.S. 15-173. *See State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969); *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955). A motion to dismiss will be treated the same as a motion for judgment of nonsuit. *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969).

Such motion requires the trial judge to consider the evidence in the light most favorable to the State and to 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). All 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). 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, the motion must be denied. So, upon motion for nonsuit, the question is whether there is substantial evidence—direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the accused committed it. *State v. Smith and Foster,* 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975). With these rules in mind, we now consider whether the State's evidence of premeditation and deliberation was sufficient to carry the first degree murder charges to the jury.

[3, 4] Premeditation and deliberation may be inferred from circumstantial evidence. *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484 (1969). Among the circumstances to be considered in determining whether a murder was committed with premeditation and deliberation are (1) want of provocation, (2) the conduct of the accused before and after the killing, (3) threats and declarations of the accused, (4) the use of grossly excessive force or the dealing of lethal blows after the deceased has been felled. *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Duncan, supra; State v. Walters, supra; State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961).

[5] A review of the evidence discloses that William Clifford Stewart, 22-year-old son of defendant, had been going with Dorothy Jean Tolar Jordan for about a year. In a conversation with her on the night of the murders, she told him to leave because she was too old for him, whereupon he cut himself with a knife and fled into a nearby field. She followed him and they were met in the field by his father, the defendant. All three went back to the house of the deceased and had a long talk. His father was driving a black Thunderbird and had a .38 pistol with him at that time. He refused to go home with defendant but allowed Dorothy Jean Tolar Jordan to drive him to his mother's house about thirty minutes later. Later that night defendant tried to persuade his son to go home with him, and

when the son refused defendant said: "If you don't, I am going to go down there and pump six bullets in them."

Other evidence tends to show that defendant shot Dorothy Jean Tolar Jordan four times after which, while she was still alive, he doused her with gasoline and set her body on fire, causing burns over ninety percent of her body.

After the killing he left the pistol and three empty cartridges with Fred Hall and said: "I just killed old Jean Tolar . . . and there stood Thelma Whitehead . . . tow-pow right in the top of her head. . . . I threw gas on them and set them afire."

We hold that premeditation and deliberation are legitimate permissible inferences to be drawn from the foregoing evidence and the first degree murder charges were properly submitted to the jury. Defendant's second assignment is overruled.

Two rulings by the trial judge relative to the admissibility of telephone conversations are the bases for defendant's third assignment of error.

[6] Defendant first contends that the court erred in excluding a telephone conversation between Betty Lou Stewart, defendant's wife, and the deceased Dorothy Jean Tolar Jordan. In that conversation Mrs. Jordan told Mrs. Stewart that she wanted to speak to defendant to tell him that his son had cut himself and planned to kill himself. She then spoke to the defendant on the telephone and apparently repeated this statement to him. The testimony indicates that immediately thereafter defendant left his home saying, "I am going to see about my son." Taken in the most favorable light to the defendant, this testimony merely establishes a reason for the appearance of defendant near the home of the two women on the afternoon of the murders. His presence there was later established by other testimony, and, since the telephone conversation is in no way exculpatory, no prejudice resulted from its exclusion. *See* 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 9.

Defendant's second contention centers on the admission of testimony by defendant's son regarding a short conversation between him and Rolland Lockamy. The record reveals that the conversation in question concerned insignificant matters which were, for the most part, already in evidence. It is inconceivable that this evidence could have prejudiced defendant under the circumstances. *See State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d

92 (1975); *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17 (1971). Defendant's third assignment has no merit and is overruled.

[7] Defendant's fourth assignment is grounded on his contention that the court erred in failing to charge on the lesser included offense of manslaughter.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155 (1930). Instructions on a lesser included offense are required only when "there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407 (1974); *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954). If all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the court correctly refuses to charge on the unsupported lesser degree. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971), and cases cited.

Here, the State's evidence tends to show that defendant entered the house of the victims, shot Dorothy Jean Tolar Jordan four times, shot Thelma Whitehead three times, doused their bodies with gasoline and set them on fire. Defendant produced no evidence tending to rebut the State's evidence with respect to the *nature* of the crime. Rather, his defense was alibi and the testimony of his witnesses tended to support the alibi theory. Upon the record before us there is no evidence to support a verdict of manslaughter and the court properly declined to charge the jury on such lesser included offense. *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969). Defendant's fourth assignment is overruled.

[8] In *Woodson v. North Carolina,* 428 U.S. 280, 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. By authority of the provisions of Section 7, Chapter 1201 of the 1973 Session Laws (1974 Session), a sentence of life imprisonment must therefore be substituted in the Dorothy Jean Tolar Jordan case (No. 75-CR-8792).

Our examination of the entire record discloses no error affecting the validity of the verdicts returned by the jury. Defendant's conviction must therefore be upheld. To the end that a sentence of life imprisonment may be substituted in lieu of the death sentence heretofore imposed in Case No. 75-CR-8792, the case is remanded to the Superior Court of Harnett County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment in Case No. 75-CR-8792 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 of superior court furnish to defendant and his counsel a copy of the judgment and commitment as revised in accordance with this opinion.

In Case No. 75-CR-8792—No error in the Verdict; Death Sentence Vacated.

In Case No. 75-CR-8793—No error.

STATE OF NORTH CAROLINA v. JOYCE WILLIS BARROW

No. 76

(Filed 7 March 1977)

1. **Kidnapping § 1; Robbery § 4— defendant as participant in crime — sufficiency of evidence**

In a prosecution for kidnapping and armed robbery, evidence was sufficient to be submitted to the jury where it tended to show that defendant was a willing participant in planning the crime in question; she distracted the victim while her companions in crime positioned themselves to accost him; the victim was robbed at gunpoint and taken away in his own car; after the victim was forced into the car, defendant went along of her own accord and without coercion from the others; the victim was shot, beaten and left for dead; defendant voluntarily fled to N. J. with her companions in crime; and a search of

defendant after she was apprehended by a N. J. State Trooper revealed a cartridge holder with 24 empty and 6 live rounds for a .38 caliber pistol and many articles belonging to the victim.

2. **Criminal Law § 115— armed robbery and kidnapping — no evidence of lesser offenses**

There was no evidence in a kidnapping and armed robbery case from which the jury could find that a crime of lesser degree had been committed where the State's evidence tended to show that defendant was a willing participant in the crimes, but defendant's evidence tended to show that she did not know that a robbery was being planned, that she was forced to accompany her companions, that she tried to get away, and that she refused to bring bullets for the gun used in perpetration of the crimes.

3. **Criminal Law § 138— defendant given maximum prison term — co-conspirators given lighter sentences — no error**

There is no rule of law that sentences imposed upon defendants for a crime jointly committed by them must be equal; therefore, defendant who was sentenced to two terms of life imprisonment upon conviction of aggravated kidnapping and armed robbery was not entitled to have her sentences modified on the ground that all other participants in the crime received lighter sentences.

DEFENDANT appeals from judgments of *Bailey, J.*, 15 March 1976 Criminal Session, CUMBERLAND Superior Court. This case was docketed and argued as No. 76 at the Fall Term 1976.

Defendant was tried upon bills of indictment, proper in form, charging her with the (1) kidnapping and (2) armed robbery of Milton L. Royal on 19 November 1975 in Cumberland County.

The State's evidence tends to show that on 19 November 1975 Raymond Carmichael, John Polson and defendant Joyce Barrow were together in Fayetteville. Carmichael testified that John Polson asked "how we would like to rob somebody, take the money and the car, . . . and Joyce said it didn't make no difference to her." They went to Rhudy's Pawn Shop to redeem Polson's pistol, a .32 caliber Smith and Wesson. After leaving the pawn shop they went to Hay Street in downtown Fayetteville and eventually to a place called The Green Derby. There Joyce Barrow found Michelle Johnson and Michelle was told about the robbery plans. They returned to Hay Street where Polson told Joyce Barrow and Michelle Johnson "to get somebody and bring them back to Bass Street and said that we'd take it from there."

The two girls, using Polson's pistol, attempted to rob a woman selling Avon products but failed. All four conspirators

then went to Bass Street and stayed together until Milton L. Royal drove into the nearby parking lot. Then, acting according to plan, Joyce Barrow and Michelle Johnson approached Royal and asked for cigarettes. After giving each of them a cigarette, he turned to walk away and was confronted by Raymond Carmichael and John Polson who, with gun in hand, demanded his watch, ring and billfold. As Royal reached for his billfold Polson grabbed the gun from Carmichael and shot Royal in the left side. Polson then took Royal's watch, keys to the car and billfold. As ordered by Polson, Royal opened the trunk of the car, got in, and Carmichael slammed the lid. The four robbers then drove Royal's car to Smith Lake at Fort Bragg.

The trunk was opened at Smith Lake and Royal was ordered out. Royal ran but Polson caught him in the woods and brought him back to a latrine building where Carmichael struck him in the side with his first. Royal ran again, tripped and fell, and Polson shot him in the stomach. While Mr. Royal lay on the ground, Polson shot him again. The two men then took him into the latrine building, removed his clothing and put him in a latrine. Polson then struck Royal with a lug wrench and thereafter shot him for the fourth time. He then fired twice into the latrine and called for "Joyce" to bring him some more bullets. The Johnson girl brought them and went back to the car. Polson began firing again and eventually left the latrine building. He fastened the door with the lug wrench and apparently thought Royal was dead.

The men returned to the car and, with Michelle Johnson and Raymond Carmichael in the back seat and Joyce Barrow and John Polson in the front, left Smith Lake and drove to New Jersey in the victim's car.

About ten o'clock the next morning the four robbers were apprehended by the New Jersey State Police. A search of their personal belongings revealed in defendant's possession (1) a cartridge holder with twenty-four empty and six live rounds for a .32 caliber weapon, (2) Milton Royal's bank credit card, library card, checkbook, receipts, Veteran's Administration card, motor vehicle inspection card, Ford Motor Company payment book and a bank deposit receipt.

All four of the robbers were returned to North Carolina for trial. John Polson and Raymond Carmichael pled guilty to armed robbery and assault with a deadly weapon with intent to

kill. Michelle Johnson pled guilty to armed robbery. Defendant Joyce Barrow pled not guilty and testified as a witness in her own behalf. Her testimony tends to show that she was sixteen years old; that she and Michelle Johnson approached Mr. Royal for a cigarette and saw the gun for the first time when Raymond Carmichael drew it on Royal; that she knew nothing of any planned robbery and thought Polson was joking when he laughingly asked her and the others about robbing someone; and that she was ordered into the car by Polson and went under coercion. She further testified that she received nothing from the robbery.

Defendant Joyce Barrow was convicted of aggravated kidnapping and armed robbery. Judge Bailey imposed a life sentence for each offense, to run concurrently. Defendant appealed assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General; Isham B. Hudson, Jr., Assistant Attorney General, for the State of North Carolina.

Edward J. David, attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant first assigns as error the failure of the trial court to grant her motion for "judgment of acquittal" at the end of the State's evidence and at the conclusion of all the evidence.

Although we are unable to find mention of such a motion in our criminal procedure, it is apparent that defendant is attacking the sufficiency of the evidence to go to the jury. Therefore, for purposes of this appeal, defendant's motion for judgment of acquittal—like a motion for "a directed verdict of not guilty," *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973)—will be treated as a motion for judgment of nonsuit under G.S. 15-173.

We note that defendant offered evidence at trial and thus, under the provisions of G.S. 15-173, waived her right to except on appeal to the denial of her motion at the close of the State's evidence. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Nevertheless, her later motion, made at the close of all the evidence, draws into question the sufficiency of all the evidence to go to the jury. G.S. 15-173. *See State v. Robbins,*

275 N.C. 537, 169 S.E. 2d 858 (1969); *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955).

Such motion requires the trial judge to consider the evidence in the light most favorable to the State and to 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). 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). 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, the question of guilt is for the jury. So upon motion for nonsuit the question is whether there is substantial evidence—direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the accused committed it. *State v. Smith and Foster*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). There must be substantial evidence of all material elements of the offense charged. *State v. McKinney, supra; State v. Hill*, 272 N.C. 439, 158 S.E. 2d 329 (1968).

The evidence in this case is sufficient to support findings that the victim, Milton Royal, was accosted by the defendant and three other people, robbed at gunpoint, taken away in his own car, shot, beaten and left for dead. There can be no question that this evidence establishes, as defendant appears to concede, the commission of an armed robbery, G.S. 14-87, and an aggravated kidnapping, G.S. 14-39. To withstand a motion for judgment of nonsuit, however, it is also necessary to show that the crimes were committed by this defendant. *See State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960).

It appears that defendant did not play the dominant role in the commission of the crimes. Even so, when two or more persons "aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966); *accord, State v. Terry*, 278 N.C. 284, 179 S.E. 2d 368 (1971); *State v. Oliver*, 268 N.C. 280, 150 S.E. 2d 445 (1966); *State v. Sellers*, 266 N.C. 734, 147 S.E. 2d 225 (1966); *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955). The fact that one is the dominant actor is immaterial on the question of guilt of the other participants.

State v. Davenport, 227 N.C. 475, 42 S.E. 2d 686 (1947). The State contends defendant aided in the planning of the crime, its execution, and the subsequent flight and that defendant's motion for "judgment of acquittal" was therefore properly denied. Defendant contends the evidence produced was not sufficient to withstand nonsuit and carry the case against her to the jury.

Evidence favorable to the State tends to show that John Polson asked the defendant and the others if they would like to rob someone, take his money and car, and go to New Jersey. The defendant replied that it made no difference to her. To implement this idea, the defendant, Polson and Carmichael went to Rhudy's Pawn Shop to get a pistol. Shortly thereafter they were joined by Michelle Johnson and she was told of the plan to rob someone. The two girls were told to "get somebody and bring them back." After scouting around, the girls returned to say that they had located a woman and believed they could get her bag. The others agreed and defendant and Johnson took the pistol and attempted to rob the lady. The attempt failed and the gun was returned to Carmichael.

Defendant and the others then waited in or near a parking lot until they spotted the victim, Milton Royal. Pursuant to a prearranged plan, defendant and Michelle Johnson distracted Royal while the others positioned themselves to accost him. After Royal was forced into the car, defendant went along of her own accord and without coercion from the others. Defendant voluntarily fled to New Jersey with the others.

While driving on the New Jersey Turnpike, the car was stopped and searched by a New Jersey State Trooper. During a search of the defendant, Officer Linden found a cartridge holder with twenty-four empty and six live rounds for a .32 caliber pistol. In her purse he found many articles belonging to Milton Royal, including his First Citizens credit card, library card, checkbook, receipts, Veteran's Administration card, motor vehicle inspection card, Ford Motor Company payment book, and a deposit receipt from First Citizens Bank.

Clearly this evidence, taken in the light most favorable to the State, implicates defendant as a willing participant in the planning and execution of the alleged crimes and in the subsequent flight. It matters not that defendant produced evidence to the contrary. Contradictions and discrepancies are matters

for the jury and do not warrant nonsuit. Defendant's first assignment was properly overruled.

Defendant next contends the court erred in not instructing the jury on lesser included offenses.

As defendant correctly notes, the necessity for a charge on a crime of a lesser degree arises only "when there is evidence from which the jury could find that a crime of lesser degree was committed." *State v. Bynum and Coley,* 282 N.C. 552, 193 S.E. 2d 725 (1973); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972). *See also* 4 N. C. Index 3d, Criminal Law § 115 and cases cited.

[2] Defendant contends there is insufficient evidence to show that she acted in concert with the other participants in the alleged crimes and thus that her guilt, if any, must be of a lesser offense. We have already demonstrated that the evidence strongly supports the inference that defendant participated fully in the kidnapping and robbery. Nevertheless, we examine the record to determine if other evidence exists which would require submission of lesser included offenses.

The defendant offered no evidence at trial to show that lesser crimes were committed. Rather, the evidence she offered tends to show that she did not participate in the crimes. She contended at trial that she, in fact, did not know the others were planning a robbery; that when the robbery occurred she was forced to accompany the others; that she tried to get away but the car engine was flooded; that she refused to bring bullets for the gun; and that she was forced to accompany the others to New Jersey. This is not evidence of a lesser included offense; rather, it tends to show defendant's complete innocence. Thus there was no evidence from which the jury could find that a crime of lesser degree had been committed. *See State v. Terry, supra; State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705 (1973). The charge of the trial judge was therefore correct. This assignment is overruled.

By her final assignment of error defendant asks this Court, in the exercise of its supervisory authority, to modify the sentences of life imprisonment imposed by the trial judge.

All other participants received lighter sentences. Raymond Carmichael pled guilty to armed robbery and assault with a deadly weapon with intent to kill and was sentenced to a prison

term of twenty-five to fifty years. John Polson pled guilty to the same charges and was sentenced to imprisonment for fifty years. Michelle Johnson pled guilty to armed robbery and was sentenced to a prison term of twenty years.

[3] There is no rule of law that sentences imposed upon defendants for a crime jointly committed by them must be equal. We have consistently held that a sentence which is within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854 (1967); *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875 (1967); *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849 (1967); *State v. Taborn,* 268 N.C. 445, 150 S.E. 2d 779 (1966); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966). Where, as here, a sentence is within statutory limits the punishment actually imposed by the trial judge is a discretionary matter. *State v. Slade,* 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901 (1965). Oftentimes, though not true here, the culpability of an accessory may exceed that of the principal. See, for example, *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970).

In this jurisdiction the punishment for aggravated kidnapping is imprisonment for not less than twenty-five years nor more than life, G.S. 14-39(b), and the punishment for armed robbery is imprisonment for not less than five years nor more than life. G.S. 14-87(a). Thus defendant's sentence for each offense is within the statutory maximum and will not be disturbed by this Court.

While in law there is no error in the life sentences imposed, the disparity between them and the sentences pronounced upon those who pled guilty would seem to warrant prompt review by the Board of Paroles. This Court corrects errors of discretion only in cases of manifest abuse. The verdicts and judgments must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. WILLARD WARREN, JR.

No. 25

(Filed 7 March 1977)

1. Homicide § 20— admissibility of knife

In this homicide prosecution, the trial court did not err in admitting a knife seized from defendant because bloodstains on the knife could not be definitely identified as human blood or grouped and the State's pathologist testified that, in his opinion, none of deceased's wounds were stab wounds, since two State's witnesses testified that defendant told them he had stabbed deceased and his brother had beaten deceased with a two by four, the pathologist's testimony revealed the body of deceased was badly mutilated, and the question of whether the knife was used in connection with the murder was thus a question for the jury.

2. 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 told three people of his participation in a murder around 4 February 1975; he told two of the witnesses that he helped to kill the deceased using a knife; deceased and defendant were in the vicinity of an abandoned bulk plant at around 4:00 p.m. on 4 February 1975; soon thereafter defendant left that vicinity without deceased; deceased failed to report for the evening meal at the rest home where he lived; deceased's body was discovered in the bulk plant the next day; and when defendant was arrested some three weeks later, he had in his possession a knife bearing bloodstains.

3. Criminal Law § 113— instruction that defendant presented evidence — absence of direct evidence by defendant

The trial court did not err in instructing the jury that defendant "has produced evidence tending to show" when defendant had presented no evidence on direct examination, since facts favorable to defendant produced on cross-examination constituted his evidence.

4. Criminal Law § 113— instructions — no assumption by court

The trial court did not assume that defendant had made statements acknowledging his guilt in instructing the jury that defendant produced evidence tending to show that "any statement that might have been made" should not be believed because of defendant's excessive drinking and tendency to brag.

5. Criminal Law § 116— failure of defendant to testify — absence of instructions

The trial court did not err in failing to instruct the jury regarding defendant's failure to testify absent a special request for such an instruction.

6. Homicide § 30— first degree murder — failure to instruct on second degree murder

In this first degree murder prosecution, testimony by a State's witness that sometime around the date of the victim's death, defendant told him that he "had killed a man down about the railroad tracks" did not require the court to submit an issue of second degree murder to the jury, and the court did not err in failing to submit such an issue where all the evidence pointed to a felony-murder.

7. Homicide §§ 4, 31— first degree murder — existence after death penalty held unconstitutional

There is no merit in defendant's contention that at the time of his second trial the crime of first degree murder did not exist because the U. S. Supreme Court had declared G.S. 14-17 unconstitutional in *Woodson v. North Carolina*, ... U.S. ..... (1976) since the *Woodson* decision declared only the death penalty imposed by G.S. 14-17 unconstitutional, and the penalty section of the statute was severable.

8. Homicide § 31— life imprisonment — provision triggered when death penalty held unconstitutional

When the U. S. Supreme Court in *Woodson v. North Carolina*, ... U.S. ..... (1976) held that the mandatory death penalty provided under Chapter 1201 of the 1973 Session Laws (1974 Sess.) could not be constitutionally imposed for first degree murder, the alternative provision for life imprisonment set forth in Section 7 of Chapter 1201 was triggered, notwithstanding the death penalty for first degree murder was not held *per se* unconstitutional.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Martin, Harry C., J.*, at the 12 July 1976 Session of HAYWOOD Superior Court.

On an indictment, proper in form, defendant was charged with the first-degree murder of Leo Jack Clark. The jury found defendant guilty as charged and a sentence of life imprisonment was imposed.

This is the second appeal in this case. We granted defendant a new trial in *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976).

The State offered evidence tending to show the following: Leo Jack Clark was a resident of a rest home in Waynesville, North Carolina. On 4 February 1975, Clark ate lunch at the rest home and then left for town with about $18.00 in his possession. When he failed to return for the evening meal, normally served between 4:00 and 5:00 p.m., Mary L. Caldwell, the operator of the rest home, notified the police. Clark's body was found on 5 February 1975 inside the abandoned Pure Oil bulk

plant near the railroad tracks in Waynesville. The floor of the building was littered with debris, papers, and dirt, and there was blood on the littered paper and the wall. The victim's wallet, found lying beside his body, was empty.

Dr. Robert S. Boatwright, an expert in pathology, examined the body and found numerous injuries upon the face of the deceased, including a deep abrasion on the upper left forehead, a torn left ear with exposed cartilage, a one-inch wound over the left eyebrow and a long abrasion over the left jaw which extended into the mouth, and a broken jawbone. There was internal hemorrhaging beneath the skull, multiple rib fractures, punctured lungs, ruptured liver, broken right wrist, broken left hand and leg. The doctor gave his opinion that the cause of death was multiple injuries. More specifically, he felt that either injuries to the side of the head and the brain, fractured ribs, ruptured liver or the shock from the combined trauma were all sufficient to cause death. He further stated that in his opinion the wounds about the head and face were caused by a blunt instrument, rather than a sharp instrument. He found no wounds that he could characterize as stab wounds, either on the face or the thoracic area of the body.

Further evidence for the State tended to show that the deceased had been seen by Kathy Trammell, an employee of the rest home, between 4:00 and 4:30 p.m. on 4 February approximately 200 to 300 yards from the bulk plant, walking in the direction of the rest home. Barbara Mercer saw the defendant talking to Reeves Webb on the street the same afternoon. Later, defendant, his brother, and Reeves Webb came to Barbara Mercer's house and drank some wine. Verlin Stewart saw defendant in the area of the bulk plant with an unidentified person between 4:00 and 4:30 p.m.

Reeves Webb testified that he met defendant, defendant's brother and the deceased near the railroad tracks on the afternoon of 4 February. Reeves left to get more wine from the A & P Store nearby. When Webb returned with the wine, he met defendant and his brother on the street near the Mercer house, but Clark was not with them. The three went into the Mercer house and drank some wine.

Verner Frank London, who was not a witness at the first trial, testified that on the morning of 5 February 1975, he was in a beer joint in Waynesville and recalled the defendant com-

ing in and sitting beside him. Defendant was intoxicated and said "he had killed a man down about the railroad tracks."

Ronald R. Shattles, who also was not a witness at the first trial, testified that on 25 February 1975, he was in the Haywood County Jail charged with several counts of forgery. He occupied a cell in common with the defendant and others, including Curtis Wyatt. The subject of Jack Clark's death came up and someone asked the defendant "if he had done it." Defendant said in Shattles' presence that he and his brother had been drinking in a shed together with Reeves Webb and the deceased; that they sent Reeves Webb for more wine; that after he left, defendant and his brother decided to rob the deceased; that in the course of the robbery defendant's brother beat Clark with a two by four and that he, defendant, stabbed the deceased twice; that "it sounded like air coming out of a car tire"; that they took $18.34 from the deceased and wiped their hands on papers in the shed.

Curtis Boyd Wyatt was incarcerated in the Haywood County Jail on 25 February on a breaking and entering charge. While in jail, he was placed in a cell with the defendant, Shattles, and others. Defendant told Wyatt that he and his brother met Webb and "this old man" on a railroad track and drank wine with them until the wine ran out. They sent Reeves to get some more wine with a dollar that the old man gave them. While Reeves was gone, defendant and his brother decided to rob the old man. When he put up a scuffle, defendant's brother struck the deceased with a two by four and defendant stabbed him with a knife. Defendant said they got $18.34 or $18.36 from him. After that the defendant cleaned himself off with papers and went out to the street to meet Reeves before he returned with the wine. They met Reeves across from the Mercer house and went inside to drink the wine.

Defendant offered no evidence.

Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General James Wallace, Jr. for the State.

Creighton W. Sossomon for defendant appellant.

COPELAND, Justice.

[1] Under his first assignment of error, defendant asserts the court erred in admitting into evidence the knife found on defendant's person when he was arrested.

Defendant maintains that the knife seized from him at the time of his arrest was irrelevant to the jury's consideration of this case because, while the State crime laboratory examination revealed blood stains on the knife, the stains could not definitely be identified as human blood or grouped. Defendant points out that the State's own expert witness, the pathologist who examined the body, testified that, in his opinion, none of the wounds were stab wounds. Thus, defendant says introduction of the knife served no probative purpose and was calculated to arouse prejudice against him. We disagree.

In a criminal case, any circumstance that is calculated to throw light upon the alleged crime is admissible. The weight of circumstantial evidence is for the jury. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied,* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936. Any object which has a relevant connection is admissible in evidence. A weapon may be admitted where there is evidence *tending* to show that it was used in the commission of the crime charged. *State v. Sneeden, supra;* 1 Stansbury's N. C. Evidence, § 118 (Brandis Rev. 1973).

Two of the State's witnesses, Wyatt and Shattles, testified that the defendant told them he and his brother had stabbed the deceased and beaten him with a two by four. Dr. Boatwright's testimony revealed the body of the deceased was badly mutilated. Under these circumstances, whether or not this knife, or any knife, was used in connection with the alleged murder was a question for the jury.

This assignment of error is without merit and overruled.

[2] Defendant contends his motion for nonsuit and his motion to set aside the verdict should have been sustained.

According to the evidence, defendant told at least three people of his participation in a murder around 4 February 1975 (to two of these witnesses he indicated that he helped kill the deceased using a knife). In addition, the State's evidence tended to show: (1) that the deceased and the defendant were both in

the vicinity of the bulk plant at around 4:00 p.m. on 4 February 1975; (2) that the deceased failed to report for the evening meal at the rest home, served between 4:00 and 5:00 p.m. (he had never missed before); (3) that soon thereafter, the defendant left the vicinity of the bulk plant without the deceased; (4) that the deceased's body was discovered in the bulk plant, the next day; (5) that when defendant was arrested some three weeks later, he had in his possession a knife bearing blood stains.

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. Finney,* 290 N.C. 755, 228 S.E. 2d 433 (1976); *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). When this is done, we conclude the motion for nonsuit was properly overruled.

A motion to set aside the verdict is discretionary and not reviewable on appeal absent an abuse of discretion. *State v. Lindley,* 286 N.C. 255, 210 S.E. 2d 207 (1974); *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971). We find no abuse in this case in view of the State's evidence. These assignments are overruled.

[3] Defendant claims Judge Martin committed error in stating to the jury that the defendant had presented evidence when in fact he had presented none on direct examination.

After recapitulating the State's evidence, Judge Martin said:

> "The defendant, members of the jury, on the other hand, has produced evidence tending to show, and what it shows is entirely for you to determine, that no one in this case has taken the stand and testified that they saw the defendant assault Mr. Clark in any way at all; that there were no fingerprints found at the scene of this location which tied the defendant, Warren; that the defendant, Warren, was seen in the home of Mrs. Marcer some time around 4:00 or 4:30 in the afternoon of February the 4th, and that he was taken to his home by Mrs. Mercer's son; that any statement that might have been made should not be believed by the jury because the witnesses testified that the defendant was a person who drank a lot of wine and

whiskey, and that he was given to bragging and talking about things that were not so."

In stating "[t]he defendant . . . has produced evidence," the trial judge was clearly referring to evidence elicited on cross-examination. Facts favorable to the defendant produced on cross-examination are his evidence. *See* V Wigmore, Evidence § 1368. The judge's instruction was correct, although it might have been clearer. If defendant desired further clarification, he should have asked for it.

[4] Defendant also complains that this portion of the judge's charge prejudicially assumed a material fact controverted by his plea of not guilty, that he had made statements acknowledging his guilt. The court's charge simply instructed that, whether the statements were made or not, if made, they should not be believed because of defendant's intemperance and tendency to brag. Only by referring to "any statement that might have been made" could the court remind the jury of the testimony elicited on cross-examination supporting this theory of defendant's innocence.

Judge Martin was obviously trying to present the evidence in the light most favorable to the defendant, even though defendant had offered no witnesses. The judge gave him the benefit of each favorable fact revealed on cross-examination and defendant was not prejudiced by this recapitulation. The assignment is overruled.

[5] In his next assignment of error, defendant contends the trial court erred in failing to instruct the jury regarding his failure to testify.

Absent a special request, the trial court is not required to instruct the jury that defendant's failure to testify creates no presumption against him. *State v. Rankin*, 282 N.C. 572, 193 S.E. 2d 740 (1973); *State v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533 (1940); *see* 1 Stansbury's N. C. Evidence, § 56 (Brandis Rev. 1973).

Furthermore, the record discloses that at the conclusion of his charge, Judge Martin invited counsel for the State and the defendant to approach the bench and, out of the hearing of the jury, inquired if either had any additions or corrections to the charge. Both counsel answered, "No."

The assignment of error is meritless and overruled.

[6] Defendant maintains the trial judge should have submitted the lesser offense of second-degree murder to the jury.

In his instruction to the jury, the trial judge restricted their consideration to felony-murder. "It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Swift,* 290 N.C. 383, 407, 226 S.E. 2d 652, 669 (1976); *accord, State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971).

Defendant contends the evidence given by State's witness Verner London was sufficient to require submission of the issue of second-degree murder. London testified that sometime around the date of Clark's death, defendant told him that he "had killed a man down about the railroad tracks." Such evidence standing alone is clearly insufficient to require submission of the issue of second-degree murder. All the other evidence in the case pointed to a felony-murder.

The assignment of error is overruled.

Finally, defendant contends Judge Martin committed error in allowing the jury to consider a verdict of first-degree murder and in sentencing the defendant to life imprisonment.

[7] Defendant argues that at the time of his second trial in this case, *Woodson v. North Carolina,* 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976) had declared G.S. 14-17 unconstitutional and thus, the crime of first degree murder did not exist. Defendant practically concedes this argument is spurious because *Woodson, supra,* declared only the death penalty imposed by G.S. 14-17 unconstitutional and the penalty section of that statute was severable. *See State v. Talbert,* 282 N.C. 718, 194 S.E. 2d 822 (1973).

[8] Defendant next takes the novel position that *Woodson v. North Carolina, supra,* did not bring into play Section 7 of Chapter 1201 of the 1973 Session Laws (1974 Sess.) which was enacted in response to *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972). The North Carolina legislature passed Chapter 1201 after *Furman, supra,* in effect struck

down our former law permitting juries unbridled discretion to either grant death or life imprisonment in a capital case. Chapter 1201 instead provided a mandatory death sentence for capital offenses. In its wisdom the General Assembly added Section 7 to Chapter 1201, providing for punishment of life imprisonment "in the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act. . . . "

Defendant interprets the General Assembly's language to mean that the alternative punishment, life imprisonment, applies only if the death penalty for first-degree murder is held to be *per se* unconstitutional. The United States Supreme Court has not so held, *Gregg v. Georgia,* ____ U.S. ____ 49 L.Ed. 2d 859, ____ S.Ct. ____ (1976), so defendant argues Section 7 of Chapter 1201 is inapplicable and he cannot be sentenced to life imprisonment. This position is untenable. In enacting Section 7, obviously the legislature was concerned that an alternative punishment be provided if the North Carolina death penalty was ever again overturned, regardless of the state of the death penalty generally.

When the United States Supreme Court in *Woodson, supra,* held that the death penalty provided under Chapter 1201 could not be constitutionally imposed, it triggered the alternative provision for life imprisonment. *State v. Cousin,* 291 N.C. 413, 230 S.E. 2d 518 (1976). Judge Martin properly allowed the jury to consider a verdict of first-degree murder and, upon conviction, properly sentenced the defendant to life imprisonment.

The assignment of error is without merit and overruled.

Because of the serious nature of the case, we have examined the record for other errors and have found none.

The defendant has again been tried and found guilty of a very brutal murder, and in his second trial we find

No error.

FOREMOST INSURANCE COMPANY v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA (IN THE MATTER OF ESTABLISHING APPROPRIATE INSURANCE PREMIUM DISCOUNTS FOR ADEQUATE MOBILE HOME TIE-DOWNS; ORDER OF THE COMMISSIONER ENTERED OCTOBER 31, 1975)

No. 16

(Filed 7 March 1977)

1. **Insurance § 116— mobile home insurance — tie-down discount — statutory requirement**

Pursuant to G.S. 58-131.3A which "directed and authorized" the Commissioner of Insurance to implement not less than a 10% discount on mobile home insurance premiums for proper mobile home tie-down, the Commissioner was not given the authority to fix a rate which would yield a fair and reasonable profit under G.S. 58-131.2 but was instead expressly directed by the legislature to decrease the premium by 10%.

2. **Insurance § 116— mobile home insurance — tie-down discount — sufficiency of evidence — no finding of facts required**

Evidence offered by petitioner was not such as would compel the allowance of a premium change for mobile home insurance in an amount other than the 10% decrease mandated by G.S. 58-131.3A, since (1) the loss experience data of petitioner which it offered into evidence did not establish the "composite" of loss experience of all carriers in the State, which the establishment of the N. C. Fire Insurance Rating Bureau was intended to create, and (2) the Commissioner was required to reduce the premiums by 10% and was not required to support his findings with substantial evidence.

3. **Insurance § 116— mobile home insurance — tie-down discount — applicability to windstorm portion of premium**

Petitioner's contention that a 10% reduction in mobile home insurance premiums for proper mobile home tie-downs should have applied only to that portion of the premiums applicable to wind loss perils is without merit, since G.S. 58-131.3A indicates that the discount should be from the total premium; and there is no experience data available regarding the savings to be realized because of the tie-downs.

4. **Constitutional Law § 12— mobile home insurance — tie-down discount — statute within legislature's police power**

G.S. 58-131.3A, providing for a 10% discount on mobile home insurance premiums for proper mobile home tie-downs, bears a reasonable relation to the protection of the health, safety and general welfare of the public and is a valid exercise of the police power, since the statute serves as an inducement to mobile homeowners to tie down their homes; such tie-downs will reduce the number of homes overturned by the wind, thus reducing the loss of life, number of personal injuries, and damage to property; and this reduction in losses will be beneficial to both the citizens of N. C. and their insurance carriers.

APPEAL as of right by John Randolph Ingram, Commissioner of Insurance for the State of North Carolina, pursuant to G.S. 7A-30(2), to review the decision of the Court of Appeals, reported in 30 N.C. App. 741, 228 S.E. 2d 656, which reversed the judgment entered by *Hall, J.*, on 11 February 1976 in WAKE Superior Court and vacated the order entered by the Commissioner on 31 October 1975.

The facts and proceedings necessary to decision are fully set out in the opinion.

Attorney General Rufus L. Edmisten and Assistant Attorney General James Wallace Jr., for Commissioner of Insurance, appellant.

Bode & Bode by John T. Bode and Robert V. Bode for plaintiff appellee.

MOORE, Justice.

The primary question for review in present case is the interpretation to be placed upon G.S. 58-131.3A [1975 Sess. Laws, c. 670, s. 1] which provides:

> *"Premium discount for proper mobile home tie-down.*— The Commissioner is authorized and directed to implement not less than a ten-percent (10%) discount from the insurance premium otherwise applicable to be allowed in diminution of the premium charged insureds under mobile-home owner policies and mobile-homeowner's policies where the mobile home covered by the policy has been properly secured in accordance with regulations of the North Carolina State Building Code Council as approved by the Commissioner or any other standard which is approved by the Commissioner and which affords no less protection from windstorm damage than the aforesaid regulations."

Petitioner, Foremost Insurance Company (Foremost) a company writing insurance upon mobile homes in this State, contends that G.S. 58-131.3A should be interpreted to require that the Commissioner of Insurance base any rate decrease upon "substantial evidence"; or, in the alternative, that the statute should be interpreted to permit a premium discount only for that portion of the total premium which is related to losses due to wind.

This Court in recent years has passed upon a number of cases relating to the action of the Commissioner of Insurance upon filings by the North Carolina Fire Insurance Rating Bureau and the Automobile Rate Office. For a thorough discussion of the respective rights and duties of the Commissioner of Insurance, the Automobile Rate Office and the Fire Insurance Rating Bureau, *see Comr. of Insurance v. Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977); *Comr. of Insurance v. Automobile Rate Office,* 292 N.C. 1, 231 S.E. 2d 867 (1977); *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975); *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971).

Pursuant to G.S. 58-126 and G.S. 58-126.1, the North Carolina Fire Insurance Rating Bureau (Bureau) is vested with the authority to promulgate rates for the mobile home policies which are the subjects of the case at bar. The duties of the Bureau are defined in Article 13, Chapter 58, of the North Carolina General Statutes (G.S. 58-125 to -131.9). Under these statutes and for rate-making purposes, the Bureau is treated as if it were the only insurance company writing policies upon the risks over which it has jurisdiction. The Bureau is regarded as having an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of all those companies over which it has jurisdiction. This is proper since all companies writing policies covering the risks over which the Bureau has jurisdiction are members of the Bureau. *See* G.S. 58-127. *See also In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969), for a succinct analysis of the duties and functions of the Bureau. With this background, we proceed to discuss the course taken by the Commissioner of Insurance in present case.

On 12 August 1975, the Commissioner of Insurance (Commissioner) issued a notice of public hearing, pursuant to G.S. 58-131.2, which set a hearing date of 16 September 1975 " . . . for the purpose of establishing appropriate insurance premium discounts for adequate mobile home tie-downs, pursuant to Chapter 670 of the 1975 session laws of North Carolina [G.S. 58-131.3A]." Thereafter, on 10 September 1975, the Bureau filed with the Commissioner certain revisions which permitted reductions in the premiums charged under the Mobile-Homeowners Policy MH(F) Program, the Mobile Home Owner Policy MH(C) Program, and the Special Mobile Home Policy—1966.

These revisions stated that with respect to each policy an amount equal to ten percent of the applicable basic premium would be deducted from the basic premium for insurance coverage on those mobile homes which were properly secured in accordance with the regulations of the North Carolina Building Code Council, as set forth in the State of North Carolina Regulations for Mobile Homes. Each revision submitted by the Bureau set forth the proposed endorsement to be attached to each policy, and stated:

> "At present creditable experience is not available to substantiate any credit for tie-downs under this program. Furthermore, it should be noted that the proposed credit of 10% is to be applied to the applicable basic premiums for coverages which encompass many exposures other than wind. Therefore, we strongly feel that the proposed credit is fully adequate under present circumstances."

On 16 September 1975, a joint hearing was held on the Commissioner's notice and the Bureau's filings made subsequent to the Commissioner's notice. At the hearing, evidence was presented by the Commissioner, the Bureau and Foremost. The Commissioner's evidence related solely to the regulations applicable to properly tying down a mobile home in North Carolina.

The Bureau offered evidence that the premium charged for mobile homeowners' coverage was an indivisible premium for all perils, including fire, theft, riot and other perils, in addition to wind; and that the perils were not individually rated. Therefore, the Bureau felt that the ten percent discount should be computed from the entire premium charged for mobile home coverage and no segregation of premiums according to peril would be proper. The Bureau further stated that any reduction in the premium in excess of ten percent would require experience data which the Bureau did not possess at that time.

Foremost introduced evidence of its losses incurred in writing mobile home policies. The information regarding losses was segregated as to those amounts applicable to wind-loss claims and those amounts applicable to claims arising from other perils. Through expert testimony, Foremost estimated the amounts of losses which would be saved because of an increased number of tied-down mobile homes. From these estimates, Foremost concluded that the expected reduction in wind-related

losses would support a five dollar decrease in the total premium charged for mobile home coverage.

On the above evidence, the Commissioner made, *inter alia,* the following findings in an order dated 31 October 1975:

> "6. That no credible statistics were introduced for all companies writing mobile home coverages that would demonstrate that the credits allowed in the North Carolina Fire Insurance Rating Bureau filings were unwarranted, unreasonable, improper or unfairly discriminatory.
>
> * * *
>
> "8. That the premium or rate charged for the peril of wind damage is indivisible, in that the peril is included with other perils in these policies and the premium or rate for wind storm cannot be separately obtained."

The Commissioner's order concluded that the discount to be allowed for tied-down mobile homes should be ten percent of the entire premium paid for mobile home insurance and that the reduction would go into effect on 1 November 1975.

In fixing premium rates in those cases arising from filings by the Bureau, the Commissioner is bound to follow the mandate of G.S. 58-131.2 in fixing a rate which produces "a fair and reasonable profit." In pertinent part, G.S. 58-131.2 provides that the Commissioner shall "give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made. . . . " Further, the Commissioner's order must be based upon material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b)(5).

[1] The authority of the Commissioner is, however, created by the legislature and the Commissioner's actions must be in accordance with the statutory procedures and standards set by the legislature. *In re Filing by Fire Ins. Bureau, supra.* The directions to the Commissioner contained in the statutes are mandatory and must be followed. Accordingly, we feel that in the case at bar the Commissioner was "authorized *and directed* to implement not less than a ten percent (10%) discount from the insurance premium. . . . " (Emphasis added.) G.S. 58-131.3A. The Commissioner was not given the authority to fix a rate which would yield a fair and reasonable profit under G.S.

58-131.2. Rather, he was expressly directed by the legislature to decrease the premium by ten percent.

[2] The evidence offered by Foremost does not alter our conclusion that the Commissioner was required to reduce premiums by ten percent. At the hearing, Foremost introduced data concerning its losses attributable to each peril covered under its mobile home policies. This included a detailed analysis of its losses occasioned by the peril of wind and an estimate of the decrease in losses expected to result from an increased number of mobile homes tied down. From this data, Foremost concluded that the decreased losses resulting from the tie-downs would be less than ten percent. We are of the opinion that Foremost's evidence was competent to be considered by the Commissioner under G.S. 58-131.2. The evidence, however, was not such as would compel the allowance of a premium change in an amount other than the ten percent decrease mandated by G.S. 58-131.3A. This is true for two reasons. First, the loss experience data of a single carrier in this State does not establish the "composite" of loss experience of all the carriers, which the establishment of the Bureau was intended to create. Secondly, as we interpret the statute, the Commissioner was required to reduce the premiums by ten percent and was not required to support his findings with substantial evidence. In our opinion, G.S. 58-131.3A mandated a ten percent decrease in the premiums charged for mobile home coverage; any greater decrease would require a finding, based upon substantial and material evidence, that such a further decrease was justified. Thus, we overrule Foremost's assignments of error directed to the lack of evidence supporting the Commissioner's order.

[3] In the alternative, Foremost argues that the ten percent premium reduction should have applied only to that portion of the premium applicable to wind-loss perils. The statute states that there is to be a "ten percent (10%) discount from the insurance premium otherwise applicable. . . . " In interpreting a statute, it is a general rule of construction that a statute is to be interpreted according to the intent of the legislature as gleaned from the language of the statute, the spirit of the statute and the purposes to be accomplished by the statute. *See Stevenson v. City of Durham,* 281 N.C. 300, 188 S.E. 2d 281 (1972).

In instant case, we feel that the language of the statute indicates that the discount was to be from the total premium.

From the Bureau's testimony, it was shown that mobile home coverage premiums had never been divided into components representing each peril and that such premiums were not susceptible to being so divided. Further, there was no loss experience data available regarding the savings which would be realized by the carriers because of the tie-downs. To accept Foremost's argument would require the use of data which does not exist and which the Bureau did not possess. This interpretation would perhaps totally prevent implementation of the ten percent reduction and clearly defeat the intent of the legislature to encourage mobile home owners to tie down their homes. Our interpretation of the statute clearly effectuates this intent. Accordingly, we overrule Foremost's assignments directed to its contention that the ten percent reduction applied only to that portion of the premium applicable to wind-loss perils.

[4] We are of the opinion that G.S. 58-131.3A was within the police power of the legislature. The legislation was passed as an inducement to mobile homeowners to tie down their homes. Such tie-downs will reduce the number of homes overturned by the wind, thus reducing the loss of life, the number of personal injuries, and the damage to property. This reduction in losses will be beneficial to both the citizens of North Carolina and their insurance carriers. The statute clearly bears a reasonable relation to the protection of the health, safety and general welfare of the public and is a valid exercise of the police power. *See Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 226 S.E. 2d 498 (1976); *State v. Anderson*, 275 N.C. 168, 166 S.E. 2d 49 (1969); *R. R. Co. v. City of Winston-Salem*, 275 N.C. 465, 168 S.E. 2d 396 (1969); *Graham v. Insurance Co.*, 274 N.C. 115, 161 S.E. 2d 485 (1968).

For the reasons stated, the decision of the Court of Appeals is reversed. 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 affirming the order of the Commissioner of Insurance entered in this case on the 31st day of October 1975.

Reversed.

STATE OF NORTH CAROLINA v. EUGENE THOMAS

No. 10

(Filed 7 March 1977)

1. **Safecracking— necessity for use of explosives, drills or tools**

Strictly and grammatically construed, G.S. 14-89.1 prohibits the unlawful and forcible opening, attempt to open, or picking of a safe or vault by the use of "explosives, drills, or tools." Thus, each method of opening a safe must be by means of "explosives, drills or tools" in order to fall within the prohibition of the statute.

2. **Safecracking— picking combination of safe — no use of tools — insufficiency of evidence of safecracking**

The evidence was insufficient to show that defendant "picked the combination" of a safe within the meaning of the safecracking statute, G.S. 14-89.1, where it tended to show that defendant merely opened the doors to an essentially unlocked safe by turning the combination dial a half turn back to zero, and there was no evidence that defendant used or attempted to use "explosives, drills, or tools" or otherwise forced open the safe.

APPEAL by the State of North Carolina pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals reported in 31 N.C. App. 52, 228 S.E. 2d 468 (1976).

Defendant was tried upon a bill of indictment which charged that on or about the 23rd day of September 1975 he "unlawfully and wilfully did feloniously pick the combination of a safe of Scarborough Hardware Company, a corporation, used for storing chattels, money and other valuables." This indictment was drawn under G.S. 14-89.1 which provides, "Any person who shall, by the use of explosives, drills, or tools, unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years' imprisonment in the State penitentiary."

The second bill of indictment charged defendant with felonious larceny.

The evidence for the State tended to show the following facts: In September 1975 Landon Scarborough owned and operated a hardware store in Wadesboro. Money and valuables were customarily kept in a safe in the office, located in the rear of the store. On the date in question, the contents of the safe

included a deposit book containing a $50 check, two $30 money orders, and $200.00 in cash, consisting of ten $20 bills. Six metal cash boxes, each holding $100.00 in various denominations, were also in the safe.

The safe had double exterior doors and a combination lock. Once the combination had been set to disengage the lock the doors could only be opened by pulling the two handles in opposite directions. The inner door to the safe was equipped with a latch but not a lock. Mr. Scarborough's normal practice during store hours was to keep the doors of the safe closed and to give the combination a half turn only. Thus, by turning the dial back to zero, the safe could be opened. No other knowledge of the combination was required.

At approximately 2:00 p.m. on 23 September 1975, Mr. Scarborough was in the office working on the store's books. He left the office to assist his clerks with some customers. After the customers had departed, he heard a "clicking noise in the vicinity of the nail bin which was about twenty feet from the staircase going to the office." Mr. Scarborough went to investigate and discovered defendant on his knees astraddle one of the cash boxes from the safe, trying to open it with a ten-penny nail. Defendant fled and Mr. Scarborough pursued him into a "kudzu patch and tree area." Shortly thereafter the police apprehended defendant in the vicinity.

An inspection of the safe revealed it ransacked, the drawers open, and the deposit book, which contained the two hundred dollars, gone. Both the outer and inner doors were open. The safe was not damaged in any manner and no burglary tools were seen around the safe. Mr. Scarborough never again saw the deposit container or the money.

At the close of the State's evidence defendant moved to dismiss the charge of safecracking. The motion was denied, and defendant presented no evidence.

The case was submitted to the jury on the issues of felonious larceny, nonfelonious larceny, and safecracking. The jury returned verdicts of guilty of felonious larceny and safecracking. The Court of Appeals reversed the safecracking conviction on the ground that there was no evidence defendant forcibly opened the safe or "picked" its combination and that his motion to dismiss should have been allowed.

Attorney General Rufus L. Edmisten and Associate Attorney Thomas H. Davis, Jr., for the State.

H. P. Taylor, Jr., for defendant appellee.

SHARP, Chief Justice.

[2] In passing upon the validity of a motion to dismiss or for judgment as of nonsuit, the Court considers the evidence in the light most favorable to the State, giving it the benefit of every legitimate inference arising therefrom. If there is any competent evidence tending to establish each material element of the offense charged in the bill of indictment the motion must be overruled. *See generally* 4 Strong's N. C. Index, *Criminal Law* §§ 104, 106, 176 (1976). Plenary evidence established that defendant unlawfully opened the safe and feloniously took and carried therefrom money belonging to Mr. Scarborough. However, there is no evidence, nor does the indictment charge, that defendant used or attempted to use "explosives, drills, or tools" or otherwise forced open the safe. This appeal presents the question whether the record contains any evidence that defendant "picked the combination" of the safe within the meaning of the term *pick* as it is used in G.S. 14-89.1. Although we have considered numerous appeals in prosecutions brought under this statute since its enactment as Chapter 653 of the Session Laws of 1961, we have not heretofore been called upon to resolve the question now before us.

[1] "It is elementary that a criminal statute must be construed strictly. *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315; *State v. Heath,* 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 37; Strong, N. C. Index, *Statutes* § 5. Adams, J., speaking for the Court in the *Heath* case, said: 'The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant.' " *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329 (1968). *Accord, State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97 (1952). Strictly and grammatically construed, G.S. 14-89.1 prohibits the unlawful and forcible opening, attempt to open, or picking of a safe or vault by the use of "explosives, drills, or tools." These three methods are described in an adverbial clause which clearly modifies each element of the compound predicate. Thus, each method of opening a safe must

be by means of "explosives, drills, or tools" in order to fall within the prohibition of the statute.

We have examined the cases brought under G.S. 14-89.1 and appealed to this Court since 1961 and also those which were carried no further than the Court of Appeals. In every case, entry to the safe was gained or attempted by means of tools. *See e.g., State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972) (chisels and sledge hammer); *State v. Battle,* 279 N.C. 484, 183 S.E. 2d 641 (1971) (hammer, chisel, bar and drill); *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499 (1966) (ax, pickax and acetylene torch).

The conclusion that the "picking" of a safe must, to come within the prohibition of the statute, be accomplished by means of a picklock (explosives and drills being clearly in apposite) is reinforced by reference to a dictionary. The authoritative Webster's New International Dictionary (2d ed. 1951) defines the transitive verb *pick:* to open (a lock) by or as by a wire." The more casual third edition has not changed this meaning: "to turn (a lock) with a wire or a pointed tool instead of the key esp. with intent to steal." Webster's New International Dictionary (3rd ed. 1964). Thus, to the lexicographer, the word *pick,* when used to describe a method of theft, necessarily implies the use of a special tool. In *State v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596 (1968), a case in which the defendant was charged with feloniously opening a safe and vault "by the use of an ax and two crowbars and other tools," he contended that G.S. 14-89.1 applied only to safes with combinations. The Court rejected that argument by indicating that the word *pick* in the statute referred to a mode of gaining entry into safes or vaults without combinations.

[2] The State contends that the adoption of the dictionary definition of *pick* would necessarily exclude entry to safes gained through divining their combinations by means of careful listening to the sound of the falling tumblers. We consider it extremely improbable that entry into a locked combination safe could be gained by this method without the use of a stethoscopic tool. However, this case does not present that problem. Here, defendant merely opened the doors to an essentially unlocked safe by a half-turn of a knob. In doing so he demonstrated neither particular preparation nor prowess, and he employed no explosives, drills, or tools.

We believe the purpose of G.S. 14-89.1, which authorizes a maximum sentence of thirty years, was to single out for special punishment those criminals who open or attempt to open a safe or vault by means of the special implements (explosives, drills, or tools) specified in G.S. 14-89.1. If, however, we have misconstrued the legislative intent, and it was indeed intended that G.S. 14-89.1 embrace the unlawful entry into or attempt to open a safe or vault by any manipulation of the combination, it will be a simple matter for the General Assembly to amend the section.

The decision of the Court of Appeals sustaining defendant's conviction of felonious larceny and vacating his conviction of safecracking is

Affirmed.

STATE OF NORTH CAROLINA v. RONALD RAVONE JONES

No. 88

(Filed 7 March 1977)

1. **Criminal Law § 57— armed robbery — evidence about pistol — no expression of opinion — evidence properly admitted**

In a prosecution for armed robbery, the trial court did not err in denying defendant's motion to strike all testimony of a police officer concerning the mechanical operation of a pistol which defendant threw down at the time of his arrest, since the officer was not expressing an opinion but was testifying from personal observation; and in light of all the evidence tending to establish the use or threatend use of a firearm, whereby the life of a person was endangered or threatened, any possible error in the admission of testimony concerning the type of gun used was harmless beyond a reasonable doubt.

2. **Criminal Law § 168— identity of defendant — brief jury instructions — no prejudice to defendant**

In an armed robbery prosecution where the defendant's identity was fully established by the circumstances under which he was captured and the loot taken from him at that time, any error of the trial court in its brief summation of a witness's identification of defendant was inconsequential and in nowise prejudicial to defendant.

DEFENDANT appeals from judgment of *Seay, J.*, 1 December 1975 Session, FORSYTH Superior Court. This case was docketed and argued as case No. 138 at the Fall Term 1976.

Defendant was tried on a bill of indictment, proper in form, charging him with the armed robbery of an ABC store in Winston-Salem on 6 October 1975.

The State's evidence tends to show that on 6 October 1975 Jimmy Lee Adams and Ralph E. Ware were employees on duty at ABC Store No. 10 in the Parkview Shopping Center in Winston-Salem. At approximately 8:35 p.m. two black males with pistols entered the ABC store, each wearing a colored stocking over his head. They jumped the counter and demanded the money in the cash registers and the safe. One of them struck Jimmy Lee Adams in the face with a pistol, breaking his nose. They took approximately $2,000 from the safe, $32 from the personal wallet of Jimmy Lee Adams, and a sum of money from Ralph E. Ware. The robbers were in the store approximately fifteen minutes.

Police Officer J. D. Wheeling observed two black males emerge from the ABC store. Neither was wearing a mask and both were carrying items in their hands. The two subjects fled around the back of the store building and were pursued by Officer Wheeling, Officer A. S. Gill and Officer D. L. Walker. Officer Wheeling rounded the corner of the building, overtook defendant Ronald Ravone Jones, raised his weapon and commanded defendant to throw down his pistol. Defendant did so and was handcuffed. The pistol was retrieved and offered into evidence as State's Exhibit 3.

Meanwhile, Officers Gill and Walker pursued the other robber and, after an exchange of shots during which the robber was felled, captured him. His name was Norman Bishop. This man was armed with a .22 caliber pistol. The gun was loaded with live cartridges and contained two spent shells. The cartridge underneath the firing hammer had an indentation on the edge of it.

The sum of $232 was taken off the person of defendant Jones. When apprehended, he threw down a nylon stocking containing $1839. This money was offered in evidence as State's Exhibit 13.

Defendant offered no evidence.

The jury convicted defendant of armed robbery as charged in the bill of indictment, and the court adjudged that defendant be confined in the penitentiary for a term of not less than forty

years nor more than life with credit for time served pending trial. Defendant appealed to the Court of Appeals and, in view of the sentence imposed, we ordered the case transferred to the the Supreme Court for initial appellate review.

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Associate Attorney, for the State.

Berrell F. Shrader, attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant first assigns as error the denial of his motion "to strike all testimony" of Police Officer C. W. Crawley concerning the pistol defendant threw down at the time of his arrest.

Officer Crawley testified that it appeared defendant had attempted to fire the gun. Objection to that statement was sustained after which the following testimony was elicited:

"Q. Mr. Crawley, can you testify whether that weapon is a center fire weapon or a rim fire.

A. A rim fire.

Q. And what do you mean by that?

A. When the hammer falls, it falls on the rim of the cartridge or shell to explode or ignite it.

MR. SHRADER: I move to strike all testimony concerning the logistics [sic] of the gun.

THE COURT: Overruled.

DEFENDANT'S EXCEPTION NUMBER ONE

Q. And if you would look at one of the shells which you identified further earlier as having a marking on it, would you describe the location of that marking.

A. It is on the edge of the shell casing.

Q. Would that be indicative of a rim fired weapon or a center fire weapon.

A. A rim fire."

Defendant contends that, absent a finding that the witness was an expert in the mechanics of firearms, the testimony of

Officer Crawley relative to the mechanical operation of the weapon should have been stricken. He further contends he was prejudiced by failure to strike the testimony in that it placed before the jury evidence that the robbery was accompanied by an overt act of violence. We find no merit in this assignment.

While defendant's motion is couched in obscure language, apparently he moved to strike all the testimony of Officer Crawley on the theory that a witness must be an expert in the mechanical operation of firearms before he is qualified to testify whether a particular weapon is center fire or rim fire. The record in this case reveals that Officer Crawley was not expressing an opinion but testifying from personal observation. He had already testified without objection that State's Exhibit 3 was a rim fire weapon. Be that as it may, however, and assuming *arguendo* that defendant's motion to strike should have been allowed, it is incumbent upon him to show "error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would likely have ensued." *State v. Cross,* 284 N.C. 174, 200 S.E. 2d 27 (1973). Here, it is clear beyond a reasonable doubt that the alleged error to which this assignment is addressed resulted in no prejudice to defendant.

G.S. 14-87 (Cum. Supp. 1975), the statute under which defendant was charged, requires, among other things, that a robbery be accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. *State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705 (1973); *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971). While the controverted testimony of Officer Crawley would permit the jury to find that the robbery was accomplished by the use or threatened use of a firearm using rim fired ammunition, other testimony in the record, admitted without objection or contradiction, points overwhelmingly to the use of firearms by the robbers. We see no reasonable possibility that the verdict of the jury would have been different had the challenged testimony been excluded.

Evidence elicited from the store employees reveals that defendant and his companion entered the ABC store and defendant, armed with a .22 caliber pistol, forced Ralph Ware to empty the contents of the cash drawer. Defendant then warned Ware that if he moved his head again Ware would be "blown

away." Defendant's companion forced Jimmy Adams to attempt to open the safe and struck Adams on the nose with a pistol. When Adams could not open the safe, defendant's companion hit him again in the back of the head. Furthermore, testimony by various other officers tends to show that while the robbers were being apprehended and during their flight, defendant's accomplice fired several shots at the police.

In light of all the evidence tending to establish the use or threatened use of a firearm, whereby the life of a person was endangered or threatened, any possible error in the admission of testimony concerning the type of gun used was harmless beyond a reasonable doubt. *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 first assignment is overruled.

[2] Defendant's second assignment of error relates to a portion of the charge in which the trial judge stated the contentions of the parties. The portion challenged reads as follows: "Mr. Adams can identify the short man that was there and that short man is the defendant, Ronald Ravone Jones. . . . " Defendant contends this brief summation of defendant's identification ignores other aspects of the testimony of the witness Adams where he said, on further cross-examination: "All that I can remember was that the shorter of the two boys in the robbery had a moustache and that he was black. No, I cannot remember any other details of his facial appearance."

Defendant concedes that the witness positively stated, on four separate occasions in his testimony, that he identified defendant as the shorter of the two robbers. He argues, however, that in light of the later qualifications in his testimony, it was incumbent upon the trial judge to incorporate those qualifications in the charge to the jury.

There is no merit in this assignment. An inadvertance in recapitulating the evidence and the contentions of the parties must be called to the attention of the court in time for correction before the jury retires. After verdict, the objection comes too late. *State v. McAllister,* 287 N.C. 178, 214 S.E. 2d 75 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106

(1975); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Black,* 283 N.C. 344, 196 S.E. 2d 225 (1973); *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). In any event, the error alleged here is inconsequential and in nowise prejudicial to defendant. His identity was fully established by the circumstances under which he was captured and the loot taken from him at that time. This assignment is overruled.

Prejudicial error not having been shown, the verdict and judgment must be upheld.

No error.

HILDA S. PINKSTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT M. PINKSTON, DECEASED v. BALDWIN, LIMA, HAMILTON COMPANY, A CORPORATION; CLARK EQUIPMENT COMPANY, A CORPORATION; ARMOUR & COMPANY, A CORPORATION; AND F. W. ALTMAN t/a F. W. ALTMAN COMPANY, AND ROBERSON CONSTRUCTION COMPANY, INC.

No. 79

(Filed 7 March 1977)

1. **Death § 4; Limitation of Actions § 4— defect in crane — no latent injury — proviso of G.S. 1-15(b)**

The ten-year statute of limitations contained in G.S. 1-15(b) did not apply to a wrongful death action based on an alleged defect in a crane where there was no latent injury.

2. **Death § 4; Limitation of Actions § 4— defective crane — wrongful death action — statute of limitations**

A cause of action by plaintiff's intestate for injuries resulting from an alleged defect in a crane would have accrued and the limitation period would have begun to run when he was injured, not on the date defendants lost control of the injury-causing instrumentality; therefore, a wrongful death action instituted approximately one year after the crane collapsed and killed plaintiff's intestate was not barred by the three-year limitation of G.S. 1-52(5) or the two-year limitation period of G.S. 1-53(4) applicable to wrongful death actions.

Chief Jusice SHARP, Justices MOORE and COPELAND dissent for the reasons stated in their respective dissenting opinions in *Raftery v. Construction Co.,* 281 N.C. 180, 197 *et seq.*

ON *certiorari* to the Court of Appeals to review its decision reported in 29 N.C. App. 604, 225 S.E. 2d 147, reversing the

order granting the motion for summary judgment in favor of defendants, Baldwin, Lima, Hamilton Company, a corporation (BLH), Clark Equipment Company, a corporation (Clark), and Armour & Company, a corporation (Armour), entered by *Snepp, J.*, at 16 October 1975 Session of MECKLENBURG Superior Court. This case was docketed and argued in the Supreme Court as No. 120, Fall Term 1976.

Plaintiff instituted this action to recover damages for the wrongful death of her intestate, Robert M. Pinkston, which she alleged resulted from injuries suffered by him when a crane fell on him on 14 January 1972 while he was operating the crane as an employee of F. D. McDonald t/a F. D. McDonald Steel Erectors (McDonald). Plaintiff further alleged that defendant BLH in the year 1961 manufactured and by sale placed said crane in the stream of commerce whereby the crane came into the hands of defendant F. W. Altman t/a F. W. Altman Company (Altman). On 10 June 1969 Altman sold it to McDonald. She alleged that defendant Armour was liable as a successor corporation to BLH and that defendant Clark was liable as a successor to defendant Armour. Summonses were issued as to these defendants in January 1973 and an extension of time to file complaint was ordered. The summonses were duly served and the complaint filed within the time allowed. On 10 January 1974 defendant Roberson Construction Company, Inc., another former owner of the crane, was made a party-defendant. Plaintiff filed an amended complaint on 30 January 1974 which was duly served upon all defendants. The original and amended complaints alleged that defendants were negligent in that the crane which caused plaintiff's intestate's injuries was negligently designed and manufactured and further, that defendants breached express and implied warranties that the crane was merchantable and fit for the use for which it was intended.

On 18 August 1975, defendants BLH, Clark and Armour moved for summary judgment on the ground that plaintiff's claim was barred by the three-year statute of limitations, G.S. 1-52(5). On 16 October 1975 Judge Frank W. Snepp, after finding that the moving defendants were entitled to judgment as a matter of law, allowed the motion of defendants BLH, Clark and Armour.

Plaintiff appealed.

Newitt & Bruny, by Roger H. Bruny and John C. Newitt, Jr., for plaintiff.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and C. Byron Holden, for defendants.

BRANCH, Justice.

[1] The facts of this case are strikingly similar to those presented in *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405. In that case the majority and concurring opinions agreed that the ten-year statute of limitations contained in G.S. 1-15(b) applies only to those cases where the plaintiff's initial injury is "not readily apparent." In such cases the action is barred unless the injury is discovered and the suit is brought within ten years from the last act of the defendant giving rise to the claim. Obviously, under the facts of this case the provisions of G.S. 1-15(b) never came into play, since there was no *latent* injury.

[2] In instant case defendants concede that G.S. 1-15(b) does not apply to these facts, but argue instead that the action is barred by the three-year statute of limitations of G.S. 1-52(5), applicable to personal injury actions. G.S. 28A-18-2 [formerly G.S. 28-173], our wrongful death statute, in pertinent part, provides:

> 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; . . . .

Defendants contend that the decedent Robert M. Pinkston, had he lived, would have been barred by G.S. 1-52(5) from bringing suit to recover damages for his injuries and therefore his personal representative is likewise barred. This argument is based upon the assumption that the three-year statute of limitations in G.S. 1-52(5) began to run from the date on which defendants last had control of the injury-causing instrumentality.

In *Raftery*, the majority and concurring opinions reaffirmed the well-established rule that a statute of limitations

does not begin to run until the cause of action has accrued and the plaintiff has a right to maintain a suit. A plaintiff's cause of action accrues only when he suffers some injury.

Here plaintiff's intestate was not injured until the crane collapsed and killed him on 14 January 1972. At that time, his cause of action accrued and the three-year statute of limitations of G.S. 1-52(5) began to run. This action was instituted against appellants in January 1973, which was clearly before the action was barred by the three-year statute, G.S. 1-52(5), or the two-year statute applicable to wrongful death actions, G.S. 1-53(4). Therefore, for the reasons stated above and by authority of *Raftery v. Construction Co., supra,* and authorities therein cited, we hold that the present action is not barred by any statute of limitations.

The decision of the Court of Appeals reversing the entry of summary judgment in favor of defendants is

Affirmed.

Chief Justice SHARP, Justices MOORE and COPELAND dissent for the reasons stated in their respective dissenting opinions in *Raftery v. Construction Company,* 291 N.C. 180, 197 et seq.

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

CHURCH v. BOARD OF EDUCATION

No. 32 PC.

Case below: 31 N.C. App. 641.
31 N.C. App. 749.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 March 1977. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 7 March 1977.

EMPLOYMENT SECURITY COMM. v. YOUNG MEN'S SHOP

No. 57 PC.

Case below: 32 N.C. App. 23.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 March 1977.

FORMAN & ZUCKERMAN v. SCHUPAK

No. 109 PC.

Case below: 31 N.C. App. 62.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 March 1977. Appeal dismissed ex mero motu 7 March 1977.

GENERAL ELECTRIC CO. v. FIDELITY & GUARANTY CO.

No. 38 PC.

Case below: 31 N.C. App. 749.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 March 1977.

GEORGE v. TOWN OF EDENTON

No. 30 PC.

Case below: 31 N.C. App. 648.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 7 March 1977.

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

IN RE USERY

No. 31 PC.

Case below: 31 N.C. App. 703.

Petition by claimant for discretionary review under G.S. 7A-31 denied 7 March 1977.

INVESTMENT PROPERTIES v. NORBURN

No. 11 PC.

Case below: 31 N.C. App. 524.

Petition by plaintiffs and defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

LAMBERT v. POWER CO.

No. 52 PC.

Case below: 32 N.C. App. 169.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 March 1977.

LEASING, INC. v. DAN-CLEVE CORP.

No. 40 PC.

Case below: 31 N.C. App. 634.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

McADAMS v. FIDELITY & GUARANTY CO.

No. 37 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 March 1977.

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

MILLER v. HOUPE

No. 51 PC.

Case below: 32 N.C. App. 103.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977. Motion of plaintiffs to dismiss appeal allowed 7 March 1977.

PARKER v. BENNETT

No. 56 PC.

Case below: 32 N.C. App. 46.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 March 1977.

RGK, INC. v. GUARANTY CO.

No. 36 PC.

Case below: 31 N.C. App. 708.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 March 1977.

SCHULZ v. SCHULZ

No. 47 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 March 1977.

STATE v. BANKS

No. 34 PC.

Case below: 31 N.C. App. 667.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

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

STATE v. BLOUNT

No. 25 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. BOSTICK

No. 7 PC.

Case below: 31 N.C. App. 524.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. CARSON

No. 42 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. CHISHOLM

No. 22 PC.

Case below: 31 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. HILL

No. 39 PC.

Case below: 31 N.C. App. 733.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

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

STATE v. JEETER

No. 54 PC.

Case below: 32 N.C. App. 131.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. KENNEDY

No. 53 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. McCOY

No. 26 PC.

Case below: 31 N.C. App. 524.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. MARSHALL

No. 49 PC.

Case below: 30 N.C. App. 751.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 March 1977.

STATE v. SNYDER

No. 12 PC.

Case below: 31 N.C. App. 745.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

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

STATE v. WHISNANT

No. 29 PC.

Case below: 31 N.C. App. 750.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE v. WHITLEY

No. 44 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

WARREN v. PARKS

No. 27 PC.

Case below: 31 N.C. App. 609.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 March 1977.

STATE OF NORTH CAROLINA v. DEWEY L. GRAY, JR.

No. 85

(Filed 14 April 1977)

1. **Constitutional Law § 31— indigent defendant — appointment of investigator, expert**

The State is required by G.S. 7A-450(b) and 7A-454 to provide an indigent defendant with a private investigator or expert assistance only upon a showing that there is a reasonable likelihood that defendant will be materially assisted in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial, and neither the State Constitution nor the Federal Constitution requires more.

2. **Constitutional Law § 31— indigent defendant — denial of appointment of investigator, serologist**

The trial court in a rape case did not err in the denial of the indigent defendant's pretrial motion that the State furnish him a private investigator where there was no showing for the necessity of a private investigator; nor did the court err in the denial of defendant's motion that the State furnish him an expert in serology to aid in defense counsel's preparation for the cross-examination of the State's expert chemist who testified regarding blood groupings ascertained by examining fluids taken from the victim, a male friend of the victim, and defendant, and from a cigarette butt found in the victim's apartment, where the court ordered that the chemist be available to defense counsel for examination under oath at State expense well before trial.

3. **Constitutional Law § 46— withdrawal of attorney**

An attorney of record may withdraw from the case only upon satisfying the court that his withdrawal is justified.

4. **Constitutional Law § 46— refusal to dismiss court-appointed counsel**

In this prosecution for rape, burglary and felonious assault, the trial court did not err in the denial of defendant's motion to dismiss his court-appointed attorney on grounds that the attorney had urged defendant to plead guilty to first degree burglary, had "misled" defendant, his wife and mother, hadn't come to see defendant regularly, and had served as an assistant district attorney, since it is clear that defendant had no reasonable objection to his attorney's conduct or preparation of his case, and the court had no reason to believe that the relationship between defendant and his counsel had deteriorated so as to prejudice the presentation of his defense.

5. **Constitutional Law § 46— desire to employ counsel — refusal to dismiss court-appointed counsel**

Defendant's assertion that he wished to employ his own counsel, made on the day trial was to begin without the appearance or even the name of a single attorney who might be privately employed to

represent him and with no claim that he had funds to employ counsel, was no ground for dismissal of his court-appointed counsel.

6. **Constitutional Law § 46— court-appointed counsel — former assistant district attorney — motion to dismiss**

Court-appointed counsel's brief former tenure as an assistant district attorney constituted no conflict of interest which would require his dismissal upon motion by defendant.

7. **Criminal Law § 55.1— blood grouping tests**

The results of blood grouping tests are generally admissible in criminal trials.

8. **Criminal Law § 55.1— blood grouping tests — relevancy in rape trial**

The results of blood grouping and absorption inhibition tests establishing that a vaginal fluid sample taken from an alleged rape victim contained type "B" or "AB" blood, that the victim and a male friend of the victim had type "A" blood, and that defendant had type "B" blood were relevant in this rape prosecution to negate a possible defense contention that semen found in the victim's vagina was deposited in a consensual sexual encounter by the victim's male friend.

9. **Criminal Law § 55.1— blood absorption inhibition tests — reliability and validity**

The reliability and validity of absorption inhibition tests were sufficiently demonstrated to render them admissible in a rape prosecution where an expert forensic chemist testified that both defendant and the victim were "secretors" whose blood types could be determined from body fluids other than blood, the witness testified at length to his methodology, and the witness conducted the tests himself and was carefully precise in his testimony.

10. **Criminal Law § 72— age — lay opinion testimony**

Lay witnesses who had adequate opportunity to observe and in fact did observe defendant may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the State; therefore, the trial court in a rape case properly permitted lay opinion testimony regarding defendant's age for the purpose of proving that he was more than sixteen years of age at the time of the rape, this being an essential element of the crime.

11. **Criminal Law §§ 72, 80.1— certificate showing birth certificate information — no official record — inadmissibility**

A "Certified Certificate of Birth" signed by a Deputy Registrar which was no more than the Deputy Registrar's assertion of what she found on the recorded birth certificate was double hearsay and inadmissible in a rape prosecution to show defendant's age since the certificate was not a certified copy of any official record so as to be admissible under G.S. 130-66, 8-34, or 8-35, and there was no showing that it was certified by the State Registrar or an authorized agent thereof; however, the admission of the certificate was rendered harm-

less by defendant's own testimony establishing that he was more than sixteen years old at the time the rape occurred.

12. Criminal Law § 29.1— denial of motion for mental examination

The trial court did not err in the denial of defendant's pretrial motion for a mental examination to determine his capacity to stand trial without conducting a formal inquiry into his mental capacity where the only evidence in support of the motion was counsel's assertion that defendant's apprehension of the seriousness of the charge against him had failed to inspire any effective communication by defendant with counsel, and the record contains nothing to indicate defendant's incapacity to stand trial and demonstrates his understanding and articulation concerning the charges against him.

13. Criminal Law § 66.9— pretrial photographic procedures — defendant's different hairdo

Pretrial photographic procedures were not unnecessarily suggestive because defendant's hairdo was different from others in the stack of photographs since the hairdo was not the basis for the identification of defendant.

14. Criminal Law § 66.12— identification at preliminary hearing — effect on in-court identification

Rape victim's in-court identification of defendant was not tainted by her identification of defendant at the preliminary hearing, where he was the only black male in the courtroom, where there was no evidence that her identification of him at the preliminary hearing had any effect on her identification at trial.

15. Criminal Law § 66.14— in-court identifications — independent origin

The trial court in a rape case properly admitted the in-court identifications of defendant by a rape victim and another witness where the court determined upon supporting evidence that pretrial identification procedures were not impermissibly suggestive and that the in-court identifications arose independently, from adequate observation at the time of the crime, and were not tainted by any pretrial conduct of any law enforcement officer or court personnel.

16. Criminal Law § 62— denial of polygraph test

Defendant's rights to confrontation, counsel, due process and equal protection were not violated by denial of his pretrial motion to undergo a polygraph examination, particularly since defendant refused the State's offer to administer a polygraph examination on condition that defendant and the State stipulate the admissibility of the results.

17. Criminal Law §§ 42.3; 84— rape case — coat worn by assailant — variance in description in warrant and actuality

Although an affidavit for a search warrant contained a rape victim's description of the coat worn by her assailant as a "brown three-quarter length coat with fur collar," a black and white tweed three-quarter length coat with a fur collar seized pursuant to the warrant was relevant and properly admitted in defendant's trial for

rape since the variance in description and actuality of the color affected the weight but not the admissibility of the evidence, and the description in the warrant was sufficiently precise to preclude any doubt that the coat seized was the one authorized to be taken.

18. Rape § 5— submission procured by use of gun — sufficiency of evidence

The State's evidence in a rape case was sufficient to permit the inference that the victim's submission was procured through the use of a gun defendant carried and was sufficient to overcome defendant's motion for nonsuit of the charge of first degree rape where it tended to show that defendant carried a gun with a "very long barrel" in full view and waved it in his hands, that the victim told her companion, "Run. He has a gun," then returned to her apartment, locked the door and called the police, and that defendant kicked the door in, discovered her hiding place and dragged her out of the apartment and into a field where he had intercourse with her, again brandishing the gun in one hand.

19. Rape § 3— indictment — procurement of submission — two means alleged conjunctively

An indictment for rape charging that the prosecutrix had her resistance overcome or her submission procured "by the use of a deadly weapon and by the infliction of serious bodily injury" correctly charged the offense of first degree rape, and defendant was not prejudiced by the inclusion of the "serious bodily injury" allegation where the court submitted the issue of first degree rape to the jury solely on the theory, supported by the evidence, that the victim's submission was procured by the use of a deadly weapon.

20. Indictment and Warrant § 17— two means alleged conjunctively — proof of one — variance

Where an indictment sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the State offers evidence supporting only one of the means charged.

21. Rape § 7— death sentence vacated — substitution of life imprisonment

Sentence of death imposed for first degree rape is vacated and the case is remanded for substitution of a sentence of life imprisonment.

DEFENDANT appeals from judgment of *Thornburg, J.*, at the 23 June 1975 Session of MECKLENBURG Superior Court. Docketed and argued as No. 106, Fall Term 1975.

Rufus L. Edmisten, Attorney General, by Edwin Speas, Jr., Special Deputy Attorney General, and Jack Cozort, Associate Attorney, for the State.

Tate K. Sterrett, Attorney for defendant appellant.

EXUM, Justice.

Upon separate bills of indictment defendant was tried and convicted of first degree rape (75-CR-2774), assault with a deadly weapon with intent to kill resulting in serious bodily injury (75-CR-2775), and first degree burglary (75-CR-2776). He was sentenced, respectively, to death, twenty years imprisonment, and life imprisonment.

Incorporated within twenty questions presented in his brief, defendant brings forward some twenty-eight assignments of error, the most significant of which challenge the: (1) trial court's refusal to appoint a private investigator and an expert witness to assist in the defense; (2) denial of defendant's motion to dismiss court-appointed counsel and counsel's motion to be permitted to withdraw; (3) admissibility of certain blood grouping and absorption inhibition tests; and (4) admissibility of lay opinion testimony as to defendant's age and a so-called "Certified Certificate of Birth." We find no merit in any of defendant's assignments of error relating to the trial of the cases. We do, however, vacate the death sentence entered in the rape case and remand this case for the entry of a sentence of life imprisonment.

The state's evidence tends to show the following: At about 11:00 p.m. on 12 January 1975, Louise Johns was at home in her apartment at 609 Key Street in Charlotte with a friend, Robert Griffith. They heard a knock at the front door. Thinking the visitor might be Griffith's wife, from whom he was separated, Griffith exited the apartment through the back door while Mrs. Johns proceeded to answer the door.

When she opened the door, Mrs. Johns encountered a black man whom she mistakenly thought she recognized as a neighbor's son. The man asked to use her phone but she told him it was out of order and suggested he use a neighbor's phone. When he was insistent she again refused. Mrs. Johns quickly apprehended her mistake as to the visitor's identity as she observed him in the strong light in the doorway. She was close enough to the man to smell alcohol on his breath.

The man pushed his way through the door with a long-barreled pistol in his hand. He was smoking a cigarette and dropped it on the carpet. Upon his inquiry, Mrs. Johns told him someone had just left the apartment. He instructed her to

"go get rid of them." Mrs. Johns went to Griffith, who was standing in front of the apartment and said, "Run. He has a gun." Griffith ran after Mrs. Johns but was confronted by the black man, who pointed a "big gun" at his stomach and threatened to kill him. At this time Mr. Griffith was standing in the parking lot where there was sufficient illumination from a street light that he could see the man's face clearly. From Griffith's and Mrs. Johns' descriptions the man was tall and thin-faced, wearing a three-quarter length coat with a fur collar and a small hat. Griffith was edged toward his car by the gunman, got into it and drove away to a phone booth from which he tried to call Mrs. Johns, but got no answer.

Mrs. Johns ran back into her apartment, locked the door and called police, giving her name and address. Then she went upstairs and hid in her bedroom closet. The man, having kicked in the door, soon discovered her hiding place, grabbed her around the neck and dragged her down the stairs and out the back door. He told her not to scream and waved the gun. Still holding Mrs. Johns by the neck, the man dragged her down an embankment and into a field behind the apartment building. He pushed her down and ordered her to undress. After Louise Johns had pulled down her jeans and the man had undressed, he began having sexual intercourse with her, and then forced her to have oral sex with him. The man then resumed having intercourse until he ejaculated.

Mrs. Johns testified that her assailant hit her on the head with the butt of his gun after the completed act of intercourse, dazing her. She said he began beating her and that she thought she was stabbed but did not see a knife. The man walked quickly back towards the apartment building. Mrs. Johns walked to the front of the apartment building where she saw a police car with the door open. She fell into the car, told police what had happened and gave them a description of her assailant.

Mrs. Johns was taken by ambulance to a hospital, where she underwent surgery to repair damage resulting from deep puncture wounds to her stomach, diaphragm and colon. Her scalp was also sutured. At the hospital Mrs. Johns told police that her assailant was not her neighbor's son, although he looked something like him. (Defendant is the brother of the man whom Mrs. Johns knew as her neighbor's son.) Medical testimony established the presence of spermatozoa in a vaginal fluid sample

taken from Mrs. Johns. Testimony of an expert witness established the presence of blood type "B" in this sample. Mrs. Johns and Griffith both had blood type "A." The defendant had blood type "B."

At trial Mrs. Johns and Robert Griffith positively identified defendant as the assailant.

Two police officers arrived at the apartment complex soon after Mrs. Johns' call, but found no one at her apartment, although they saw the dead bolt lock hanging by one screw. In cruising the parking lot using their spotlight these officers saw a man who met the description later given them by Mrs. Johns, but the man disappeared before the officers could apprehend him. At trial both officers positively identified defendant as the man they saw in the parking lot.

Defendant presented an alibi defense. He testified himself that he was with friends at the Red Bird Lounge or Club until 10:00 or 10:30 on the night of the crime, that he went home alone, watched TV and went to sleep. His testimony was corroborated by the friends he named as his companions that evening.

I

By his first assignment of error defendant, an indigent, contends the court erred in denying his pre-trial motion that the state furnish him for the purpose of assisting in his defense an expert in serology and a private investigator. We fully considered the questions presented by this assignment in *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976) and *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). In these cases defendants' pre-trial motions for appointment of private investigators at state expense were held properly denied. Recognizing that General Statute 7A-450(b) requires the state to provide an indigent defendant "with counsel and the other necessary expenses of representation," the Court in *Tatum* held that an order for 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. Mere hope or suspicion that such evidence is available will not suffice." 291 N.C. at 82, 229 S.E. 2d at 568. To similar effect was the statement in *Montgomery* that "[t]his 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 . . . 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 productive of evidence favorable to him." 291 N.C. at 97-98, 229 S.E. 2d at 577. These cases also established that denial of a state-paid private investigator to an indigent defendant did not, *ipso facto,* constitute a denial of equal protection of the laws notwithstanding that such investigators might be available to indigent defendants represented by public defenders, G.S. 7A-468, and to pecunious defendants.

We recognized in *Tatum* 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." 291 N.C. at 80, 229 S.E. 2d at 566-67. While in *Tatum,* we determined to adhere to the holding in *United States ex rel. Smith v. Baldi,* 344 U.S. 561 (1953) (the state has no constitutional duty to provide an expert witness to assist in the defense of an indigent), we said, further, that "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." 291 N.C. at 81, 229 S.E. 2d at 567. We concluded in *Tatum* that the appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. *See also* G.S. 7A-454 providing for payment in the court's discretion of a fee for an expert witness who *testifies* for an indigent defendant.

We know, of course, that the assistance of an expert or private investigator or both would be, generally, welcomed by all defendants and their counsel as an added convenience to the preparation of a defense. *State v. Tatum, supra.* We must, however, also recognize that it is practically and financially impossible for the state to give indigents charged with crime every jot of advantage enjoyed by the more financially privileged. *See State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated,* 96 S.Ct. 3211 (1976). "And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally re-

quired." *Ross v. Moffitt,* 417 U.S. 600, 616 (1974). There are usually other methods by which defense counsel himself, without the use of investigators or experts, can uncover information or educate himself regarding a particular scientific discipline.

[1] There are, then, no constitutional or legal requirements that private investigators or expert assistance *always* be made available simply for the asking. *See, generally,* "Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert," Annot., 34 A.L.R. 3d, 1256 (1970). Our statutes, G.S. 7A-450(b) and 7A-454, as interpreted in *Tatum* and *Montgomery* require that this kind of assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the state nor the federal constitution requires more.

[2] Defendant here really makes no showing or serious argument for the necessity of a state-appointed private investigator. He does argue vigorously that the appointment of an expert in serology was necessary for effective cross-examination of the state's expert, Brian Stemball, an SBI chemist, who testified regarding blood groupings ascertained by examining certain fluids taken from the bodies of Mrs. Johns, Mr. Griffith and defendant and from a cigarette butt found in Mrs. Johns' apartment.

We do not find the argument persuasive. In its order denying defendant's motion to appoint an expert and investigator, the court provided that Brian Stemball would be available to defense counsel for examination under oath at state expense well before trial. Defendant thus had ample opportunity to discover the procedures used in the blood grouping tests and the expert's opinion regarding the results he obtained. The able cross-examination of Stemball at trial well demonstrates that defense counsel was amply prepared for this phase of the trial.

Since the facts and circumstances reveal no real necessity for the appointment of an expert serologist or a private investigator in the preparation of an adequate defense, it was not error to deny defendant's motion.

II

Defendant next claims error in the denial of his motion to dismiss his court-appointed attorney and the attorney's motion to withdraw from the case. We believe the court ruled correctly in denying both motions.

[3] An attorney of record may withdraw from the case only upon satisfying the court that his withdrawal is justified. *Smith v. Bryant,* 264 N.C. 208, 141 S.E. 2d 303 (1965). Defendant's attorney, in support of his motion to withdraw, cited only the reasons set forth by defendant in his motion to dismiss counsel. Therefore, unless adequate justification was demonstrated by defendant it was not error to deny his attorney's motion to withdraw.

The United States Supreme Court has recognized a right to self-representation implicit in the Sixth Amendment and independent of defendant's power to waive the right to counsel. *Faretta v. California,* 422 U.S. 806 (1975). California was held to have violated that right when it imposed counsel upon a defendant who, weeks before trial, had "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835.[1]

In *State v. Sweezy,* 291 N.C. 366, 230 S.E. 2d 524 (1976), the defendant requested that his counsel be removed in order that two black counsel might be appointed. Since no substantial claim was asserted that defendant was denied effective assistance of counsel, and since an indigent defendant has no right to choose his appointed counsel, *State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174 (1976), we held there was no error in the denial of defendant's request in *Sweezy.* Addressing the informality of the pertinent exchange between the court and the defendant, but noting the defendant's vociferous insistence that his desires be known, we held the lack of a formal hearing in that case did not constitute reversible error. We nevertheless cautioned:

> "It would have been the better practice for the trial judge to have excused the jury and allowed defendant to

[1] The Court nevertheless recognized that termination of self-representation by a defendant who deliberately and seriously disrupts court proceedings and appointment of stand-by counsel to assist a defendant representing himself if he should request such assistance during the trial were constitutionally permissible. 422 U.S. at 834, n. 46.

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." *Id.* at 372, 230 S.E. 2d at 529.

Since there was no intimation that defendant Sweezy wished to represent himself, but only that he wanted "two black lawyers," and since "[d]efendant's courtroom behavior gave the trial judge every right 'to suspect the bona fides of the defendant,' " *Id.* at 373, 230 S.E. 2d at 529, there was no reversible error in the court's failure to follow the recommended procedure.

[4] In this case, defendant Gray moved at his arraignment on June 23, 1975, the day his trial was to begin, to dismiss his attorney on the grounds that his attorney had, on several occasions, urged defendant to plead guilty to first degree burglary. In addition, he complained that the attorney had "misled" defendant, his wife and mother and had "put distrust" in his witnesses' hearts. Defendant also said he and his attorney had not been able to communicate because "he hasn't been coming to see me and when he does come to see me his only objective is to get me to plead guilty." Defendant concluded his request by telling the court that "under the circumstances I feel that it's best for me to get my own counsel to come into this court pertaining to this matter where I would get proper representation, and that is the only way I feel I would get justice."

The court questioned defendant extensively concerning his wishes and the background of his case. Defendant revealed that after his arrest in mid-January he requested that an attorney appointed prior to Mr. Austin (defendant's trial counsel) be relieved from representing him and another attorney appointed. This request was granted. Defendant asserted that he was not this time requesting the appointment of another attorney, but only that "the court relieve this attorney of all obligation toward this case and me." In reply to the court's question as to how long defendant had known he had a right to employ an attorney of his choosing, defendant responded that he had known this "since the very beginning . . . but the fact remains that I did not have necessary funds to obtain counsel on my own, but since I've found out certain information and corresponded with certain

other attorneys, I have a better opportunity now to obtain my own counsel." Thereupon the following colloquy ensued:

"COURT: How much money do you have?

MR. GRAY: It's not a matter of money. It's a matter that I have corresponded and talked to other attorneys and, you know, I could still get back in touch with them so they could take up this matter.

COURT: Are any of them here?

MR. GRAY: No, they are not.

COURT: How long have you known the case was going to be tried today?

MR. GRAY: I would say approximately three weeks, but there were certain matters involved that I mentioned that I didn't know until only recently, within a week or so."

The court also questioned defense counsel and ascertained that he was qualified, both by education and experience, including an eariler two year's service as assistant district attorney, to do criminal defense work at the superior court level. At this point defendant interrupted, reminding the court that his first court-appointed attorney had been an ex-district attorney and that another ex-district attorney had refused to take the case. He objected to the "injustice and wrong" of having had ex-district attorneys appointed for him.

[5] It is clear that defendant had no reasonable objection to his attorney's conduct or preparation of his case. His complaints are general and vague, and the emphasis of his objections shifted during the hearing. His counsel, as appears from the record, was well qualified and did, in fact, represent defendant in an exemplary fashion. Defendant's assertion that he wished to employ his own counsel, made as it was, on the day trial was to begin and without the appearance or even the name of a single attorney who might be privately employed to represent him, was no ground for the dismissal of his court-appointed counsel. Defendant did not claim he had the funds to employ counsel. There is not a scintilla of evidence indicating defendant's intention or desire to represent himself; indeed, he seems to have been more than usually aware of the critical role played by counsel in criminal trials.

[6] While defendant may have been peeved with his attorney for personal reasons, the court had no reason to doubt that attorney's effectiveness and capability as an advocate or to suspect the relationship between defendant and his counsel to have deteriorated so as to prejudice the presentation of his defense. *See State v. Robinson, supra* at 66-67, 224 S.E. 2d at 179-80. Certainly, counsel's brief former tenure as an assistant district attorney constitutes no conflict of interest and yields, if anything, a greater probability that defendant would be competently represented by an attorney experienced in serious criminal trials. To have allowed the motions to remove counsel would have significantly delayed defendant's trial without the slightest demonstration of any potential benefit to his case.

III

[8] Defendant challenges on grounds of relevancy the admission of the results of certain blood grouping and absorption inhibition tests and the comparison of those results with the blood types of Mrs. Johns, the defendant, and Griffith.

The Court of Appeals has resolved the issue of the relevancy of blood grouping test results in favor of admissibility. *State v. Jacobs,* 6 N.C. App. 751, 171 S.E. 2d 21 (1969). That Court held, speaking through Judge Morris, that "[t]here is respectable authority that such testimony relating to blood test results may be admitted into evidence. 46 A.L.R. 2d 1000; McCormick on Evidence, § 177 (1954); 29 Am. Jur. 2d, Evidence, § 106." The following authorities also support the general rule of admissibility of blood grouping test results in criminal trials: *Kemp v. Government of the Canal Zone,* 167 F. 2d 938 (5th Cir. 1948); *State v. Thomas,* 78 Ariz. 52, 275 P. 2d 408 (1954), *aff'd,* 356 U.S. 390 (1958), *rev'd on other grounds in State v. Pina,* 94 Ariz. 243, 383 P. 2d 167 (1963); *Davis v. State,* 189 Md. 640, 57 A. 2d 289 (1948); *see Dockery v. State,* 269 Ala. 564, 114 So. 2d 394 (1959); *Commonwealth v. Statti,* 166 Pa. Super. Ct. 577, 73 A. 2d 688 (1950); *cf. People v. Mummert,* 57 Cal. App. 2d 849, 135 P. 2d 665 (1943), *rev'd on other grounds in People v. Collins,* 54 Cal. 2d 57, 351 P. 2d 326, 4 Cal. Rptr. 158 (1960); *State v. Alexander,* 7 N.J. 585, 83 A. 2d 441, *cert. denied,* 343 U.S. 908 (1951); *State v. Tipton,* 57 N.M. 681, 262 P. 2d 378 (1953).

While this Court has never directly decided the relevancy issue we have several times addressed questions closely associ-

ated with it. In *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975), *death sentence vacated*, 96 S.Ct. 3208 (1976), evidence was offered that some blood stains found on a coat at defendants' residence were group "O" and some were group "A." The victim's blood was group "O" and defendants' group "A." The Court overruled assignments of error directed to the factual basis for allowing blood samples to be drawn from defendants, to defendants' right to counsel at the time blood samples were taken and to the trial court's finding certain witnesses on the point to be experts. One of these witnesses was Brian Stemball, the state's serology expert in the case at bar. The court allowed the evidence, no error having been assigned based on its relevancy. Similar tangential issues were resolved in favor of the state in *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972) and *State v. Peale*, 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied*, 393 U.S. 1042 (1969).

[7, 8] We believe the better view to be that results of blood grouping tests are generally admissible. While their positive probative value is somewhat tenuous, we see little, if any, ascertainable prejudice which could arise from their admission. As we observed in *State v. Johnson, supra* at 287, 185 S.E. 2d at 701: "At most, analysis of hair and blood samples tended to identify the defendant as belonging to the class to which the guilty party belonged. The analysis might have indicated he did not belong to that class." Obviously the tests are highly probative negatively. Here Stemball testified that the vaginal sample of semen taken from the victim indicated the secretor thereof had type "B" or type "AB" blood. This tended to negate a possible defense contention, however weak, that the semen was deposited in perhaps a consensual sexual encounter by Griffith who had blood type "A."

Neither *People v. Robinson*, 27 N.Y. 2d 864, 265 N.E. 2d 543, 317 N.Y.S. 2d 19 (1970) (finding blood grouping test results "of no probative value" but holding their admission nonprejudicial in light of unspecified limiting instructions and "the fully adequate case made out by other proof against the defendant") nor *State v. Peterson*, 219 N.W. 2d 665 (Iowa, 1974) (holding blood samples inadmissible because seized unlawfully) is persuasive of defendant's contention that the admission of the test results here was prejudicial error. In view of the weight of other evidence against defendant we cannot

perceive how evidence of the blood grouping results could have affected the outcome of the trial.

[9] Defendant also argues that no proper foundation was laid for the admission of the absorption inhibition tests. The contention is that their validity and reliability were not properly established. The witness Brian Stemball, found to be an expert forensic chemist by the court, on *voir dire* testified that both Louise Johns and defendant Gray were "secretors," that is, that their blood types could be determined from body fluids other than blood. His tests established defendant as a type "B" secretor and Louise Johns as a type "A" secretor. The witness testified at length to his methodology. Over objection he testified that he found blood types "A" and "B" in a test done on a vaginal swab taken from Louise Johns and type "B" on a cigarette butt which, evidence tended to show, had been dropped in Mrs. Johns' apartment by her assailant. The witness conducted the tests himself and was carefully precise in his testimony. Under these circumstances and particularly in light of the evident similarity between the absorption inhibition tests used here and standard blood typing tests, whose reliability are not open to serious doubt, *see State v. Fowler*, 277 N.C. 305, 177 S.E. 2d 385 (1970), we hold that the reliability and validity of the tests in question were sufficiently demonstrated to render them admissible. *Cf. State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 96 S.Ct. 3205 (1976); *Coppolino v. State*, 223 So. 2d 68 (Fla. 2d Dist.), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

IV

By assignment of error numbers seven and twenty, defendant asserts error in the allowance, over objection, of lay opinion testimony regarding defendant's age and the admission into evidence of State's Exhibit # 13, a so-called "Certified Certificate of Birth." For reasons given below we find no error prejudicial to the defendant in the admission of this evidence.

In a prosecution for first degree rape under General Statute 14-21(a)(2) the state must allege in the indictment and prove that the defendant was more than sixteen years of age at the time of the alleged rape, this being an essential element of the crime. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). In an effort to meet this burden here the state elicited

from the victim, Robert Griffith and two police officers, all of whom had observed defendant, their respective opinions that the defendant was in his "middle to late twenties"; "twenties, mid-twenties"; "twenty-one or twenty-two"; "twenty-six or twenty-seven." The state also offered a paper writing, State's Exhibit #13, in words and figures as follows:

"CERTIFIED CERTIFICATE OF BIRTH

This certifies that the following birth occurred in Charlotte, North Carolina, and is registered in the Office of Vital Statistics, Mecklenburg County Health Department, Charlotte, North Carolina.

NAME Dewey Lee Gray, Jr.

DATE OF BIRTH February 17, 1947

NAME OF FATHER Dewey Lee Gray, Sr.

MAIDEN NAME OF MOTHER Birdie Williams

This birth is recorded as Certificate No. 868

Witness my hand and official seal this 18th day of June 1975

DIRECTOR OF HEALTH /s/Jacqueline Creech
/s/Maurice Kamp, M.D. Deputy Registrar"

The signature of Maurice Kamp, M.D., is printed as is all else except the information pertaining particularly to "Dewey Lee Gray, Jr." and the signature of Jacqueline Creech. The name Jacqueline Creech appears as an original signature. The seal of the Mecklenburg County Health Department is embossed on the document.

At trial defendant objected to introduction of State's Exhibit # 13 on the ground that the "Dewey Lee Gray, Jr.," named therein was not shown to be the defendant on trial.

Defendant was a witness on his own behalf. On cross-examination he testified in part as follows:

"I was born and raised in Charlotte. My mother's name was Bertie Williams. Yes, my birthday is February 17, 1974.

"As to whether I was in San Diego in 1967, right, in the Navy."

[11] Clearly whatever error may have been committed in the introduction of evidence of defendant's age in the state's case was rendered harmless by defendant's own testimony. While on the stand he never denied that he was more than sixteen years old. His statement about his Navy duty establishes that he must have been more than sixteen long before the alleged rape occurred. His statement that his birthday was "February 17, 1974," is obviously either a *lapsus linguae* or a typographical error whereby the seven and the four have been transposed. Defendant on direct examination testified that he was married, living with his wife, the father of two children, working regularly, and buying his own home. From defendant's own testimony the conclusion that he was more than sixteen years old, although admittedly one for the jury to draw, is simply inescapable. Furthermore the jury may base its determination of a defendant's age on its own observation of him even when the defendant does not testify. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967), relying on 1 Stansbury's North Carolina Evidence § 119 (2d ed. 1963). *Cf. State v. McNair,* 93 N.C. 628 (1884).

While to decide this case we need not determine whether the admission of defendant's age was technical error, we deem it advisable to consider the question for the guidance of our district attorneys and defense counsel in future cases where the state will be faced with the problem of proving a defendant's age. Our conclusion is that it was proper to admit the opinion of the lay witnesses who had ample opportunity to observe and did observe defendant but that it was error to admit the so-called "Certified Certificate of Birth."

The question of the admissibility of lay opinion regarding a person's age when age is in issue is, with us, one of first impression. This Court has held that a medical expert may give his opinion as to the age of the victim of a crime. *State v. Smith,* 61 N.C. 302 (1867). It has long been established, too, that lay opinion generally is permitted in circumstances where an ordinary observer having sufficient opportunity to observe would be qualified to draw inferences helpful to the jury if the factual foundations for such inferences are difficult of formulation or explication. Examples are cases allowing lay opinion as to mental capacity, value, or identity. 1 Stansbury's North Carolina Evidence §§ 127, 128, 129 (Brandis Rev. 1973). Non-expert testimony as to a person's race has been allowed. *Hop-*

kins v. Bowers, 111 N.C. 175, 16 S.E. 1 (1892). "Even when it might be *possible* to describe the facts in detail, it may still be *impracticable* to do so because of the limitations of customary speech, or the relative unimportance of the subject testified about, or the difficulty in analyzing the thought processes by which the witness reaches his conclusion, or because the inference drawn is such a natural and well understood one that it would be a waste of time for him to elaborate the facts . . . . " 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). The general rule is that a competent lay observer may be permitted to state his opinion as to the age of another person. 32 C.J.S. Evidence § 546(7).

[10] Since the age of a defendant is a fact peculiarly within his own knowledge, the state must be left some latitude within which to carry its burden of proof on this issue. We, therefore, adopt the rule that lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the state. It is important to note that the exact age of the defendant is not in issue, nor need the state prove it. It must prove only that he was at the time of the offense charged over sixteen. The rule we adopt should not be interpreted to extend to any case, criminal or civil, where the *exact* age of someone must be proved.

Regarding the so-called "Certificate of Birth" it is obvious that, again due to defendant's own testimony, the ground stated by defendant at trial for his objection is feckless. He testified that his mother was named Bertie Williams. State's Exhibit # 13 listed the mother of the person whose date of birth was given as "Birdie Williams."

[11] It would have been, however, a proper ground of objection that State's Exhibit # 13 is not really a certified *copy* of any official record so as to be admissible under General Statutes 130-66; 8-34; or 8-35. The exhibit, while labeled a "Certified Certificate of Birth," purports to be an original document which, over the signature of a "Deputy Registrar" merely summarizes certain information which is apparently recorded in the Office of Vital Statistics in Mecklenburg County on Birth Certificate No. 868. Thus State's Exhibit # 13 is no more than the Deputy Registrar's assertion of what she found on the recorded

birth certificate. As such it was double hearsay and inadmissible.

General Statute 130-66(b) provides:

> "The State Registrar is authorized to prepare typewritten, photographic, or other reproductions of original records and files in his office. Such reproductions, when certified by him, shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated."

The State Registrar in this same section is also given power to appoint agents with authority to issue certified *copies* of birth or death records and "to sign the name of or affix a facsimile of the signature of the State Registrar to the certification of said copy; and any copy of a record of a birth or a death, with the certification of same, so signed or with the facsimile of the State Registrar fixed thereto shall have the same evidentiary value as those issued by the State Registrar." Not only does State's Exhibit # 13 not purport to be a certified copy of an official birth certificate, there is no showing that it was certified by the State Registrar or an authorized agent thereof.

The admission, consequently, of State's Exhibit # 13 was technically error but not, under the circumstances, prejudicial to this defendant. *Cf. State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972).

V

[12] We now discuss seriatim other less substantial contentions of defendant. Defendant assigns as error the denial of his pretrial motion to be mentally examined to determine his capacity to stand trial. Defendant concedes that under General Statute 122-91, in effect at the time of this trial but since repealed, this motion lay within the sound discretion of the trial court. *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied*, 414 U.S. 1132 (1974). Nevertheless, he complains of the informality of the inquiry in this case. "Ordinarily, it is for the court, in its discretion, to determine whether the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense." *State v. Propst*, 274 N.C. 62, 68, 161 S.E. 2d 560, 565 (1968).

The question of defendant's competency to stand trial was raised in this case at the end of the hearing conducted on defendant's motion to dismiss his counsel, discussed *ante*. During the process of that hearing, the court inquired concerning the alleged breakdown of communications between defendant and his attorney and questioned defendant as to whether he had ever been treated by or consulted with a psychologist or psychiatrist or been confined to a mental institution. Defendant answered negatively. At that point defendant and his attorney conferred out of the courtroom. Upon returning to the courtroom, defense counsel moved to have defendant mentally examined "to determine whether or not he is, by reason of mental illness, capable of assisting in the preparation of his defense, and also to determine the question of whether or not he understands the charges against him . . . . " To the court's invitation for evidence on that question, defense counsel replied that his evidence was "his inability to communicate" with defendant for the preceding week or ten days. Counsel concluded "I'm not a psychologist or psychiatrist so I can only speculate, but the reason may very well be mental illness." This conclusion, he said, was induced by the failure of defendant's apprehension of the seriousness of the charge against him to inspire any effective communication. Counsel specifically stated he had no other evidence to present. At that time, defendant interrupted to inform the court that the reason for the lack of communication lay in his attorney's failure to come to see him for a week accompanied by counsel's urging that defendant plead guilty to first degree burglary. We see nothing amiss in the procedure utilized by the court in hearing and ruling on this question. We find nothing in the record to indicate defendant's incapacity to stand trial; indeed he seems to have been more than usually adept at that task. His lengthy personal argument to the court on other pre-trial motions demonstrates his understanding and powers of articulation concerning the charges against him. The motion for a pre-trial mental examination was a mere afterthought totally lacking in substance. This assignment is overruled.

[13, 14] Defendant assigns as error the admission of Louise Johns' and Robert Griffith's in-court identification. He contends that the pre-trial photographic identification procedures were unnecessarily suggestive because of the nature of the photographs. We have examined the photographs and find nothing to indicate impermissible suggestiveness. Defendant's hairdo,

though different from others in the stack of photographs, was not the basis for either identification. Testimony revealed the assailant wore a hat. Nor is there any evidence to suggest that Louise Johns' identification of defendant at the preliminary hearing, where he was the only black male in the courtroom, had any effect on her identification at trial.

[15] The trial court held *voir dire* examinations before admitting Louise Johns' and Robert Griffith's testimony identifying defendant as the assailant. Each time, the court found facts, fully supported by testimony given during *voir dire*, that the witnesses had extensive opportunity to view defendant in good lighting and in close proximity at the time of the crime. The court's conclusions, properly supported by these findings of fact, were that none of the pre-trial identification procedures were impermissibly suggestive and that the in-court identifications of defendant by witnesses Johns and Griffith arose independently, from adequate observation at the time of the crime, and were not tainted by any pre-trial conduct of any law enforcement officer or court personnel.

These assignments are overruled. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death sentence vacated*, 96 S.Ct. 3207 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972).

[16] Defendant next contends his constitutional rights to confrontation, counsel, due process, and equal protection were violated by denial of his pre-trial motion to undergo a polygraph examination. There is no merit to this contention. The results of a polygraph examination are inadmissible in evidence. *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). In addition, defendant's argument is considerably undermined by his refusal of the state's offer to administer a polygraph examination on condition that defendant as well as the state stipulate the admissibility of the results. Such an examination was, therefore, irrelevant to the case and unnecessary to the presentation of an effective defense.

[17] Defendant objects to the admission into evidence of a black and white tweed three-quarter length coat with a fur collar, which closely matched the description Mrs. Johns gave police of the coat worn by her assailant as well as descriptions offered by other witnesses. The day after defendant's arrest,

the coat was seized from his home pursuant to a search warrant. The affidavit upon which the warrant was issued contained Mrs. Johns' description of the coat as a "brown three-quarter length coat with fur collar." The coat is unquestionably relevant and was properly admitted. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972). The variance in description and actuality of the color of the coat is easily explained by the darkness and the rain on the night of the crime. Under such conditions it would be easy to mistake a black and white tweed for brown. This discrepancy affects the weight but not the admissibility of the evidence. The description in the warrant was sufficiently precise to preclude any doubt that the coat seized was the one authorized to be taken. Since the warrant was adequately descriptive to prevent a roving or exploratory search, there is no merit to defendant's objection to the warrant. *State v. Foye,* 14 N.C. App. 200, 188 S.E. 2d 67 (1972); *United States v. Scharfman,* 448 F. 2d 1352 (2d Cir. 1971), *cert. denied,* 405 U.S. 919 (1972); *James v. United States,* 416 F. 2d 467 (5th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970). Neither must the coat be excluded, as defendant contends, as "the fruit of a poisonous tree." The trial court found on *voir dire* that the coat was legally and properly obtained pursuant to a valid search warrant. There is no evidence whatever in the record that the seizure of the coat originated from an illegal search at the time of arrest, as defendant contends. This assignment is overruled.

[18] Defendant's contention that nonsuit should have been granted as to first degree rape because there was no evidence that the victim's resistance was overcome or her submission procured through the use of a deadly weapon is wholly without merit. Defendant argues there is not substantial evidence that the use of the gun he carried caused Louise Johns to submit, and that the term "use" in General Statute 14-21 means more than "possess." "[A] deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21(a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. In other words, the deadly

weapon is used, not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by his threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use." *State v. Thompson,* 290 N.C. 431, 444, 226 S.E. 2d 487, 494-95 (1976); *accord, State v. Dull,* 289 N.C. 55, 220 S.E. 2d 344 (1975), *death sentence vacated,* 96 S.Ct. 3211 (1976).

Both Mrs. Johns and Griffith testified that defendant carried a gun with a "very long barrel" in full view and waved it in his hands and that Mrs. Johns told Griffith, "Run. He has a gun," then returned into her apartment, locked the door and called police. Mrs. Johns testified defendant kicked the door in, discovered her hiding place and dragged her out of the apartment into the field behind to rape her, again brandishing the gun in one hand.

Not only is this evidence fully sufficient to permit a reasonable inference that Mrs. Johns' submission was procured by the use of a deadly weapon, it would permit no other reasonable inference.

[19] Defendant urges that there is a fatal variance between the allegations in the indictment and the proof. The indictment charges that the prosecuting witness had her resistance overcome or her submission procured "by the use of a deadly weapon and by the infliction of serious bodily injury . . . . " General Statute 14-21(a)(2) provides: "[A]nd the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliciton of serious bodily injury . . . . " We considered a similar issue concerning General Statute 14-87 in *State v. Swaney,* 277 N.C. 602, 611, 178 S.E. 2d 399, 405, *appeal dismissed,* 402 U.S. 1006 (1971). We held there, " 'Where a statute sets forth disjunctively several means or ways by which the offense may be committed, a warrant thereunder correctly charges them conjunctively.' 4 Strong's N. C. Index 2d, Indictment and Warrant § 9, p. 353; *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297." The indictment correctly charged the offense of first degree rape.

All of the evidence pointed to the procurance of Mrs. Johns' submission by the use of a deadly weapon, i.e., a gun. The stabbing, as the state's evidence shows, took place after the act of

intercourse. There is no evidence that serious bodily injury occurred to the victim prior to the act of intercourse.

The court submitted the issue of first degree rape to the jury solely on the theory, supported by the evidence, that the prosecuting witness' submission was procured by the use of a deadly weapon. There was thus no error prejudicial to defendant in the inclusion of the "serious bodily injury" theory of the crime in the indictment. *See State v. Shields,* 14 N.C. App. 650, 188 S.E. 2d 641 (1972); *cf. State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505 (1966); *State v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312 (1955).

[20] Where an indictment sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged. *See State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965), *rev'd on other grounds in State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969) and *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Best,* 232 N.C. 575, 61 S.E. 2d 612 (1950); *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201 (1947).

Defendant assigns error directed to the court's failure to submit an issue of second degree rape to the jury. Defendant presented an alibi defense. He concedes that if the Court finds sufficient evidence of first degree rape to withstand motion for nonsuit, this assignment is of no merit. We find no evidence in the record to support a verdict of guilty of second degree rape. This assignment is overruled. *State v. Harris,* 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Woods, supra.*

We have closely examined the record and have considered all defendant's remaining assignments of error. No purpose is served by our discussing them. They are obviously without merit. Since there is no error in this record which would require a new trial, we may not disturb the verdict of the jury.

[21] However, under *Woodson v. North Carolina,* 428 U.S. 280 (1976) the judgment of the superior court sentencing defendant to death must be vacated. *State v. Montgomery,* 291 N.C. 91, *supra.* So that a sentence of life imprisonment in Case No. 75-CR-2774 may be substituted under the authority of 1973 Session Laws, Ch. 1201, § 7 (1974 Session), we remand this case to the Superior Court of Mecklenburg County with direc-

tions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment in Case No. 75-CR-2774 imposing life imprisonment for the first degree rape of which 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 of Superior Court furnish to defendant and his counsel a copy of the judgment and commitment as revised in accordance with this opinion.

In Case No. 75-CR-2774—No error in the verdict; Death sentence vacated.

In Case No. 75-CR-2775—No error.

In Case No. 75-CR-2776—No error.

STATE OF NORTH CAROLINA v. ANDREW ARTHUR BEST

No. 32

(Filed 14 April 1977)

1. **Narcotics § 1; Physicians and Surgeons § 1— prescription of controlled substance by physician — no sale or delivery**

The action of a physician in prescribing a controlled substance does not amount to a "sale or delivery" as proscribed by G.S. 90-95(a)(1).

2. **Narcotics § 1; Physicians and Surgeons § 1— Controlled Substances Act — parallel systems of drug regulation**

By enacting the N. C. Controlled Substances Act the Legislature established parallel systems of drug regulation—one system, administered through G.S. 90-95, to control those who "sell and deliver" in the streets; the other, administered through G.S. 90-108, to regulate those permitted by law to conduct authorized transactions with controlled substances.

3. **Narcotics § 1; Physicians and Surgeons § 1— prescription of controlled substance by physician — normal course of practice — violation of statute**

Where a licensed physician merely writes a prescription for a controlled substance listed in Schedules II, III, IV or V of the Controlled Substances Act, and nothing more, such act is not a violation of G.S. 90-95(a)(1); however, if that prescription is written outside

the normal course of professional practice in N. C. and not for a legitimate medical purpose, the physician violates G.S. 90-108.

4. **Narcotics § 4; Physicians and Surgeons § 1— prescription written by physician — charge of sale and delivery — variance between indictment and proof**

A fatal variance existed between the allegations and the proof and it was error to deny defendant's motion to dismiss where defendant was indicted and tried on the theory that he did "sell and deliver" a controlled substance in violation of G.S. 90-95(a)(1), but the evidence disclosed a violation, if at all, of G.S. 90-108 in that defendant, a licensed physician who wrote prescriptions for controlled substances, may in doing so have acted outside the normal course of professional practice in N. C. and not for a legitimate medical purpose.

DEFENDANT appeals from decision of the Court of Appeals upholding judgment of *Tillery, J.*, 10 November 1975 Criminal Session, PITT Superior Court.

Defendant was tried upon six separate bills of indictment. Four of the bills charged that on 4 February, 27 February and 19 March 1975 defendant did unlawfully, willfully and feloniously sell and deliver Ritalin, a Schedule II Controlled Substance, and on 25 March 1975, Phenobarbital, a Schedule IV Controlled Substance, to M. T. Owens, Special Agent of the State Bureau of Investigation, and that said sales and deliveries were not within the normal course of his professional practice. One bill charges such sale and delivery of Preludin Endurets, a Schedule II Controlled Substance, on 18 March 1975, to Curtis Douglas, Special Agent of the State Bureau of Investigation. Finally, one bill charges such sale and delivery of Preludin Endurets on 6 March 1975 to Ray Eastman, Special Agent of the State Bureau of Investigation.

SBI Agent Martha T. Owens testified that on 4 February 1975 she drove to the office of Dr. Andrew Arthur Best, accompanied by SBI Agent Michael Boulus and others, and then entered the office alone. She told the receptionist she was Martha Ann Taylor residing at Apartment 22, Cherry Court, Greenville, North Carolina; date of birth, 2 March 1945; occupation, waitress. Agent Owens furnished the name of her father and mother, after which the receptionist weighed her and took her blood pressure and temperature in an examination room. Shortly thereafter Dr. Best entered and Agent Owens told him she was working as a waitress at the bus station and needed something to stay awake. He asked her what she had been tak-

ing and she told him "Dexadrine and other junk." He looked at her card which had been filled out by the receptionist (State's Exhibit 8) and said that Dexadrine was probably the reason her blood pressure was up. He left the examining room, returned and stated that no buses came in late at night and inquired what hours she worked. Agent Owens told him she worked at Hardee's from 9 to 5 and that from 8 until 2 or 3 in the morning she was hustling. Dr. Best said, "Oh, you are doing that kind of work." He then told her to be careful with Dexadrine, "that the heat is on it." He told her to return to the reception room, which she did. Shortly thereafter, Dr. Best brought out a prescription which read: "Martha Taylor, Apartment 22, Cherry Court, dated 2-4-75, Ritalin tablets, No. 36, one tablet b.i.d." The receptionist gave the prescription to Agent Owens who paid the receptionist $5 and got a receipt. She then left the office and rejoined SBI Agent Boulus and others. After the prescription was copied at the Greenville SBI office, Agent Owens took it to Hollowell's Drug Store where it was filled.

Agent Owens again saw Dr. Best in his office on 27 February 1975. She carried with her the bottle in which she received the Ritalin tablets at Hollowell's Drug Store and told the receptionist she wanted a refill. The receptionist took the bottle, consulted a yellow card from the filing cabinet (State's Exhibit 8) and, while Agent Owens stood by, wrote out the prescription in her presence. After the receptionist wrote the prescription, Dr. Best entered the reception room, which was full of waiting patients, placed the prescription bearing his signature on the counter and said, "Here it is." Agent Owens paid the receptionist $5, got a receipt, left and rejoined SBI Agent Boulus and others. After the prescription was copied at the Greenville SBI office, Agent Owens carried it to Hollowell's Drug Store where it was filled, again receiving thirty-six Ritalin tablets.

On 19 March 1975 Agent Owens returned to Dr. Best's office carrying with her the bottle she last received from Hollowell's Drug Store, and told the receptionist she wanted it refilled. The receptionist looked at the bottle and again pulled the yellow card (State's Exhibit 8) from the files. She left and went into the examination room and had a prescription with her when she returned. Dr. Best's signature was written on it, and the receptionist then filled in the prescription for thirty-six Ritalin tablets. After the receptionist gave her the prescription,

Agent Owens asked to see the doctor but did not get to see him. She paid the receptionist $5 in cash and got a receipt. She then rejoined SBI Agent Boulus and others who were maintaining surveillance outside the building. After the prescription was copied at the SBI office in Greenville, Agent Owens carried it to Hollowell's Drug Store where it was filled.

On 25 March 1975 Agent Owens returned to Dr. Best's office for the fourth time, informed the receptionist that she wanted to see the doctor and signed the register. Shortly after taking a seat she was called to the examining room by a nurse who took her blood pressure and temperature. As she was leaving the room, Dr. Best entered and asked what he could do for her. She told Dr. Best the pills he had given her were making her nervous. Dr. Best said she should have skipped a day in taking them so as to take one every other day. He said he could give her something to calm her down. He left the examining room and sometime later a nurse told her to go back to the reception room, which she did. After returning to the reception area, Dr. Best placed a small vial of white tablets on the counter and said, "Here you are Mrs. Taylor." She paid the receptionist $8 for the vial of pills and got a receipt. The directions read "one tablet before supper and two at bedtime." Agent Owens left the office and rejoined other SBI agents who were waiting outside. They counted the tablets in the vial and determined that there were 115 Phenobarbital tablets.

State's Exhibit 8 is the card that the receptionist filled out on 4 February 1975 on the first visit of Agent Owens. After the four visits by Agent Owens, that card contained the following entries:

> "Mrs. Martha Ann Taylor, Apartment 22 Cherry Court, Greenville, North Carolina; 2-4-75; d.o.b. 3-2-45; occupation, waitress; age 29, sex F, and she circled S [sic]; family history, father, Mr. Willie Taylor, mother Mrs. Iradell Hinton Taylor. On the other side is written 2-4-75, weight 147, BP 160/80 temp. 99.6, works nights needs something to stay awake; Rx Ritalin 10 milligrams, 36, and charge cost $5.00; 2-27-75, Ritalin number 36, charge $5.00, paid $5.00; 3-19-75, Ritalin tabs Number 36, charge $5.00, paid $5.00; BP 150-90, temp. 98.6, nervousness, Rx P.B. tabs I can't read that, charge $8.00, paid $8.00."

Dr. Edward G. Bond was qualified as an expert and testified that the controlled substance Ritalin has three legitimate uses, to wit: (1) for the so-called hyperactive child, (2) in cases of narcolepsy (a sleeping disorder), and (3) for people with a mild depression. Dr. Bond was then asked a hypothetical question that assumed facts substantially in accord with the testimony of SBI Agent Martha T. Owens with respect to her drug transaction with defendant in his office on 4 February 1975. Based upon those assumed facts and on his experience as a medical practitioner, Dr. Bond testified that in his opinion such a prescription was outside the usual course of a doctor's professional practice in this State and was not written for a legitimate medical purpose.

Dr. Bond was then asked a second hypothetical question that assumed facts substantially in accord with SBI Agent Martha T. Owens' testimony with respect to her drug transaction with defendant in his office on 27 February 1975. Based upon those assumed facts and on his experience as a medical practitioner, Dr. Bond stated that in his opinion such a prescription was outside the usual course of a doctor's professional practice in this State and was not written for a legitimate medical purpose.

Dr. Bond was then asked a third hypothetical question that assumed facts substantially in accord with the testimony of SBI Agent Martha T. Owens with respect to her drug transaction with defendant in his office on 19 March 1975. Based on those assumed facts and on his experience as a medical practitioner, Dr. Bond testified that in his opinion such a prescription was outside the usual course of a doctor's professional practice in this State and was not written for a legitimate medical purpose.

Dr. Bond was then asked a fourth hypothetical question that assumed facts substantially in accord with the testimony of SBI Agent Martha T. Owens with respect to the drug transaction involving Phenobarbital with defendant in his office on 25 March 1975. Based upon those assumed facts and upon his experience as a medical practitioner, Dr. Bond testified that in his opinion such delivery of Phenobarbital was outside the usual course of a doctor's professional practice in this State and was not for a legitimate medical purpose.

The State also offered evidence with respect to the alleged unlawful sale and delivery of the controlled substance Preludin Endurets to SBI Agents Curtis Douglas and Ray Eastman.

The defendant, Dr. Best, testified in his own behalf. He said he was a family practitioner and sees between eighty and ninety people on an average day. He was found by the court to be an expert in the field of general practice.

Dr. Best testified that SBI Agent Owens visited his office several times, using the alias of Martha Ann Taylor. On her initial visit on 4 February 1975 her weight, blood pressure and temperature were taken and recorded by his nurse. Also recorded on the card (State's Exhibit 8) was the fact that she was working at night and needed something to stay awake. When defendant talked with her in the examining room he got the impression she was working as a waitress on two jobs and had just moved to town. She told him she had a tendency to fall asleep on her customers and she was afraid she would be fired if she didn't get something to control the situation. Dr. Best said he reviewed the clinical information on her weight, blood pressure and temperature and formed the diagnostic impression that the patient was suffering from intermittent narcolepsy. He relied solely on her history in forming his diagnosis and planned to prescribe small controlled doses of Ritalin, monitoring results by getting information from the patient on return visits. He prescribed Ritalin in 10 milligram strength with instructions to take one tablet twice per day for eighteen days.

Agent Owens returned on 27 February 1975, twenty-three days after the original prescription. Without seeing her, Dr. Best said he wrote a refill prescription because his receptionist did not report any complaint of side effects or any other difficulty with the drug. On 19 March 1975 she returned to his office and asked for a third prescription for a refill. On this occasion Dr. Best testified that he told Agent Owens, as he handed her the prescription for a refill, that she could not stay on this medication forever. On 25 March 1975 he saw and talked with Agent Owens after his nurse had taken her blood pressure and temperature. She complained of nervousness which she thought was a reaction to the Ritalin. In response to his question she said she had stopped taking the drug. Dr. Best testified he formed the diagnostic impression that Agent Owens could be having side effects from the Ritalin so he decided to

discontinue the use of Ritalin and gave her the Phenobarbital to control the symptoms she was experiencing from Ritalin. He testified that he prescribed Phenobarbital and dispensed it directly in half grain tablet form because he felt that would save her some money on the cost of the drug. She paid $8 for the consultation and the Phenobarbital.

Speaking as a medical expert and in response to hypothetical questions posed by defense counsel, defendant testified that he prescribed Ritalin and dispensed Phenobarbital to Agent Owens for a legitimate medical purpose and that he believed his conduct was within the normal course of professional practice of family medicine in this State. He said he did so in good faith based on representations made to him by the patient.

On cross-examination Dr. Best answered, with some equivocation, the first and last hypothetical questions, as posed by the State, in the same manner as Dr. Bond answered them but disagreed with the State's witness on the second and third hypothetical questions, stating that he felt that that refill prescription had been written and delivered to Agent Owens for a legitimate medical purpose and that such conduct was within the normal course of professional practice in this State.

Dr. Malene Grant Irons, when asked four hypothetical questions formulated by defense counsel concerning the transactions between Dr. Best and Agent Owens, stated that the transactions were within the normal course of professional practice in this State. Later when asked hypothetical questions by the State, which were substantially the same as those asked of Dr. Bond, Dr. Irons answered the first three hypothetical questions in the same manner as Dr. Bond answered them but stated that the transaction embraced in the fourth question, with respect to the Phenobarbital, was within the normal course of professional practice in this State except that she would have dispensed fewer Phenobarbital tablets under the circumstances.

Defendant called six other doctors to give expert testimony: Drs. Jack Wilkerson, Ray Minges, Ernest Ferguson, Jack Koontz, Donald Garrenton and Edwin Monroe. All of these witnesses, with the exception of Dr. Ferguson, responded to the hypothetical questions of both the defendant and the State with the answer that the described activities were in the normal course of professional practice in this State and were for a legitimate medical purpose. Dr. Ferguson gave this response to

the hypothetical question as posed by the defense but had no opinion as to the question formulated by the State.

Defendant also offered evidence tending to show that he is a person of good character, enjoys a good reputation in the community, and is a hard working doctor and civic leader.

The jury found defendant not guilty of four of the six cases, to wit: (1) sale and delivery of Ritalin to SBI Agent Owens on 4 February 1975, (2) sale and delivery of Phenobarbital to SBI Agent Owens on 25 March 1975, (3) sale and delivery of Preludin Endurets to SBI Agent Eastman on 6 March 1975, and (4) sale and delivery of Preludin Endurets to SBI Agent Douglas on 18 March 1975. Defendant was convicted by the jury in Case No. 75-CR-4598, sale and delivery of Ritalin to SBI Agent Owens on 27 February 1975 and in Case No. 75-CR-4595, sale and delivery of Ritalin to SBI Agent Owens on 19 March 1975. For each conviction the court imposed a prison sentence of twelve months, suspended upon payment of a $1,000 fine and costs. Upon appeal, these judgments were upheld by the Court of Appeals with Clark, J., dissenting. Defendant appealed to the Supreme Court as of right pursuant to the provisions of G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Associate Attorney, for the State of North Carolina.

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., of counsel for defendant appellant.

HUSKINS, Justice.

The defendant, Dr. Best, was arrested on 26 March 1975, pursuant to a warrant charging him with violation of G.S. 90-95(a)(1). That statute reads in pertinent part as follows:

> "(a) Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, *sell or deliver* . . . a controlled substance;" (Emphasis added.)

Defendant was indicted and convicted under charges that on two occasions he "unlawfully and wilfully did feloniously *sell and deliver* a controlled substance, to wit: Methylphenidate in the form of Ritalin, which is included in Schedule II of the

North Carolina Controlled Substances Act, not within the normal course of his professional practice, to M. T. Owens, Special Agent, SBI, Diversion Investigative Unit." (Emphasis added.)

Evidence elicited at trial tends to show that on 27 February 1975 and 19 March 1975 Dr. Best gave prescriptions to SBI Agent M. T. Owens for Ritalin, a Schedule II Controlled Substance. The State produced one expert witness who stated that under similar circumstances, related in a hypothetical question, the conduct of the doctor in prescribing the drug was outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose.

At the close of the State's evidence defendant's motion to dismiss was denied. This motion was renewed at the close of all the evidence and is properly before this Court. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974).

[1] We have said that a defendant must be convicted, if at all, of the particular offense charged in the bill of indictment. "Whether there is a fatal variance between the indictment and the proof is properly presented by defendant's motion to dismiss." *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). Thus the threshold question presented by this case is whether the offense charged conforms to the evidence elicited; that is, does the action of a physician in *prescribing* a controlled substance amount to a "sale or delivery" as proscribed by G.S. 90-95 (a) (1)? For the reasons which follow, we hold that it does not.

The North Carolina Controlled Substances Act (Article 5 of Chapter 90 of the General Statutes) is not a model of clarity or good draftsmanship and, with respect to particular applications, its interpretation is clouded by gaps and inconsistencies. Analysis of the entire Act compels the conclusion that the Legislature has established parallel systems of regulation for controlled substances. The separate systems are distinguished according to the nature of the transaction and the status of the individuals involved. Simply put, one system applies to "street traffickers," while the second regulates the dispensation of controlled drugs for legitimate medical purposes. Within each system there are further gradations, based generally on the seriousness of the drug involved and the nature of the

transaction. For example, *compare* G.S. 90-95(b)(1) *with* G.S. 90-95(b)(2) *and* G.S. 90-95(b) *with* G.S. 90-95(c).

Prior to 1971, drug transactions were regulated in North Carolina through the Uniform Narcotic Drug Act, Article 5 of Chapter 90 of the General Statutes (1965), and Barbiturate and Stimulant Drugs, Article 5A of Chapter 90 of the General Statutes (1965). Under that scheme, the statute under which a defendant was prosecuted was determined by the nature of the drug involved. Thus under Article 5 it was unlawful for a person to "manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized . . . . " G.S. 90-88 (1965). "Narcotic drugs" included coca leaves, opium, cannabis, and others chemically similar. G.S. 90-87(9) (Cum. Supp. 1969). Prescribing, administering and dispensing were specifically authorized when done in good faith and in the course of professional practice. G.S. 90-94 (1965). The penalty for a first violation of that article was a fine of not more than $1,000 or imprisonment for not more than five years. G.S. 90-111 (Cum. Supp. 1969). Penalties for subsequent violations were higher.

In 1971 the Legislature made basic changes in North Carolina drug laws, bringing them into closer alignment with Federal law, 21 U.S.C. §§ 801, et seq., and with the Uniform Controlled Substances Act found in Volume 9 of The Uniform Laws, Annotated.

In skeletal form the present system of control over *physicians* operates as follows: (1) All transactions with controlled substances are prohibited by G.S. 90-95 *except as authorized.* (2) Under G.S. 90-101 a physician who meets established objective criteria is *authorized* to make certain transactions with controlled substances and thus is *exempted* from the proscriptions of G.S. 90-95. (3) Control is reasserted under G.S. 90-108 whereby the physician's actions with respect to these transactions must be within the normal course of professional practice in this State and for a legitimate medical purpose. We now look at the scheme in more detail.

We initially note that in the 1971 enactment schedules were set up classifying various drugs based upon potential for abuse and accepted medical use. See G.S. 90-88 to 94. Then by enact-

ment of G.S. 90-95 (Cum. Supp. 1971), the General Assembly provided as follows:

"(a) Except as authorized by this Article, it shall be unlawful for any person:

(1) To manufacture, distribute or dispense or possess with intent to distribute a controlled substance listed in any schedule of this Article;

(2) To create, distribute or possess with intent to distribute a counterfeit controlled substance included in any schedule of this Article;

(3) To possess a controlled substance included in any schedule of this Article."

G.S. 90-95 was amended in 1973 to read:

"(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance."

This statute prohibits any person from manufacturing, selling, delivering or possessing with intent to manufacture, sell or deliver, a controlled substance, *except as authorized by Article 5.* We now examine Article 5 to determine what transactions it authorizes.

G.S. 90-101 in pertinent part provides:

"(b) Persons registered by the North Carolina Drug Authority under this Article (including research facilities) to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this Article.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

* * * *

(4) Practitioners licensed in North Carolina by their respective licensing boards under Articles 1, 2, 4, 6, 11 and 12 of this Chapter."

By these provisions a registrant is specifically authorized to manufacture, distribute, dispense, or conduct research with certain controlled substances. A practitioner is authorized to dispense and distribute.

We note that under the language of G.S. 90-101(c)(4) a practitioner is only permitted to "possess" controlled substances. Normally the plain words of a statute control; however, where a literal interpretation will lead to an absurd result and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter disregarded. 7 N. C. Index 2d, Statutes § 5 and cases cited. In this instance it seems apparent that the Legislature intended to permit these practitioners listed in G.S. 90-101(c)(4) not only to possess but also to distribute and dispense controlled substances as authorized by Article 5. *Compare* G.S. 90-101 *with* G.S. 90-102(c), G.S. 90-105 and G.S. 90-106.

Thus the registrant or practitioner is, by his *status*, exempted from the proscriptions of G.S. 90-95. By the language of G.S. 90-101 this exemption is subject only to the requirement that the person claiming the exemption meet the following *objective criteria:* The person claiming the exemption must be a registrant, G.S. 90-87(25), or not required to register, G.S. 90-101(c)(4); and exemption from the provisions of G.S. 90-95 applies only when (a) persons claiming the exemption are engaged in transactions authorized by their registration and (b) those transactions involve drugs authorized by their registration. G.S. 90-101(b) and (c)(4). A detailed breakdown of particular registration limitations is provided in I North Carolina Administrative Code, ch. 14, §§ .0105 and .0106.

We reemphasize that the standards are objective and, when met, exempt those who qualify from the proscriptions and penalties of G.S. 90-95. We do not construe G.S. 90-101(c)(4) as incorporating a subjective standard through use of

the word "practitioners." Subsection (c) (4) is not found in the Uniform Controlled Substances Act or the Federal Controlled Substances Act. It was added in North Carolina law for the purpose of exempting from registration those persons licensed under the articles enumerated in said subsection, to wit: those licensed to practice medicine, dentistry, pharmacy, optometry, veterinary medicine, and podiatry. While technically a non-registrant would be exempted only when he was a "practitioner," and thus exempted only "so long as such activity is within the normal course of professional practice or research in this State," G.S. 90-87(22), the addition of this subjective standard was not intended by the Legislature and we decline to impose it absent such intention. Otherwise the anomalous situation is created whereby those not required to register under G.S. 90-101(c) (4) would be subjected to standards far more stringent and of a fundamentally different nature than the standards imposed on conventional registrants. Such a distinction would be wholly illogical and the law presumes that the Legislature did not intend such a result. *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E. 2d 443 (1971); *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970).

Exemption under G.S. 90-101 does not, however, give free rein to the person who has attained the exempt status. As that statute specifically notes, he must act in conformity with the other provisions of Article 5. G.S. 90-108(a) (2) makes it unlawful for any person subject to the registration requirements of G.S. 90-101 "or a practitioner" to "distribute or dispense a controlled substance in violation of G.S. 90-105 or 90-106."

G.S. 90-105 provides:

> "Controlled substances included in Schedules I and II of this Article shall be distributed only by a registrant or practitioner pursuant to an order form. Compliance with the provisions of the Federal Controlled Substances Act or its successor respecting order forms shall be deemed compliance with this section."

G.S. 90-106(a) provides:

> *"Prescriptions and labeling.* (a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed *without the written prescription of a practitioner.*" (Emphasis added.)

"Dispensing" drugs includes the prescribing of them, G.S. 90-87(8); thus, under G.S. 90-106(a) a physician may lawfully prescribe drugs only through a written *prescription.* Inherent in the definition of a valid "prescription" is the requirement that it be written by a person licensed to dispense and acting within the normal course of professional practice within the State of North Carolina. *Compare* G.S. 90-87 (23) *with* G.S. 90-87(22). Thus where a physician prescribes Schedule II controlled drugs, not in the normal course of professional practice in this State, he is acting unlawfully and in violation of G.S. 90-106(a). This construction is bolstered by examination of G.S. 90-106 as a whole. Subsection (a), as noted, requires that Schedule II drugs may be dispensed only through a written prescription. Subsection (c) provides that Schedule III and IV drugs, with one exception, may be dispensed by a written prescription or an oral prescription promptly reduced to writing. Subsection (d), dealing with Schedule V drugs, *has no* prescription requirement, yet it specifically states that such drugs may be distributed or dispensed only for a medical purpose. It is inconceivable that the Legislature would have imposed tighter strictures on the dispensing of the less dangerous Schedule V drugs than it imposed on the dispensing of the drugs listed in Schedules II, III and IV. It is reasonable to assume that the Legislature intended all controlled substances to be dispensed only for legitimate medical purposes and it felt no need specifically to enunciate such a standard for Schedules II, III and IV drugs as it had already incorporated the legitimate medical purpose standard into the prescription requirement of subsections (a) and (c).

In addition, we note the provisions of the Code of Federal Regulations, 21 CFR § 1306.04(a) (1975), which are incorporated into our drug law through I North Carolina Administrative Code, ch. 14 § .0301. That section reads in relevant part:

"1306.04. Purpose of issue of prescription.

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. *The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner,* but a corresponding responsibility rests with the pharmacist who fills the prescription. *An order purporting to be a prescription issued not in the*

usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." (Emphasis added.)

Under this regulation the "legitimate medical purpose" requirement, implicit in the language of G.S. 90-106, is made explicit. *See United States v. Moore,* 423 U.S. 122, 46 L.Ed. 2d 333, 96 S.Ct. 335 (1975).

We are not unmindful that the parallel system scheme of drug regulation, as discussed in this opinion, has been rejected by other jurisdictions which have construed somewhat similar acts. *See e.g., United States v. Moore, supra; United States v. Rosenberg,* 515 F. 2d 190 (9th Cir. 1975); *United States v. Green,* 511 F. 2d 1062 (7th Cir. 1975); *United States v. Badia,* 490 F. 2d 296 (1st Cir. 1973); *United States v. Leigh,* 487 F. 2d 206 (5th Cir. 1973); *United States v. Bartee,* 479 F. 2d 484 (10th Cir. 1973); *State v. Vinson,* 298 So. 2d 505 (Fla. Dist. Ct. App. 1974); *see United States v. Ellzey,* 527 F. 2d 1306 (6th Cir. 1976). However, several aspects of the North Carolina Controlled Substances Act differ from both the Uniform Controlled Substances Act and the Federal Controlled Substances Act and lend credence to the view which we have taken.

It is apparent that the North Carolina Drug Commission, established by G.S. 143B-377 and empowered by G.S. 90-100 to set rules and regulations relating to the registration and control of the manufacture, distribution and dispensing of controlled substances, views Article 5 of Chapter 90 as establishing a parallel system. *See* N. C. Drug Authority, Practitioner's Drug Law Information (1974); N. C. Drug Authority, Physicians' Reference on Drug Laws and Emergency Treatment (1972). Where an issue of statutory construction arises, the construction adopted by those charged with the execution and administration of the law is relevant and may be considered. *MacPherson v. City of Asheville,* 283 N.C. 299, 196 S.E. 2d 200 (1973), and cases cited.

Further, we note that under Article 5 as enacted in 1971, the basic penalty provisions for a violation of G.S. 90-95(a)(1) and an intentional violation of G.S. 90-108 were essentially

the same. Thus our statutory scheme is not burdened by a major problem found in the Federal Controlled Substances Act. The Federal counterpart to G.S. 90-108 provides only minor penalties. Had the Federal Act been construed as implementing parallel systems of control, medical "pushers" would be subject only to those minor penalties. It was presumed by the courts that since Congress recognized the particularly heinous nature of the prohibited conduct, it could not have intended such a result. *See United States v. Moore, supra.* No such problem exists under the North Carolina Act. On the contrary, the enactment of potentially stiff penalties under G.S. 90-108 indicates that the Legislature felt that the unlawful acts proscribed thereby were more than minor "technical violations" and fixed the punishment accordingly.

Other evidence of legislative intent is found in the 1973 Amendment to G.S. 90-95(a)(1) which changed the words "manufacture, distribute or dispense" to "manufacture, sell or deliver." When a statute is construed with reference to an amendment, it is "presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). We think the Legislature intended no substantive change in the Act by the 1973 amendment. That amendment, entitled an "Act to Increase the Penalties for Certain Violations of the Controlled Substances Act," 1973 Session Laws, c. 654, § 1, is clearly aimed at revision of the penalty structure for violation of the Act. That no real change was intended by the new wording is also indicated by G.S. 90-96.1, enacted at the same time, which refers to minors "accused with possessing or distributing a controlled substance in violation of G.S. 90-95(a)(1). . . ." 1973 Sess. Laws, c. 654, § 3. Had the Legislature intended substantive change by the substitution of the new terms "sell or deliver" in G.S. 90-95(a)(1), it would not have used the old term "distribute" when referring to that subsection.

[2] As no substantive change was intended, it follows that the new words were designed to clarify the meaning of the statute. By the use of "sell or deliver"—words of the street—rather than "distribute or dispense"—which have technical medical connotations and which are used extensively in those sections relating to regulation of registrants and practitioners—the Legislature intended to clarify and emphasize the dual nature of the regula-

tory scheme. We therefore conclude that by enacting the North Carolina Controlled Substances Act the Legislature established parallel systems of drug regulation—one system, administered through G.S. 90-95, to control those who "sell and deliver" in the streets; the other, administered through G.S. 90-108, to regulate those permitted by law to conduct authorized transactions with controlled substances.

It now becomes our duty to apply these statutes to the case at hand.

[4] Defendant was indicted and tried on the theory that he did "sell and deliver" a controlled substance in violation of G.S. 90-95(a)(1). The evidence, reviewed in the light most favorable to the State, discloses that the defendant was a licensed physician; that he wrote prescriptions for controlled substances; and that he, in doing so, may have acted outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose.

[3] Where a licensed physician merely writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and nothing more, such act is not a violation of G.S. 90-95(a)(1). However, if that prescription is written outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates G.S. 90-108.

[4] Applying this law to the facts as presented it is apparent that while the indictments follow the language of G.S. 90-95(a)(1), the evidence discloses a violation, if at all, of G.S. 90-108.

This is analogous to the problem presented in *State v. Kimball*, 261 N.C. 582, 135 S.E. 2d 568 (1964). In that case the defendant was tried under an indictment which charged that while lawfully confined at a prison camp he feloniously escaped therefrom. The evidence revealed that the defendant failed to return to the prison while on work release. G.S. 148-45(a) made it a crime to escape from prison, while G.S. 148-45(b) specifically made it a crime to fail to return while on work release. Our Court, speaking through Justice Sharp (now Chief Justice), found that the "indictment in this case follows the language of subsection (a), but the evidence discloses a violation of subsection (b)." The Court then stated that defendant

would have been entitled to a nonsuit, had he moved for one, "for this *fatal variance.*" (Emphasis added.) *Accord, State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969).

We adhere to this reasoning and hold that a fatal variance exists between the allegations and the proof and it was error to deny defendant's motion to dismiss. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Cooper, supra; State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Kimball, supra; State v. Overman,* 257 N.C. 464, 125 S.E. 2d 920 (1962); *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149 (1940).

For the reasons stated the decision of the Court of Appeals is reversed. The cause is remanded to that court for entry of an order remanding the action to the Superior Court of Pitt County for entry of judgment dismissing the action.

Reversed and remanded.

STATE OF NORTH CAROLINA EX REL RUFUS L. EDMISTEN, ATTORNEY GENERAL v. J. C. PENNEY COMPANY, INC.

No. 75

(Filed 14 April 1977)

Unfair Competition— unfair acts in conduct of trade or commerce — debt collection activities

The debt collection activities of a department store chain do not come within the purview of the statute prohibiting unfair or deceptive acts or practices "in the conduct of any trade or commerce," G.S. 75-1.1, since the statute applies only to unfair and deceptive acts or practices involved in the bargain, sale, barter, exchange or traffic.

Justice HUSKINS dissenting.

Justice EXUM joins in the dissenting opinion.

APPEAL by defendant pursuant to G.S. 7A-30(2) from decision of the Court of Appeals, 30 N.C. App. 368, 227 S.E. 2d 141 (1976) (opinion by *Arnold, J., Hedrick, J.,* concurring, *Parker, J.* dissenting), reversing judgment of *Bailey, J.,* denying a preliminary injunction, entered 23 December 1975, WAKE County Superior Court. This case was docketed and argued as No. 75, Fall Term, 1976.

On 26 November 1975, the State of North Carolina, acting on relation of the Attorney General pursuant to authority granted by Chapter 75 of the General Statutes, filed a complaint charging defendant J. C. Penney Company with violating G.S. 75-1.1 by engaging in unfair and deceptive debt collection practices. The complaint sought relief in the form of a temporary restraining order, a preliminary injunction and a permanent injunction forbidding the activities alleged in the complaint; restoration of monies collected and cancellation of debts outstanding in cases in which defendant had made use of the practices described in the complaint; costs of investigating and preparing the claims involved; court costs and reasonable attorneys' fees.

Defendant is a Delaware corporation having its principal place of business in New York City. Defendant is the second largest retailer in the United States, operating a large chain of retail stores throughout the country. A number of its stores are located in North Carolina.

Many of defendant's customers are offered the opportunity to buy merchandise on credit. North Carolina residents who purchase merchandise from defendant on one of its credit plans, and who become delinquent in fulfilling their repayment obligations, are contacted by defendant's regional collection office in Atlanta, Georgia. These contacts, by letter and telephone, are for the purpose of encouraging the credit customer to pay his delinquent account.

The complaint alleged that telephone calls made by defendant's collection agents to delinquent credit customers were "repeated, harassing, abusive, demeaning, and threatening"; that calls were placed to the credit customer at his place of employment even after the customer repeatedly requested that he be contacted only at home; that calls were placed to credit customers' employers, "informing the employer of the debt and attempting to use the employer's influence and position to force payment of the debt," and that these calls were placed even if the credit customer had made regular payments toward his debt.

On 26 November 1975, the court entered an order temporarily restraining the defendant from making any abusive, annoying, threatening, harassing or embarrassing contact with its credit customers, contacting its credit customers at work after being instructed not to do so, and contacting any person other

than the credit customer regarding the credit account. The order further provided for a hearing to be held on 5 December 1975 to consider plaintiff's motion for a preliminary injunction.

At the hearing on the motion for a preliminary injunction, plaintiff submitted fourteen affidavits of various credit customers and their employers concerning telephone calls they received from defendant's collection agents. These affidavits tended to support the allegations of the complaint. In response, defendant filed an affidavit of the operations manager of its Atlanta credit office that tended to show that defendant has issued a credit manual and guide cards describing the manner in which telephone contacts should be made by collectors and forbidding threats, harassment and abusive telephone calls; that collectors' calls are supervised and standards regularly reviewed; that accounts must be delinquent by at least 60 days before telephone contact is made, and that "special exceptions are made for [debtors with] legitimate hardship cases."

On 9 December 1975, the trial judge issued an order denying the State's request for a preliminary injunction and dissolving the temporary restraining order. Defendant then answered the complaint denying its material allegations.

On motion of the State, the trial court amended its order on 23 December 1975 to include findings of fact and conclusions of law. In its amended order, the court found that "there is ample evidence to support a [f]inding that the conduct complained of did occur." However, the court concluded that it was not proper to enter a preliminary injunction because the conduct complained of did not fall within the purview of G.S. 75-1.1. Plaintiff appealed assigning as error the trial court's failure to find as a matter of law that the alleged conduct constituted a violation of G.S. 75-1.1. On appeal, the Court of Appeals reversed.

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

Smith, Anderson, Blount & Mitchell by John H. Anderson and Henry A. Mitchell, Jr., and Alston, Miller & Gaines (Atlanta, Georgia) by Sidney O. Smith, Jr., for defendant appellant.

David M. Fitzgerald for the Federal Trade Commission as amicus curiae.

Jordan, Morris & Hoke by John R. Jordan, Jr., and R. W. Newsom III, for the North Carolina Bankers Association, Inc. as amicus curiae.

Johnson, Gamble & Shearon by Samuel H. Johnson for the North Carolina Merchants Association, Inc. as amicus curiae.

COPELAND, Justice.

The question before the court on this appeal is whether the activities of merchants attempting to collect funds allegedly owed them were intended to be, and constitutionally can be, subject to G.S. 75-1.1.* The burden of proof on this issue falls upon the defendant who seeks to exempt himself from the statute's embrace. G.S. 75-1.1(d).

The statute, enacted by the legislature in 1969, provides in relevant part:

> "Unfair methods of competition and unfair or deceptive acts or practices *in the conduct of any trade or commerce* are hereby declared unlawful." G.S. 75-1.1(a). (Emphasis supplied.)

Initially, the most striking aspect of the statutory language is its resemblance to Section 5(a)(1) of the Federal Trade Commission Act (hereinafter FTC Act) which provides as follows:

> "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices *in or affecting commerce,* are declared unlawful." 15 USC § 45(a)(1). (Emphasis supplied.)

The similarity in language was apparently not accidental. *See* Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared,* 50 N.C. L. Rev. 199, 246 (1972) [hereinafter cited as Aycock]; Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection,* 6 Wake Forest Intra. L. Rev. 1, 18 (1969) [hereinafter cited as Morgan]; Comment, *Consumer Protection and Unfair Competition*

* Ironically, this suit would not have arisen had the successors to Mr. James *Cash* Penney followed the teachings of the company's founder concerning the acceptance of *cash* sales only! As time passed, competition apparently required that credit be extended for sales made. J. Penney, *Fifty Years with the Golden Rule* 52, 102 (1950).

in North Carolina—The 1969 Legislation, 48 N.C. L. Rev. 896 (1970) [hereinafter cited as Comment]. Consequently, we have said that the federal decisions construing the FTC Act, may furnish some guidance to the meaning of G.S. 75-1.1. *Hardy v. Toler,* 288 N.C. 303, 218 S.E. 2d 342 (1975).

No protracted analysis of dictionary and judicial definitions is needed to arrive at the conclusion that at least one definition of the word "commerce," which appears in both acts, is expansive enough to encompass all business activities, including the collection of debts. Indeed, the Federal Trade Commission (hereinafter FTC) and the federal courts construing the FTC Act have so held. *See, e.g., Spiegel, Inc. v. FTC,* 540 F. 2d 287 (7th Cir. 1976); *Floersheim v. FTC,* 411 F. 2d 874 (9th Cir. 1969), *cert. denied,* 396 U.S. 1002, 24 L.Ed. 2d 494, 90 S.Ct. 551; *Slough v. FTC,* 396 F. 2d 870 (5th Cir. 1968), *cert. denied,* 393 U.S. 980, 21 L.Ed. 2d 440, 89 S.Ct. 448; *In re Floersheim,* 316 F. 2d 423 (9th Cir. 1963); *Mohr v. FTC,* 272 F. 2d 401 (9th Cir. 1959), *cert. denied,* 362 U.S. 920, 4 L.Ed. 2d 739, 80 S.Ct. 672; *William H. Wise Co. v. FTC,* 246 F. 2d 702 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 856, 2 L.Ed. 2d 64, 78 S.Ct. 84; *Dejay Stores v. FTC,* 200 F. 2d 865 (2d Cir. 1952); *Bernstein v. FTC,* 200 F. 2d 404 (9th Cir. 1952); *Bennett v. FTC,* 200 F. 2d 362 (D.C. Cir. 1952); *Rothschild v. FTC,* 200 F. 2d 39 (7th Cir. 1952), *cert. denied,* 345 U.S. 941, 97 L.Ed. 1367, 73 S.Ct. 832; *Silverman v. FTC,* 145 F. 2d 751 (9th Cir. 1944) (all of the cases cited involved abuses in the collection of credit accounts by creditors, collection agencies, or companies selling "skip tracing" forms to creditors or collection agents).

"Commerce" under federal decisions "is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms. . . ." *Welton v. Missouri,* 91 U.S. 275, 280, 23 L.Ed. 347, 349 (1876); *accord, Adair v. United States,* 208 U.S. 161, 177, 52 L.Ed. 436, 443, 28 S.Ct. 277, 281 (1908); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23, 68 (1824). The federal courts have properly assigned the broadest possible definition to the word "commerce," since in defining the word, they define the limits of federal power to regulate activities under the commerce clause. U. S. Const. art. 1, § 8, cl. 3.

The federal court decisions, however, are not controlling in construing the North Carolina Act. *See Horton v. Gulledge,*

277 N.C. 353, 177 S.E. 2d 885 (1970). Unlike other state trade regulation statutes, G.S. 75-1.1 does not require or direct reference to the FTC Act for its interpretation. *See* Ariz. Rev. Stat. Ann. § 44-1522B (West 1967); Conn. Gen. Stat. Ann. § 42-110b (b) and (c) (West Cum. Supp. 1977); Fla. Stat. Ann. § 501.204(2) (West Cum. Supp. 1977); Idaho Code § 48-604, -618 (Cum. Supp. 1976); Ill. Ann. Stat. ch. 121 ½, § 262 (Smith-Hurd Cum. Supp. 1977); Me. Rev. Stat. Ann. tit. 5, § 207 (West Supp. 1973); Mass. Gen. Laws Ann. ch. 93A, § 2 (b) and (c) (West 1972); Mont. Rev. Codes Ann. § 85-403 (Cum. Supp. 1975); N.M. Stat. Ann. § 49-15-3 (Supp. 1975); S.C. Code § 66-71.1(b) (Cum. Supp. 1975); Tex. Bus. & Com. Code Ann. tit. 2, §§ 17.46(c), 17.49(b) (Vernon Cum. Supp. 1976-77); Vt. Stat. Ann. tit. 9, § 2453 (b) and (c) (1970). Moreover, by modifying the language borrowed from the federal act, the North Carolina legislature must have intended to alter its meaning to some extent.

"[W]ords used in the statute must be given their natural or ordinary meaning." *Seminary, Inc. v. Wake County,* 251 N.C. 775, 782, 112 S.E. 2d 528, 533 (1960). By inserting the word "trade" in G.S. 75-1.1, which has a narrower meaning than the word "commerce," we believe the legislature signaled its intent to limit the otherwise broad definition of "commerce" obtained under federal decisions. Debt collection activities are "not trade in the ordinary sense" although they could be considered "a species of commerce." *Bernstein v. FTC, supra,* 200 F. 2d at 405. The use of the word "trade" interchangeably with the word "commerce" indicates that a narrower definition of commerce which comprehends *an exchange* of some type was intended.

Just as in one sense the word "trade" has a limiting effect on the word "commerce," in another sense the word "commerce" enlarges the meaning of the word "trade." The two words, when used in conjunction, "include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter." Black's Law Dictionary (4th Ed. 1968). Thus, a host of occupations would be covered by G.S. 75-1.1 that would not be subject to a statute which relied exclusively on the word "trade." *See* Comment, *supra,* 48 N.C. L. Rev. at 905-6.

We believe the unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain, sale,

barter, exchange or traffic. We are reinforced in this view by G.S. 75-1.1(b), a declaration of legislative intent having no counterpart in the federal act. G.S. 75-1.1(b) states:

> "The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings *between buyers and sellers* at all levels of commerce be had in this State." (Emphasis supplied.)

The General Assembly, thus, is concerned with openness and fairness in those activities which characterize a party as a "seller." Debt collection is not an activity necessarily typical of nor unique to sellers. It is rather an activity descriptive of creditors. An individual or a company may conduct the activities of both seller and creditor, as does J. C. Penney Co., but it is only those activities surrounding the "sale" that are regulated by G.S. 75-1.1.

Also, bolstering our view of the legislature's intent is G.S. 75-15.1, a companion enforcement provision to G.S. 75-1.1. G.S. 75-15.1 provides that:

> "In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract *obtained* by the defendant *as a result of such violation.* (Emphasis added.)

Inherent in this remedy is the intent to prohibit only unfair and deceptive practices affecting sales. If the legislature had intended to cover the acts alleged in this suit, we believe it would have provided for the rescission of contracts not only where the contract is obtained as a result of a violation, but also where a violation occurs which is unrelated to the contract's formation.

Another factor bearing on our decision in this case is contemporary literature on the subject. Strictly speaking, North Carolina has no documented legislative history. However, the then Attorney General, Robert Morgan, was instrumental in the enactment of G.S. 75-1.1, Aycock, *supra,* 50 N.C. L. Rev. at 207, and his views on the effect of the statute were expressed

in a contemporaneous article. Morgan, *supra,* 6 Wake Forest Intra. L. Rev. at 18. The entire tone of the article suggests that the Attorney General was concerned about "consumer fraud" in securing passage of the new legislation. He catalogued those practices which he envisioned would be covered by G.S. 75-1.1 as follows:

> "Cases involving unfair or deceptive practices include false advertising, misnaming and misrepresentation, misleading trade or products names, simulation of well known products or trade names, 'free' goods, deceptive nondisclosure (such as failure to reveal abridgement, condensation or title change of books and literary articles), false disparagement of competing products, misrepresentation of business status or connections, misuse of the term 'guarantee,' misuse of 'seals of approval,' fraudulent sales schemes, deceptive pricing and lottery merchandising." Morgan, *supra,* 6 Wake Forest Intra. L. Rev. at 20.

While Attorney General Morgan's list was obviously not intended to be all inclusive, we think it significant not only that debt collection practices were not included, but also that no unfair or deceptive practices *unrelated to the sale* were mentioned. Likewise, other contemporary commentators failed to address practices unrelated to the sale in their discussions of the scope of G.S. 75-1.1. *See* Aycock, *supra,* 50 N.C. L. Rev. 199; Comment, *supra,* 48 N.C. L. Rev. 896. Thus, it appears most likely that either the legislature did not intend to cover debt collection practices in G.S. 75-1.1, or that it did not consider the question of the statute's application to this area. For policy reasons discussed *infra,* we believe the subject deserves careful consideration by the legislature and a clear statement of intent before these practices are regulated under G.S. 75-1.1.

We note also that the North Carolina Legislature has in the past specifically exempted the collection activities of certain creditors, including this defendant, from specific regulation. G.S. 66-41 to -49 provides for the licensing and regulation of collection agencies. Under the act, "collection agency" does not include "[r]egular employees of a single creditor." G.S. § 66-42. In addition, the General Assembly, in enacting detailed legislation to govern retail installment sales, left debt collection activities unregulated. Retail Installment Sales Act, G.S. 25A-1 to -45. Under such circumstances we think it inappropriate, in the ab-

sence of a clear legislative mandate, for this Court to extend regulation to debt collection activities by a broad reading of the very general language of G.S. 75-1.1.

The State and the defendant both call our attention to various rules of construction that they deem controlling. Defendant contends the statute is penal in nature and, thus, must be strictly construed. *Chadwick v. Salter,* 254 N.C. 389, 119 S.E. 2d 158 (1961). The State, on the other hand, insists the statute is remedial and must, therefore, be broadly construed. *Morris v. Staton,* 44 N.C. 464 (1853). We find neither of these views persuasive.

> "[T]he distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from acting in a like manner. A remedial statute, of course, is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged." 3 Sutherland, Statutes and Statutory Construction § 60.03 (4th Ed. C. D. Sands, 1974), citing, *School Dist. of Omaha v. Adams,* 147 Neb. 1060, 26 N.W. 2d 24 (1947) [hereinafter cited as Sutherland].

While the FTC Act has been held to be remedial, *Sears, Roebuck & Co. v. FTC,* 258 F. 307, 311 (7th Cir. 1919), the North Carolina statute appears to be a hybrid. *See* Sutherland, *supra* at § 60.04. It is not criminal, G.S. 75-7. But a statute which imposes *treble* damages can hardly be said to be designed exclusively "for the purpose of adjusting the rights of the parties as between themselves." *See Hardy v. Toler, supra* at 312, 218 S.E. 2d at 348 (Huskins, J., concurring).

Another state supreme court has held, in construing statutory language identical to that of G.S. 75-1.1(a), that only acts or practices "designed to effect a sale" are covered. *Johnston v. Beneficial Management Corp.,* 85 Wash. 2d 637, 538 P. 2d 510 (1975). The State's brief cites us to two trial courts that reached a contrary result in construing state statutes having language distinguishable from that of G.S. 75-1.1. *Garland v. Mobil Oil Corp.,* 340 F. Supp. 1095 (N.D. Ill. 1972); *Liggins v. May Co.,* 44 Ohio Misc. 81, 337 N.E. 2d 816 (1975).

While the federal court decisions extending the FTC Act to debt collection activities appear proper in the context of the

federal regulatory scheme, we question the appropriateness of such an extension under the North Carolina framework, which is in many ways unique. By choosing to incorporate G.S. 75-1.1 into Chapter 75 of the General Statutes, the State's general antitrust laws section, the General Assembly provided the new provision with characteristics of enforcement and procedure unparalleled by either the FTC Act or the consumer protection acts of other states. Comment, *supra*, 48 N.C. L. Rev. at 899-90. Under the FTC Act a private party may not bring an action against an alleged violator. The Federal Trade Commission alone is charged with enforcement responsibility. *Holloway v. Bristol-Myers Corp.*, 485 F. 2d 986 (D.C. Cir. 1973). By contrast, North Carolina statutes not only provide a private right of action to a person claiming an injury as a result of a violation of G.S. 75-1.1, but the successful claimant is entitled to treble damages and may be awarded attorney's fees. G.S. 75-16, -16.1. Presumably, a class action is also permissible under our statutes. As noted previously, in a suit by the Attorney General to enforce G.S. 75-1.1, the court may order restoration of money or property and cancellation of contracts obtained as a result of the violation. G.S. 75-15.1. The FTC was not given the power to seek these remedies until adoption of the Magnuson-Moss Act of 1974 and then, only under limited circumstances. 15 U.S.C. § 57b.

Our holding that debt collection activities are not within the purview of G.S. 75-1.1 dispenses with the need to resolve constitutional challenges to the statute raised by this defendant. Obviously if we have not properly interpreted G.S. 75-1.1, our General Assembly may amend the statute.

The Court of Appeals is

Reversed.

Justice HUSKINS dissenting.

The controlling question presented by this appeal is whether the debt collection activities of defendant Company fall within the purview of G.S. 75-1.1. The pertinent subsections of that statute read as follows:

> "(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."

In order to apply the provisions of G.S. 75-1.1 to transactions between persons engaged in business and the consuming public, as here, it must be shown (1) that the company has committed "unfair or deceptive acts or practices," and (2) that these acts or practices were "in the conduct of any trade or commerce." With respect to the first requirement, it is my opinion that the debt collection activities of J. C. Penney Company, Inc., revealed by the affidavits included in the record, constitute *unfair* acts or practices.

The affidavit of Narcissus Marrow discloses that she and her husband applied for and received two J. C. Penney credit cards in 1973. A year later the Marrows separated. At that time Mrs. Marrow wrote to Penney advising that due to the change in her marital status she would be unable to pay the $190.00 balance of her credit account at the usual rate, but she intended to pay the balance due as soon as possible. Defendant did not acknowledge this letter. After missing two payments Mrs. Marrow began to receive letters from Penney concerning her delinquency, and during the next year she made payments as she could afford them. In September 1975 she received a call at her place of employment from a Mrs. Spence who represented herself to be employed by the Collection Department of J. C. Penney Company. Mrs. Marrow asked Mrs. Spence not to call her at her office again and apparently worked out a payment schedule for the balance of her account. Nevertheless, Mrs. Spence called her again a day or so later at her place of employment and demanded more money. Mrs. Spence threatened to garnish her wages or turn her account over to a collection agency if the new sum was not forthcoming. Mrs. Marrow again asked Mrs. Spence not to call her at work.

A few days later a Mrs. Morris from the Collection Department of Penney called her office eight times attempting to locate Mrs. Marrow. During this time Mrs. Morris called the employment office to verify Mrs. Marrow's employment, told

the switchboard operator at the office that she was "tired of getting the run around," made the same statement to a fellow employee of Mrs. Marrow, and twice attempted to get her supervisor on the phone. During this time Mrs. Marrow received monthly statements from Penney in which Penney *attempted to induce her to make more purchases!*

The affidavit of Judi Fenderson disclosed that Mrs. Fenderson is divorced, the mother of two small children, and that she receives no support from her former husband. In 1973 she opened a charge account with J. C. Penney. A year later she was forced to change jobs, leaving her with a $348 per month cut in salary and, as a result, she was unable to make proper payments to Penney. She did pay as much as possible but began to receive threatening letters from that company. On 14 July 1975 she received a phone call at work from a Ms. Brown, employed by Penney, and worked out a payment agreement. A week later she received a phone call from a Ms. Betanzos demanding that she pay all accounts in full. Ms. Betanzos threatened that if she did not pay, Penney could garnish her wages and contact her employer. In addition, Ms. Betanzos told her of other debtors "who had been fired from their jobs just because they didn't pay Penney's." She received subsequent phone calls similar in nature.

Mr. Donald Poole, a delinquent debtor of J. C. Penney Company, received several calls at work concerning his debt and culminating with a call from a J. C. Penney employee to his supervisor, Mary Kay Creech. Ms. Creech's affidavit reveals that a Mr. Barrow from J. C. Penney called her and stated that Mr. Poole was uncooperative with Penney's, either on the phone or by mail, asked if North Carolina permitted Penney to garnish the wages of Mr. Poole, and finally stated that apparently Penney would have to take Poole to civil court. He then asked Ms. Creech to tell Mr. Poole of the conversation he had with her regarding this matter.

The affidavits of Sandra and William Wheeler reveal that when they became delinquent in their accounts, Penney continually harassed them with letters and phone calls threatening to garnish their wages, repossess the furniture, put liens on their house and car and talk to their employer and supervisor about "counselling" them in the matter of their delinquent accounts. None of these threats were acted upon.

Numerous other affidavits were filed, all reflecting a similar pattern of threats and harassment.

These sworn affidavits of those who have dealt with the J. C. Penney Company reveal a nightmarish pattern of harassment and other unscrupulous and unethical tactics. In particular, the threat and, indeed, the actual practice of informing the debtor's employer, supervisors and fellow workers of the debtor's credit status is an intolerable practice, bordering on blackmail and serving only to coerce the payment of the debt through fear and intimidation of the debtor. In my opinion these tactics show that the J. C. Penney Company has engaged in *unfair* acts and practices.

The majority, however, never reaches the question whether the acts, as alleged, are *unfair*. Rather, the majority has apparently decided that, regardless of whether the enumerated activities amount to unfair acts or practices, such acts are not "in the conduct of any trade or commerce." This conclusion is reached through close and narrow construction of the term "trade and commerce" and, in my opinion, is erroneous.

As construed by the majority these words are read as an indivisible term having a single meaning different from the sum of its parts. Thus the majority states that "the two words, when used in conjunction, 'include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter.' Black's Law Dictionary (4th Ed. 1968)."

I agree with the quoted definition but think the meaning of the phrase "trade or commerce" is more clearly understood by examination of the longer statement in *State v. Tagami,* 195 Cal. 522, 234 P. 102 (1925), from which the abbreviated definition quoted by the majority is lifted. In that case the California Supreme Court, dealing with a 1911 international treaty, stated:

> " . . . [W]hen so used in the conjunctive, they ["trade" and "commerce"] are held to impart to each other an enlarged signification which would include practically every business occupation carried on for the purpose of procuring subsistence or profit and into which, *or any material part of which,* the elements of bargain and sale, barter, exchange, or traffic enter." (Emphasis added.)

It seems clear from this more complete statement that "trade or commerce," by the majority's own authority, is not to be artificially limited to only those parts of a business in which elements of bargain and sale enter or which induce bargain or sale, but rather extends to the *whole* of any business or occupation of which bargain and sale is a material part. As to what comprises the "whole" of the business or occupation, I would suggest that, in a retail sales business such as Penney's, the business extends from the inducement to enter the buyer-seller relationship, generally advertising, through the termination of the buyer-seller relationship, generally final payment.

I am at a loss as to what position the majority adopts on this issue. At one point the opinion states that the "unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those *involved in* the bargain, sale, barter, exchange or traffic." (Emphasis added.) In the next paragraph it is said that "it is only those activities *surrounding the 'sale'* that are regulated by G.S. 75-1.1." (Emphasis added.) Elsewhere, the majority speaks of legislative intent to "prohibit only unfair and deceptive practices *affecting sales.*" (Emphasis added.) Later, the majority implies that prohibited acts are those which are *related to the sale.* Finally, the majority quotes with approval language from another jurisdiction holding that, under a similar law, only "acts or practices 'designed to *effect a sale'* are covered." (Emphasis added.)

The majority seems to envision some relationship—between the act or practice and the element of bargain and sale—as the touchstone for coverage under G.S. 75-1.1. Whatever the nature of that relationship, the majority does not find it to be present in this case.

By stating that the act must be "surrounding" or "related to" the bargain or sale element, the majority seems to adopt the same test that I expressed earlier; that is, that coverage extends to the whole of the business of which the bargain and sale element is a material part. If this is true, then the majority must have found that where a retail sales company permits customers to purchase goods on a time payment or credit basis, final payment is not an integral part of the sales system.

Support for this position, if it is indeed the position adopted by the majority, may be found in the discussion of G.S. 75-1.1(b). That section reads:

"(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State."

The majority singles out the words "between buyers and sellers" and, on that basis, states that the Legislature is "concerned with openness and fairness in those activities which characterize a party as a seller."

Language in the majority opinion suggests that once the promise to pay is made, the consumer and Penney change hats and become debtor and creditor rather than buyer and seller. In this vein the majority states that debt collection is not an activity necessarily typical or unique to sellers—a conclusion contrary to reality. Debt collection may not be *unique* to sellers, as indeed advertising (which is conceded to be under G.S. 75-1.1) is not unique to sellers; but if debt collection is not *typical* of credit sellers, then bankruptcy soon will be.

Nevertheless, I do not quarrel with the concept that a company may be both a seller and a creditor and that these activities may be distinct businesses. J. C. Penney Company, Inc., for example, could be in the business of lending money for automobile purchases or home improvements as well as being a retail sales company; and, absent direct connection with those retail sales, the credit collection activities stemming from its lending would not be subject to the provisions of G.S. 75-1.1 solely because some corporate arm was involved in retail sales. *Such is not the case here.* Here the credit is extended as a direct result of the sale. The promise to pay is what the consumer has exchanged for the goods. I reject the implication that in this situation payment for the goods pursuant to the promise to pay is separate and distinct from the sales transaction itself. Such a position defies the realities of modern commercial transactions and chooses to apply technical legal distinctions where none exist. It has been said that it "is a matter of common knowledge that the collection of accounts is a part, and a vital part, of any merchandising business in which credit is extended." *Ocean Accident & Guaranty Corp. v. Rubin*, 73 F. 2d 157 (9th Cir. 1934). As Justice Lake ably points out, dissenting in *Gardner*

v. Reidsville, 269 N.C. 581, 597, 153 S.E. 2d 139, 151 (1967), our Legislature has a keen awareness of conditions in North Carolina and a demonstrated competency in fiscal matters. To suggest that they intended that acts "surrounding" or "related to" a sale do not include payments made to the store under a credit plan *established and operated by that store* attributes to that body a degree of naivety not justified by its record.

It is possible, however, that the majority does not reach this question. Under certain language in the opinion the majority seems to adopt the position that the act must "affect," "involve" or "effect" the sale or bargain—language which would require that the act *induce* the sale. For reasons already stated, I do not agree with this construction of the phrase "in the conduct of any trade or commerce." Assuming for the moment, however, that this construction is proper, the majority leaves many questions unanswered.

Primarily the majority opinion does not resolve the issue whether the unfair or deceptive act or practice must itself induce the sale or bargain in order for G.S. 75-1.1 to apply, or whether that statute applies where the unfair act in itself did not induce the sale but the activity out of which the act arose induced the sale. For example, if the State demonstrated with competent evidence that extension of credit was offered to induce the sale, would later unfair acts in enforcing the credit terms, as demonstrated in this case, be proscribed by G.S. 75-1.1?

If this question is answered in the affirmative then, although there is no clear proof in the record that the J. C. Penney Company extends credit as an inducement to sales, it should be a simple matter for the State to allege and prove such inducement in future proceedings under G.S. 75-1.1. Moreover, it is my view that if G.S. 75-1.1 is construed to proscribe unfair acts arising out of activities which induce the sale or bargain, this Court should take judicial notice of the fact that where credit is extended in retail sales *by a major merchandising corporation*, as in this case, such credit is extended as an inducement to the buyer to make a purchase.

Judicial notice may be taken of "the general business methods of railway and other well-known or *quasi*-public corporations when these methods are universally practiced or commonly known to exist." *Furniture Co. v. Express Co.*, 144 N.C. 639,

57 S.E. 458 (1907); *accord, U-Haul Co. v. Jones,* 269 N.C. 284, 152 S.E. 2d 65 (1967); *Lichtenfels v. Bank,* 260 N.C. 146, 132 S.E. 2d 360 (1963); *Comrs. v. Prudden,* 180 N.C. 496, 105 S.E. 7 (1920); *cf. Ocean Accident & Guaranty Corp. v. Rubin,* 73 F. 2d 157 (9th Cir. 1934) (collection of accounts is a vital part of any merchandising business in which credit is extended); *Kansas Com'n. on Civil Rights v. Sears, Roebuck & Co.,* 216 Kan. 306, 532 P. 2d 1263 (1975) (extension of credit is commonplace in merchandise sales); *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A. 2d 69 (1960) (automobile manufacsurers, including Chrysler Corporation, use large scale media advertising to induce sales); *Wetherington v. Motor Co.,* 240 N.C. 90, 81 S.E. 2d 267 (1954) (marketing practices of automobile manufacturers); *General Bronze Corp. v. Schmeling,* 213 Wis. 150, 250 N.W. 412 (1933) (employees frequently receive a portion of the net profits of a company as a part of their compensation).

In my opinion the use of credit *by major retail sales corporations* as a sales inducement is so commonplace and well known as to fall into that category of facts of which judicial notice may be taken. In this regard the majority opinion impliedly recognizes the sales inducement aspect of credit extension when it states in a footnote that "[a]s time passed, competition apparently required that credit be extended for sales made."

If indeed the majority holds that G.S. 75-1.1 proscribes *unfair* acts arising out of activities which induce the sale or bargain, then, taking judicial notice of the inducement to buy which credit produces, it is my view that the trial court erred in holding, as a matter of law, that the conduct of the defendant J. C. Penney Company is not proscribed by G.S. 75-1.1.

If the majority holds that the unfair act itself must induce the sale, then the Court today effectively deletes "unfair" practices from the purview of G.S. 75-1.1, and "deceptive" practices *only* are now prohibited. It is not amiss to say that many "immoral, unethical, oppressive, or unscrupulous" acts which are not *deceptive* may nonetheless be unfair. *See F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 31 L.Ed. 2d 170, 92 S.Ct. 898 (1972). In my opinion, limiting the proscriptions of G.S. 75-1.1 to those acts which "induce" a sale deals a grievous blow to the encouragement of "good faith and fair dealings between buyers and sellers at all levels of commerce" envisioned by G.S.

75-1.1(b). Nevertheless, if G.S. 75-1.1 be so construed, I would hold that the promise of "fair" credit collection is included by implication in the extension of credit and thus covered by the statute.

For the reasons stated, I respectfully dissent from the majority opinion and vote to uphold the decision of the Court of Appeals.

Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES JUNIOR BIGGS

No. 9

(Filed 14 April 1977)

1. **Criminal Law § 75.9— non-custodial statements — admissibility**

The trial court in a first degree murder prosecution did not err in denying defendant's motion to suppress statements allegedly made by him to law enforcement officers without benefit of Miranda warnings where, at the time the statements were made, defendant was not under arrest and there had been no restriction of his freedom such as to render him in custody; and the statements were not the product of interrogation but were spontaneously volunteered by defendant.

2. **Criminal Law §§ 75.14, 75.15— defendant's statements — waiver of constitutional rights**

Evidence was insufficient to show that defendant's lack of education, his mental condition or his intoxication at the time he made a statement to an SBI agent precluded any effective waiver of his constitutional rights, and the trial court therefore properly allowed the statements into evidence.

3. **Homicide § 4— first degree murder — premeditation and deliberation — definitions**

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation, premeditation meaning thought beforehand for some length of time, however short, and deliberation meaning an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.

4. **Homicide § 21— premeditation and deliberation — sufficiency of evidence**

Evidence of premeditation and deliberation was sufficient for the jury in a prosecution for first degree murder where it tended to

show that defendant confessed to an SBI agent that he stabbed the victim because she had falsely sworn out an assault warrant against him and he was not sorry he had done so; he had planned to shoot the victim but was unable to obtain any shotgun shells; and defendant stated that he would have stabbed the victim even if he had not been drinking because he had it on his mind.

5. Criminal Law § 118.2— State's contentions — jury instructions proper

The trial court in charging on the State's contentions did not express an opinion in violation of G.S. 1-180, since there was ample evidence introduced to support the contentions as given and there was no erroneous statement or application of the law in the challenged instructions.

6. Homicide § 24— first degree murder — burden of proof — jury instructions proper

The trial court's instructions in a first degree murder case properly placed upon the State the burden of proving beyond a reasonable doubt each element of the offense charged, and the court's instructions on the presumption of malice did not violate defendant's privilege against self-incrimination.

7. Homicide §§ 26, 27— second degree murder — voluntary manslaughter — intent to kill — voluntary intoxication — erroneous instruction

The trial court's erroneous instruction in a first degree murder prosecution that a specific intent to kill was a necessary element of the crimes of second degree murder and voluntary manslaughter and that voluntary intoxication was a complete defense to those crimes was not prejudicial to defendant.

8. Constitutional Law § 80; 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 from *Tillery, J.*, 28 June 1976 Session, GATES County Superior Court. Defendant was charged with first-degree murder. He entered a plea of not guilty.

This case has previously been before this Court and a new trial was awarded. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371. Pursuant to a consent order the case was transferred from Chowan County to Gates County for the second trial.

The State's evidence tended to show that at about 1:30 a.m. on 12 July 1975 Deputy Sheriff Glenn Perry received a phone call from the Edenton Police Department informing him that Doris Jean Ferebee (Doris) had been stabbed. He proceeded to her home but after a thorough search of the premises was unable to find Doris. There was a butcher knife and a fire poker

on the kitchen table and he observed spots of blood beside the table.

Sheriff Troy Toppin came to the Ferebee home and shortly thereafter directed Perry to go to defendant's home to ascertain if defendant could help locate the missing woman. Deputy Perry, who had earlier that night served a warrant on defendant charging him with assault on Doris Jean Ferebee, proceeded to defendant's home. Defendant agreed to accompany him to the Ferebee home for the purpose of helping them locate Doris. The circumstances surrounding an inculpatory statement made by defendant to Deputy Sheriff Perry as they returned to the Ferebee home and subsequent statements made by defendant to Sheriff Toppin and SBI Agent William Earl Godley will be more fully set forth in our discussion of the questions presented by this appeal.

At about 3:00 a.m. SBI Agent Godley found the body of Doris Jean Ferebee on the shoulder of the road about 215 yards from her residence.

Antoinette Ferebee, the twelve-year-old daughter of the deceased, testified that on the night of 11 July 1975, while sleeping in her mother's bed with her brothers and sisters, she was awakened by a tap on the window. She heard defendant calling her mother's name. He then broke open the locked front door and came into the bedroom, carrying an open pocketknife in his hand. Defendant told the children to get up and go find their mother. Antoinette went upstairs, where she found her mother hiding under a bed. After her mother told her to go away, she went back downstairs and told defendant that she was unable to find her mother. Defendant threatened to kill the children if they didn't find their mother for him. After Doris had received assurances that defendant would not hurt her, she came downstairs armed with a fire poker and a knife. She and defendant began to argue about the warrant which she had earlier caused to be issued for his arrest. At that point, in the presence of her children, defendant stabbed Doris. Defendant then told the children to take one last look at their mother because "[t]he next time you see her she will be in a casket."

There was expert medical testimony that Doris Jean Ferebee died as a result of four stab wounds in the chest and stomach, any one of which was sufficient to have caused death.

Defendant offered no evidence.

The jury returned a verdict of guilty of first-degree murder and the trial judge entered a judgment imposing the death penalty.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

W. T. Culpepper III for defendant.

BRANCH, Justice.

[1] Defendant assigns as error the denial of his motion to suppress statements allegedy made by him to Deputy Sheriff Perry and Sheriff Toppin.

Before the introduction of evidence the trial judge, pursuant to defendant's motion to suppress, conducted a *voir dire* hearing to determine the admissibility of statements allegedly made by defendant to police officers. On *voir dire* Deputy Sheriff Perry testified that on 12 July 1975, as a result of a telephone call, he went to the residence of Doris Jean Ferebee. Upon his arrival, he was told by Officer Mizelle, of the Edenton Police Department, that Doris' child had told him that her mother had been hurt. The witness and other officers searched the Ferebee house but were unable to find the child's mother. Sheriff Toppin then directed him to go to defendant's house to see if he could help locate Doris. Deputy Perry found defendant, his father and his brother at home and he asked defendant if he had been to the Ferebee house that night. Defendant replied that he had left there at about 1:30 a.m. He then agreed to go to the Ferebee residence to help locate the missing woman. Defendant was not placed under arrest at that time, but Deputy Perry did ask him if he had a knife. Defendant replied that he did and voluntarily gave the knife to the officer. During the ride back to the Ferebee home, defendant inquired: "Mr. Perry, you mean she's not in the house?" When Officer Perry replied "no," defendant said, "I don't see how the bitch could go any place the way she was hurt."

Deputy Sheriff Perry unequivocally stated that neither he nor Officer Mizelle, who had accompanied him to defendant's home, asked any questions during their return trip to the Ferebee home. Upon arriving at the Ferebee home the witness

told Sheriff Toppin about the statement made by defendant. Sheriff Toppin thereupon immediately advised defendant of his "*Miranda* rights."

Sheriff Toppin testified that he sent Deputy Perry to defendant's home to see if he knew where Doris was. He did not instruct the deputy to arrest defendant. However, when Deputy Perry told him of defendant's statement he immediately advised defendant of his constitutional rights, including his right to have a lawyer appointed for him before he answered any questions. The Sheriff testified:

> . . . I asked him if he understood that. He said he did. "Do you understand each of these rights I have explained to you?" I asked him if he understood that. He said he did. I said, "Having these rights in mind without a lawyer present, do you wish to answer any questions now?" He said he would. I did not at any time threaten or coerce the defendant to answer those questions in any regard other than what he wanted to answer them. In my opinion the defendant did appear to understand his rights. . . .

Thereafter, in response to the Sheriff's questions, defendant stated that he did not know where Doris was "because he didn't see how she could get out of the house the way he had stabbed her." The Sheriff then directed his deputy to carry defendant to the Chowan County jail.

Defendant then testified that Deputy Perry came to his home at about 1:30 on 12 July 1975 and asked him if he would help find Doris. He said that the officer told him "that he wasn't under arrest." At the officer's request he gave him his knife. As they proceeded to the Ferebee home he asked Deputy Sheriff Perry, "You mean she's not in the house?". He testified that he said nothing about Doris being hurt. He further stated that upon his arrival at the Ferebee home, Sheriff Toppin advised him that he had a right to remain silent but gave him no other warnings. He denied that he told the Sheriff that he had stabbed Doris Jean Ferebee.

Judge Tillery found facts consistent with the evidence offered by the State and concluded:

> Upon the foregoing findings of fact, the court concludes as a matter of law that statements made to Deputy

Sheriff Glenn Perry were made freely and voluntarily and in a noncustodial situation, and that the statements were not the result of any interrogation or questioning by any law enforcement officer and were entirely unsolicited.

* * *

Upon the foregoing findings of fact, the court concludes as a matter of law that any statements made thereafter to Sheriff Toppin were made by the defendant freely, voluntarily, understandingly and in awareness of his constitutional right to remain silent and of his right to the presence of counsel, and after having intelligently, expressly and vocally waived his right to remain silent and his right to the presence of counsel by his affirmative answer to the last question which was asked him by Sheriff Troy Toppin.

He thereupon denied defendant's motion to suppress the statements made by defendant to Deputy Sheriff Perry and Sheriff Toppin.

It is well established that a confession obtained as a result of custodial interrogation, without the *Miranda* warnings is inadmissible. *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. 2 Stansbury's N. C. Evidence (Brandis Rev. 1973) § 184, page 72. However, such warnings are not required when defendant is not in custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona, supra; State v. Sykes,* 285 N.C. 202, 203 S.E. 2d 849.

We think the very recent case of *Oregon v. Mathiason,* ..... U.S. ....., 50 L.Ed. 2d 714, 97 S.Ct. 711, is noteworthy. There, the United States Supreme Court considered the admissibility of certain inculpatory statements made by an accused who was charged with murder and, in pertinent part, stated:

In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a one half-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

> Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restrain on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." . . .

Even more apropos to the case under consideration is the rule that volunteered and spontaneous statements made by a defendant to police officers without any interrogation on the part of the officers are not barred by any theory of our law. *Miranda v. Arizona, supra; State v. Bell,* 279 N.C. 173, 181 S.E. 2d 461; 4 N.C. Index 3d, Criminal Law § 75.9.

In instant case all the evidence, including defendant's testimony, shows that defendant was not under arrest and that there had been no such restriction of his freedom as to render him in custody when he made the inculpatory statement to Officer Perry. It is equally clear that the statement was not the product of interrogation, but was spontaneously volunteered by defendant. We, therefore, hold that Judge Tillery correctly denied defendant's motion to suppress the statement made to Deputy Sheriff Perry.

The principal thrust of defendant's attack upon the statement made to Sheriff Toppin is that since the prior statement to Officer Perry was involuntarily made, a presumption arose imputing the same prior influence to his subsequent statement. He argues that the State has failed to overcome this presumption by clear and convincing evidence. *State v. Silver,* 286 N.C. 709, 213 S.E. 2d 247. Our holding that the original statement made to Deputy Sheriff Perry was properly admitted into evi-

dence completely deflates this argument. Suffice it to say that the trial judge's findings which supported his ruling that the statements made to Sheriff Toppin were admissible into evidence were supported by ample, competent evidence and are therefore binding upon this Court. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561. Thus, the statements made to Sheriff Toppin by defendant were properly admitted into evidence.

[2] Defendant assigns as error the admission of statements made by him to SBI Agent Godley. In view of our earlier consideration of this very question, we do not deem it necessary to discuss defendant's contention that the statements made to SBI Agent Godley are presumed to be involuntary because of a prior involuntary confession made to Deputy Sheriff Perry. However, by this assignment of error, defendant also contends that the entire record shows that defendant's lack of education, his mental condition and his intoxication at the time he made the statement to Agent Godley precluded any effective waiver of his constitutional rights.

In this connection Agent Godley, testifying on *voir dire*, stated that he talked with defendant in the office of the Sheriff of Chowan County on 12 July 1975. He further testified:

> I first asked him if he remembered being advised of his constitutional rights by Sheriff Toppin out at Doris Jean Ferebee's residence. Mr. Biggs stated that he did. . . .
>
> I told Mr. Biggs . . . that I wished to discuss matters related to her [Doris Jean Ferebee] death with him, that I needed to advise him of his constitutional rights again due to the fact that I hadn't advised him personally in the time lag, and I did so. . . .
>
> * * *
>
> The defendant appeared to understand the rights as I went over them on the sheet and pointed them out to him. I specifically asked him to stop me if there was a question. On one occasion he did stop me and had a question. This was in reference to the word "coercion" in the waiver of rights form. . . . I explained to him what the word "coercion" means. . . .
>
> * * *
>
> The defendant did not appear abnormal in any way to me, did not walk or talk abnormally. . . .

. . . He did tell me that he was intoxicated, but in my opinion he was not. . . .

At the conclusion of the *voir dire* hearing, the court made extensive findings of fact including the following:

> During the time they were together [Agent Godley and defendant], the defendant did not appear to be intoxicated. There was no odor of alcohol upon his breath. He had no difficulty in standing or walking, and on the one occasion he asked a question, he asked an intelligent question which was the meaning of the word "coercion."

Judge Tillery then concluded and ruled:

> Upon the foregoing findings of fact, the court concludes as a matter of law that any statements made to W. E. Godley by James Junior Biggs at Chowan County Sheriff's office on July 12, 1975 were made freely, voluntarily, understandingly and in full awareness of the defendant's constitutional rights to counsel and against self-incrimination.
>
> The court further concludes as a matter of law that the defendant expressly and vocally and in writing waived his right to counsel and his right to remain silent, and that this also was done freely, voluntarily and understandingly.
>
> . . . The motion to suppress the same and any motion to suppress State's Exhibit No. 1 is denied.

This record discloses no substantial evidence of defendant's lack of mental capacity. Neither does defendant's showing that he had only a fourth grade education render his confession inadmissible since even complete illiteracy does not preclude understanding or a free exercise of the will. *State v. White,* 291 N.C. 118, 229 S.E. 2d 152. Nor does the evidence show that, as a result of intoxication, defendant did not know what was being said or done at the time he made the statement to Agent Godley. *State v. Jackson,* 280 N.C. 563, 187 S.E. 2d 27. On the other hand, there was plenary evidence to support the trial judge's findings and conclusion that defendant's statements to SBI Agent Godley were made voluntarily and understandingly and that he understandingly waived his constitutional rights, including his right to counsel. We are bound by these findings which

support the trial judge's conclusions. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610.

There was no error in the trial court's denial of defendant's motion to suppress statements made by him to SBI Agent Godley.

It is next argued by defendant that there was insufficient evidence of premeditation and deliberation to submit the case to the jury on the charge of first-degree murder.

[3] First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65; *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652. Premeditation means "thought beforehand for some length of time, however short." *State v. Reams, supra.* Deliberation means "an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *State v. Benson,* 183 N.C. 795, 111 S.E. 869.

In *State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600, this Court held that evidence of defendant's hostile feelings toward the deceased because of her prosecution of him for assault was a circumstance which tended to show premeditation and deliberation.

[4] In instant case SBI Agent Godley testified that defendant had confessed to him that he stabbed Doris Jean Ferebee because she had falsely sworn out an assault warrant against him and that he was not sorry that he had done so. Agent Godley further testified as follows:

> . . . I asked Mr. Biggs at that point if he had been planning in advance to stab Mrs. Ferebee, and Mr. Biggs stated that he had planned on shooting her but he was unable to obtain any shotgun shells.
>
> * * *
>
> . . . [H]e stated that . . . he inquired from about 10 people about how he could get a shotgun shell and that no one would give him one. . . .

Agent Godley also testified that upon further questioning of defendant as to his intoxication at the time of the stabbing, the following exchange occurred: "I then asked Mr. Biggs if he would have stabbed Mrs. Ferebee even if he had not been drinking, and his reply was, 'Yep, because I had it on my mind'."

Thus, there was evidence that defendant, by his own admission, planned in advance to kill Doris Jean Ferebee in order to gratify a desire for revenge, and carried out that fixed design under unusually cruel circumstances. Clearly this was sufficient to support a jury verdict that defendant unlawfully killed Doris Jean Ferebee with malice and with premeditation and deliberation.

[5] Defendant contends that the trial judge expressed an opinion in violation of G.S. 1-180, when he charged the jury as follows:

> The State has further offered evidence that the defendant felt that this was an unfair and unfounded charge, and that he went to a place in Edenton called Choke's Grill and began to drink liquor or drink some alcoholic beverage, in any event, that he consumed a considerable amount of some alcoholic beverage, and that in addition he smoked some marijuana cigarettes; that he began to inquire about a shotgun shell having in mind killing Doris Jean Ferebee, and that he asked a number of people, as many as ten, perhaps, and nobody would give him a shotgun shell; that he obtained at Choke's Grill a knife and walked from Edenton to the home of Doris Jean Ferebee who lived on Paradise Road outside of Edenton; that when he got there, he went to the window and tapped on it and called the name "Jean" and at this point, Mrs. Ferebee got out of bed and when he got no response, he broke the front door in, tearing two fasteners or locks partly aside in the process; that he went in and demanded of the children of Mrs. Ferebee to know where she was, and one of the children, that is, Antoinette Ferebee, said she didn't know. After some discussion, he sent the children upstairs to find Mrs. Ferebee, and Antoinette found her mother underneath a bed; that she, that is, Mrs. Ferebee, told her to go ahead, meaning to leave her alone, and she went downstairs and told the defendant she didn't know where her mother was; that

during this entire time the defendant had in his hand an open pocketknife.

Ordinarily, objections to the charge in stating contentions of the parties must be brought to the court's attention in time to afford opportunity to correct the alleged misstatement. *State v. McAllister,* 287 N.C. 178, 214 S.E. 2d 75; *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477. However, this rule does not apply when a misstatement incorrectly applies the law or presents an erroneous statement of the law. *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423. Nor does the rule apply when the statement of contentions is not supported by the evidence. *State v. Pike,* 267 N.C. 312, 148 S.E. 2d 136.

Here defendant did not voice his objections in time for any possible misstatement of the State's contentions to be corrected. There was ample evidence introduced to support the contentions as given and there was no erroneous statement or application of the law in the challenged instructions. Even had defendant timely voiced his objections, we can find nothing in the language of this instruction which tends to express an opinion of the trial judge.

We find no merit in this contention.

[6] Defendant assigns as error the court's instruction that: "[I]f the State proves beyond a reasonable doubt that the defendant intentionally killed Doris Jean Ferebee with a deadly weapon or intentionally inflicted a wound upon Mrs. Ferebee with a deadly weapon that proximately caused her death, the law implies first that the killing was unlawful and second that it was done with malice."

Relying upon *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881, he takes the position that the instruction violated his rights to due process as guaranteed by the Fourteenth Amendment to the United States Constitution because it relieved the State of its burden of proving beyond a reasonable doubt each element of the offense charged.

In *Mullaney* Justice Powell, speaking for the Court, succinctly stated the holding in that case: "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a

homicide case." We have held in a number of cases subsequent to the *Mullaney* decision that the presumptions of malice and unlawfulness arising from an intentional assault with a deadly weapon proximately causing death are constitutionally sound. *State v. Lester,* 289 N.C. 239, 221 S.E. 2d 268; *State v. McCall,* 289 N.C. 512, 223 S.E. 2d 303; *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575; *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558. In *State v. Hankerson, supra,* Justice Exum, speaking for the Court, explained:

> The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. . . .

In instant case the trial judge meticulously adhered to the *Mullaney* requirement that the State must bear the burden throughout of proving the element of malice beyond a reasonable doubt when he further instructed as follows:

> The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the State fails to prove this, that is, fails to meet this burden, the defendant can be guilty of nothing more than voluntary manslaughter. . . .

Here all the evidence showed a cold-blooded killing pursuant to a fixed plan to satisfy a craving for revenge. There was no evidence of heat of passion upon sudden provocation. Thus, even though an issue as to this mitigating factor was not "properly presented" as it was in *Mullaney,* defendant had the benefit of an instruction requiring the State to prove the absence of heat of passion beyond a reasonable doubt. We find nothing in the trial judge's instructions which violates the requirements of due process as enunciated in *Mullaney.*

By this same assignment of error defendant contends that this rule of law concerning the presumption of malice violates his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

In *State v. Williams, supra,* this Court examined the effect of the presumption of malice upon the allocation of the burden of proof. It was there stated:

> . . . Establishment of the presumption requires the triers of fact to conclude that the prosecution has met its burden of proof with respect to the presumed fact by having established the required basic facts beyond a reasonable doubt. This does not shift the ultimate burden of proof from the State but actually only shifts the burden of going forward so that the defendant must present some evidence contesting the facts presumed. . . .

Defendant argues that since he was the only available defense witness, this rule resulted in an unconstitutional coercion to waive his right against self-incrimination. This argument is overcome by the following language contained in footnote 28 of the *Mullaney* decision:

> . . . Many States do require the defendant to show that there is "some evidence" indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. [Citations omitted.] Nothing in this opinion is intended to affect that requirement. . . .

We conclude that the trial judge's instructions neither relieved the State of its burden of proving beyond a reasonable doubt every element of the offense charged, nor violated defendant's constitutional privilege against self-incrimination. This assignment of error is overruled.

[7] Defendant next attacks the following instruction by the trial judge:

> . . . I charge that if upon considering the evidence with respect to the defendant's state with regard to intoxication or a drugged condition you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first degree murder, you will not return a verdict of guilty of first degree murder, and with respect to the charges of second degree murder and voluntary manslaughter, the same general rule with regard to voluntary intoxication or drugged condition would apply, and the court instructs you that if you reach those possible

verdicts and find that the defendant was intoxicated or drugged, you should consider whether that condition affected his ability to form this specific intent which is required for conviction of either second degree murder or voluntary manslaughter.

In order for you to find the defendant guilty of either second degree murder or involuntary (sic) manslaughter, you must find beyond a reasonable doubt that he had the intent to kill, and if as a result of intoxication or a drugged condition he did not have that intent, you would have to find the defendant not guilty.

Defendant properly takes the position that the challenged instruction incorrectly states that a specific intent to kill is a necessary element of the crimes of second-degree murder and voluntary manslaughter, *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638, and that voluntary intoxication is a complete defense to those crimes. *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777. However, it is well established that on appeal the defendant has the burden not only to show error, but also to demonstrate that the error affected the result adversely to him. 4 N.C. Index 3d, Criminal Law § 168. Had the jury reached and considered the lesser-included offenses of second-degree murder and voluntary manslaughter, the effect of the admittedly erroneous portion of the instructions was to improperly increase the State's burden of proof and to erroneously permit the jury to consider a complete defense to those charges which is not provided by law.

Defendant does not attack the trial judge's instruction on murder in the first degree. In that portion of the charge the court correctly instructed the jury that they must find that defendant formed a specific intent to kill before they could return a verdict of guilty of murder in the first degree. Implicit in the jury's verdict of guilty of first-degree murder is a finding that defendant formed a specific intent to kill. Having found this element, there was nothing in the erroneous instructions which would have deterred the jury from returning a verdict of guilty of second-degree murder or a verdict of guilty of voluntary manslaughter. Obviously the jury chose to believe the State's evidence which supported a finding of an unlawful killing committed with malice and after premeditation and deliberation.

We hold that defendant was not prejudiced by the erroneous charge as to the lesser-included offenses of second-degree murder and voluntary manslaughter. This assignment of error is overruled.

Defendant argues that it was error for the trial judge to refuse to give his requested instruction to the effect that premeditation and deliberation must occur prior to the proximate cause of death. We note that the trial judge gave a complete and accurate instruction as to the elements of premeditation and deliberation which adequately conveyed the rather obvious message of defendant's requested instruction.

[8] Finally, defendant attacks the imposition of the death penalty in this case. In *Woodson v. North Carolina,* 428 U.S. 280, 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), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, the judgment imposing a sentence of death upon defendant is vacated and 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.

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

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA v. DAVID LEE DOLLAR

No. 22

(Filed 14 April 1977)

1. **Criminal Law § 29.2— mental capacity to plead or stand trial — confinement of defendant to hospital**

When the capacity of one charged with a criminal offense to proceed is questioned, the court may direct the commitment of the defendant to a State mental health facility for observation or may appoint one or more impartial medical experts to conduct such examination and may make appropriate temporary orders for the confinement or security of the defendant pending the ruling of the court upon the question of his capacity to proceed; therefore, the trial court did not err in transferring defendant, who was under examination to determine his mental competency to plead and stand trial, from Dorothea Dix Hospital to the hospital at Central Prison upon learning that defendant's brother planned to break into Dorothea Dix and release defendant. G.S. 15A-1002.

2. **Criminal Law § 29.1— mental capacity to plead or stand trial — procedure**

Where defendant moved for a psychiatric examination to determine his mental competency to plead and stand trial, the court committed him to Dorothea Dix Hospital, and the hospital staff reported to the court that defendant did have mental capacity to proceed, the trial court erred in proceeding with the trial without conducting any further hearing for the determination of that question; however, defendant waived his right to such a hearing by failing before trial to request a hearing or otherwise indicate any adherence to his contention of lack of mental capacity. G.S. 15A-1002(b)(3).

3. **Criminal Law § 15.1— pretrial publicity — change of venue properly denied**

The trial court in a first degree murder prosecution did not err in denying defendant's motion for change of venue on account of local pretrial publicity where jurors apparently were found who were not aware of, or were not affected by, the publicity of which defendant complained, and nothing in the record indicated that, prior to verdict, defendant was not content with the twelve jurors who found him guilty.

4. **Bill of Discovery § 6— State's witnesses — pretrial disclosure not required**

The State is not presently required to disclose to the defendant in advance of trial the names of its prospective witnesses.

5. **Bill of Discovery § 6— proof of gun ownership — pretrial disclosure not required**

G.S. 15A-903 does not support defendant's contention in this first degree murder prosecution that he was entitled to pretrial disclosure

of how the State intended to prove the victim's ownership of the guns sold by defendant and his companion.

6. **Criminal Law § 75.7— noncustodial interrogation — necessity for Miranda warnings**

The trial court in a first degree murder prosecution did not err in allowing into evidence testimony concerning statements made by defendant without benefit of the *Miranda* warnings to investigating officers concerning an earlier conversation between defendant and others present in a store during which defendant remarked that he knew who killed the victims, since, at the time defendant was interrogated by the officers, he was not in custody nor was he then a suspect.

7. **Constitutional Law § 49; Criminal Law § 75.8— request for counsel — subsequent waiver — admissibility of confession**

Defendant's earlier request for counsel did not make inadmissible a confession made at a subsequent conversation with the investigating officers, initiated by the defendant himself, at which he was again fully informed of his constitutional rights and at which he expressly waived the right to have counsel present.

8. **Robbery § 6; Criminal Law §§ 102.12, 138— counsel's statement of punishment to jury — State's objection — sustaining not prejudicial error**

The trial court in an armed robbery and murder prosecution erred in sustaining the State's objection to defense counsel's reading to the jury of the armed robbery statute, including the provision prescribing punishment, but such error was harmless beyond a reasonable doubt since the desired information was brought to the attention of the jury which was not instructed to disregard it, and judgment was arrested upon the charge of armed robbery anyway.

9. **Criminal Law § 130— expression of opinion by juror — no mistrial**

The trial court in a felony murder prosecution did not err in denying defendant's motion for mistrial on the ground that jurors already selected and others of the panel awaiting interrogation were influenced by the statement of one prospective juror that he had formed an opinion that defendant was guilty because defendant's alleged companion in the crimes charged had committed suicide and the defendant had tried to do so.

10. **Bill of Discovery § 6— photographs not supplied to defendant — admissibility**

The exclusion of evidence for the reason that the party offering it has failed to comply with the statutes granting the right of discovery, or with an order of the court issued pursuant thereto rests in the discretion of the trial court. The court did not abuse its discretion in allowing into evidence illustrative photographs which had not been supplied to defendant pursuant to the order for discovery where the district attorney did not know of the existence of the photographs until the morning on which the witness was called to testify. G.S. 15A-910.

11. Homicide § 20— photographs for illustration — number not excessive

The trial court in a felony murder prosecution did not abuse its discretion in allowing into evidence an allegedly excessive number of photographs depicting the victims' bodies and surrounding area, since each photograph illustrated a portion of the testimony of the witness not illustrated by other photographs.

12. Homicide § 21— felony murder — doctor performing autopsy — testimony insufficient basis for nonsuit

Defendant in a felony murder prosecution was not entitled to nonsuit on the basis of an opinion expressed by the doctor who performed the autopsy on the victims that they could not have been killed prior to the day after the dates alleged in the bills of indictment, since the evidence of the State, taken to be true, revealed two ruthless, brutal murders in the perpetration of a planned robbery by the defendant and his companion.

13. Homicide § 30; Robbery § 5— felony murder — armed robbery or common law robbery immaterial

In a prosecution for murder committed during the perpetration of an armed robbery where all the evidence was that each victim was struck on the head with a weapon of such nature and used with such force as to make it a deadly weapon, the trial court was not required to submit to the jury as a possible verdict defendant's guilt of common law robbery; furthermore, defendant was not prejudiced since he received no sentence for the robbery, judgment being arrested as to that charge, and a murder committed in the perpetration of any robbery, whether armed robbery or common law robbery, is murder in the first degree. G.S. 14-17.

14. Criminal Law § 9.1; Homicide § 25— defendant at scene of crime — defendant as active participant — jury instructions

There is no merit in defendant's contention that the trial court failed to instruct the jury that if it found the defendant was merely present at the scene of the crime that circumstance alone would not justify a verdict of guilty, since the court did so instruct the jury, but, in any event, defendant's own statement, properly admitted in evidence, showed that he actively participated in the planning of the robbery and its execution.

15. Constitutional Law § 80; Homicide § 31— felony murder — life sentence substituted for death penalty

Sentence of life imprisonment is substituted for the death penalty in this felony murder prosecution.

APPEAL by defendant from *Walker, J.*, at the 31 May 1976 Mixed Session of WILKES.

Upon indictments, proper in form, the defendant was convicted of armed robbery, the first degree murder of Thurmond Royal and the first degree murder of Lecie Royal, the wife of

Thurmond Royal. The State having proceeded upon the theory of felony murder, judgment was arrested in the armed robbery case. The two murder cases were consolidated for judgment and the defendant was sentenced to death.

Prior to trial the defendant moved to suppress evidence of a statement made by him, while in custody, to investigating officers at approximately 12:30 p.m. on 30 March 1976. The court, prior to trial, conducted a hearing on this motion. At that hearing, the defendant did not testify and offered no evidence except the testimony of his mother to the effect that she had no telephone in her home; a printed statement of the constitutional rights of one interrogated while in custody, which statement was signed by the defendant at 12:19 a.m. on 30 March 1976, and upon which he stated that he did want a lawyer; and an order of the Judge of the District Court, dated 31 March 1976, appointing counsel for the defendant. The evidence for the State at this hearing was to the following effect:

The defendant, who lived near the Royals and had had contacts with Mr. Royal, was interrogated on four occasions by officers investigating the murders. At the time of the first two interrogations, he was not in custody and was not a suspect. Nevertheless, at the outset of the first interrogation, which was general in nature, the officer advised him of his constitutional rights as stated by the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436. The second interrogation was the result of the defendant's having indicated, in a general conversation at a store in the vicinity, that he knew who had killed Mr. and Mrs. Royal. The third interrogation occurred shortly after midnight on 30 March 1976 following the defendant's arrest. At that time his constitutional rights, as so stated by the Supreme Court of the United States in the Miranda case, were read to him and, as above indicated, he signed this statement of his rights and stated thereon that he did want a lawyer. That interrogation thereupon ceased.

Approximately twelve hours later, the Sheriff of Wilkes County and his Chief Deputy went to the defendant's jail cell, having been told that the defendant wished to talk to them. They asked if he did wish to talk with them and he replied that he did. He told the officers, "I am willing to talk now if you will get me some marijuana." They refused to do so but stated that if he wanted to talk with them they would go to

the office, sit down and listen to him. He told the officers that he understood he had the right to an attorney but did not want one. The two officers and the defendant then went to the Chief Deputy's office where the Chief Deputy read to the defendant his constitutional rights as declared in the Miranda case. The defendant stated that he understood all of those rights and that he wanted to talk with the officers without the presence of a lawyer. He thereupon signed a waiver of the above mentioned rights. He was approximately 25 years of age, did not appear sleepy or confused and was coherent. He complained of no physical ailment. The officers promised him nothing and did not threaten him. He then made a statement to the officers, the substance of which is set forth below.

At the conclusion of the hearing, the court made full findings of fact, including the finding that the statement in question was made freely and voluntarily after the defendant had been fully advised of his above mentioned constitutional rights and had signed a waiver thereof, including his right to the presence of counsel at the interrogation, and denied the motion to suppress evidence of the statement.

When, at the trial, in the presence of the jury, evidence of this statement was offered, the defendant objected and the court again, in the absence of the jury, conducted a voir dire at which no other evidence was offered by the defendant. The court again examined the Chief Deputy Sheriff with reference to the circumstances under which the statement was made. At the conclusion of this voir dire, the court again made full findings of fact, including the finding that the statement was freely and voluntarily given after the defendant had been fully advised of his above mentioned constitutional rights. The objection to the introduction of the evidence was thereupon overruled.

The evidence for the State at the trial was to the following effect:

On the morning of 9 January 1976, the daughter and son-in-law of Mr. and Mrs. Royal went to their home. They found Mrs. Royal dead upon the living room floor and, shortly thereafter, found Mr. Royal dead in a tool shed near the house. Upon the floor of one of the bedrooms there was a pile of bed quilts and there were blood stains on the front door and other areas of the house, including the inside of a gun cabinet. Suspended from the door of the gun cabinet was a chain. This chain could

be connected with a hasp so as to fasten the door only by use of a lock which, together with a group of keys, was found lying upon a sewing machine in front of the cabinet. One of the keys opened the lock. In each case, the cause of death was a blow upon the head with a blunt instrument which produced a comminuted fracture of the skull.

Mr. Royal had in the gun cabinet a large collection of antique guns, both "long guns" and pistols. He also carried upon his person at all times a small Derringer, a present from one of his sons. The indictments charged that Mr. and Mrs. Royal were murdered on 7 January 1976. Prior to the middle of January 1976, the defendant and his companion, Prosser, sold the Derringer and two other pistols, each identified by a son of Mr. Royal who had given the gun to his father. The three pistols were introduced in evidence, an uninterrupted chain of possession from the defendant and Prosser to the witness, through whom they were offered in evidence, being established.

In the above mentioned statement to the Sheriff of Wilkes County and his Chief Deputy, made on 30 March 1976, at approximately 12:30 p.m., the defendant said that he and Prosser went to the Royal home for the purpose of robbing Mr. Royal of his gun collection. The defendant enticed Mr. Royal out of the house by requesting the loan of a tow bar so that the defendant could move his car. When Mr. Royal went to the tool shed, Prosser struck him. They then went into the house and Prosser, catching Mrs. Royal off guard, hit her in the head. The defendant, who had previously visited in the Royal home and knew where the guns were kept, showed Prosser the gun cabinet which was locked. Prosser went back to Mr. Royal's body and got the key to the lock and the Derringer. They then wrapped the guns in quilts and the defendant took them out to their car. They drove back to Prosser's house where, the next day, they sold the guns.

Prosser, while in custody, committed suicide.

Rufus L. Edmisten, Attorney General, by Patricia B. Hodulick, Associate Attorney, and Elizabeth C. Bunting, Associate Attorney, for the State.

E. James Moore for defendant.

LAKE, Justice.

[1] Prior to trial the defendant moved for a psychiatric examination to determine his mental competency to plead to the indictment and to stand trial thereon. For this purpose, he was committed to Dorothea Dix Hospital. During the term of that commitment, the court, being advised that the defendant's brother planned to break into the hospital and release the defendant, ordered that he be transferred to the hospital at Central Prison and that the psychiatric examination be continued there. This was done, the examination being conducted by the staff of the Dorothea Dix Hospital.

The defendant's contention that this transfer to the prison hospital was error is without merit. When the capacity of one charged with a criminal offense to proceed is questioned, the court may direct the commitment of the defendant to a State mental health facility for observation or may appoint one or more impartial medical experts to conduct such examination and may make appropriate temporary orders for the confinement or security of the defendant pending the ruling of the court upon the question of his capacity to proceed. G.S. 15A-1002; *State v. Washington,* 283 N.C. 175, 185, 195 S.E. 2d 534 (1973).

[2] The defendant next assigns as error the failure of the court to hold a hearing on the question of his ability to plead and stand trial. Following the above mentioned psychiatric examination, the hospital staff made a report to the court indicating that the defendant did have mental capacity to plead to the indictment and to stand trial. Without conducting any further hearing for the determination of that question, the court proceeded with the trial. This was contrary to G.S. 15A-1002(b)(3) which specifically requires that when the capacity of the defendant to proceed is questioned, the court must hold a hearing to determine that question, which hearing must be held, upon reasonable notice to the defendant and the prosecutor, after the psychiatric examination if one is ordered by the court. However, we think it obvious that, under the circumstances of this case, the defendant has waived his right to such hearing. *State v. Young,* 291 N.C. 562, 231 S.E. 2d 577 (decided January 31, 1977).

The report of the psychiatric examination is admissible in evidence at such hearing. G.S. 15A-1002(b)(1 and 2). The statute further provides that other evidence may be introduced

at the hearing by the State and by the defendant. The record in the present case shows that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial. Nothing in the record indicates that before going to trial the defendant requested a hearing or otherwise indicated any adherence to his contention of lack of mental capacity. He offered no evidence on the question. See: *State v. Washington, supra.* See also: *State v. Propst,* 274 N.C. 62, 68, 161 S.E. 2d 560 (1968), as to the law of this State upon this question prior to the enactment of the foregoing statute.

[3] The defendant next assigns as error the court's denial of his motion for change of venue on account of local pretrial publicity. It is well established that this is a matter in the sound discretion of the trial court. *State v. Brewer,* 289 N.C. 644, 655, 224 S.E. 2d 551 (1976); *State v. Alford,* 289 N.C. 372, 378, 222 S.E. 2d 222 (1976); *State v. Harrill,* 289 N.C. 186, 190, 221 S.E. 2d 325 (1976). Nothing in the present record indicates an abuse of discretion in this ruling. The record does not show the defendant's examination of prospective jurors nor does it show that he exhausted the peremptory challenges allowed him by law. Apparently, jurors were found who were not aware of, or were not affected by, the publicity of which the defendant complains and nothing in the record indicates that, prior to verdict, he was not content with the twelve jurors who found him guilty.

[4, 5] We find no merit in the defendant's Assignments of Error 5, 6 and 7 relating to the denial of portions of his pretrial motions for discovery. The State is not presently required to disclose to the defendant in advance of trial the names of its prospective witnesses. *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975). However, a list of the State's witnesses was supplied to defendant's counsel prior to the commencement of the selection of the jury. G.S. 15A-903 specifies certain types of information which the defendant is entitled to obtain by discovery procedure. The statute does not support the defendant's contention that he was entitled to pretrial disclosure of how the State intended to prove Mr. Royal's ownership of the guns sold by the defendant and his companion. As to the defendant's request for information as to evidence obtained by the State as a result of the defendant's statement, it is sufficient

to note that the record does not indicate any such evidence was so discovered.

There is likewise no merit in the defendant's Assignments of Error 8, 9 and 10 with reference to the overruling of his pretrial motions to suppress statements made by the defendant to the investigating officers and evidence obtained by the officers as the result of such statements. As above noted, the record does not indicate any evidence introduced at the trial was so obtained. Furthermore, the statements themselves were properly obtained and were properly admitted in evidence. The rule that evidence, which is fruit of a poisoned tree, is not admissible has no application where, as here, the tree in question was not poisoned and it bore no fruit.

[6] The defendant's statement to the investigating officers, at the time of the second interrogation, related to a general conversation had by the defendant with others present in a store, in which conversation the defendant remarked that he knew who killed Mr. and Mrs. Royal. That statement, apparently, was not made to police officers. Upon learning of it, the investigating officers would have been exceedingly remiss had they not interrogated the defendant about it. At such interrogation the defendant was not warned of his constitutional rights. However, he was not in custody nor was he then a suspect. The court conducted a pretrial voir dire upon the defendant's motion to suppress evidence of his statement to the officers concerning this conversation. It found that the defendant was not in custody but was free to terminate the interview and leave at will, as, in fact, he did immediately after the conclusion of the interrogation. The rule of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), relating to the admissibility of confessions made without prior warning of the declarant's constitutional rights, applies only to statements while in custody. The finding of the trial court that the defendant was not in custody at the time he made the statement in question, being supported by evidence in the record, elicited on a properly conducted voir dire, is conclusive. *State v. Smith,* 278 N.C. 36, 41, 178 S.E. 2d 597 (1970); *State v. Wright,* 274 N.C. 84, 93, 161 S.E. 2d 581 (1968); *State v. Gray,* 268 N.C. 69, 78, 150 S.E. 2d 1 (1966).

The motion to suppress the statement made by the defendant to investigating officers on the afternoon of 30 March 1976

was also properly denied. Both upon the motion to suppress and upon the defendant's objection to the introduction of the evidence at the trial, the court conducted a full voir dire and made detailed findings of fact which are supported completely by the evidence for the State. At neither hearing did the defendant offer any evidence whatever. It is true that, some eight hours prior to this conversation with the officers, the defendant had stated he wanted an attorney. When he did so, the interrogation then being conducted ceased immediately. The subsequent interrogation, eight hours later, was initiated by the defendant, not the officers. Prior to making the confession, the defendant was once more warned of his constitutional rights, including his right to counsel, and he expressly stated that he was willing to talk to the officers without the presence of an attorney. The evidence indicates no threats and no promises were made or other inducements given to cause the defendant to confess his guilt. Here also, the findings of fact by the court, being supported by evidence, are conclusive. *State v. Smith, supra; State v. Wright, supra; State v. Gray, supra.*

[7] The defendant's earlier request for counsel did not make inadmissible the confession made at the subsequent conversation with the investigating officers, initiated by the defendant, himself, at which he was again fully informed of his constitutional rights and at which he expressly waived the right to have counsel present. *State v. Jones,* 278 N.C. 88, 93, 178 S.E. 2d 820 (1971). See also: *State v. Bishop,* 272 N.C. 283, 296, 158 S.E. 2d 511 (1968).

[8] In his argument to the jury, counsel for the defendant read the statute relating to armed robbery, including the provision thereof prescribing the punishment, this being G.S. 14-87. The trial court sustained the objection of the State. In this there was error since counsel was entitled to so inform the jury. *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (1976). This error was, however, harmless beyond a reasonable doubt. The desired information was thus brought to the attention of the jury and the jury was not instructed to disregard it or that it was erroneous. Furthermore, upon the charge of armed robbery, judgment was arrested.

[9] The defendant next assigns as error the denial of his motion for a mistrial. During the selection of the jury, a prospective juror stated that he had formed an opinion that the

defendant was guilty because the defendant's alleged companion had committed suicide and the defendant had tried to do so. The defendant contends that this response, blurted out by the prospective juror in the presence of jurors already selected and others of the panel awaiting interrogation, was so prejudicial that its effect could not be removed by instructions of the judge. In *State v. Jarrette,* 284 N.C. 625, 639, 202 S.E. 2d 721 (1974), reversed as to the imposition of the death penalty only, ... U.S. .... , 96 S.Ct. 3205, 49 L.Ed. 2d 1206, a juror stated on voir dire that he had read in the newspaper that the defendant, charged with rape, murder and kidnapping, had been declared an outlaw. We held that there was no error in the denial of the defendant's motion for mistrial on account of this statement made in the presence of other selected and prospective jurors. As we there stated: "A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. *State v. Self,* 280 N.C. 665, 187 S.E. 2d 93; Strong, N. C. Index 2d, Criminal Law, § 128."

[10] The defendant assigns as error the overruling of his objections to the introduction in evidence of certain photographs admitted to illustrate the testimony of the doctor who performed autopsies upon the bodies of Mr. and Mrs. Royal. The ground for this objection was that these photographs had not been supplied to the defendant pursuant to the order for discovery. The record establishes that the District Attorney did not know of the existence of these photographs until the morning on which the witness was called to testify. Furthermore, the exclusion of evidence for the reason that the party offering it has failed to comply with the statutes granting the right of discovery, or with an order of the court issued pursuant thereto, rests in the discretion of the trial court. G.S. 15A-910.

[11] The defendant next assigns as error the overruling of his objections to the introduction in evidence of certain other photographs of the bodies of Mr. and Mrs. Royal as they lay in the living room of the home and in the tool shed and of the areas surrounding them. The defendant contends that these photographs were excessive in number. We find no merit in this contention. The photographs were not merely repetitious, each being useful to illustrate a portion of the testimony of the witness not illustrated by other photographs. It is well settled that the mere fact that a photograph is gruesome, revolting or horrible does not prevent its use by a witness to illustrate his testi-

mony. *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), reversed as to death penalty only, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed. 2d 859; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948). Nevertheless, an excessive number of such photographs may not properly be admitted in evidence. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). What constitutes an excessive number of photographs must be left largely to the discretion of the trial court in the light of their respective illustrative values. The photographs in the present case were not merely repetitious. They portrayed somewhat different scenes and we find in the use of the total number no abuse of discretion.

[12] It is elementary that, upon a motion for judgment as in the case of nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every inference of fact that may reasonably be drawn therefrom. *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973); *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). The fact that the doctor who performed the autopsy expressed the opinion that Mr. and Mrs. Royal could not have been killed prior to the day after the dates alleged in the bills of indictment does not entitle the defendant to such judgment of nonsuit upon the present record. G.S. 15-155; *State v. Holton, supra; State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Gore,* 207 N.C. 618, 178 S.E. 209 (1935). The evidence of the State, taken to be true, reveals two ruthless, brutal murders in the perpetration of a planned robbery by the defendant and his companion. This assignment of error is overruled.

[13] The defendant next contends that the trial court erred in failing to submit to the jury, as a possible verdict, the defendant's guilt of common law robbery. There is no evidence whatever in the record to show common law robbery. All of the evidence is that each of the victims was struck on the head with a weapon of such nature and used with such force as to make it a deadly weapon. Thus, the robbery committed was armed robbery, not common law robbery. As this Court, speaking through Justice Sharp, now Chief Justice, said in *State v. Lee,* 282 N.C. 566, 569, 193 S.E. 2d 705 (1973):

"The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. G.S. 14-87 (1969); *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971). In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required."

Furthermore, in the present case, the defendant received no sentence for the robbery, judgment being arrested as to that charge. A murder committed in the perpetration of any robbery, whether armed robbery or common law robbery, is murder in the first degree. G.S. 14-17. Therefore, even had there been error in the failure of the court to submit guilt of common law robbery as a possible verdict, the defendant was in no way prejudiced thereby.

[14] Finally, there is no merit in the defendant's contention that the court failed to instruct the jury that if it found the defendant was merely present at the scene of the crime that circumstance alone would not justify a verdict of his guilt thereof. Actually, the court did so instruct the jury, but, in any event, the defendant's own statement, properly admitted in evidence, shows that he actively participated in the planning of the robbery and in its execution. This being true, it is immaterial that it was his companion who struck the fatal blows. *State v. Scott,* 289 N.C. 712, 224 S.E. 2d 185 (1976); *State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (1973).

[15] We have carefully examined all of the defendant's assignments of error relating to his convictions upon the charges of armed robbery and first degree murder and find no merit in any of them. However, 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 therewith in 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 this State, we must hold that there is merit in the defendant's attack upon the death sentence imposed upon him by reason of his convictions of murder in the first degree. Consequently, the judgment of the Superior Court sentencing the defendant to death upon these verdicts, must be, and is hereby, vacated and, by authority of the provisions of the Session Laws of 1973, Ch. 1201, § 7 (1974 Session), a sentence to imprisonment for life must be substituted therefor. *State v. Cawthorn*, 290 N.C. 639, 650, 227 S.E. 2d 528 (1976).

This case is, therefore, remanded to the Superior Court of Wilkes County with directions (1) that the presiding judge, without requiring the presence of the defendant, enter a judgment imposing upon the defendant a sentence of life imprisonment for the first degree murders of which he has been convicted, in lieu of the sentence of death heretofore imposed upon him; and (2) that, in accordance with this judgment, the Clerk of the Superior Court issue a new 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.

No error in the verdict.

Death sentence vacated.

STATE OF NORTH CAROLINA v. DONALD STANFIELD AND PERNELL JAMES HAM

No. 65

(Filed 14 April 1977)

1. **Criminal Law § 88.1— scope of cross-examination**

Cross-examination is not confined to the subject matter covered on direct examination but ordinarily may extend to any matter relevant to the issues in the case; however, this does not mean that all decisions on cross-examination are left to the cross-examiner, since the trial judge may and should rule out immaterial, irrelevant and incompetent matter.

2. **Criminal Law § 169.6— refusal to have answer placed in record**

The trial judge's refusal to have an answer placed in the record will not be held error where both the question and the answer are immaterial.

3. **Criminal Law § 88.3— cross-examination — refusal to require immaterial answer**

The trial court in a homicide case did not infringe on defendant's right to cross-examine a State's witness by refusing to require the witness to answer specifically a question as to where he obtained marijuana which he smoked where the witness stated that his source of marijuana was not connected with this case, and so no specific answer that he might have given would have been material.

4. **Criminal Law § 35— evidence crime not committed by another — opening door by cross-examination**

Where defense counsel on cross-examination of a witness brought out evidence tending to show that someone else had been suspected of committing the crime charged, the State was entitled to introduce evidence that the earlier suspects could not have committed the offense for the purpose of explaining or rebutting the testimony elicited by defense counsel, even though such evidence would have been irrelevant had it been offered initially by the State.

5. **Criminal Law § 89.8— accomplice — absence of threats or promises**

An accomplice may testify that he has received neither promises nor threats for his testimony even though his credibility has not yet been impugned.

6. **Criminal Law § 34— evidence of another crime — competency to show possession of gun**

In a murder prosecution in which the State's evidence tended to show that the victim was killed with a shotgun owned by one defendant, evidence that such defendant assaulted his landlord's son with a shotgun less than a month before the murder was properly admitted for the limited purpose of showing possession by such defendant of a shotgun shortly before the murder.

7. **Criminal Law § 77.1— "effect" of conversation — competency as admission**

Testimony of the "effect" of a conversation between the witness and defendants several days after a murder concerning disposition of the murder weapon was competent as an admission by defendants, although the witness did not remember the exact words spoken.

8. **Criminal Law § 102.8— jury argument — failure to show whereabouts at time of crime**

In a murder prosecution in which the State's evidence tended to show that the crime occurred at about 6:00 p.m. and defendant offered evidence of his whereabouts at 4:30 p.m. and again at 6:45 p.m. on the day of the crime, the prosecutor's argument that defendant did not show where he was between 4:30 and 6:45 p.m. because he was where a State's witness said he was did not constitute a comment on

defendant's failure to testify but was directed solely at defendant's failure to offer evidence rebutting the State's case.

9. **Homicide § 31— substitution of life sentences for death penalties**

Sentences of life imprisonment are substituted for death penalties imposed for first degree murder.

DEFENDANTS appeal pursuant to G.S. 7A-27(a) from judgment of *Webb, J.*, entered at the 11 November 1975 Criminal Session of ONSLOW Superior Court. This case was docketed and argued as No. 55, Fall Term 1976.

On indictments, proper in form, defendants were charged with the murder of Scott Webber. Their cases were consolidated for trial. The jury returned a verdict of guilty of murder in the first degree as to each defendant, and each received the death sentence.

The evidence for the State tended to show that in July 1975 Scott Webber was a Marine Sergeant living on Highway 17 South, near Jacksonville. At noon on July 7, Webber was seen alive at his apartment. That night at 8 p.m., he was not at home. Between 9:00 and 9:30 p.m. the same night, Webber's van was observed parked along Highway 210 near a bridge at West Onslow Beach, some twenty-six miles from Jacksonville. The next morning, Webber still had not returned to his apartment. His associates, including defendant Stanfield, looked for him and in the course of their search examined the van.

On 9 July 1975, employees of the North Carolina Department of Transportation, engaged in road construction in the West Onslow Beach area, went to eat their lunches at an abandoned hunting lodge located about a quarter of a mile off Highway 210 near a bridge. In the bathroom of this abandoned hunting lodge they found a body, which had not been present there two days earlier. The body was identified as that of Scott Webber. Medical testimony indicated Webber died from a gunshot wound to the back of the head. From this wound a part of a slug and plastic wadding were removed.

At some time prior to his death, Scott Webber, Phillip Tatta, and defendant Stanfield, all members of the United States Marine Corps, planted a marijuana field at West Onslow Beach to raise "grass" for sale. They set out over 2,000 plants and expected to make around $20,000 on the crop. After the marijuana grew large enough to pick, defendant Stanfield

became angry because Webber was not doing his share of the work, was telling other people about the "pot" field, and had taken an outsider with him to the private field.

In the latter part of June 1975, defendant Stanfield asked Roger Olive, also a member of the United States Marine Corps, and defendant Ham, who apparently had formerly been in the Marine Corps, to get rid of Webber and promised them all the "pot" they could smoke. About 5:30 p.m. on July 7, defendant Ham and Olive went to the abandoned hunting lodge near West Onslow Beach. They had been in the area earlier the same day and located the lodge. On the second trip to the lodge defendant Ham carried a shotgun, which he and defendant Stanfield had purchased earlier. Ham and Olive entered the abandoned hunting lodge after hiding Ham's car so Webber could not see it as he approached the lodge. Defendant Ham stood inside next to a window, apparently watching the road for the approach of Webber and defendant Stanfield.

Sometime later, Scott Webber and defendant Stanfield arrived at the abandoned hunting lodge in a Volkswagen automobile. After Webber and Stanfield entered the front room, Stanfield went directly to the bathroom. Defendant Ham then went into the bedroom and returned with the shotgun. He ordered Webber to get into the bathroom. Webber asked Stanfield what was going on. Stanfield did not reply but instead exited from the bathroom into the bedroom where Olive was located and closed the door.

Shortly thereafter Olive heard a shot and something hit the floor. Olive and defendant Stanfield came from the bedroom and went into the front room when they observed defendant Ham leaving the bathroom with a shotgun in his hand. The three left the lodge but returned almost immediately to get Webber's keys and wallet. Defendant Ham and Olive left the lodge for the last time between 6:00 and 6:30 p.m. They moved Webber's white van, which had been parked along Highway 210, across the bridge. Defendant Stanfield was still at the lodge when they departed.

Substantial circumstantial evidence tended to corroborate the above events as testified to by Olive.

Defendant Stanfield's evidence tended to show that on 7 July 1975 he worked a normal day in the Marine Corps, getting

off at 4:30 p.m. At about a quarter to seven he arrived at his scuba diving school in Jacksonville. Other evidence tended to show that defendant Stanfield was a person of good character and that Roger Olive was a person of bad character.

Defendant Ham offered no evidence.

Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney, George J. Oliver for the State.

Roger W. Smith for defendant Stanfield.

Joseph C. Olschner for defendant Ham.

COPELAND, Justice.

[1] Defendants first contend the court erred by permitting a witness to refuse to answer a question on cross-examination.

The State called as a witness, Ted Purpero, a Marine Corporal who testified that he first became acquainted with defendant Stanfield in May 1975, when Stanfield moved into the same residence. Purpero testified that on 7 July 1975, defendant Stanfield did not arrive home until 9:00 or 9:30 p.m. At the time, he "stormed into the house and said someone stripped his field and someone it going to pay for it." Witness Purpero admitted on cross-examination that he knew about the marijuana field and knew that defendant Stanfield had brought marijuana to the house. However, he denied smoking any of Stanfield's marijuana.

On cross-examination Purpero was asked, "Where did you get the marijuana?" He replied, "It doesn't have anything to do with anybody in this [case]." An objection by the State followed and was sustained by the court. Upon defendants' request that the witness place his answer to the question in the record, the witness whispered to the court reporter "Nobody that had anything to do with this case." The trial court refused to require the witness to give a more specific response. The next morning when defense counsel continued to cross-examine the witness he obtained the same answer to his question and the State's objection was again sustained. Defendants contend the ruling of the trial court infringed on their right to cross-examine the State's witness.

[1] Cross-examination is not confined to the subject matter covered on direct examination but ordinarily may extend to any matter *relevant* to the issues in the case. *State v. Waddell,* 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Huskins,* 209 N.C. 727, 184 S.E. 480 (1936); *State v. Allen,* 107 N.C. 805, 11 S.E. 1016 (1890); 1 Stansbury's N. C. Evidence, § 35 at 105, 107 (Brandis Rev. 1973). However, "wide open" cross-examination does not mean that all decisions on cross-examination are left to the cross-examiner. The trial judge may and should rule out immaterial, irrelevant and incompetent matter. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970); 1 Stansbury's N. C. Evidence, § 35 at 108 (Brandis Rev. 1973). The legitimate bounds of cross-examination are largely within the discretion of the trial judge. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. McPherson, supra.*

[2] "Ordinarily, this Court does not approve the refusal of the trial court to permit counsel to insert in the record the answer to a question to which objection has been sustained." *State v. McPherson, supra* at 487, 172 S.E. 2d at 53. But in certain instances where both the question and the answer are immaterial, the trial judge's refusal to have an answer placed in the record will not be held error. *State v. McPherson, supra.*

[3] The witness, Purpero, denied smoking any of defendant Stanfield's marijuana, but admitted he had smoked marijuana "once in awhile." Obviously, it was immaterial where Purpero obtained his marijuana unless, as defendants argue, he was involved with someone in the case that would tend to create bias or interest on his part. Since the witness adamantly contended that his marijuana source was completely unrelated to this case, we cannot see how any answer he might have given could possibly be material. The trial judge properly exercised his discretion in not requiring the witness to specifically answer the question.

Assuming *arguendo* that the court should have required the witness to answer, the error would not necessarily entitle defendants to a new trial. The burden is on appellants, not only to show error, but to show *prejudicial* error. *State v. Robinson, supra; see State v. Asbury,* 291 N.C. 164, 229 S.E. 2d 175 (1976). Witness Purpero admitted several times on cross-

examination that he disliked defendant Stanfield. At one point he testified "I did not like him. I don't like him any better now than I did then. The time he stayed there hardly a civil word passed between the two of us." Defense counsel could not have hoped to have shown a more biased witness than Purpero appeared to be. In view of this witness' bias, we do not feel defendants were prejudiced by the exclusion of other evidence merely cumulative in nature. The assignment of error is overruled.

Under several assignments of error defendants claim the court erred in permitting the State to show that other people were not responsible for the death of the deceased.

The record discloses that the investigating officer first charged and arrested two other suspects with the murder of Scott Webber but later releasesd them when the district court found no probable cause for their arrest.

Defendants maintain that *State v. England,* 78 N.C. 552 (1878), is controlling and that it requires a new trial. In that case the defendant was charged with burning a stable. From the State's evidence it appeared the defendant's brother had first been suspected and arrested for the offense, but that measurements of tracks near the scene compared unfavorably with the brother's foot. Introduction of this evidence was held error because it "had no legal tendency to establish the guilt of the prisoner, *though it was evidently introduced and used for that purpose.*" *State v. England, supra* at 554 (emphasis supplied). Lacking probative value, the evidence was irrelevant and inadmissible. Nothing else appearing, *England* would be controlling in the instant case.

In the present case the State offered the testimony of the investigating officer. During *cross-examination,* the officer testified that he had issued and served a warrant on 16 August 1975 charging two other people with the murder of Scott Webber. The officer stated that, at the time, the facts were consistent with their guilt, and for that reason, he signed the arrest warrant. The officer admitted these cases were later dismissed and that he had to begin his investigation anew.

Obviously defense counsel by delving into this subject was attempting to show that the sheriff's department was engaged in a witch hunt and had previously charged innocent people with the crime. The jurors might then infer that the State had

a weak case against these defendants and that the offense could have been committed by someone else. It was only after this cross-examination that the State proceeded to show through the testimony of additional witnesses that the earlier suspects could not possibly have committed the offense charged. It appeared that when the earlier suspects' alibi was positively confirmed, the investigating officer recommended their release, which was subsequently granted by the court.

[4] We hold that where defense counsel on cross-examination of a witness brings out evidence tending to show that someone else was suspected of comitting the crime charged, the State is entitled to introduce evidence in explanation or rebuttal thereof, even though such evidence would have been irrelevant had it been offered initially by the State. In such a case, the defendant has "opened the door" to this testimony and will not be heard to complain. *Highfill v. Parrish,* 247 N.C. 389, 100 S.E. 2d 840 (1957) ; *State v. Black,* 230 N.C. 448, 53 S.E. 2d 443 (1949). "Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so." *State v. Patterson,* 284 N.C. 190, 196, 200 S.E. 2d 16, 20 (1973).

State v. England is distinguishable because in that case the State introduced evidence tending to show that a person other than the defendant could not have committed the crime charged, *not* in explanation or rebuttal of testimony elicited by defense counsel, but rather as part of its case in chief. Under the circumstances of the present case, the State had a right to explain the evidence brought out on cross-examination by defense counsel and to rebut any negative inferences arising therefrom. This assignment of error is overruled.

[5] Richard Olive, an admitted accomplice, was permitted to say on direct examination that his testimony was not motivated by promises or threats. Under defendants' next assignment of error they assert that an accomplice may not testify that he has received neither promises or threats for his testimony before his credibility has been impugned. Defendants concede this evidence is relevant to the credibility of the witness but contend that self-serving statements on the part of a witness are not permissible.

Even without cross-examination, the testimony of an *accomplice,* when offered by the State, is subject to careful scrutiny because an accomplice is generally regarded as interested

in the event. *State v. Hale*, 231 N.C. 412, 57 S.E. 2d 322 (1950); *State v. Roberson*, 215 N.C. 784, 3 S.E. 2d 277 (1939). It is common knowledge that accomplices often testify as a result of threats of prosecution or promises of immunity. Thus, we see nothing wrong with an accomplice testifying that he has received neither threats nor promises for his testimony in order to forestall such a contention on the part of the defendant. *State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871 (1951).

This assignment lacks merit and is overruled.

[6] Under two assignments of error, defendants claim the court committed error by permitting the State to introduce evidence of an unrelated incident of misconduct on the part of defendant Ham.

The State offered evidence tending to show that defendant Ham had been evicted from a mobile home for nonpayment of rent in late June or early July 1975. His possessions were removed by the landlord's son and placed in a nearby trailer. Defendant Ham appeared on the scene and threatened the boy with a shotgun until his possessions were returned to the mobile home.

Defendants maintain this evidence is irrelevant and thus inadmissible. Furthermore, they claim it is inadmissible under the general rule prohibiting the State from introducing over defendant's objection evidence that the accused has committed another separate and independent criminal offense—in this case, assault with a firearm. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

In the instant case, substantial evidence tended to show that the deceased was murdered with a shotgun owned by defendant Ham. The challenged evidence tends to show that defendant Ham exhibited a shotgun less than a month before the murder. The State contends that this incident was not introduced to show the commission of another crime, but solely to show possession by defendant Ham of a shotgun shortly before Webber's death.

Immediately following introduction of this evidence, defendant Ham moved to strike. The court then instructed the jury as follows:

> "Ladies and gentlemen, I will tell you you can consider the fact Pernell Ham had a shotgun in his possession, but it is irrelevant to this case, as to the testimony of the witness telling him to put the stuff back in the trailer. So do not consider that at all in your deliberations in this case."

Thus, the court excluded this evidence from the jury's consideration except as it tended to show possession by defendant Ham of a shotgun. We believe the evidence was relevant for this limited purpose. We may assume the jury complied with the judge's instructions and that any prejudicial effect was thus removed. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966). The assignment of error is overruled.

[7] Defendants next complain the court erred in permitting a witness for the State to testify to the "effect" of a conversation, after the witness had testified that he did not remember exactly what was said.

This conversation between the defendants and witness Olive occurred several days after the murder of Webber and involved disposition of the murder weapon. Olive testified that he could remember the subject of the conversation although he could not remember the exact words. He definitely recalled that the conversation concerned the shotgun and that defendant Stanfield wanted defendant Ham to get rid of it.

This conversation qualifies as an admission by the defendants, and as such, is competent evidence. *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974); *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364 (1963); 2 Stansbury's N. C. Evidence, § 167 (Brandis Rev. 1973). We know of no rule that requires the witness to remember the exact words spoken. This is not a case of a witness speculating or guessing as to the substance of a conversation. The assignment of error is without merit and overruled.

[8] Defendants assign as error the district attorney's final argument, claiming he improperly commented on their failure to testify. Neither defendant testified in his own behalf, but defendant Stanfield offered evidence of his whereabouts on 7

July. This testimony tended to show that Stanfield went off duty at the Marine base at 4:30 p.m. and arrived at the scuba diving school at 6:45 p.m.

The district attorney argued there was no evidence before the jury explaining defendant Stanfield's whereabouts between 4:30 and 6:45 p.m. He said: "Where was this defendant between four thirty and quarter to seven. He has put on evidence, has he showed you, ladies and gentlemen, where he was between four thirty and quarter to seven. *You ask him, has he showed you that.*" Defendants excepted. Whereupon, the court instructed the jury not to consider the italicized portion of the prosecutor's remarks and advised the prosecutor that his argument was improper, thus curing any error. *State v. Covington, supra; State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970).

The district attorney continued: "Ladies and gentlemen, he has told you where he was at four thirty; he had told you where he was at quarter to seven, he has offered evidence as to where he was at that time; why do you think he has not offered evidence to you as to where he was between four thirty and quarter to seven, why do you think he has not offered evidence to show you where he was at this time . . . " Again there was objection by counsel for the defendants and a motion for a mistrial. The court overruled both motions.

Finally the district attorney said: "Ladies and gentlemen, you keep that in mind in your deliberations when you try to determine whether or not this defendant, Stanfield, is guilty or not guilty. I submit that you have not been shown where he was because he was right where Roger Olive said he was."

Defendants contend these arguments of the district attorney infringed their right to remain silent under the United States and North Carolina Constitutions and G.S. 8-54.

We have consistently held that " '[W]hile defendant's failure to testify is not the subject of comment or consideration, the jury in weighing the credibility of the evidence offered by the State may consider the fact that it is uncontradicted . . . or unrebutted by evidence available to defendant.' *State v. Bryant,* 236 N.C. 745, 747, 73 S.E. 2d 791, 792 (1953); . . . " *State v. Tilley,* 292 N.C. 132, 143, 232 S.E. 2d 433, 441 (1977).

According to the State's evidence, the murder allegedly took place at around 6:00 p.m. at a lodge some twenty-six miles from

Jacksonville. The facts as to defendant Stanfield's whereabouts during this particular time period are critical. Certainly, the district attorney had a right to comment on defendant Stanfield's failure to account for the hours between 4:30 and 6:45 p.m., especially after the defendant had offered evidence tending to establish an alibi. The prosecutor's remarks were directed solely at defendant Stanfield's failure to offer evidence rebutting the State's case, rather than at his failure to take the stand.

The assignment of error is without merit and overruled.

Defendants assign as error the court's instructions to the jury. Defendants maintain the court commented on the sufficiency of the evidence to establish intent to kill, deliberation, and alibi in violation of G.S. 1-180.

We have reviewed the judge's instructions in their entirety and find that the court's statements concerning the sufficiency of the evidence were expressed as contentions of the State and do not represent the court's opinion. The judge's charge must be read *contextually* and when this is done, we find the charge free from error. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966); *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 (1964).

These assignments of error are without merit and overruled.

[9] Defendants last assignments of error attacks the imposition of the death penalty. In *Woodson v. North Carolina,* ___ U.S. ___, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), the United States Supreme Court invalidated the death penalty provisions of G.S. 14-17 (Cum. Supp. 1975) under which defendants were indicted, convicted, and sentenced to death. By authority of the provisions of 1973 Sess. Laws, c. 1201, § 7 (1974 Session), sentences of life imprisonment are substituted for the death penalty in these cases. We, therefore, deem it unnecessary to discuss further this assignment of error.

These cases are remanded to the Superior Court of Onslow County with directions (1) that the presiding judge, without requiring the presence of defendants, enter judgments imposing life imprisonment for the first-degree murder of which defendants have 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 defendants and their attorneys copies of the judgments and commitments as revised in accordance with this opinion.

We have also examined defendants' Assignment of Error No. 31 and find no merit in it. Due to the serious nature of the crime for which defendants have been convicted, we have searched the record for errors other than those assigned and have found none prejudicial to the defendants.

In the trial we find

No error.

Death sentences vacated and, in lieu thereof, life sentences imposed.

IN THE MATTER OF TED HEATH, BY AND THROUGH HIS FATHER, DONALD HEATH, PLAINTIFF v. BOARD OF COMMISSIONERS OF GUILFORD COUNTY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. LLOYD S. FREEMAN, THIRD-PARTY DEFENDANT

No. 63

(Filed 14 April 1977)

1. **Animals § 4— dog bite — strict liability of county for damages**

In an action to recover from defendant board of county commissioners for personal injuries inflicted by a dog, defendant's contention that when the General Assembly enacted G.S. 67-13 it never intended to impose strict liability upon a county for all injuries and destruction caused by dogs or to abolish common law defenses previously existing to claims based on injuries inflicted by dogs is without merit, since, on its face, the statute required the county to honor a plaintiff's claim simply upon satisfactory proof of the amount of damage done and of all reasonable expenses incurred.

2. **Animals § 4; Statutes § 11— dog bite — liability of county — statute repealed — savings clause**

Plaintiff's claim against defendant board of county commissioners for injuries inflicted by a dog survived the repeal of G.S. 67-13 pursuant to the "savings clause" of the repealing act, since the injury complained of occurred on 6 May 1973 and the savings clause manifested the legislative intent that the repeal of G.S. 67-13 not extinguish any legal right existing before 1 February 1974.

3. **Indemnity § 3; Rules of Civil Procedure § 14— suit by indemnitee — payment of claim not required first**

Since enactment of G.S. 1A-1, Rule 14, which provides that at any time after commencement of an action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him, it is no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim.

4. **Animals § 4— dog bite — liability of county — county's cause of action against owner**

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog, the county acquired a cause of action against third-party defendant dog owner from the moment his dog injured plaintiff, and that cause of action survived the repeal of G.S. 67-13.

Justice EXUM dissenting in part.

Justice LAKE joins in the dissenting opinion.

ON petition for discretionary review of the unreported decision of the Court of Appeals (filed 7 April 1976) upholding the judgments of *Crissman, J.*, and *Collier, J.*, entered respectively at the 19 August 1974 and the 31 March 1975 sessions of the Superior Court of GUILFORD County, High Point Division. This appeal was docketed and argued as Case No. 49 at the Fall Term 1976.

Claim under G.S. 67-13 (1965) as amended by 1933 N. C. Sess. Laws, ch. 547 for personal injuries inflicted by a dog.

On 5 February 1974 claimant Ted Heath, 12 years old, by and through his father, Donald Heath, filed a claim with the Guilford County Board of Commissioners (Board) for $15,000. In the claim Heath asserted that on 6 May 1973 claimant was walking "along the side of a garden" located in back of an auto repair shop operated by Lloyd S. Freeman in High Point; that Freeman owned a vicious dog which he kept restrained on a long chain attached to a stob at the edge of the building; that Freeman had posted no warnings of the presence of this dog, which was unattended; that claimant was never aware of the dog's presence until it attacked him from behind without ever having made a sound; that the dog's bite mangled the muscles of claimant's leg and caused him permanent injury.

At its next regular session after the claim was filed (on 4 March 1974), the Board heard claimant's evidence and rejected his claim on the ground that he "has no cause of action at law." Claimant appealed this decision to the Superior Court and demanded a jury trial. Thereafter the Board filed its answer to the claim and moved under G.S. 1A-1, Rule 14 (1969) that the dog's owner, Lloyd S. Freeman, be made a third-party defendant to the proceeding. Kivett, J., granted this motion and the Board filed its complaint against Freeman alleging that it was entitled to recover from him any monies which the court might require the county to pay claimant.

Freeman moved to dismiss the complaint against him on the ground, *inter alia,* that G.S. 67-13, the statute on which the Board also based its claim to reimbursement, had been repealed by 1973 N. C. Sess. Laws, ch. 822, § 6(b), effective 1 February 1974, a date prior to the time any right of reimbursement could have accrued or vested in the Board. Crissman, J., allowed this motion on 29 August 1974. The Board excepted and noted its appeal to the Court of Appeals.

Thereafter the Board moved to dismiss claimant's claim on the ground that the repeal of G.S. 67-13 prior to the time the claim was filed destroyed both claimant's right and his remedy. Judge Crissman denied this motion on 17 September 1974. The Board next moved for summary judgment. In support of this motion it filed an affidavit by Freeman, who averred that he was the owner of the dog alleged to have injured the claimant; that at the time the injuries were allegedly inflicted the dog was chained on Freeman's property which, to the best of his knowledge, "was not used by any neighborhood children as a shortcut or path between any other properties." Judge Collier denied the Board's motion, and the case went to trial.

The jury's verdict established that on 6 May 1973 in Guilford County Ted Heath was injured by a dog and, in consequence, he was entitled to recover $5,000 from the funds derived from license taxes on dogs in Guilford County. The county appealed to the Court of Appeals from the judgment entered upon the verdict and from Judge Crissman's order dismissing Board's cross action against Freeman. The Court of Appeals affirmed Judge Crissman's order and found no error in the trial before Judge Collier.

William L. Daisy, Assistant County Attorney, for defendant and third-party plaintiff appellant.

Bencini, Wyatt, Early & Harris by William E. Wheeler for third-party defendant-appellee.

Gardner and Tate by Rossie Gardner and Raymond A. Bretzmann for plaintiff appellee.

SHARP, Chief Justice.

In 1973 G.S. 67-13 (1965) provided:

"[I]t shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damage done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any monies arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same."

1933 N. C. Sess. Laws ch. 547, amended G.S. 67-13 for the counties of Guilford and Forsyth by adding at the end thereof the following:

"*Provided,* that when any claim is presented to the Board of County Commissioners under authority of this section said Board may, in its discretion, in lieu of the procedure above provided for in this section, require the claimant to appear before said Board at its next regular meeting and furnish proof in support of said claim. After hearing the evidence submitted for and against said claim said Board shall ascertain the amount of damages, if any, and shall order the same paid out of any monies arising from the tax on dogs, as provided for in this section. The claimant may, within ten days, appeal to the Superior Court by giving written notice to the said Board as in cases of appeal from a Justice of the Peace."

[1] The Board contends that when the General Assembly enacted G.S. 67-13 it never intended to impose strict liability upon a county for all injuries and destruction caused by dogs or to abolish common law defenses previously existing to claims based on injuries inflicted by dogs. The most cursory reading of the foregoing statute, however, refutes this contention. It is immediately obvious that the statute made no mention of the common law elements imposing liability on dog owners for the misdeeds of their animals. There are no requirements: (1) that the dog be dangerous and vicious toward persons; (2) that the owner know of the dog's propensities; or (3) that the owner be negligent in failing to confine the dog or in his manner of restraining the dog. *See Sink v. Moore,* 267 N.C. 344, 148 S.E. 2d 265 (1966). Nor does the statute mention the common law defense of contributory negligence or trespass. *Cf. Hobson v. Holt,* 233 N.C. 81, 62 S.E. 2d 524 (1950) (contributory negligence available as a defense in a suit to recover damages inflicted by an animal); *Burke v. Fischer,* 298 Ky. 157, 182 S.W. 2d 638 (1944) (assumption of risk and provocation are acceptable defenses to a suit to recover damages inflicted by a dog). On its face, the statute required the county to honor a plaintiff's claim simply "upon satisfactory proof" of "the amount of damage done" and of "all reasonable expenses incurred." Thus, whether the injury was caused by a playful or an angry dog has been held to be without significance to a recovery under the act. *In re Truitt,* 269 N.C. 249, 152 S.E. 2d 74 (1967).

To the limit of monies arising from the tax on dogs, G.S. 67-13 imposed absolute liability on the county for injury and destruction caused by a dog and on the dog owner, who is required to reimburse the county "to the amount [it] paid out" for such damage. *See Board of County Commissioners v. George,* 182 N.C. 414, 109 S.E. 77 (1921); Note, *Torts—Dog Owner's Statutory Liability in North Carolina,* 45 N.C.L. Rev. 1118, 1128 (1967). The language of the statute is clear; its purpose and meaning are unmistakable. Thus, "there is no room for construction." *State v. Norfolk Southern R. Co.,* 168 N.C. 103, 82 S.E. 963 (1914). *Accord, Perrell v. Beaty Service Co.,* 248 N.C. 153, 102 S.E. 2d 785 (1958).

This statute absolves neither the county nor the dog owner for injuries inflicted by the dog albeit the injured party was a trespasser and the dog restrained by a chain when he inflicted the injury. We therefore may not construe these exceptions

into the act. Accordingly, on the facts of this case, we overrule defendant's assignment of error No. 3, which challenges the judge's instructions to the jury that if they found plaintiff had been injured by a dog in Guilford County, the county would be liable for the amount of damages inflicted. In so doing we note the absence of any evidence that claimant was tormenting or mistreating the dog at the time he was attacked. On the contrary, all the evidence tended to show he was unaware of the dog's presence.

We further note that this ruling is in accord with the decisions of other jurisdictions which have had statutes similar to G.S. 67-13. *See Town of Wallingford v. Neal,* 108 Conn. 152, 142 A. 805 (1928); *McGlone v. Womack,* 129 Ky. 274, 111 S.W. 688 (1908); *Town of Richmond v. James,* 27 R.I. 154, 61 A. 54 (1905).

Effective 1 February 1974, four days before claimant filed his claim with the Board, G.S. 67-13 and all its local modifications were repealed by 1973 N. C. Sess. Laws, ch. 822, § 6 (repealing act). The Board and Freeman contend that the repeal of G.S. 67-13 absolved each of them of any liability for the injuries which Freeman's dog inflicted upon claimant. We must therefore consider the effect of the repeal upon this claim. The rules have been clearly stated:

"When statutes providing a particular remedy are unconditionally repealed, the remedy is gone." *Spooner's Creek Land Corp. v. Styron,* 276 N.C. 494, 496, 172 S.E. 2d 54, 55 (1970). "In order to permit a proceeding to survive [the repeal of the underlying statute authorizing the proceeding or creating the cause of action] there must be a saving clause in the repealing act." *In re Incorporation of Indian Hills,* 280 N.C. 659, 663, 186 S.E. 2d 909, 912 (1972). Citing these cases, third-party defendant Freeman successfully argued before Judge Crissman that the county's right to reimbursement had disappeared with the repeal of G.S. 67-13. However, when the county sought to avail itself of the same doctrines on its motion for summary judgment against Heath, Judge Collier correctly ruled that G.S. 67-13 had not been *unconditionally* repealed. The repealing act contained a savings clause.

Section 9 of the repealing act provides:

"No provision of this act is intended, nor may any be construed, to effect in any way a right or interest, public or private:

"(a) Now vested or accrued, *in whole or in part,* the validity of which might be sustained or preserved by reference to a provision of law repealed by this act (emphasis added); or

"(b) Derived from or which might be sustained or preserved in reliance upon, action . . . taken before the effective date of this act pursuant to or within the scope of a provision of law repealed by this act."

Section 12 provides:

"No action or proceeding of any nature . . . pending at the effective date of this act is abated or otherwise affected by the adoption of this act."

[2] The all-inclusive language of the two subsections of section 9 and section 12 constitutes "saving clauses" which clearly manifest the legislative intent that the repeal of G.S. 67-13 not extinguish any legal right existing before 1 February 1974. Claimant's injury having been inflicted by a dog on 6 May 1973, we hold that his claim survived the repeal of G.S. 67-13 under the specific protection of § 9(a) of the Repealing Act. The question whether the county's right to reimbursement from Freeman survived the statute's repeal is somewhat more complicated.

Freeman argues (1) that the county's statutory right to reimbursement is similar to indemnity or subrogation and, as such, it could not accrue or vest, in whole of in part, until the county had paid Heath's claim; and (2) that since the county has paid claimant nothing it has no action against Freeman for reimbursement. In support of his contentions Freeman relies upon *Pittman v. Snedeker,* 264 N.C. 55, 57, 140 S.E. 2d 740, 742-43 (1965), *Insurance Co. v. Gibbs,* 260 N.C. 681, 687, 133 S.E. 2d 669, 674 (1963), and similar cases which hold that an indemnitee's right of action accrues at the time of payment, not before.

[3] However, since the enactment of G.S. 1A-1, Rule 14 (1969), at any time after commencement of an action "a defendant, as

a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is *or may be* liable to him for all or part of the plaintiff's claim against him" (emphasis added). It is, therefore, no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim.

The purpose of Rule 14 is to promote judicial efficiency and the convenience of parties by eliminating circuity of action. "When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof. Additionally, the third-party practice procedure is advantageous in that a potentially damaging time lag between a judgment against defendant in one action and a judgment in his favor against the party ultimately liable in a subsequent action will be avoided. In short, Rule 14 is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically." Wright & Miller, Federal Practice and Procedure § 1442 (1971). *Accord,* 3 Moore's Federal Practice, ¶ 14.04 (1974).

These salutary purposes should not be frustrated whenever the defendant indemnitee denies his liability and resists paying the plaintiff's claim. Yet this is precisely what would happen here were the courts to cling to the doctrine that no liability exists in the indemnitor to the indemnitee (and thus no cause of action arises) until the indemnitee had first satisfied the underlying obligation. Accordingly, in order to reconcile Rule 14 practice with the old substantive law of indemnification, the federal courts developed a doctrine of accelerated liability which allows third-party practice without the initial payment of the underlying liability. *Glenn Falls Indemnity Co. v. Atlantic Bldg. Co.,* 199 F. 2d 60, 63 (4th Cir. 1952); *Bosin v. Minneapolis, St. P. & S. Ste. M. R. Co.,* 183 F. Supp. 820, 823 (E. D. Wis. 1960). *See generally,* 3 Moore's Federal Practice, *supra,* ¶ 14.08.

Rule 14 does not create any substantive rights where none existed before, and allowing a defendant indemnitee to implead a third-party defendant before the indemnitee has paid the debt owing to the plaintiff does not create any new substantive

rights in the indemnitee. 3 Moore's Federal Practice ¶ 14.03 (1974); Wright & Miller, Federal Practice and Procedure § 1446 (1971); Shuford, North Carolina Civil Practice and Procedure § 14-3 (1975). Thus, the county could not have sued Freeman independently of Heath's suit unless it had first paid his claim. Nor could the county collect from Freeman in this consolidated suit until both had been found liable and the county had paid the judgment. 3 Moore's Federal Practice, *supra*, ¶ 14.08. Nonetheless, a cause of action now arises in the indemnitee where he impleads a third-party defendant before he pays the claim for which the indemnitor must reimburse him. When he brings a separate suit against the person whose action caused the loss the rule stated in *Insurance Co. v. Gibbs, supra*, prevails.

We need not explore further the question of when this cause of action accrues in an ordinary civil suit for indemnification, because the instant case involves a statutory scheme of primary liability with reimbursement which implicitly established the date on which the right to reimbursement arose in the county. Freeman became exposed to an action at common law by Ted Heath on 6 May 1973 when his dog bit the youth. On the same date, the county became liable to an action by Heath brought under G.S. 67-13.

The purpose of this statute was not to relieve the dog owner of liability or to make the county an insurer for the behavior of dogs with known and solvent owners. The same statute which granted a cause of action in the dog's victim also created a cause of action in the county against the dog owner. The two are indissoluble parts of an entire plan, the purpose of which was to make dog owners insurers of the good behavior of their animals.

If a dog-bite victim chooses to seek relief under G.S. 67-13 the fact that the statute requires him to proceed against the county does not mean that the dog owner is relieved of ultimate responsibility for his dog's bite. The statute was never intended to allow the dog's victim to recover from the county without allowing the county to recover over against the dog owner, where known.

[4] Thus, when we view the facts of this case in the light of the statute's purpose and, by analogy to ordinary indemnifica-

tion practice under Rule 14, it is clear that the county acquired a cause of action against Freeman from the moment his dog injured a claimant. The repealing act saves any "right or interest, public or private: (a) Now vested or accrued, in whole or in part." This all inclusive language demonstrates the legislature's intent to save every conceivable legal interest which had been created before the effective date of the repeal of G.S. 67-13 on 1 February 1974.

Accordingly, we hold that Guilford County had a vested right within the meaning of the repealing act which survived the repeal of G.S. 67-13. Thus the decision of the Court of Appeals upholding the judgment of Crissman, J., granting third-party defendant's motion to dismiss the county's complaint was erroneous and therefore reversed.

This cause is remanded to the Court of Appeals with directions to remand it to the Superior Court of Guilford County, High Point Division, for additional proceedings consistent with this opinion.

As to claimant Heath—affirmed;

As to third-party defendant Freeman—reversed.

Justice EXUM dissenting in part:

In its appeal from the judgment entered against it on the verdict Guilford County assigned as error the submission to the jury of the damages issue on the theory that damages were recoverable as in any ordinary negligence action. The county contends that the only damages recoverable under the statute, G.S. 67-13 (1965), are reasonably necessary medical expenses and other out-of-pocket losses attributable to the dog bite. I agree with the county's contention and disagree with the implicit holding of the majority that the damages recoverable are those which would be recoverable in an ordinary personal injury suit grounded on negligence.

The statute, as I would interpret it, limits the damages recoverable to reasonably necessary medical expenses and other out-of-pocket losses of the plaintiff. Before the proviso was added the statute provided that "three freeholders" would "ascertain the amount of the *damage done*, including necessary treatment, if any, and all reasonable expenses incurred . . . ." (Emphasis added.) This language seems clearly intended to

limit recovery to actual expenses incurred by the claimant insofar as they are necessary and reasonable. The word "damage" is not used in the sense of "damages" recoverable but in its more ordinary sense of the physical "damage done" by the bite itself. Such damage is to be determined as a means of further ascertaining what treatment was "necessary" and what expenses were "reasonable." The purpose of the proviso, although it refers only to "damages" to be ascertained by the board or a jury, is not, it seems, to alter the measure of recovery but to change the method by which it is ascertained.

The recovery is to be had in all events out of a limited fund created by the levy of an annual $1.00 dog tax against dog owners in the county. Recovery must necessarily be limited by the amount in the fund. The county, moreover, as the majority correctly notes, is strictly liable without the benefit of any common law defenses. These facts militate in favor of the construction which I propose. A claimant who wants more damages than the statute permits is free, of course, to file a negligence action against the dog owner.

I think, therefore, there was error in the submission of the damages issue to the jury and the county's assignment of error directed thereto should be sustained. I would remand the case for a new trial on the damages issue.

Justice LAKE joins in the dissenting opinion.

IN THE MATTER OF: JUDGE GEORGE Z. STUHL

No. 44

(Filed 14 April 1977)

1. **Judges § 7— willful misconduct in office**

Willful misconduct in office denotes improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith; it is more than a mere error of judgment or an act of negligence, and while the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present.

2. **Judges § 7— conduct prejudicial to administration of justice**

Conduct prejudicial to the administration of justice that brings the judicial office into disrepute denotes conduct which a judge under-

takes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.

3. Judges § 7— judicial misconduct — excluding prosecutor from case

A judge's failure to accord the prosecuting attorney the opportunity to be present and to be heard at a criminal case violates the N. C. Code of Judicial Conduct, Canon 3A(4).

4. Judges § 7— misconduct in office — censure by Supreme Court

A district court judge is censured by the Supreme Court for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he: (1) improperly precluded the district attorney from participating in the disposition of cases in which he represented the State and was entitled to be present and to be heard; (2) improperly removed the disposition of cases from public view in open court and transacted the court's business in secrecy; (3) improperly entered a judgment of not guilty in a case under circumstances suggesting bad faith; (4) improperly changed the judgment in a case under circumstances suggesting bad faith; and (5) violated Canon 3A(4) of the N. C. Code of Judicial Conduct.

Justice LAKE dissenting.

THIS matter is before the Supreme Court upon the recommendation of the Judicial Standards Commission (Commission), filed with this Court on 30 December 1976, that Judge George Z. Stuhl, Judge of the General Court of Justice, District Court Division, Twelfth Judicial District (respondent), be censured for willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. See Article IV, section 17(2) of the North Carolina Constitution and G.S. 7A-376 (1975 Cum. Supp.). Respondent George Z. Stuhl did not petition this Court for a hearing upon the censure recommendation, thereby waiving the right to file a brief and to be heard on oral argument. Rule 2, Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, 288 N.C. 740.

Having considered the record consisting of the verified complaint and answer filed with, the evidence heard by, the findings of fact, conclusions, and recommendations made by the Judicial Standards Commission, we take note of the proceedings and findings and, based thereon, make our conclusions of law and order of censure:

PROCEEDINGS BEFORE THE COMMISSION

1. This proceeding was instituted before the Commission by the filing of a verified complaint on 29 June 1976 which alleged that respondent had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute in that:

(a) The respondent George Z. Stuhl presided over District Court No. 5 in Cumberland County on 13 November 1975 and on that date personally entered a verdict of guilty and a judgment of "Prayer for Judgment Continued" on payment of costs in a criminal action, No. 75-CR-36358, against Fay Victor Parrous wherein said Parrous was charged with unlawfully and willfully operating a motor vehicle on a street or highway at a speed of 60 miles per hour in a 45 mile-per-hour zone on 2 November 1975. At the time respondent entered said verdict and judgment, Fay Victor Parrous was not present in court and was not represented by an attorney. Said case was not on the court calendar on 13 November 1975. At the end of court on said date at approximately 1 p.m., respondent picked up the court file (shuck) in which he had rendered the verdict and judgment above set out and took said file to the cashier's window of the Clerk of Superior Court in the hallway outside the courtroom and paid $25 to a cashier. The cashier issued to respondent, in the name of Fay Victor Parrous, receipt No. 981688 for $25 and it was signed by Ailene Smith.

(b) On 29 October 1975 Dr. Panagiotis Elias Darviris was issued a citation by Traffic Officer J. P. Croome charging Dr. Darviris with willfully and unlawfully passing in a no-passing zone while driving a motor vehicle on a public street or highway. That citation, No. C2052881, directed Dr. Darviris to appear in District Court No. 5 at 9 a.m. on 12 November 1975. The case was continued until 10 December 1975. Sometime after issuing the citation and prior to 10 December 1975, respondent asked Officer Croome in the courthouse hallway near District Court No. 5 if Croome would reconsider the charge made against Dr. Darviris and give the doctor a break, stating that Greek people in Fayetteville wanted to help the doctor and the Greek Orthodox Church would not look too favorably on respondent if

respondent did not give Dr. Darviris a break. Officer Croome advised respondent that he was the judge and could do what he wanted to do. Officer Croome never had any further contact with any lawyer, the defendant, the district attorney or any assistant district attorney relative to the charge against Dr. Darviris; and Officer Croome never appeared in court relative to said case. Dr. Darviris never appeared in district court for a disposition of the charge made against him by Officer Croome and did not employ an attorney or anyone else to represent him in said case. On 10 December 1975 respondent asked Assistant District Attorney Willie A. Swann, who was prosecuting the docket in District Court No. 5 over which respondent was presiding, to take a dismissal in the case against Dr. Darviris but Swann did not do so. District Attorney Edward W. Grannis did not authorize the entry of dismissal in the criminal action against Dr. Darviris. Nevertheless, on or about 10 December 1975 respondent entered a plea of not guilty and a judgment of not guilty with the notation "no evidence" on the traffic citation No. C2052881. At that time Dr. Darviris was not present in court, no one was present representing the doctor, and neither the district attorney nor any assistant district attorney had knowledge of said entry of plea and judgment.

(c) On or about 3 December 1975 Henry Mitchell Colvin was charged by Highway Patrolman Mike Robertson with willfully and unlawfully driving a motor vehicle on a public highway at a speed of 65 miles per hour in a 55 mile-per-hour zone and issued Citation No. 2039560 to Colvin with a notation to appear in Cumberland County District Court No. 5 at 9 a.m. on 15 January 1976. On or about 16 December 1975 respondent caused to be entered a check mark in the "Guilty Plea" block on said citation and a check mark in the "Guilty Verdict" block on said citation. At the time of those entries the case was not on the court calendar for trial. Assistant District Attorney Willie A. Swann, who was prosecuting the docket in District Court No. 5 in December 1975, did not consent to or have knowledge of the entries. Said entries were made by Clerk of Court Cashier Sue Faircloth at the direction of respondent and Faircloth wrote out a receipt for the payment of said costs in said case at the direction of the re-

spondent. While an attorney and before becoming a district court judge, respondent had represented Henry Colvin in the district courts of Cumberland County on charges of issuing worthless checks and on charges involving traffic violations.

(d) On 15 August 1975 Lindsey Anthony Antis was charged in Uniform Traffic Citation No. 1762839, issued by Patrolman Kent Pierce, with the willful and unlawful operation of a motor vehicle on a public street or highway while under the influence of intoxicating liquor and with operating said vehicle at a speed of 69 miles per hour in a 55 mile-per-hour zone. The citation ordered Antis to appear in Cumberland County District Court No. 5 at 9 a.m. on 16 September 1975. Shortly after the arrest of Antis a Breathalyzer test was administered to him by Trooper Gerald Morton and the test indicated that Antis had a blood alcohol content of .15 percent. The case came on for trial before respondent on 13 November 1975. The State was represented by Assistant District Attorney Willie Swann and Antis was represented by Attorney Doran Berry. The prosecutor reduced the charge of driving under the influence to a violation of G.S. 20-138(b) to which defendant pled not guilty. He also pled not guilty to the speeding charge. Respondent, in open court, found Antis guilty of violating G.S. 20-138(b) and guilty of speeding 69 miles per hour in a 55 mile-per-hour zone. The charges of driving with a .10 percent blood alcohol content and speeding were combined for judgment and defendant Antis was given a six-month sentence suspended on condition that he pay a fine of $150 and court costs, and his driver's license was suspended for one year. Judgment was entered accordingly. Prosecutor Swann never again appeared in District Court No. 5 in connection with the charges against Antis. Nevertheless, on or about 17 November 1975, the respondent, out of the presence and without the knowledge or consent of the district attorney or any assistant district attorney, vacated the judgment against Antis above described and entered a judgment of guilty of careless and reckless driving.

(e) On several occasions prior to 16 January 1976, respondent, while serving as a district court judge, appeared at the cashier's window in the clerk's office with

the official papers in criminal cases and directed employee Frances Fisher to enter prayer for judgment continued in various cases, which she did, and respondent then signed the judgment and paid the costs and received the clerk's receipt in the name of the defendant. While serving as a district court judge respondent has done the same thing in other criminal actions and caused employee Joan Graham to issue receipts in the name of the defendant in such cases after the fines were paid by respondent. Likewise, in several cases in 1975, the respondent, while serving as a district court judge, caused the clerk's employee Sue Fisher Faircloth to issue receipts after respondent paid costs of court on traffic citations at the cashier's window of the clerk's office. Respondent paid costs in such manner in traffic citations on an average of once or twice a week in 1975 to Sue Fisher Faircloth after she, at respondent's direction, had entered a plea of guilty and verdict of guilty, followed by the words "Prayer for Judgment Continued upon Payment of Cost."

2. Respondent filed a verified answer admitting the allegations of the complaint concerning Fay Victor Parrous (Case No. 75-CR-36358), admitting only the harmless allegations concerning Dr. Darviris (Citation No. C2052881), admitting all allegations concerning Henry Mitchell Colvin (Citation No. 2039560), except the allegation that respondent had represented him on worthless check and traffic charges prior to becoming a judge, admitting in the Lindsey Anthony Antis case (Citation No. 1762839) that he found said defendant guilty in open court of violating G.S. 20-138(b) and guilty of speeding 69 miles per hour in a 55 mile-per-hour zone and entered judgment accordingly. All other allegations of the complaint were denied.

3. Upon due notice respondent was accorded a full adversary hearing before the Commission on 14 October 1976 at which time he was represented by counsel, testified in his own behalf, and offered other evidence. After hearing all evidence offered in support of the allegations, the Commission made findings as hereinafter appear:

FINDINGS OF FACT

(a) That a written complaint was filed by a citizen of North Carolina with the Commission concerning the mis-

conduct of respondent who was and is a Judge of the General Court of Justice, District Court Division, Twelfth Judicial District of North Carolina.

(b) That thereupon the Commission caused a preliminary investigation to be conducted by agents of the State Bureau of Investigation in accordance with the provisions of Rule 7 of the Commission Rules, who filed written reports with the Commission; that respondent was notified in writing in apt time of the investigation, the nature of the charge, by notice dated 30 June 1976, which notice informed him that the charges alleged against him were willful misconduct in office and conduct prejudicial to the administration of justice which brings the Judicial Office into disrepute and that attached to said notice was a copy of the verified complaint.

(c) That the verified complaint together with the notice were duly served on respondent on 1 July 1976 by service on Mr. Sneed High, counsel for respondent. Thereafter, and in apt time, respondent filed a verified answer to said complaint.

(d) That respondent was duly notified that the Commission would convene a hearing into said matter in the Conference Room of the Council of the North Carolina State Bar, Inc., Law Building, 107 Fayetteville Street, Raleigh, N. C. 27602, at 2 p.m. on Thursday, 14 October 1976, and said notice was duly served on respondent by service on his counsel, Mr. Sneed High.

(e) That at the time and place set for said hearing, with all members of the Judicial Standards Commission being present, respondent was present in person and represented by counsel whose name appears hereinabove.

(f) That Special Counsel for the Judicial Standards Commission at said hearing was William W. Melvin, Deputy Attorney General.

(g) That respondent presided over District Court No. 5 in Cumberland County on 13 November 1975. That on said date respondent personally entered a verdict of guilty and a judgment of "Prayer for Judgment Continued" on payment of costs, in a criminal action, No. 75-CR-36358, against Fay Victor Parrous, 1802 Morganton Road, Fay-

etteville, N. C., wherein Fay Victor Parrous was charged with unlawfully and willfully operating a motor vehicle on a street or highway at a speed of 60 miles per hour in a 45 mile-per-hour zone on 2 November 1975.

That at the time respondent entered said verdict and judgment, Fay Victor Parrous was not present in court and was not represented by an attorney. Said case was not on the court calendar on 13 November 1975. That at the end of the court on said day, at around 1 p.m., respondent picked up the court file (shuck) in which he had rendered the verdict and judgment hereinabove set out, and took said file to the cashier's window of the Clerk of Superior Court in the hallway outside the courtroom and paid $25 to the cashier.

That a cashier issued to respondent, in the name of Fay Victor Parrous, a receipt for $25, being Receipt No. 981688, and signed by Ailene Smith.

(h) That on 29 October 1975 Dr. Panagiotis Elias Darviris, P. O. Box 155, Stedman, North Carolina, was issued a citation by Traffic Officer J. P. Croome of the Fayetteville Police Department, charging Dr. Darviris with willfully and unlawfully passing in a no-passing zone while driving a motor vehicle on a public street or highway.

That Citation No. C2052881 was issued by Officer Croome and Dr. Darviris was directed to appear in District Court No. 5 on 12 November 1975, at 9 a.m. That said case was continued until 10 December 1975. That sometime after issuing the citation and prior to 10 December 1975, Officer Croome was in the Cumberland County Courthouse hallway near District Court No. 5 and was approached by respondent who asked Officer Croome if he would be willing to drop the charge against Dr. Darviris. Officer Croome told respondent he could do whatever he wanted to do with it.

On 12 November 1975 respondent asked Willie A. Swann, Assistant District Attorney who was prosecuting the criminal docket in Courtroom No. 5 over which respondent was presiding, to take a dismissal on the charge hereinabove set out against Dr. Darviris. Willie Swann did not dismiss the charge, and District Attorney Edward W.

Grannis did not authorize an entry of dismissal in the criminal action against Dr. Darviris.

(i) That Officer Croome, after talking with respondent as aforesaid, never had any further contact with any lawyer, the defendant or the district attorney or any assistant district attorney relative to the charge he had made against Dr. Darviris; that Croome never appeared in court relative to said case. That Dr. Darviris never appeared in court relative to said case. That Dr. Darviris never appeared in District Court of Cumberland County for a disposition of the charge made against him by Officer Croome nor did Dr. Darviris employ an attorney or anyone else to represent him in said case.

(j) That on or about 10 December 1975 respondent signed a judgment of not guilty in Citation No. C2052881 hereinabove described. That said citation was introduced in evidence as a portion of respondent's Exhibit A.

(k) That on or about 3 December 1975 Henry Mitchell Colvin, 1917 Sansberry, Fayetteville, North Carolina, was charged by State Highway Patrol Trooper Mike Robertson with willfully and unlawfully driving a motor vehicle on the public highways at a speed of 65 miles per hour in a 55 mile-per-hour zone.

That Trooper Robertson issued Citation No. 2039560 to Colvin with a notation to appear in Cumberland County District Court No. 5 on 5 January 1976 at 9 a.m. That on or about 16 December 1975 respondent caused to be entered a check mark on the "Guilty Plea" block on said citation and a check mark on the "Guilty Verdict" block on said citation.

That at the time of the entry of said judgment, said case was not on the court calendar for trial. That Assistant District Attorney Willie A. Swann, who was prosecuting the docket in District Court No. 5 in December 1975, did not consent to or have knowledge of the entry of said judgment.

That said judgment was entered by Clerk of Court Cashier Sue Faircloth at the direction of respondent, and Faircloth wrote out a receipt for a payment of said costs in said case at the direction of respondent. That respond-

ent, while an attorney in private practice, prior to becoming a district court judge, had represented Henry Colvin in the District Courts of Cumberland County.

(l) That the Clerk of Superior Court of Cumberland County maintains a cashier's window on the first floor of the Cumberland County Courthouse directly opposite District Courtroom No. 5. That at said window an employee of the Clerk accepts payment of criminal costs and fines in waiveable offenses. That on numerous occasions the respondent has come to said window and handed to an employee of the Clerk's Office a citation in a criminal action and directed an employee of the Clerk, and particularly Frances Fisher Conyers and Sue Faircloth, who worked at said window, to enter a Prayer for Judgment Continued upon the payment of the cost and the respondent would, usually in the presence of the defendant in said action, hand to the Clerk's employee the cost in said action, accept a receipt in return made out to the defendant, and thereupon hand it to the defendant.

That there are five district court judges in the Twelfth District and that no other district court judge in said district has ever paid costs at said window or directed the Clerk's employee to enter Prayer for Judgment Continued at said window except respondent.

(m) That the aforesaid FINDINGS and this RECOMMENDATION were concurred in by five or more members of the Judicial Standards Commission.

Upon the foregoing findings of fact the Commission concluded as a matter of law that the conduct of respondent constituted willful misconduct in office and conduct prejudicial to the administration of justice which brings the Judicial Office into disrepute and recommended that respondent be censured by the Supreme Court for such conduct.

CONCLUSIONS OF LAW AND ORDER OF CENSURE

The Supreme Court concludes that the Commission's findings of fact are supported by substantial evidence. We therefore accept the facts as established by the findings and apply the law accordingly.

G.S. 7A-376 (Cum. Supp. 1975) provides, in pertinent part, as follows:

> "Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for wilful misconduct in office, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

[1] Willful misconduct in office denotes "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present." *In re Edens,* 290 N.C. 299, 226 S.E. 2d 5 (1976).

[2] Conduct prejudicial to the administration of justice that brings the Judicial Office into disrepute denotes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *Geiler v. Commission on Judicial Qualifications,* 10 Cal. 3d 270, 515 P. 2d 1, 110 Cal. Reptr. 201 (1973), *cert. denied,* 417 U.S. 932; *In re Edens, supra.* Whether a judge's conduct should be so characterized "depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Crutchfield,* 289 N.C. 597, 223 S.E. 2d 822 (1975).

[3] A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates North Carolina Code of Judicial Conduct, Canon 3A(4), 283 N.C. 771, 772, which provides:

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."

[4] Application of the foregoing legal principles to defendant's actions in the various cases detailed in the findings of fact

compels the conclusion that respondent is guilty of willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that respondent: (1) improperly precluded the district attorney from participating in the disposition of cases in which he represented the State and was entitled to be present and to be heard; (2) improperly removed the disposition of cases from public view in open court and transacted the court's business in secrecy; (3) improperly entered a judgment of not guilty in the Dr. Darviris case under circumstances suggesting bad faith; (4) improperly changed the court's judgment in the Lindsey Anthony Antis case under circumstances suggesting bad faith; and (5) violated Canon 3A(4) of the North Carolina Code of Judicial Conduct. We conclude that respondent should be censured for such conduct in accordance with the recommendation of the Judicial Standards Commission.

Now, therefore, it is ORDERED by the Supreme Court of North Carolina that Judge George Z. Stuhl, be, and he is hereby censured for his improper conduct established and detailed in the findings of fact of the Judicial Standards Commission.

Done by the Court in Conference this 5th day of April 1977.

EXUM, Justice
For the Court

Justice LAKE dissenting.

I dissent for the reasons stated by me in my dissenting opinion in *In re Crutchfield,* 289 N.C. 597, 605, 223 S.E. 2d 822 (1976). This dissent is in no way intended as a condonation of any of the alleged conduct in office of the respondent or is it intended to imply that such conduct, if it occurred, is not prejudicial to the administration of justice or that it does not bring the judicial office into disrepute. My dissent is based solely upon what I consider the obvious unconstitutionality of the statute pursuant to which the Judicial Standards Commission operates and from which the jurisdiction of this Court in this proceeding is purportedly derived.

STATE OF NORTH CAROLINA v. WILLIE LEE WILLIAMS, A/K/A BUBBA WILLIAMS

No. 6

(Filed 14 April 1977)

1. **Criminal Law § 34.7— first degree murder — evidence of earlier murder — admissibility to show motive and intent**

In a prosecution for first degree murder of a highway patrolman and larcency of automobiles, the trial court did not err in allowing defendant's companion in the crimes to testify concerning defendant's participation in a prior armed robbery and murder, since such evidence was competent to show motive and intent and to show that the patrolman was killed for the purpose of concealing another crime; moreover, the earlier robbery and murder, the larceny of the automobiles for the purpose of escape, and the murder of the patrolman were so connected in point of time and circumstance that the patrolman's murder could not be fully shown without proving the other offenses.

2. **Criminal Law § 86.5—cross-examination of defendant — prior armed robberies — impeaching questions proper**

The trial court in a first degree murder and larceny prosecution did not err in allowing the district attorney to question defendant on cross-examination as to whether he had committed certain named armed robberies during the week preceding the murder for which he was on trial, since a defendant in a criminal case who testifies in his own behalf may be questioned about specific acts of misconduct for the purpose of impeachment.

3. **Constitutional Law § 80; 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 case.

DEFENDANT appeals from judgments of *Tillery, J.*, 14 June 1976 Session, NEW HANOVER Superior Court.

Defendant was tried upon four separate bills of indictment, proper in form, charging him with (1) the first degree murder of Hugh Richard Griffin on 14 September 1975, (2) the felonious larceny on the same date of a 1964 model Ford of the value of $500, the property of Joseph Troy Casey, (3) the felonious larceny on the same date of a 1974 two-door Dodge automobile of the value of $2,000, the property of Fairway Ford, Inc., and (4) possession of heroin. The cases were consolidated for trial.

Joseph Sweat testified as a witness for the State. His testimony tends to show that on 10 September 1975 he, the de-

fendant Willie Williams (also known as Bubba Williams) and George "Pokey" Davis were driving around Wilmington looking for a store to rob. Finding K & B's Grocery Store on Castle Street open, they robbed it, taking $60 from the cash register. During the robbery Joseph Sweat shot Thurston Smith twice with a .22 caliber pistol and defendant shot him once with a .38 caliber pistol. After the robbery the defendant and Sweat met Davis in a waiting car and rode to the home of defendant's grandmother. The $60 was used to buy heroin.

On 13 September 1975 Sweat saw defendant at James Carr's house and told him they were both wanted by the police for the death of Thurston Smith. At that time there were three pistols in the house—a .22 caliber, a .38 caliber and a silver and brown .357 Magnum which defendant told Sweat he had taken from a man named "Pop." Sweat and defendant remained at Carr's house until around 4 p.m. on 14 September 1975 when they got a ride to a Cadillac dealership where defendant broke into the trunk of his brother's car and obtained tools used to start cars without the ignition key. Defendant and Sweat then used these tools to start a white 1964 Ford parked nearby. They stole the Ford and drove it to Carr's house. There they picked up the three pistols and placed them in a blue and red bag along with the tools and headed toward Burgaw, Pender County, North Carolina. Near Burgaw, using the tools they had used to start the Ford, they started the motor of a Dodge located on a car lot and stole it, intending to take it New York and sell it. Defendant drove the Dodge while Sweat drove the Ford as they proceeded along dirt roads until they came to a dead end. There defendant jacked up the Ford, punched holes in its gas tank and filled two containers with gasoline which he then poured into the Dodge. The battery and license plate from the Ford and the bag containing the tools and pistols were transferred to the Dodge. At that point defendant and Sweat abandoned the Ford, drove back to the highway in the Dodge and headed toward Jacksonville with defendant driving.

Defendant and Sweat were stopped for speeding by Highway Patrolman Hugh Richard Griffin. Defendant told Trooper Griffin that his name was Ernest Carr and that he had left his driver's license at home. The officer ordered defendant to follow him to Burgaw where he would be placed under a $100 bond for speeding. Trooper Griffin led the way in his car, and defendant and Sweat followed him in the Dodge. Defendant told

Sweat he could not go to jail because the authorities in Burgaw would discover he was wanted for the murder of Thurston Smith in Wilmington and therefore he had to kill the patrolman. Defendant began steering the Dodge from side to side and blowing the horn. Both cars stopped, and defendant told Trooper Griffin something was wrong with the car and he couldn't drive it. The officer told him to drive only 35 miles per hour. The two cars started off again, this time with the patrol car behind the Dodge. Defendant blew his horn again and stopped. He told Sweat to hand him the .357 Magnum so he could shoot Trooper Griffin between the eyes and dump the body in the woods.

As Trooper Griffin approached the Dodge, defendant told him he would have to call a wrecker to get the car to Burgaw. When the officer appeared angry, defendant again agreed to drive and Trooper Griffin turned to walk back to his car. With the .357 Magnum in hand, defendant called to the patrolman and fired. The officer grabbed his side and defendant fired three more shots, then sped away as Trooper Griffin fired at them and began struggling back to his patrol car.

Defendant drove the Dodge into a blueberry field, back onto the highway, and then into another field where he finally hit a tree. Defendant told Sweat to get the tools and guns and wipe all fingerprints off the car. Defendant emptied three shells from the gun used to shoot Trooper Griffin, and Sweat placed that gun and the .22 caliber pistol back in the red and blue bag which he later lost while they were in a wooded area attempting to elude a police search. A few hours later defendant and Sweat were found in the woods and arrested. On 15 September 1975 Sweat led officers to the area where the guns had been lost and told them where the white 1964 Ford could be found.

Sweat pled guilty to accessory before and after the fact of murder in connection with Trooper Griffin's death and pled guilty to possession of heroin and to larceny of the Ford and the Dodge, receiving a life sentence and a twenty-five year sentence.

At the time of this trial Sweat had not been tried for the robbery and shooting at K & B's Grocery, but defendant had been tried, convicted and sentenced to death for the murder of

Thurston Smith during that robbery. See 290 N.C. 770, 228 S.E. 2d 241 (1976), where his conviction was upheld.

The State's evidence further tends to show that defendant had stolen a .38 caliber pistol from Willie Lee "Pop" Gibbs. This weapon, a Colt .38 caliber Special, Diamond Back Model, closely resembles a .357 Magnum Colt pistol, and was the gun actually used by defendant to kill Trooper Griffin. Joseph Sweat was misinformed about the caliber of the gun and referred to it in his testimony as a .357 Magnum.

Joseph Casey testified that on 14 September 1975 he parked his 1964 white Ford on Market Street in Wilmington and returned around 5 p.m. to find it gone. He next saw it in Burgaw on the following day and observed that the trunk had been forced open and that the battery, license plate and other items were missing.

Hugh Highsmith, owner of Fairway Ford, Inc., in Burgaw, testified that the Dodge car, license HNF-385, was missing from his lot on 14 September 1975.

Defendant testified as a witness in his own behalf. He stated that on 14 September 1975 he and Joseph Sweat stole the two automobiles mentioned in Sweat's testimony. When stopped by Trooper Griffin, they had left the white Ford in the woods and had returned to the highway in the Dodge with defendant driving. Trooper Griffin turned on his blue light, stopped the Dodge, walked to the door of the car and said defendant was driving too fast. While seated in the patrol car Trooper Griffin "called in" the license number of the car and told defendant that the license plate did not go on the Dodge. Defendant replied that he had only obtained the Dodge on Friday and the plate hadn't been "changed over." The officer stated that the car was not stolen and neither was the plate but said defendant would have to go to Burgaw where they would probably set a bond and permit defendant to continue on his way. They left for Burgaw with defendant driving the Dodge behind the patrol car.

Defendant testified that he was afraid the officials in Burgaw would see that the ignition switch had been ripped out of the Dodge and for that reason wanted to leave the Dodge beside the highway and ride to Burgaw with the patrolman. Then after his sister or other relative had made his bond, he planned

to return to the Dodge and continue on his way. For that reason he pretended the Dodge did not steer properly and twice induced the patrolman to stop. The third time they stopped he had run over a Budweiser box with some cans in it and told the patrolman when he approached the car that something was hung up under the bottom. Then defendant said: "I saw him turn real quick and then I heard a couple of shots which seem to come from the right side of the car. The shots hit the patrolman as he was turning around to go back to the car. I jumped into my car and mashed the gas. Sweat was jumping in on the other side. I would have left him if he had not. I did not have a gun and I did not fire the shots. The car was weaving and the patrolman was firing at us."

On cross-examination defendant admitted, over objection, that, using a pistol, he robbed one Tetterton of $142 on 8 September 1975; that, using a pistol, he robbed Ernest Pinyan of $75 on 9 September 1975; that, using a .38 caliber pistol, he robbed A. E. Lewis on 10 September 1975; that, using a pistol, he robbed one Keels of $120 on 11 September 1975. He further admitted that on 12 or 13 September 1975, using a pistol, he robbed Willie Gibbs of money and a .38 caliber Diamond Back Special. He stated that he had two .38 caliber pistols at James Carr's house and last saw them when Joseph Sweat put them in a sack at Carr's house with a .22 caliber pistol belonging to Sweat. He said the .22 caliber pistol was taken in the robbery at Pinyan's Grocery.

At the close of all the evidence defendant's motion for nonsuit on the charge of possession of heroin was allowed. His motion for nonsuit with respect to the two counts of larceny and the charge of murder was denied. The jury convicted him in those three cases and he was sentenced to death for the murder and given consecutive ten-year terms for the auto thefts, the first to commence at the end of the sentence pronounced in the murder case.

Having admitted the theft of the automobiles, defendant did not appeal the sentences in those cases. His appeal in the murder case presents for consideration the assignments of error discussed in the opinion.

Rufus L. Edmisten, Attorney General; Charles M. Hensey, Assistant Attorney General; Jane Rankin Thompson, Associate Attorney, for the State of North Carolina.

John Richard Newton and William B. Harris III, Attorneys for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends the testimony of Joseph Sweat regarding defendant's participation in the armed robbery at K & B's Grocery Store on Castle Street and the murder of Thurston Smith should have been excluded since it put defendant's character in issue and its only relevancy was to show that defendant had committed another distinct, independent, separate crime. Admission of this evidence over objection constitutes defendant's first assignment of error.

It is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, separate offense. Exceptions to the general rule of inadmissibility, as well recognized as the rule itself, are discussed and documented by Mr. Justice Ervin in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). The second and fifth exceptions there stated are pertinent here and read as follows:

> "2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." (Citations omitted.)
>
> "5. Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused." (Citations omitted)

Stansbury formulates the rule thusly:

> "Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because

it also shows him to have been guilty of an independent crime." 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 91.

Joseph Sweat testified, in effect, that defendant said he could not accompany Trooper Griffin to Burgaw to make bond for speeding because the authorities there would discover he was wanted for the murder of Thurston Smith in Wilmington during the K & B Grocery robbery on 10 September 1975, and for that reason he had to kill Trooper Griffin.

The challenged evidence was competent under the exception noted in *State v. McClain, supra,* to show both motive and intent. Moreover, Sweat's testimony was competent to show that Trooper Griffin was killed for the purpose of concealing another crime. *State v. Beam,* 184 N.C. 730, 115 S.E. 176 (1922). In fact, the robbery and murder at K & B's Grocery, the theft of the two cars for purpose of escape, and the murder of Trooper Griffin are so connected in point of time and circumstance that the trooper's murder cannot be fully shown without proving the other offenses. These crimes are all an integral link in the chain of events leading to Trooper Griffin's murder by the defendant. The challenged evidence was competent and properly admitted. *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962); *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902 (1957); *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853 (1949). Defendant's first assignment of error is overruled.

[2] Defendant took the stand as a witness in his own behalf. On cross-examination the district attorney was permitted, over objection, to ask defendant whether he had *committed* certain named armed robberies on each day of the week preceding Trooper Griffin's murder, to which defendant responded that he had committed all except one of the armed robberies mentioned, including the robbery at K & B's Grocery on 10 September 1975. Admission of this evidence constitutes defendant's second assignment of error.

It has long been the rule that when a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. *State v. Colson,* 194 N.C. 206, 139 S.E. 230 (1927); 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 111. Such cross-examination *for purposes of impeachment* is not

limited to conviction of crimes. "Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Sims,* 213 N.C. 590, 197 S.E. 176 (1938). A defendant may not be asked whether he has been accused, arrested or indicted for a particular crime, but "[i]t is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others." *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). The scope of such questions is subject to the discretion of the trial judge, and the questions must be asked in good faith. *State v. Williams, supra; State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875 (1969); *State v. Bell,* 249 N.C. 379, 106 S.E. 2d 495 (1959). When defendant's second assignment is subjected to these rules, its lack of merit is quite apparent.

[3] The Court notes *ex mero motu* that in *Woodson v. North Carolina,* 428 U.S. 280, 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. The consecutive ten-year terms for the auto thefts, unappealed from, shall commence at the end of the life sentence.

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 New Hanover County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for the first degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court issue commitments in substitution for the commitments heretofore issued. It is further ordered that the clerk furnish

to defendant and his counsel a copy of the judgment and commitments as revised in accordance with this opinion.

No error in the verdict.

Death sentence vacated.

MARGARET ELEANORA GALLIMORE, MOTHER; JOHN RAY GALLIMORE, FATHER, OF BONNIE LYNN GALLIMORE, DECEASED, EMPLOYEE v. MARILYN'S SHOES, EMPLOYER; BITUMINOUS CASUALTY CORP., CARRIER

No. 24

(Filed 14 April 1977)

1. **Master and Servant § 56— workmen's compensation — whether accident arises out of employment — appellate review**

The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions are supported by sufficient evidence. G.S. 97-86.

2. **Master and Servant § 55— workmen's compensation — assault as accident**

An assault upon a shoe store employee when she went to her car in a mall parking lot after leaving work was an accident within the purview of the Workmen's Compensation Act.

3. **Master and Servant § 56— workmen's compensation — in course of — arising out of**

As used in the Workmen's Compensation Act, the term "in the course of" refers to the time, place and circumstances under which an accident occurs, while the term "arising out of" refers to the origin or causal connection of the accidental injury to the employment.

4. **Master and Servant § 56— workmen's compensation — accident arising out of employment**

The controlling test of whether an accident arises out of the employment is whether the injury is a natural and probable consequence of the nature of the employment.

5. **Master and Servant § 56— workmen's compensation — accident arising out of employment**

In order for an injury to arise out of the employment, a contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment, and this risk must be such that it might have been contemplated by a reasonable

person familiar with the whole situation as incidental to the service when he entered the employment.

6. **Master and Servant § 56— workmen's compensation — shoe store employee — abduction in parking lot — subsequent robbery and shooting — accident not arising out of employment**

The death of a shoe store employee when she was abducted in a mall parking lot after leaving work and was thereafter robbed and shot to death did not arise out of her employment where there was evidence that her assailant had been informed that she often carried large sums of money but not that he had any information that she ever carried money belonging to her employer, the employee was not carrying any money belonging to her employer or any article indicating such at the time of her abduction, and there was no evidence that the employee ever made bank deposits for her employer unless accompanied by the manager or assistant manager, since (1) there was no evidence that the employee's risk of being robbed or abducted was affected by her employment, and (2) the risk of assault on the employee was essentially one common to the neighborhood and was not peculiar to the employment.

APPEAL as of right by defendants pursuant to G.S. 7A-30(2) to review the decision of the Court of Appeals, reported in 30 N.C. App. 628, 228 S.E. 2d 39, which affirmed the award to plaintiffs by the Industrial Commission filed on 3 September 1975.

Plaintiffs were the parents of Bonnie Lynn Gallimore and allege that Miss Gallimore sustained fatal injuries arising out of and in the course of her employment with defendant Marilyn's Shoes (Marilyn's).

From the stipulations of the parties and the evidence introduced before the Hearing Commissioner, it appears that on 3 November 1972 Miss Gallimore was employed by Marilyn's at its store in Westchester Mall in High Point. The duties of her employment consisted of selling merchandise, making sales reports and preparing deposits to be taken to the bank. Mrs. Margaret Gallimore (deceased's mother) testified that on two occasions prior to 6 October 1972 Mrs. Gallimore had accompanied her daughter to a "Branch Bank" located in the Westchester Mall wherein Miss Gallimore made deposits.

The manager of Marilyn's testified that it was company policy for the manager or assistant manager and one employee to take the daily deposits to the bank, and that such deposits were made after the store closed each evening at 9:00 p.m. The deposits were made at Wachovia Bank and Trust Company at

Westchester Mall, where Marilyn's had its account. The deposits were carried to the bank in a canvas bank bag placed in a shoe bag from the store. The manager testified that he knew of no instance in which this procedure was not followed.

At approximately 6:00 p.m. on the evening of 3 November 1972, Miss Gallimore left Marilyn's for the day, having completed her working hours. She went to her automobile (an orange Vega) parked in the mall lot. Upon arriving at her automobile, she was kidnapped by one Darrell Lee Young. Young took Miss Gallimore in her automobile to a secluded area. After attempting to fondle her, he robbed her of approximately one hundred dollars contained in her purse, and then shot and killed her. Young has entered a plea of guilty of second degree murder for the killing.

Young testified that he and two other persons (Jerry Allen and Timothy Wayne) had gone to Westchester Mall to steal tape players from automobiles in the parking lot. At the mall, Allen informed him that a certain orange Vega in the mall lot had a tape player in it, and that its owner was known to carry large sums of money. Young then agreed to rob the owner of the Vega; and in pursuance of the plan, Young abducted, robbed, shot and killed Miss Gallimore. Young testified that Miss Gallimore was carrying a regular handbag, not a bank or money bag, at the time of the abduction. He further testified that the information that Miss Gallimore was known to carry large sums of money originated from Allen's sister who worked in a store adjacent to Marilyn's.

Upon these facts, the Hearing Commissioner and, later, the Full Industrial Commission found that Miss Gallimore's death arose out of and in the course of her employment, within the meaning of the Workmen's Compensation Act, and awarded compensation. The Court of Appeals, with one member of the hearing panel dissenting, affirmed.

Other facts necessary to the decision of this case will be discussed in the opinion.

Harold I. Spainhour for plaintiff appellees.

Horton, Singer, Michaels & Hinton by Walter L. Horton, Jr. for defendant appellants.

MOORE, Justice.

[1] For an injury to be compensable under our Workmen's Compensation Act (Chapter 97 of the General Statutes of North Carolina), the claimant must prove three elements: (1) That the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment. G.S. 97-2(6); *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633 (1966). The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence. However, the determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence. G.S. 97-86; *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963); *Lewter v. Enterprises, Inc.,* 240 N.C. 399, 82 S.E. 2d 410 (1954).

[2] An assault may be an accident within the meaning of the Workmen's Compensation Act when it is unexpected and without design on the part of the employee who suffers from it. *Robbins v. Nicholson,* 281 N.C. 234, 188 S.E. 2d 350 (1972); *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668 (1949). Under the facts in this case we hold that the assault upon Miss Gallimore was an accident within the purview of the Workmen's Compensation Act.

[3] We are thus confronted with the issue of whether the finding by the Commission that Miss Gallimore's death was caused by an injury "arising out of" and "in the course of" her employment with Marilyn's is supported by the evidence in the record. The phrases "arising out of" and "in the course of" one's employment are not synonymous but rather are two separate and distinct elements both of which a claimant must prove to bring a case within the Act. In general, the term "in the course of" refers to the time, place and circumstances under which an accident occurs, while the term "arising out of" refers to the origin or causal connection of the accidental injury to the employment. *See, e.g., Watkins v. City of Wilmington,* 290 N.C. 276, 225 S.E. 2d 577 (1976); *Robbins v. Nicholson, supra.* As was stated in *Bryan v. Church, supra,* at 115, 147 S.E. 2d at 635, the reason for the requirement that an injury arise from the employment is to prevent "our [Workmen's Compensation] Act from being a general health and insurance benefit act."

See also Clark v. Burton Lines, 272 N.C. 433, 158 S.E. 2d 569 (1968).

In the cases of *Robbins v. Nicholson, supra,* and *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930), this Court has extensively analyzed the term "arising out of" the employment. In *Robbins v. Nicholson, supra,* the claimants were the survivors of two deceased employees of a grocery store. It appears from the evidence that on Christmas day, 1967, the husband of one of the deceased employees entered the grocery with a rifle and shot his wife and a co-worker. The shootings had their origin in domestic problems which had arisen between the assailant husband and his wife. The Commission awarded recovery to the survivors. This Court reversed, holding that while the injuries occurred "in the course of" the employment, they did not "arise out of" that employment. In reaching this conclusion, the Court quoted the following from *Harden v. Furniture Co., supra,* at 735, 155 S.E. at 730:

> " ' . . . The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' "

The Court further held that to be compensable, the injury must be caused by a risk which is reasonably related to and created by the employment. Since the origin of the shootings of the two employees had no relation to their employment, this Court held that no recovery was proper.

In *Harden v. Furniture Co., supra,* the plaintiff was the widow of a deceased employee. The employee was a night watchman and was slain while on the job by a fellow employee. The motive for the slaying was rooted in personal animosity between the two men. This Court denied recovery holding that the death did not arise out of the employment. In its opinion, the Court reasoned that to be compensable the injury must have a causal connection with the conditions under which the work is performed. Accordingly, where the assault upon the employee grows out of a motive foreign to the employment relationship, the necessary connection between the injury and the employ-

ment is not present and no compensation for the injury is proper.

The case of *Walk v. S. C. Orbach Co.*, 393 P. 2d 847 (Okla. 1964), is factually similar to the case at bar. In *Walk*, the employee-claimant sustained injuries when her purse was "snatched" as she was walking to her car at the end of her working day. The car was in a parking lot maintained by her employer and she contended that her injuries were compensable. The Oklahoma Supreme Court denied recovery on the ground that for an injury to be compensable it must arise out of a risk which is in some manner peculiar to the employment. The court reasoned that no recovery should be permitted for an injury caused by a risk to which all persons are exposed. Thus, in the absence of any evidence that the nature of her employment increased the risk of injury or that the employer's parking lot increased the risk of injury *(i.e.*, it was less safe than any other parking lot), the court held that the employee could not recover. This "increased-risk" test has been applied in decisions in other jurisdictions. *See Bloom v. Industrial Comm.*, 335 N.E. 2d 423 (Ill. 1975); *Malacarne v. City of Yonkers Parking Auth.*, 375 N.Y.S. 2d 206 (N.Y. App. Div. 1975); *West v. Home Indemnity Co.*, 444 S.W. 2d 786 (Tex. Civ. App. 1969); *O'Connor v. American Mutual Liab. Ins. Co.*, 87 So. 2d 16 (La. App. 1956).

[4, 5] From these cases, the controlling test of whether an injury "arises out of" the employment is whether the injury is a natural and probable consequence of the nature of the employment. A contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment. This risk must be such that it "might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test 'excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. . . . ' " *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E. 2d 193, 195 (1973). In other words, the " 'causative danger must be peculiar to the work and not common to the neighborhood. . . . ' " *Harden v. Furniture Co., supra*, at 735, 155 S.E. at 730.

[6] In our view, the unquestioned facts compel the conclusion that the assault which caused Miss Gallimore's untimely death

did not arise out of her employment. There is no evidence that the assault and robbery were motivated in any way by her employment. Miss Gallimore was employed to sell merchandise, to make sales reports, and to prepare deposits to be taken to the bank. On the day in question she had completed her work and had signed out. She was not carrying any money belonging to her employer at the time of her abduction, nor was she carrying a bank bag or other article indicating that she was transporting any funds belonging to her employer. There was no evidence that Miss Gallimore ever made bank deposits on behalf of her employer unless accompanied by the manager or assistant manager. Mrs. Gallimore's testimony that she had accompanied her daughter to a "Branch Bank" on two occasions does not establish that her daughter ever made deposits for Marilyn's. Neither is there any evidence that Darrell Lee Young had any information that Miss Gallimore ever carried any money belonging to her employer. Hence, we are unable to conclude that there is any evidence in the record to show that Miss Gallimore's risk of being robbed or abducted was affected by her employment.

The risk of the assault upon Miss Gallimore was essentially one common to the neighborhood, not peculiar to the employment, and one which could happen to anyone who patronizes a shopping mall. As found by the Commissioner, "The Westchester Mall was well lighted and was no more hazardous than other areas of High Point. There had been several purse snatchers about the Westchester Mall as well as in other areas of High Point." The tragic and untimely death of Miss Gallimore was caused by the vicious and unreasoned criminal act of Darrell Lee Young, not by an accident arising out of her employment.

The cases cited by the Commission in support of its ruling, *Craig v. Electrolux Corp.*, 510 P. 2d 138 (Kan. 1973), and *Boulanger v. First Nat. Stores, Inc.*, 163 A. 261 (Conn. 1932), wherein the Kansas and Connecticut courts upheld compensation awards, are distinguishable from the case at bar. In *Craig*, the employee's duties consisted of both selling the employer's products and collecting payments from his customers. At the time the employee was slain, he was waiting in his car for a customer to arrive and thus was clearly in the course of his employment. The slayer admitted that he had seen the deceased with a large sum of cash earlier in the day and had followed him with the intent to rob him. This intent to rob, coupled with the fact that

the employee was required to carry substantial sums of money in his employment, led the court to uphold an award of compensation. In *Boulanger*, the employee was in charge of counting the daily proceeds of his employer's grocery store. Through observation, two men concluded that the employee carried the daily proceeds home in his briefcase. Hence, one evening while on his way to a mailbox to post a letter on behalf of his employer, the employee was relieved of his briefcase, shot and killed. The court held that because of his position and responsibilities with his employer, the employee's risk of being robbed was increased and his survivors were entitled to recover.

In both *Craig* and *Boulanger* there is a clear relation between the employment and the employee's death. The evidence clearly showed in each case that the risk of robbery was increased because of the fact that the employee was required to handle the employer's money as a part of his employment. Further, each of the employees possessed or appeared to possess his employer's money at the time of the assaults. In the case at bar, no such evidence appears. Therefore, we do not find these decisions to be controlling.

In view of our finding that Miss Gallimore's death did not arise out of her employment, it is not necessary for us to consider whether it arose "in the course of" her employment.

For the reasons stated, the decision of the Court of Appeals is reversed and the cause is remanded to that court with direction that it remand to the Industrial Commission for entry of an award for defendant in accordance with this opinion.

Reversed and remanded.

LEONARD K. THOMPSON v. WAKE COUNTY BOARD OF EDUCATION

No. 29

(Filed 14 April 1977)

1. Schools § 13— teacher dismissal — judicial review — whole record test

The standard of judicial review of a board of education's dismissal of a career teacher is the "whole record" test. Former G.S. 143-315 (now G.S. 150A-51).

2. Schools § 13— whole record test

While the "whole record" test does not allow the reviewing court to replace a board of education's judgment as between two reasonably conflicting views even though the court could justifiably have reached a different result had the matter been before it *de novo*, the "whole record" test does require the court, in determining the substantiality of evidence supporting the board's decision, to consider not only the evidence which justified the board's decision but also contradictory evidence or evidence from which conflicting inferences could be drawn.

3. Schools § 13— teacher dismissal — judicial review — consideration of Review Committee report

Under the whole record rule, a trial judge reviewing a school board decision in a teacher dismissal case must not only consider the complete testimony of all the witnesses, but he must also consider the panel report of the Professional Review Committee.

4. Schools § 13— teacher dismissal — neglect of duty — insubstantial evidence

Evidence that a career teacher neglected his duty to maintain good order and discipline by permitting two students to settle a dispute by fighting was insubstantial in view of the entire record, and the teacher was improperly dismissed by the school board for neglect of such duty.

Justice LAKE concurs in result as to the wrongfulness of the discharge.

Justices LAKE and MOORE dissent as to the amount of damages.

PLAINTIFF appeals pursuant to G.S. 7A-30 from the decision of the Court of Appeals reported in 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *(Clark, J.,* dissenting) reversing judgment for the plaintiff by *Alvis, S.J.*, entered out of session by consent of the parties 3 December 1975, WAKE Superior Court.

At the time of trial, the plaintiff, Leonard K. Thompson, was a fifty-year-old "career teacher" as defined by G.S. 115-142(a) (3). He had 12 to 13 years of teaching experience, the last 7 years of which he had taught in the Wake County Public School System. First employed by defendant Wake County Board of Education (hereinafter referred to as Board) to teach at Cary Elementary School, the plaintiff was later transferred to Apex Elementary School as part of an effort to ensure racial balance in the staff of the Wake County Public Schools. During the 1973-74 school year, Thompson was assigned to teach eighth grade health and physical education at Apex Elementary School.

Thompson had previously served as head of the Classroom Teachers Association in both Durham and Wake Counties. While at Apex Elementary, he was selected by the faculty as a school representative to the North Carolina Association of Educators.

On 11 March 1974, the Wake County Board of Education, upon the recommendation of the Superintendent of Wake County Schools (hereinafter referred to as Superintendent), voted by unanimous resolution to suspend Thompson from his teaching duties without pay and without prior notice or a hearing pursuant to G.S. 115-142(f), on the grounds of immorality, insubordination, neglect of duty and physical or mental incapacity, G.S. 115-142(e)(1)(b), (c), (d) and (e).

Upon being advised of the Board's action, Thompson requested a hearing pursuant to G.S. 115-142(h)(3)(i) before a panel of the Professional Review Committee. After two days of hearings held in May 1974, the panel found that all the charges preferred against the plaintiff were untrue and unsubstantiated.

Notwithstanding the report of the panel of the Professional Review Committee, the Superintendent, as was his option under G.S. 115-142(i)(5), submitted a written recommendation for Thompson's dismissal to the Board accompanied by the panel's report. Upon receiving notification of the Superintendent's recommendation, Thompson requested a hearing before the Board under G.S. 115-142(i)(6). Thereupon, the Board conducted five days of hearings in July and August 1974. After the hearings, the Board by resolution ordered Thompson dismissed as a teacher in the Wake County Public Schools on the grounds of immorality, insubordination, neglect of duty and mental incapacity.

Thompson appealed from the Board's order to Wake County Superior Court requesting judicial review under G.S. 115-142(h). The case was heard by Judge Jerry Alvis who entered an order on 3 December 1975 reversing the Board's dismissal of Thompson. The trial judge ordered the Board to reinstate Thompson to his status as a career teacher and pay him all sums that he would have received as compensation through the date of the order but for the wrongful dismissal.

On appeal, the North Carolina Court of Appeals, reversed and reinstated Thompson's dismissal.

Other facts necessary to the decision of this case will be discussed in the opinion.

Chambers, Stein, Ferguson & Becton by Charles L. Becton and Adam Stein for the plaintiff.

Boyce, Mitchell, Burns & Smith by James M. Day and G. Eugene Boyce for the defendant.

COPELAND, Justice.

G.S. 115-142 provides greater job security for career public school teachers, as defined, than existed under prior law. *Taylor v. Crisp,* 286 N.C. 488, 212 S.E. 2d 381 (1975). G.S. 115-142(e)(1) lists the only twelve grounds upon which a career teacher may be dismissed, demoted or employed on a part-time basis. In this case, defendant Wake County School Board relied on four charges in dismissing the plaintiff—immorality, insubordination, neglect of duty and mental incapacity. G.S. 115-142(e)(1)(b), (c), (d) and (e). In support of these charges, the Board reached seven conclusions of law based on seven findings of fact.

The trial judge found that "the Board did not reach a single conclusion of law, supported by competent evidence, which gave lawful support to its order of dismissal." The Court of Appeals held that Judge Alvis properly overruled all the Board's conclusions of law except for Conclusion of Law No. 5 relating to neglect of duty in the encouragement of order and discipline. The Court of Appeals felt this conclusion was supported by a finding based on sufficient competent evidence.

Suffice it to say, that after careful scrutiny of the record, we concur in the result reached by the Court of Appeals on the charges of immorality, insubordination and mental incapacity for the reasons stated in the opinion below. As pointed out by the Court of Appeals, several of the Board's findings of fact were supported by substantial, competent and material evidence in the light of the entire record. However, these findings while they paint a portrait of a teacher whose conduct was at times imprudent and ill-advised, do not, as a matter of law, constitute immorality, insubordination or mental incapacity so as to justify the dismissal of a career teacher. The majority opinion below has dealt with these issues in detail. We believe it would serve no useful purpose for us to plow again the same ground.

Before turning to the charge of neglect of duty sustained by the Court of Appeals, we need to examine the applicable scope of judicial review. At the time of the plaintiff's hearing before Judge Alvis, the scope of judicial review of the Board's actions was set out in G.S. 143-315 (now G.S. 150A-51). This general judicial review statute allows a court to reverse a school board decision if:

> "[t]he substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> * * *
>
> "(5) Unsupported by competent, material, and *substantial evidence in view of the entire record as submitted; . . .*" (Emphasis added.)

[1, 2] This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C. L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C. L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp., supra*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp., supra*.

The Wake County Board of Education concluded as a matter of law that plaintiff's "actions in allowing his students to fight with each other and with him constituted neglect of duty insofar as encouragement of discipline and good order in accordance with N.C. G.S. 115-146 is concerned." The Court of Ap-

peals felt this conclusion was supported by a portion of the Board's Finding of Fact No. 7 which states, "[o]n occasion during the 1973-74 school year Mr. Thompson allowed students under his supervision to settle disputes by fighting among themselves, . . . " Arguably this finding, if supported by substantial evidence in light of the entire record, would, as a matter of law, constitute neglect of the teacher's duty imposed by G.S. 115-146 to "maintain good order and discipline."

The evidence in the record supporting this finding is limited to testimony concerning a fight between students Mike Novick and Eddie Barker. Several witnesses testified before the Board on the subject of this fight. Joe Jungers had physical education, a health class and a study hall under Mr. Thompson. He testified: "I know Mike Novick and Eddie Barker. I recall an occasion when they fight with each other. Mr. Thompson saw the fight. He did not stop it. Mike and Eddie were fighting and Mr. Thompson called to Mike and as he turned around he said 'beat the hell out of Eddie' and Eddie hit and Mike turned around and bashed the mess out of Eddie." Viewed in isolation, this testimony may constitute "substantial" evidence, but a reviewing court is not permitted to stop here under the whole record rule.

On cross-examination the witness testified: "I came in the class a bit late. I was sitting over there playing chess and they started fighting for some reason. From what I had heard Mike had been sitting in Eddie's chair and Eddie got mad at him about it. As to whether I heard Mr. Thompson say 'if you are going to act like animals, well, go ahead and beat the hell out of each other,' I did not hear those exact words. I do not recall he said anything about acting like animals. I do recall Mr. Thompson saying: 'beat the hell out of him, Eddie.' That's all I heard said. He said, 'you are making such a ruckus,' making such a big amount of noise fighting. I thought that Mr. Thompson was in the class when the fighting started. I was over there playing chess, but I don't know whether or not he was, but he was in there when I looked up there when he started talking." On redirect examination Joe Jungers added: "I do not know whether the two boys that were fighting were reprimanded or punished in any way. *This occurrence was a rarity you might say in class. . . . In the classes which I am in Mr. Thompson's room, it's usually quiet and orderly.*" (Emphasis added.)

Obviously Joe Jungers was not in a position to hear Mr. Thompson's entire statement on this occasion. He was apparently preoccupied by his chess game until at some point the noise of the fight attracted his attention.

The other witness called by the Board to substantiate the neglect of duty charge was Johnette Smith, a student under Mr. Thompson who offered the following testimony on the subject of the fight: "Two guys were fighting, started fighting. One was picking at the other, and this guy, they didn't like each other. It was Eddie Barker and Mike Novick. They would be fighting. He [apparently Mr. Thompson] would *probably* be out of the room and they would be fighting. He would come in and *more than likely* he would look at them and he would *probably* tell them *more than likely*, say, 'Go ahead and beat the hell out of each other!' He didn't care. It was in a class." (Emphasis added.)

At best, Johnette Smith presented an inconclusive and incomplete picture of what transpired on this occasion. Johnette also indicated that there "was only one fight in our class last year."

Plaintiff Leonard K. Thompson had a different recollection of the fight between Eddie Barker and Mike Novick. Mr. Thompson testified: "I arrived at that study hall and there was something going on, a scuffle. It was stopping. I did not stop it because it was somebody else there at that moment, a student. The two boys had been hitting each other. And it was stopped, but they were still angry. One of them was very angry. He was crying. He was being picked on, as occasionally happened. He had done some picking himself, and he had pulled a chair from under another student the class before. And the Novack [sic] boy, when they came down to the study hall, deliberately sat in this young man's chair, which was not an assigned seat. The boy asked him to get out and he said he wasn't going to, and so the two boys got into a scuffle, and there was an exchange of blows. I said to them, 'This is supposedly a class of exceptional students. If you cannot act like gentlemen—we are animals of the highest calibre—if you can't settle your differences by using your brains, just beat the hell out of each other!' After I made that remark, they did not exchange any more blows. They talked about it, but they did not do it."

Not only does Mr. Thompson's version of the fight differ from the students' in that the fighting stopped following his remarks, but also from his complete statement, it appears that his language was calculated to shame the boys into settling their differences peaceably. His full statement was thus a form of maintaining good order, and according to his recollection, it produced the desired result.

For reasons unknown, the Board ignored the testimony of Lula Pearl Atwater, a career teacher of thirty-two years. This witness had taught at Apex Elementary for about twenty years. At the time of her testimony, she was President of the North Carolina Association of Educators in Wake County and had been approved by the State Board of Education to serve on the Professional Review Committee. She had known Leonard K. Thompson for five or six years and was a teacher at Apex Elementary School during the year in controversy.

While admitting that she had never had the opportunity to observe Mr. Thompson in the classroom setting, she testified, "I have had occasion to observe Mr. Thompson's students during lunchroom or field days or at volleyball exercises. The students appeared to me to have been as well disciplined as the others" and "in my opinion Mr. Thompson had good discipline over his students in physical education activities, this is my observation of Mr. Thompson and the children."

She stated that she was surprised to see many of the students who were before the Board to testify. She said, "I have taught most of the same students one or two classes. As to whether I had any behavior problems with those students, you know, I am so happy you asked me I don't know what to do because I haven't slept since I saw those students here. They are *problem students* and can I go right down the line and tell you about them. They have behavior problems in the classrooms. . . . I can cite you problems that we had with those children at school . . ." Lula Pearl Atwater, with her thirty-two years experience, continued: "[W]hen I looked down that list at all those students whose names were called, most of them, they have been problems and low achievers; they're in the low-achieving level." (Emphasis added.)

Mrs. Atwater's testimony was relevant as it tended to show that Mr. Thompson was generally successful at maintaining good order and discipline at school notwithstanding the fact that

a number of his students had serious behaviorial problems. Applying the whole record rule, Judge Alvis properly took Mrs. Atwater's testimony into account.

[3] Under the whole record rule, a trial judge reviewing a school board decision must not only consider the *complete* testimony of *all* the witnesses, he must also consider the panel report of the Professional Review Committee. Under G.S. 115-142(1)(2) the report of the panel is "deemed to be competent evidence," and when it is introduced, it becomes part of the record.

In this case the panel report cleared Mr. Thompson of all the charges, including the charge of neglect of duty. While the panel report is not determinative, it is entitled to some weight in a review of the entire record. *Universal Camera Corp., supra.* The substantial evidence standard is not altered because the Board and a panel of the Professional Review Committee disagrees. However, the evidence supporting a school board decision may appear less substantial when an impartial panel, which has observed the witnesses and dealt with the case, has drawn different conclusions than when the panel has reached the same conclusions as the school board. The significance of the panel report depends largely on the importance of the witnesses' credibility in the case. *Universal Camera Corp., supra.*

In the instant case, credibility was important to the extent that Mr. Thompson's version of the fight differed from that of two students. The fact that an impartial panel of teachers and laymen (under G.S. 115-142(h)(4), panel members cannot be employed in or be residents of the county in which the request for review is made) made findings contrary to those of the Board, detracts from the substantiality of the evidence supporting the Board's findings and conclusions.

Once all the competent evidence in the record has been examined, the reviewing court must decide if it is substantial. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Fire Insurance Rating Bureau,* 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977); *accord, Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1975). "Substantial evidence is more than a scintilla or a permissible inference." *Comr. of Insurance v. Automobile Rate Office, supra*

at 205, 214 S.E. 2d at 106; *Utilities Commission v. Trucking Company*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203 (1943).

[4] When the *whole record* is viewed, the evidence shows that Mr. Thompson ordinarily maintained good order and discipline at school activities. One may disagree strenuously with the methods he employed but on the whole they were designed to and did result in good order and effective discipline. All the evidence indicates that only one fighting outbreak occurred in Mr. Thompson's classroom during the 1973-74 school year. According to Mr. Thompson's testimony, he tried by his words to end the fight and was successful. Neither of the two students who testified directly contradict Mr. Thompson's *complete* statement on the occasion of the fight.

If a career teacher's ability to maintain good order and discipline at school is to be judged solely by *one* incident, the evidence of that incident should be clear. We hold the evidence that Mr. Thompson neglected his duty to maintain order and discipline was insubstantial in view of the entire record. While the Court of Appeals laid down the correct standard of judicial review, that court failed to apply it, as Judge Clark in his dissent correctly noted.

The Court of Appeals is

Reversed.

Justice LAKE concurs in result as to the wrongfulness of the discharge.

Justices LAKE and MOORE dissent as to the amount of damages.

JOSEPH D. WILLIAMS II, MINOR BY GUARDIAN AD LITEM JOSEPH D. WILLIAMS v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF ESTATE OF JOHN WALDROP WILLIAMS

JOSEPH D. WILLIAMS, INDIVIDUALLY v. WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF ESTATE OF JOHN WALDROP WILLIAMS

No. 77

(Filed 14 April 1977)

1. **Automobiles § 108— family purpose doctrine — requirements for applicability**

The family purpose doctrine imposes liability upon the owner or person with ultimate control of a motor vehicle for its negligent operation by another when it is shown (1) that the operator was a member of his family or household and was living in his home, (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of his family, and (3) that the vehicle was being so used by a member of his family at the time of the accident with his express or implied consent.

2. **Automobiles § 108.1— family purpose doctrine — motorcycle as motor vehicle**

A motorcycle is a motor vehicle for purposes of the family purpose doctrine, since it is a self-propelled vehicle designed and intended for operation upon the public highways.

3. **Automobiles § 108.1— motorcycle on private property — applicability of family purpose doctrine**

The family purpose doctrine is applicable to accidents involving the operation of a motorcycle upon private property.

4. **Automobiles §§ 41.1, 41.2— children on highway or private property — duty of motorist**

The presence of small children on or near a street is a danger signal to a motorist who must bear in mind that children have less capacity to avoid danger than adults, and the motorists is, therefore, required to use the care a reasonable man would exercise under such circumstances. This duty of increased vigilance is also required when a vehicle is being operated on private property.

5. **Automobiles § 63.3— motorcycle striking child on private property — sufficiency of evidence of negligence**

In an action to recover for injuries sustained by minor plaintiff when he was struck by a motorcycle operated by a fourteen year old on private property, evidence was sufficient to support a reasonable inference by the jury that the boy was operating the motorcycle at a greater rate of speed than was reasonable or prudent under the circumstances and that he failed to keep a proper lookout where such

evidence tended to show that the fourteen year old was operating the motorcycle belonging to his father and furnished to him for his use and pleasure across the front yard of a home in which he knew little children lived and played; he had been told not to operate the vehicle on these premises; he was operating his motorcycle at a speed of about 15 mph along a path which had been created by his motorcycle and the motorcycle of one of his friends; although his vision was momentarily obstructed by a bush, he failed to decrease his speed before he saw the child and was forced to apply his brakes suddenly; and by own admission his brakes were of little value under these conditions.

ON petition for discretionary review of the decision of the Court of Appeals reported in 30 N.C. App. 18, 226 S.E. 2d 210, reversing the judgment entered by *Lanier, J.*, at the 8 September 1975 Session of the Superior Court of PITT County. This case was argued and docketed as Case No. 117 in the Fall Term 1976.

This action was instituted by Joseph D. Williams as Guardian Ad Litem for his minor child, Joseph D. Williams II, to recover damages for injuries suffered by his minor son when he was struck by a motorcycle owned by John Waldrop Williams, deceased, and operated by his fourteen-year-old son, Johnathan David Williams (David). Joseph D. Williams instituted a separate action to recover for medical expenses incurred as a result of the accident. The cases were consolidated for trial.

Plaintiff's evidence, summarized except where quoted, is as follows: On 5 May 1972, between the hours of 4:00 and 6:00 p.m., David Williams was riding a Honda SL 100 motorcycle on a path through the yard of plaintiff, Joseph D. Williams. This path was about ten feet from the public street and had been cut through the grass by motorcycles operated by David and a friend. David could not operate the motorcycle on a public highway because he was not old enough to obtain a license. However, he rode the vehicle nearly every day either on a vacant lot or a nearby tobacco field. He had crossed the Joseph Williams' yard ten or twelve times in order to reach one of these places without riding on a public street. Mrs. Joseph D. Williams testified that she had told David not to ride across her yard. David denied that he had been so ordered. The motorcycle which David operated was capable of a speed of sixty miles per hour and was owned by David's father, John Waldrop Wil-

liams, who furnished it to David for his use and pleasure. At trial David testified:

> I recall going through the Joseph Williams yard on May 5th between 4 o'clock and 6 o'clock. The sun had started to set; it had to be late. Between 4:00 and 6:00 I did strike Joey with my motorbike. The motorbike was in my father's name. I was about 10 or 12 feet from the roadway when I struck Joey. . . .
>
> * * *
>
> I was riding down through the yard in front of their yard. . . . Al Cayton was in front of me, and he had his little brother which was about 2 or 3 years old riding with him, in front of him, and he went on down the road. . . . I was riding about 15 miles an hour with a tinted face shield over my helmet.
>
> * * *
>
> As soon as I saw them I hit the brakes and the horn. As to whether they came some 10 feet into the yard, no, they were running. As soon as I saw them I hit the brakes and they kept on running and I hit the horn and then the little boy ran right out in front of me and the girl stayed there. Yes, I said the brakes had already locked. Well, you slide. You will slide. I slid for about 10 or 12 feet. That was the grass. I was going down hill and if you lock the back brake on the grass you will slide. You might as well not hit the brakes just about. . . .

The injured child, who was three years old, was taken to the hospital where he remained in intensive care for a week. After surgery, he was removed to a private room where he remained for an undisclosed period of time.

At the close of plaintiff's evidence defendant moved for a directed verdict on grounds that (1) plaintiff had failed to prove actionable negligence, and (2) the "family purpose doctrine" did not apply so as to impute the negligence of John David Williams to his father, John Waldrop Williams. The mo-

tion was denied. Defendant offered no evidence and issues were submitted to and answered by the jury as follows:

ISSUES

1. Was David Williams driving the Honda SL100 for a family purpose of defendant John Waldrop Williams at the time of the collision?

ANSWER: Yes.

2. Was the plaintiff Joseph D. Williams II injured by the negligence of David Williams?

ANSWER: Yes.

3. What amount, if any, is the plaintiff Joseph D. Williams, Gdn. entitled to recover for personal injuries to Joseph D. Williams II, a minor?

ANSWER: 6786.00 (67.86 (life expectancy for 3 year old) X $100) to be paid in a lump sum at the present time.

4. What amount, if any, is plaintiff Joseph D. Williams entitled to recover for medical expenses incurred on behalf of his child, Joseph D. Williams II?

ANSWER: Yes $1,721.60.

Defendant appealed from judgment entered on the verdict.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff.

Gaylord, Singleton & McNally, by Louis W. Gaylord, Jr., and Phillip R. Dixon, for defendant.

BRANCH, Justice.

The initial question presented in this case is whether the family purpose doctrine is applicable to negligence actions arising from the operation of a motorcycle off the public highways.

[1] The family purpose doctrine imposes liability upon the owner or person with ultimate control of a motor vehicle for its negligent operation by another when it is shown (1) that the operator was a member of his family or household and was living in his home, (2) that the vehicle was owned, provided

and maintained for the general use, pleasure and convenience of his family, and (3) that the vehicle was being so used by a member of his family at the time of the accident with his express or implied consent. *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427; *Watts v. Lefler,* 190 N.C. 722, 130 S.E. 630. In this State the doctrine is a rule of law adopted by the Court as an extension of the principle of *respondeat superior. Grindstaff v. Watts,* 254 N.C. 568, 119 S.E. 2d 784. Although the family purpose doctrine has been criticized as unduly straining this principle of law, our Court has long considered any shortcomings in legal reasoning to be outweighed by the doctrine's value as an instrument of social policy. In *Grindstaff v. Watts, supra,* Justice Moore, speaking for the Court, explored the genesis of the doctrine:

> The family purpose doctrine "came into being as an instrument of social policy to afford greater protection for the rapidly growing number of motorists in the United States." 38 N.C. Law Review 252-3. Perhaps nothing has had so great an impact on the business and social life of this country during the past half century as the advent and ever increasing use of automobiles and trucks. It was probably inevitable that there should be an alarming number of collisions and accidents resulting in injuries, suffering and economic loss. This possibly justified the search of the courts for some device to impose a greater degree of financial responsibility. . . .

Defendant contends that because David Williams was operating a *motorcycle* in his neighbor's front yard, and *not on the public highway,* the family purpose doctrine should not apply. It is argued, and the Court of Appeals agreed, that the family purpose doctrine is "an anomoly in the law" which should be extended only by legislative action. In support of the argument that the doctrine should not be extended to apply to the operation of motorcycles off the public highways, defendant strongly relies upon the following statement from *Grindstaff v. Watts, supra:* "In the absence of legislative action, this Court is not disposed to extend the family purpose doctrine in North Carolina to instrumentalities other than *motor vehicles operating on public highways.*" [Emphasis added.]

It was held in *Grindstaff* that the family purpose doctrine did not apply to negligence cases arising out of the operation

of motorboats on the waters of this State. This holding, however, was shortly thereafter overruled by the enactment of G.S. 75A-10.1 which specifically makes the doctrine applicable to such cases. Further, we interpret the crucial language in *Grindstaff* to be *descriptive* of the *nature* of the vehicle to which the family purpose doctrine is applicable, and not *restrictive* of the *use* in which the vehicle must be engaged at the time of the accident. In other words, *Grindstaff* only limited the application of the family purpose doctrine to motor vehicles of a type which are commonly used upon the public highways, as opposed to those of a wholly different design, in that case motorboats. With this distinction in mind, we do not think the application of the family purpose doctrine to the facts of instant case runs counter to the rationale of the *Grindstaff* decision.

[2] Unquestionably a motorcycle is a motor vehicle for purposes of the family purpose doctrine. It is a self-propelled vehicle designed and intended for operation upon the public highways. G.S. 20-4.01(27) includes motorcycles within the definition of "passenger vehicles" so as to make them subject to the motor vehicle registration and driver's licensing laws of G.S. 20-50 and G.S. 20-7. In *Meinhardt v. Vaughn,* 159 Tenn. 272, 17 S.W. 2d 5, the Tennessee Supreme Court indicated that the reasoning which forms the basis for the application of the family purpose doctrine to automobile accidents applies with equal force to accidents involving motorcycles.

We do not believe that the fact that an injury occurs as a result of the operation of a motor vehicle on private property defeats the application of the family purpose doctrine. In many instances, as here, the youth of the operator *requires* that the operation of the motor vehicle be restricted to private property. The legislature has wisely determined that persons under 16 years of age lack the discretion and maturity to operate motor vehicles safely upon the public highways. This policy determination should heighten a parent's sense of responsibility and increase his duty of oversight when he provides his fourteen-year-old son with a potentially dangerous motor vehicle capable of attaining speeds of 60 miles per hour, knowing that its use will necessarily be limited to private property. Indeed, it is such use which presents the greatest risk of injury to those least capable of protecting themselves. Parents constantly implore their children to play in their yards and thereby avoid the dangers of motor vehicular traffic. Even those of sufficient

maturity to better care for their own safety would be justified in being less attentive to the dangers of such traffic when safely situated on their own property. It would surely be "an anomoly in the law" to hold a parent liable for his child's negligent operation of a motor vehicle in an area designated for its proper use, but to insulate the parent from liability when the vehicle is used in an area presenting a greater potential for injury. Children belong in yards; motorcycles do not.

[3] We hold that the family purpose doctrine is applicable to accidents involving the operation of a motorcycle upon private property.

The family purpose doctrine does not relieve plaintiff of his burden to show actionable negligence in order to justify a jury verdict in his favor. We, therefore, must consider defendant's contention that the trial judge erred when he failed to grant its motion for a directed verdict on the ground that there was not sufficient evidence to carry the case to the jury.

Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent man would exercise under similar conditions and which proximately causes injury or damage to another. *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132; *Jackson v. Stancil* and *Smith v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817; *Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451. Defendant's motion for a directed verdict raised the question of whether plaintiff's evidence, when considered in the light most favorable to plaintiff, would justify a verdict for the plaintiff. *Winters v. Burch,* 284 N.C. 205, 200 S.E. 2d 55; *Rayfield v. Clark,* 283 N.C. 362, 196 S.E. 2d 197.

[4] The presence of small children on or near a street is a danger signal to a motorist who must bear in mind that children have less capacity to avoid danger than adults and he is, therefore, required to use the care a reasonable man would exercise under such circumstances. *Rodgers v. Carter,* 266 N.C. 564, 146 S.E. 2d 806. This duty of increased vigilance is also required when a vehicle is being operated on private property. *McNeill v. Bullock,* 249 N.C. 416, 106 S.E. 2d 509.

The facts in *Sugg v. Baker,* 261 N.C. 579, 135 S.E. 2d 565, are strikingly similar to those presented in instant case. The evidence in *Sugg v. Baker, supra,* tended to show that defendant was traveling 15 to 20 miles per hour along a street

when his attention became focused upon a man and two youths with a homemade go-cart in a driveway to his left. He did not see plaintiff's intestate, a child less than three years old, who had wandered into the street from behind a hedge along a driveway on defendant's right. There the Court held that this evidence was sufficient to permit an inference that had defendant kept a proper lookout he might have seen the child in time to have stopped or avoided the injury.

[5] Here, when considered in the light most favorable to the plaintiff, the evidence tends to show that David Williams was operating the motorcycle belonging to his father and furnished to him for his use and pleasure across the front yard of a home in which he knew little children lived and played. He had been told not to operate the vehicle on these premises. He was operating his motorcycle at a speed of about 15 miles an hour along a path which had been created by his motorcycle and the motorcycle of one of his friends. Although his vision was momentarily obstructed by a bush, he failed to decrease his speed before he saw the child and was forced to suddenly apply his brakes. By his own admission, his brakes were of little value under these conditions.

This evidence was sufficient to support a reasonable inference that David Williams was operating the motorcycle at a greater rate of speed than was reasonable or prudent under the circumstances. Likewise the evidence was sufficient to support a reasonable inference that David Williams was operating the motorcycle in a negligent manner in that he failed to keep a proper lookout.

We hold that there was ample evidence to repel defendant's motion for a directed verdict.

The decision of the Court of Appeals reversing the judgment of the trial court is

Reversed.

STATE OF NORTH CAROLINA v. BENNY REID HERNDON

No. 43

(Filed 14 April 1977)

1. **Criminal Law § 76.5— admissibility of confession — necessity for findings**

When there is conflicting evidence introduced at a *voir dire* hearing to determine the admissibility of an in-custodial, inculpatory statement made by a defendant, the trial judge must make findings of fact to show the basis of his ruling on admissibility, and such findings are conclusive upon the reviewing court if supported by competent evidence appearing in the record.

2. **Criminal Law § 76.8— waiver of constitutional rights — conflicting evidence**

The evidence supported the trial court's determination that defendant's in-custody statement was voluntarily given after a proper waiver of his constitutional rights, although defendant testifed that he was coerced into signing a waiver of his rights by reason of an assault upon him by an officer.

3. **Criminal Law § 66.1— in-court identification — opportunity for observation**

A rape victim's identification of defendant as her assailant was not rendered inadmissible by the victim's physical condition and the darkness of the scene of the crime where the evidence on *voir dire* showed that there was sufficient sunlight for the victim to see the two men in her room at 6:30 a.m. and that the men were in her apartment for thirty to forty-five minutes; during this time the victim's eyes were never covered or her vision otherwise obstructed; although the victim usually wore glasses or contact lenses, she was able to see clearly persons and objects close to her without her glasses; and at varying times, defendant's face was within one foot of the victim.

4. **Criminal Law § 66.3— objection to lineup evidence — similar evidence admitted without objection**

The admission over objection of an officer's testimony concerning a lineup will not furnish the basis for a new trial where evidence of the lineup had already been placed before the jury, without objection, during testimony by the prosecutrix.

5. **Criminal Law § 102.5— conduct of district attorney — improper examination of witness**

A district attorney may not needlessly badger or humiliate a witness by asking impertinent or insulting questions which he knows will not elicit relevant or competent evidence, and he may not place before the jury through insinuating questions, argument, or other means any evidence which is incompetent and prejudicial and not legally admissible.

6. **Criminal Law § 102.5— conduct of district attorney — cross-examination of witnesses not improper**

Defendant is not entitled to a new trial because of questions propounded by the district attorney to defendant and his mother on cross-examination where the questions to which objections were sustained did not place before the jury any incompetent or otherwise inadmissible evidence, and questions to which objections were not sustained were proper for impeachment purposes as tending to show specific acts of misconduct of defendant and bias of defendant's mother.

7. **Criminal Law § 165— necessity for objection to remarks of counsel**

Objections to improper remarks by counsel must be made before verdict or else be lost.

APPEAL pursuant to G.S. 7A-27(a) from *Fountain, J.*, at the 18 October 1976 Session of MECKLENBURG Superior Court.

Defendant was tried upon indictments, proper in form, which charged him: (a) with the rape of Patricia Louise McCroskey; (b) with the breaking and entering of the apartment of Ms. McCroskey with intent to commit a larceny therein; and (c) with the larceny of certain items of personalty belonging to Ms. McCroskey. Upon the return of a verdict of guilty to each of the above stated offenses, defendant was sentenced to life imprisonment on the conviction for rape and ten years on the conviction of breaking and entering with intent to commit larceny and larceny.

The State introduced evidence tending to show that at approximately 6:00 or 6:30 a.m. on 5 July 1976, defendant and one Charles Carson broke into the apartment of Ms. McCroskey. The two men then raped her several times. As the men left the apartment, they took certain personal property belonging to Ms. McCroskey, having a value in excess of $100.00. Defendant made a statement to officers which contained the facts related above, and which also enabled the officers to locate the property taken from Ms. McCroskey's apartment on this occasion.

Defendant testified in his own behalf. He stated that he did not commit the crimes for which he was indicted and that he did not make any statement to the police. Defendant also offered the testimony of his mother and sister, each of whom stated that defendant was at his home on the morning of 5 July 1976.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas B. Wood for the State.

David R. Badger for defendant appellant.

MOORE, Justice.

Defendant first contends that any inculpatory statements that he made to law enforcement officers should have been suppressed. He further argues that the findings made by Judge Hasty are not sufficient to support the conclusion that the statements were voluntarily and understandingly made.

Upon defendant's motion to suppress his statement to police, a hearing was held prior to trial before Judge Hasty on 21 September 1976. At the hearing, the State introduced the testimony of W. D. Starnes and W. M. Goff, investigators for the Charlotte Police Department. The testimony for the State tended to show that defendant, both orally and in writing, voluntarily and understandingly waived his "Miranda" rights after having been fully apprised thereof. The evidence further tended to show that the statement made by defendant at this time was freely and voluntarily given and was not the product of any threats or coercion. Defendant, however, testified that he was coerced into signing a waiver of his rights by reason of an assault upon him by Officer Starnes. Defendant denied that he made a statement regarding the crimes to any law enforcement officers.

After hearing this evidence, Judge Hasty made detailed findings of fact which contained, *inter alia,* this finding:

> "Defendant was then taken to an interview room at the Law Enforcement Center in Charlotte where he was read his Miranda rights by a law enforcement officer from State's Exhibit 1, after which defendant stated he understood what his rights were. At this time the officer handed defendant State's Exhibit 1, the defendant read it and stated he did not wish to have an attorney present, initialed this section of the exhibit, and signed it as indicated. The defendant was then interrogated during the course of which he made several incriminating statements. He did not appear to be under the influence of drugs or alcohol, and at no time did the officer promise him anything nor was he threatened or physically harmed so as in

any way to cause him to execute the waiver or incriminate himself. He is 19 years of age, advanced to the 9th grade in school, can read and write, has gone through the arrest procedure before, and knew of what his rights consisted."

Judge Hasty concluded that defendant was fully and properly advised of his constitutional rights and knowingly waived them. The judge further concluded that any statement made by defendant was voluntary and not the product of any promises, threats or coercion on the part of law enforcement officers. Later, at trial, Judge Fountain conducted another hearing during which he reviewed the evidence and findings made by Judge Hasty. Judge Fountain entered the additional conclusion that defendant had voluntarily waived his right to remain silent.

[1, 2] It is well established in this jurisdiction that when there is conflicting evidence introduced at a *voir dire* hearing to determine the admissibility of an in-custodial, inculpatory statement made by a defendant, the trial judge must make findings of fact to show the basis of his ruling on admissibility. *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969). Such findings of fact are conclusive upon the reviewing court if supported by competent evidence appearing in the record. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681, *cert. den.,* 396 U.S. 934 (1969). In present case, the findings of fact by the trial judge were supported by evidence in the record and were sufficient to support the conclusion that defendant's statement was voluntarily given after a proper waiver of his constitutional rights. Any contradictions between the defendant's testimony and that which was introduced by the State were for the trial judge to resolve, and his ruling will not be disturbed on appeal. *State v. Miley,* 291 N.C. 431, 230 S.E. 2d 537 (1976). This assignment is overruled.

[3] Defendant next contends that there was no evidence of any probative value which would identify defendant as one of the men who raped Ms. McCroskey. Defendant argues that this conclusion should be reached because the physical condition of the prosecutrix and the darkness of the scene of the crime made identification of him impossible. For this proposition, he cites *State v. Miller,* 270 N.C. 726, 154 S.E. 2d 902 (1967).

In *Miller,* the State's evidence tended to show that the witness who identified defendant saw a man running along the

side of a building which had been burglarized. The witness testified that the man ran along the side of the building twice, once stopping in front of the building to "peep" around it. The witness did not know defendant, but was able to pick him out of a "lineup" which was "so arranged that the identification of [defendant] would naturally be suggested to the witness." 270 N.C. at 732, 154 S.E. 2d at 905. Further, the evidence was uncontradicted that the witness was never closer than 286 feet from defendant and that the crime occurred at night. This Court held that the physical conditions under which the witness purportedly saw defendant were such that the State should have been nonsuited. However, the Court also stated: "Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury. . . . " 270 N.C. at 732, 154 S.E. 2d at 906.

We hold that in present case there was more than a "reasonable possibility of observation sufficient to permit subsequent identification." Upon timely objection by defendant, a *voir dire* hearing was held concerning the ability of Ms. McCroskey to see defendant. The evidence at this hearing showed that there was sufficient sunlight for Ms. McCroskey to see the two men in her room and that the men were in her apartment for thirty to forty-five minutes. During this time, Ms. McCroskey's eyes were never covered or her vision otherwise obstructed. Although she wore glasses or contact lenses, she was able to clearly see persons and objects close to her. At varying times, defendant's face was within one foot of Ms. McCroskey. Hence, we agree with Judge Fountain's conclusion that Ms. McCroskey could clearly and plainly see defendant in her apartment. Ms. McCroskey had the opportunity and the ability to see her assailant. The credibility of her testimony and the weight to be given thereto were properly submitted to the jury. *State v. v. Humphrey,* 261 N.C. 511, 135 S.E. 2d 214 (1964). This assignment is overruled.

[4] During direct examination, Ms. McCroskey testified without objection that on 19 July 1976 she viewed a lineup at the Mecklenburg County Jail which consisted of five black males. She further testified that she did not see defendant in the lineup and could not identify anyone in it. Prior to the introduction of this testimony, a *voir dire* hearing was held upon defendant's motion to suppress Ms. McCroskey's in-court identification.

After hearing the evidence on *voir dire*, Judge Fountain found that the identification was of independent origin and based entirely upon Ms. McCroskey's observation of defendant on the morning of 5 July 1976. *See State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). Defendant contends that the admission of the evidence of the 19 July 1976 lineup was prejudicial error in that it improperly corroborated Ms. McCroskey's identification of defendant.

At trial, defendant did not object to the testimony of Ms. McCroskey concerning the lineup nor to the introduction of a photograph of the lineup. Rather, defendant objected to the testimony of W. D. Starnes, the law enforcement officer who conducted the lineup. Starnes' testimony regarding the lineup was similar to and corroborated that of Ms. McCroskey. Thus, the evidence to which defendant objected, and to which he now assigns error, had already been placed before the jury, without objection, during the direct examination of Ms. McCroskey. Accordingly, assuming, *arguendo*, that the admission of the lineup evidence through Starnes' testimony was error, it will not furnish the basis for a new trial. *See State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); 1 Stansbury, N. C. Evidence § 30 (Brandis rev. 1973). This assignment is overruled.

Defendant contends that the conduct of the district attorney during the course of the trial was sufficiently improper to warrant a new trial. This contention is directed to certain questions propounded to defendant and his mother on cross-examination and to certain portions of the district attorney's argument to the jury.

With respect to the questions propounded to the defendant and his mother, it appears that during cross-examination the district attorney asked defendant six questions to which objections were sustained. A representative example of these questions is:

> "Q. And when she says she looked straight in your face, she's wrong about that, too?
>
> OBJECTION.
>
> OBJECTION SUSTAINED."

Other questions, to which objections were not sustained, dealt with impeaching the witness for specific acts of misconduct on the part of that witness. An example of these questions is:

> "Q. I'll ask you if on the 4th of July, 1976, you didn't go to 1625-H Merry Oaks Road off Central Avenue, where you and Charles Carson found two young women in that apartment and you and Charles Carson raped both of those women, didn't you?
>
> OBJECTION.
>
> OBJECTION OVERRULED.
>
> A. No, I didn't."

[5] It is a well settled rule in this jurisdiction that a district attorney may not needlessly badger or humiliate a witness by asking impertinent or insulting questions which he knows will not elicit relevant or competent evidence. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972). Likewise, the district attorney may not place before the jury through insinuating questions, argument, or other means any evidence which is incompetent and prejudicial and not legally admissible in evidence. *State v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561 (1973). The trial judge, however, has wide discretion in controlling the examination of witnesses. *State v. Daye, supra.*

[6] In present case, we find no conduct by the district attorney which would furnish the basis for a new trial. The questions to which objections were sustained did not place before the jury any incompetent or otherwise inadmissible evidence. Those questions to which objections were not sustained were proper for impeachment purposes as tending to show specific acts of misconduct on the part of the witness; or, with respect to those questions asked of defendant's mother, to show bias. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954). *See also* 1 Stansbury, N. C. Evidence §§ 45, 111 (Brandis rev. 1973).

[7] Defendant raises numerous assignments of error addressed to the district attorney's argument to the jury. Only one portion of the argument was objected to at trial. This objection was sustained and the jury instructed to disregard the improper statement. The remainder of the assignments were not objected to at trial. Hence, we apply the rule that objections to improper

remarks by counsel must be made before verdict or else be lost. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970). In light of the failure of defendant to object and the lack of any impropriety in the district attorney's argument sufficient to warrant a new trial, we overrule this assignment.

We have reviewed the entire record and all of defendant's assignments. There is no error contained therein sufficient to constitute prejudicial error and require a new trial.

No error.

STATE OF NORTH CAROLINA v. FRED BRENT ALLEN

No. 70

(Filed 14 April 1977)

1. **Criminal Law § 141— indictment as habitual felon**

The Habitual Felons Act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may also be indicted in a separate bill as being an habitual felon. G.S. 14-7.1 *et seq.*

2. **Criminal Law § 141— habitual felon — ancillary proceeding**

The Habitual Felons Act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon but requires that the proceeding be ancillary to a pending prosecution for the principal, or substantive, felony.

3. **Criminal Law § 141— habitual felon — increased punishment**

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime.

4. **Criminal Law § 141— habitual felon — independent proceeding — dismissal of indictment**

Where it is clear from the indictment charging defendant with being an habitual felon that prior to its return all the substantive felony proceedings upon which it is based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment on motion of the defendant should have been dismissed for failure to charge a cognizable offense.

ON petition for review of a judgment of *Crissman, J.,* entered at the April 12, 1976 Session of FORSYTH Superior Court

prior to determination by the Court of Appeals pursuant to General Statute 7A-31. Docketed and argued as No. 68, Fall Term 1976.

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

Douglas R. Hux, Attorney for defendant appellant.

EXUM, Justice.

In an independent proceeding purportedly pursuant to the North Carolina Habitual Felons Act, G.S. 14-7.1 through 14-7.6, defendant was indicted, tried and convicted of being an habitual felon. He was sentenced to twenty years imprisonment. The indictment alleged and the state's evidence tended to prove that before the present indictment was returned defendant had entered successive pleas of guilty at different times to more than three felony offenses each committed after conviction of the one preceding it. The state's evidence tended to show further that defendant had been sentenced on each of these prior convictions. Defendant moved to dismiss the indictment, to dismiss the charge at the close of all the evidence, and appealed from the judgment of the court imposing a 20-year sentence, assigning as error the entry of the judgment and failure of the trial court to allow these motions.

By his motion to dismiss the indictment defendant raised the question of whether our Habitual Felons Act authorized the state to bring this independent proceeding to declare him an habitual felon when the indictment itself revealed that before it was returned all the proceedings by which he had been found guilty of the underlying substantive felonies had been concluded. We hold that the act does not authorize such a proceeding and that defendant's motion to dismiss the indictment should have been allowed.

The Habitual Felons Act provides in pertinent part as follows:

> "§ 14-7.1. Persons defined as habitual felons.—Any person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon.
>
> "§ 14-7.2. Punishment.—When any person is charged by indictment with the commission of a felony . . . and is

also charged with being an habitual felon as defined in § 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon, as in this chapter provided, except in those cases where the death penalty is imposed.

"§ 14-7.3. Charge of Habitual Felon.—An indictment which charges a person who is an habitual felon within the meaning of § 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

. . . .

"§ 14-7.5. Verdict and Judgment.—When an indictment charges an habitual felon with a felony as above provided and an indictment also charges that said person is an habitual felon as provided herein, the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony . . . . If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge. If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this article.

"§ 14-7.6. Sentencing of habitual felons.—When an habitual felon as defined in this chapter shall commit any felony under the laws of the State of North Carolina, he must, upon conviction or plea of guilty under indictment in form as herein provided . . . be sentenced as an habitual felon; and his punishment must be fixed at a term of not less than 20 years in the State prison nor more than life imprisonment . . . . "

[1, 2] Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by

which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon. For a similar statutory procedure see General Statute 15A-928 and note especially the official commentary thereto.

One writer has identified three basic multiple offender or recidivist type procedures by which criminal sentences otherwise appropriate may be increased. "Recidivist Procedures," 40 N.Y.U. L. Rev. 332 (1965). The first type requires the allegation of recidivism in the indictment charging the substantive offense. The same jury which tries the substantive offense simultaneously tries the recidivism issue. This kind of proceeding was sustained from constitutional attack in *Spencer v. Texas*, 385 U.S. 554 (1967). A second kind of procedure is a supplemental proceeding whereby a multiple offender charge is filed after the necessary underlying felony prosecutions have been completed. If in the supplemental proceeding the defendant is found to be a multiple offender, the sentence earlier imposed for the last substantive felony is, by statute, vacated and a new enhanced sentence is imposed for that felony. The third kind of proceeding is that contemplated in the North Carolina Habitual Felons Act. This type proceeding requires the indictment or information charging the defendant to be separated into two parts, the first alleging the present, or substantive crime, and the second alleging defendant's recidivist status. Such a procedure was generally described in the cited article as follows, 40 N.Y.U. L. Rev. at 334:

> "Before the trial and in the absence of the jury, both parts of the indictment are read to the defendant, at which time he must plead to the charge of the present crime. If he pleads not guilty to the present offense and proceeds to trial, at the trial there can be no mention to the jury of the prior convictions. If and when the jury returns a verdict of guilty, the second part of the indictment is again read to the defendant, at which time he must plead to the recidivist allegation. If he admits the prior convictions, he is sentenced in accordance with the recidivist statute. If he denies them, he is entitled to a jury trial on the issue of prior convictions."

This last approach, which our legislature has adopted, seems to be the fairest and least susceptible to constitutional attack of the three described.

> "[T]he defendant has notice that he is to be charged as a recidivist before pleading to the present offense, eliminating the possibility that he will enter a guilty plea on the expectation that the maximum punishment he could receive would be that provided for in the statute defining the present crime. Moreover, while notice is given before pleading, only the allegation of the present crime is read and proved to the jury at the first trial, preventing any prejudice due to the introduction of evidence of prior convictions before the trier of guilt for the present offense." 40 N.Y.U. L. Rev. at 348.

[3] The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding "is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past." *Spencer v. Texas, supra,* 385 U.S. at 556. Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. "The habitual criminal act . . . does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered." *State v. Tyndall,* 187 Neb. 48, 50, 187 N.W. 2d 298, 300, *cert. denied sub nom. Goham v. Nebraska,* 404 U.S. 1004 (1971).

The state urges that our statute is susceptible of an interpretation which would permit a separate habitual felon proceeding to take place supplementary to and following the completion of the substantive felony prosecutions. The argument is based on the requirement in General Statute 14-7.3 that the indictment charging the habitual felon status "shall be separate from the indictment charging him with the principal felony" and General Statute 14-7.5 which provides that the question of defendant's recidivism "*may* be presented to the same jury."

(Emphasis added.) Since the statute does not make mandatory the requirement that the same jury hear both issues, the state argues that a different jury in a different and subsequent proceeding may determine the recidivism issue.

This argument misses the point. One basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist.* Failure to provide such notice where the state accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences. *United States v. Edwards,* 379 F. Supp. 617 (M.D. Fla. 1974). Since the statute makes no distinction between guilty pleas and jury verdicts of guilt the same notice requirement prevails in either event. *Id.*

The state relies only on cases from Louisiana. The court in these cases, however, had under consideration a Louisiana statute which specifically provided for the filing of a supplemental "multiple offender charge" after the necessary underlying felony prosecutions had been completed. *State v. Bullock,* 329 So. 2d 733 (La. 1976); *State v. Bell,* 324 So. 2d 451 (La. 1975); *State v. McQueen,* 308 So. 2d 752 (La. 1975). This, as we have already noted, is a different statutory scheme from that contained in our Habitual Felons Act.

[4] Since it is clear from the indictment that prior to its return all the substantive felony proceedings upon which it is based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment on motion of the defendant should have been dismissed for failure of the bill to charge a cognizable offense. G.S. 15A-954(10). The judgment of the Forsyth Superior Court is therefore reversed and the case remanded to that court for entry of an order that the indictment be dismissed.

Reversed and remanded.

FALLS SALES COMPANY, INC., PLAINTIFF v. BOARD OF TRANSPORTATION, DEFENDANT v. ASHEVILLE CONTRACTING COMPANY, THIRD-PARTY DEFENDANT

No. 47

(Filed 14 April 1977)

1. **Highways and Cartways § 7— contractor's liability — injury constituting taking of property**

A contractor who is employed by the Board of Transportation to do work incidental to the construction or maintenance of a public highway and who performs the work with proper care and skill cannot be held liable to a property owner for damages resulting to property from the performance of the work; rather, in such a case, the injury to the property constitutes a taking of the property for public use for highway purposes, and the only remedies available to the owner are a special condemnation proceeding against the Board of Transportation under G.S. 136-19 or an action for "inverse condemnation" against the Board to recover compensation for the property taken or damaged.

2. **Highways and Cartways § 7; Negligence § 5— blasting operations — third party defendant strictly liable for damages**

Blasting is an inherently dangerous or extrahazardous activity and persons using explosives are strictly liable for damages proximately caused by an explosion; thus, when a contractor employed by the Board of Transportation uses explosives in the performance of his work, he is primarily and strictly liable for any damages proximately resulting therefrom.

3. **Highways and Cartways § 7; Negligence § 5— blasting operations — contractor's assumption of liability for damages — proof of negligence unnecessary**

Allegation and proof of negligence by the Board of Transportation in its action against third party defendant for indemnification for any amount recovered from defendant Board by plaintiff for the taking of property by blasting damages was unnecessary, since defendant Board intended to and did insure itself against the highly unpredictable and dangerous consequences of blasting by including in the contract specifications a clause which stated explicitly and without qualification that "the contractor shall be responsible for any and all damage resulting from the use of explosives," and third party defendant's motions to dismiss, for summary judgment, and for directed verdict were properly denied.

4. **Appeal and Error § 2— appeal from Court of Appeals — review limited to questions first presented in Court of Appeals**

After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals, and the potential scope of the

Supreme Court's review is limited by the questions properly presented for first review in the Court of Appeals.

5. **Judgments § 5; Rules of Civil Procedure § 42— severance order interlocutory — modification of order proper**

A severance order is an interlocutory order, that is, one incidental to the progress of the cause which does not affect a substantial right of the parties, and, as such, it may be subsequently modified by the presiding judge upon a determination that present circumstances warrant such action.

6. **Rules of Civil Procedure §§ 14, 42— third party impleaded — severance — principal action properly tried first**

Even where circumstances require separate trials after a Rule 14 impleader, the better practice is to try the principal action first.

APPEAL by third-party defendant pursuant to G.S. 7A-30(2) from decision of the Court of Appeals, reported in 32 N.C. App. 97, 231 S.E. 2d 168 (1977) (opinion by Martin, J., Britt, J., concurring, Vaughn, J., dissenting), affirming judgment of *Walker, S.J.*, at the 1 March 1976 Session of HENDERSON Superior Court, directing a verdict for the defendant.

Plaintiff instituted this inverse condemnation action against defendant Board of Transportation (hereinafter referred to as Board) alleging, among other things, a taking of plaintiff's property by the depositing of rocks, timber and other debris on plaintiff's land beyond defendant's highway right-of-way and construction easements. For this and other damages alleged, plaintiff prays for compensation in the amount of $87,500.

Defendant filed an answer and a third-party complaint denying these allegations and further alleging that any damages which may have resulted from blasting are the responsibility of the third-party defendant, Asheville Contracting Co. (hereinafter referred to as Asheville), the independent contractor employed by the defendant to construct the highway. The defendant alleges that §§ 7.11 and 7.14 of the "North Carolina State Highway Commission, Raleigh, Standard Specifications for Roads and Structures, including Supplement No. 1, Revised January 1, 1965," incorporated by reference into the contract between the defendant and the third-party defendant, places absolute responsibility for blasting damages upon the third-party defendant, and thus entitles the defendant to indemnification from the third-party defendant for any amount recovered

by the plaintiff against the defendant for blasting damages. §§ 7.11 and 7.14 of the specifications provide as follows:

> "Section 7.11 *Use of Explosives.* When the use of explosives is necessary for the prosecution of the work, the contractor shall exercise the utmost care not to endanger life or property. *The contractor shall be responsible for any and all damage resulting from the use of explosives.*" (Emphasis added.)
>
> "Section 7.14 *Responsibility for Damage Claims.* The contractor shall indemnify and save harmless the Commission . . . from all suits, actions, or claims of any character brought because of any injuries or damages received or sustained by any person, persons, or property on account of the operations of the said contract; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of said contractor. . . ."

Asheville moved to dismiss the defendant's third-party action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that the Board of Transportation failed to state a claim against it upon which relief could be granted. Judge Snepp denied this motion. Later Asheville moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure which motion was denied by Judge Friday.

Asheville filed an amended answer which asserts as defenses that all blasting operations were conducted in a prudent, careful, and accepted manner under the supervision of the Board of Transportation; that indemnification of the Board would constitute unjust enrichment because Asheville would in effect be purchasing an additional right-of-way from the plaintiff for the Board; that the Board was negligent in its design of the project and as a consequence did not purchase sufficient right-of-way from the plaintiff for the road construction, and that it was impossible for the third-party defendant to perform its contract strictly due to the Board's failure to purchase sufficient right-of-way.

In the pre-trial order, all parties expressed the opinion that a separation of the issues in the case would not be feasible.

Nevertheless, Judge Walker ordered the two actions severed for trial and the third-party action between the Board and Asheville to be tried first. All parties excepted to this order.

At trial the Board of Transportation presented evidence as to the nature and extent of blasting damages to plaintiff's property and evidence tending to show that the Board's inspector at the highway project in question was not a blasting expert, and that the blasting was the responsibility of the independent contractor. Asheville offered an explosive expert who testified that he personally supervised the blasting on the behalf of Asheville. He testified that the blasting was performed in accordance with approved methods in general use; that the Board's inspector did not object to the procedures used, and that he knew of no other way the rock could have been blasted so as to contain the deposit from the blast within the construction easement.

At the close of all the evidence, both the defendant and the third-party defendant moved pursuant to Rule 50 of the North Carolina Rules of Civil Procedure for a directed verdict. Judge Walker denied Asheville's motion but granted the Board's motion for a directed verdict, finding that the defendant was entitled to indemnification from the third-party defendant under the terms of their contract. The trial court entered a final judgment in the third-party action and certified it for immediate appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Attorney General Rufus L. Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the Board of Transportation.

Adams, Hendon & Carson, P.A. by George Ward Hendon for the third-party defendant.

COPELAND, Justice.

Asheville first contends the Court of Appeals erred in affirming the trial court's denial of its motions to dismiss, for summary judgment, and for a directed verdict. Asheville claims its various motions should have been allowed because neither the plaintiff nor the defendant Board of Transportation has ever alleged or proven that Asheville performed its work in a negligent manner or in any manner inconsistent with prevailing good practices in the construction industry.

[1] It is a well settled rule in this jurisdiction that a contractor who is employed by the Board of Transportation to do work incidental to the construction or maintenance of a public highway and who performs the work with proper care and skill cannot be held liable to a property owner for damages resulting to property from the performance of the work. In such a case, the injury to the property constitutes a taking of the property for public use for highway purposes. *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198 (1968); *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900 (1963); *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182 (1952). The only remedies available to the owner are a special condemnation proceeding against the Board of Transportation under G.S. 136-19 or an action for "inverse condemnation" against the Board to recover compensation for the property taken or damaged. *Reynolds, supra; Insurance Co., supra.* But if the contractor employed by the Board of Transportation performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. *Reynolds, supra; Insurance Co., supra; Moore, supra.*

We do not believe these established rules bar the third-party action involved in the instant case. While nothing else appearing, the contractor employed by the Board of Transportation is not absolutely liable for damages to a property owner, we have never held that a contractor may not *contract* to assume this liability. In *Reynolds, supra,* an action brought by the Highway Commission against a contractor to recover compensation paid to the owner of a building damaged by the contractor in the construction of a highway for the plaintiff, this Court had occasion to construe § 7.14 of the standard specifications, the general damage responsibility clause of the contract. In that case, we held that the parties did not *contemplate or intend* that the contractor should reimburse the Highway Commission for any amount paid by the Commission in discharge of its own primary liability and that reimbursement was contemplated and intended only in instances in which the Commission was called upon to discharge a liability to which it was subject on account of some wrongful act of the contractor and for which the contractor was primarily liable. *Reynolds, supra.*

[2] *Reynolds* is distinguishable in several respects from the case at bar. First, the trial court found as a fact in *Reynolds* that the damages to the building *did not result from blasting opera-*

tions but were the result of the use of standard and accepted machinery and road-building equipment according to standard and accepted methods and techniques in the road construction industry. The contractor in *Reynolds, supra,* thus did not appear to be engaged in an ultrahazardous activity. We have held that blasting is an inherently dangerous or extrahazardous activity and that persons using explosives are strictly liable for damages proximately caused by an explosion. *Insurance Co., supra.* Thus, when a contractor employed by the Board of Transportation uses explosives in the performance of his work we believe that he is primarily and strictly liable for any damages proximately resulting therefrom. *See Insurance Co., supra.*

Fifty years ago, the Fourth Circuit Court of Appeals found Asheville Construction Co. (possibly a predecessor of the third-party defendant in this case?), an independent contractor, strictly liable on the theory of trespass for damages caused by rock and debris thrown on the property of another as a result of blasting operations. *Asheville Construction Co. v. Southern Ry. Co.,* 19 F. 2d 32 (1927) (Parker, J.). That court held the fact that the contractor was employed by an agency of the State to construct the highway did not entitle it to any immunity from liability. *Asheville Construction Co., supra.*

[3] Assuming *arguendo* that the contractor is not primarily and strictly liable to the property owner for damages resulting from blasting, *Reynolds* is nevertheless distinguishable because of § 7.11 of the standard specifications. That specific liability clause of the contract states explicitly and without qualification that "[t]he contractor shall be responsible for any and all damage resulting from the use of explosives." The Board of Transportation, which is liable for any "taking" of property through the use of explosives by its contractors, *Insurance Co., supra,* has the right to enter into an indemnity contract with the contractor. Clearly, the Board of Transportation by the insertion of § 7.11 into the contract specifications intended to insure itself against the highly unpredictable and dangerous consequences of blasting. "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *Roberson v. Williams,* 240 N.C. 696, 700-1, 83 S.E. 2d 811, 814 (1954). "It is the simple law of contracts that 'as a man consents to bind himself, so shall he be bound.' " (Cases

omitted.) *Troitino v. Goodman,* 225 N.C. 406, 414, 335 S.E. 2d 277, 283 (1945).

We conclude that allegation and proof of negligence by the Board of Transportation in its action against Asheville is unnecessary and Asheville's motions to dismiss, for summary judgment, and for a directed verdict were properly denied.

[4] Asheville next assigns as error the trial court's allowance of the Board's motion for a directed verdict. This issue is not properly before us. Asheville did not present and discuss the assignment in its brief before the Court of Appeals as required by Rule 28(a) of the North Carolina Rules of Appellate Procedure. Accordingly, under Rule 28(a) the assignment was "deemed abandoned" and that court did not consider the question. After there has been a determination by the Court of Appeals, review by this Court, whether by appeal of right or by discretionary review, is to determine *whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before us for review. State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); Rule 16(a), N. C. Rules of Appellate Procedure. We inquire into the proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals except in those instances in which we elect to exercise our general supervisory power over inferior courts. *State v. Williams, supra.* A party who was an appellant in the Court of Appeals is only entitled to present in his brief before this Court assignments of error which he *properly presented for review to the Court of Appeals.* Rule 16(a), N. C. Rules of Appellate Procedure; *accord, State v. Colson, supra.* The potential scope of our review is limited by the questions properly presented for first review in the Court of Appeals. *State v. Colson, supra;* Drafting Committee Note to Rule 16(a). "The attempt to smuggle in new questions is not approved." *State v. Colson, supra* at 309, 163 S.E. 2d at 386.

Nevertheless, we note that the directed verdict was proper because the only issue to be determined was a question of law based on admitted facts. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). Both parties admit their written contract. We find § 7.11 of the standard specifications is free from ambiguity and when a written contract is free from ambiguity, interpretation of the contract is for the court. *Briggs v. Mills, Inc.,* 251 N.C. 642, 111 S.E. 2d 841 (1960). Asheville's conten-

tion that there were other issues of fact related to its affirmative defenses which should have been submitted to the jury is without merit.

On this appeal neither the Board nor Asheville challenges Judge Walker's order serving the third-party action from the principle action and requiring the third-party action to be tried first. However, in view of the posture in which this action will return to the superior court, we are constrained to make the following observations:

[5] A severance order is an interlocutory order, that is, one incidental to the progress of the cause which does not affect a substantial right of the parties. As such, it may be subsequently modified by the presiding judge upon a determination that present circumstances warrant such action. "Interlocutory orders are subject to change 'at any time to meet the justice and equity of the case upon sufficient grounds shown for the same.' " *Calloway v. Ford Motor Co.*, 281 N.C. 496, 502, 189 S.E. 2d 484, 488 (1972).

The decision in this opinion, that Asheville is absolutely liable to the Board for all sums recovered by the plaintiff from the Board for blasting damages, settles one of the major issues in the case. Thus from now on Asheville's interests will be inextricably bound with those of the Board.

[6] The provision for consolidated trials contained in G.S. 1A-1, Rule 14(a) was designed to deal with this type of situation. "When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof." Wright & Miller, Federal Practice and Procedure § 1442 (1971). Even where circumstances require separate trials after a Rule 14 impleader, we believe the better practice is to try the principal action first.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. GARY EAKINS

No. 45

(Filed 14 April 1977)

1. **Criminal Law § 117— credibility of interested witness — charge not required absent request**

An instruction as to the credibility of an interested witness relates to a subordinate feature of the case, and the court is not required to charge thereon absent a request; however, when the trial judge undertakes to instruct on a subordinate feature of a case he must do so accurately and completely.

2. **Criminal Law § 117.5— scrutiny of defendant's testimony — proper instruction**

It is not error for the trial court to instruct the jury to scrutinize the testimony of a defendant and his relatives in light of their interest in the verdict; however, the jury must also be instructed to the effect that if, after such scrutiny, they believe the testimony it should be given the same weight and credence as the testimony of any witness.

3. **Criminal Law § 117.5— scrutiny of defendant's testimony — like instruction about State's witnesses not given — no error**

Where the trial court instructed the jury to scrutinize closely the testimony of defendant and those closely related to him, it was not incumbent upon the trial judge, without request, to give a like instruction as to any possible interested witness who testified for the State.

4. **Criminal Law § 117.4— alleged accomplices — no instruction to scrutinize testimony — no error**

In a first degree murder prosecution where the evidence tended to show that two witnesses were standing by defendant when the shooting occurred and there was some evidence that one of them aided in disposing of the murder weapon, evidence was insufficient to show that the witnesses were accomplices or accessories after the fact, and the trial court therefore did not err in failing to charge the jury to scrutinize carefully the testimony of the witnesses.

APPEAL by defendant from *Rouse, J.*, at the 30 August 1976 Criminal Session of SAMPSON County Superior Court.

Defendant was tried upon a bill of indictment charging him with murder in the first degree. He entered a plea of not guilty.

The State presented evidence which tended to show the following:

In the early morning hours of 2 May 1976 defendant was present at a night spot known as "Raz's Place" which was lo-

cated near Harrells, North Carolina. Shortly after midnight defendant approached Ruth Mae Lamb, a crippled girl, and began to make advances towards her. He left and went outside when a friend of Ruth Mae's walked up. When defendant returned he asked Violet McNeil, who had accompanied Larry Chestnutt to "Raz's Place," to dance with him. She refused and he thereupon threatened to strike her. An argument ensued between defendant and Larry Chestnutt. Violet attempted to get Larry to leave by taking his hand and leading him to the door. As Larry slowly backed towards the door, defendant pulled a sawed-off shotgun from his pants and shot him. Defendant fled.

After the shooting Johnny Beale and Douglas Hall left the scene in a car driven by defendant. Defendant obtained a post-hole digger from his home and, accompanied by Beale and Hall, drove to a secluded spot where he buried a sawed-off shotgun. He threatened to kill Johnny Beale if he told anyone what he had done.

It was stipulated that Larry Chestnutt died as a result of a shotgun wound to the throat.

Defendant testified that he was present at "Raz's Place" when the shooting occurred, but that he had not fired the shot. William Pigford, defendant's nephew, testified that he was standing next to defendant when the shooting took place and that defendant had no part in the shooting. Defendant's wife testified that when defendant came home on the morning of 2 May 1976 he did not behave in an unusual manner. She also stated that defendant had never owned a sawed-off shotgun. Several witnesses testified as to defendant's good character and reputation.

The jury returned a verdict of guilty of murder in the first degree and the trial judge entered judgment imposing a sentence of life imprisonment.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Dale P. Johnson and Charles L. Becton, for defendant.

BRANCH, Justice.

By his first assignment of error defendant contends that the trial judge erred in charging that the jury should carefully

consider and scrutinize the testimony of defendant and those closely related to him. The portion of the charge questioned by this assignment of error is as follows:

> When you come to consider the evidence and the weight you will give to the testimony of the different witnesses, the Court instructs you that it is your duty to carefully consider and scrutinize the testimony of a defendant when he testifies in his own behalf and also the testimony of those who are closely related to him.
>
> In passing upon the testimony of such witnesses, the jury ought to take into consideration any interest the witness has in the result of the action, but the Court instructs you that the law requiring you to do so does not require you to reject or impeach such evidence and if you believe such witnesses or witness has sworn to the truth, you will give to his or their testimony the same weight you would do that of any disinterested or unbiased witness.

Defendant's position is that the State received the benefit of a favorable charge without any request and that he was left in the position of being required to request a like charge as to any State's witnesses who were interested witnesses.

[1-3] Initially we note that an instruction as to the credibility of an interested witness relates to a subordinate feature of the case and the court is not required to charge thereon absent a request. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335. However, when the trial judge undertakes to instruct on a subordinate feature of a case he must do so accurately and completely. *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39; *State v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867. We have approved charges that the jury should scrutinize the testimony of a defendant and his relatives in light of their interest in the verdict. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839; *State v. Britt,* 263 N.C. 535, 139 S.E. 2d 735; *State v. Ellington,* 29 N.C. 61. However, this approval is qualified by the requirement that the jury must also be instructed to the effect that if, after such scrutiny, they believed the testimony it should be given the same weight and credence as the testimony of any witness. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149; *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217. The instruction here given is in accord with those approved by this Court. Nevertheless, defendant contends that upon giving this subordinate instruction it was incumbent upon

the trial judge, *without request,* to give a like instruction as to any possible interested witness who testified for the State. We do not agree.

In *State v. O'Neal,* 187 N.C. 22, 120 S.E. 817, defendant was convicted of the unlawful sale of spiritous liquor. The principal witnesses for the State were two detectives who were employed and paid to get evidence against persons who were unlawfully dealing in liquor. The defendant contended that since the trial judge instructed the jury to scrutinize the testimony of defendant and his relatives, he should have given a similar instruction in regard to the testimony of the detectives. Defendant admitted that he did not request this instruction. Rejecting the defendant's contention, the Court, speaking through Justice Adams, stated:

> Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instructon. . . .

A similar question was presented in *State v. Anderson,* 208 N.C. 771, 182 S.E. 643, where the defendants, among other things, were charged with conspiracy to dynamite certain buildings in Alamance County. In an opinion by Chief Justice Stacy the Court held:

> Nor was there error in the court's instruction to the jury that the testimony of the defendants and their near relatives who went upon the stand and testified in their behalf should be scrutinized with care in order to ascertain to what extent, if any, their testimony was warped or biased by their interest, adding, however, that if, after such scrutiny, they believed such witnesses, they would give the same credit to their testimony as if they were disinterested. *S. v. Lee,* 121 N.C., 544, 28 S.E., 552; *S. v. Deal,* 207 N.C., 448, 177 S.E., 332.
>
> Again, the defendants complain because the trial court did not caution the jury, or instruct them, as to how the testimony of detectives and accomplices should be received and considered. *S. v. Palmer,* 178 N.C., 822, 101 S.E., 506.

There was no request for such instruction, and the assignment is without exceptive basis. A similar contention was advanced and rejected in *S. v. O'Neal,* 187 N.C., 22, 120 S.E., 817. A like result must follow here.

The facts in *State v. Sauls,* 190 N.C. 810, 130 S.E. 848, are remarkably similar to those in instant case. We quote from that case:

> The jury were instructed to "scrutinize the evidence of the defendant and that of all his close relatives before accepting it as true," and the defendant excepted because the instruction was not extended and applied to all interested witnesses. The exception must be overruled. . . .

We approved a charge similar to the one herein under consideration in *State v. Vance,* 277 N.C. 345, 177 S.E. 2d 389, and further stated:

> . . . Neither was there prejudicial error in the trial court's failure to give a similar instruction as to possibly interested State's witnesses since defendant did not request such instruction on this subordinate feature of the trial. . . .

We note that there is a split of authority concerning the question presented by this assignment of error. 75 Am. Jur. 2d, Trial § 861. However, our research discloses that the rule enunciated in the line of cases represented by *State v. O'Neal, supra,* is firmly entrenched in this jurisdiction. We do not believe that the requirement that a defendant must request the desired instruction places an unconscionable burden upon him.

Our conclusion that no prejudicial error is made to appear under this assignment of error is strengthened by the following portion of the trial judge's charge:

> When you come to consider the evidence in this case, I charge you that you are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand.
>
> In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know, or remember the facts or occurrences about

which he has testified, the manner and appearance of the witness, any interest, bias or prejudice, the witness may have, the apparent understanding and fairness of the witness and whether his testimony is reasonable and whether his testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

In light of the entire charge and particularly the portion above quoted, we do not believe that the jurors could have failed to understand that the question of the credibility of *all* the witnesses was solely for them.

[4] Defendant also directs the same argument contained in his first assignment of error to the testimony of the alleged accomplices Johnny Beale and Douglas Hall.

"The generally accepted test as to whether a witness is an 'accomplice' is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony." *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165.

The State's evidence tended to show that the witnesses Beale and Hall were standing by defendant when the shooting occurred, and there was some evidence that one of them aided in disposing of the murder weapon.

Mere presence at the scene of a crime does not make one guilty as a principal or as an aider and abettor or as an accessory before the fact. *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655. While the evidence might have permitted a jury to find that the witness Beale was an accessory after the fact, such a finding would not make him subject to the rules relating to accomplice testimony. *State v. Bailey, supra.*

For the reasons herein stated we reject defendant's contention that the trial judge erred when he failed to charge the

jury to carefully scrutinize the testimony of the witnesses Beale and Hall.

Our review of this entire record discloses

No error.

EARL SAMUEL FARMER v. EARL DAVIS CHANEY AND WIFE, BETTY BOWLIN CHANEY

No. 66

(Filed 14 April 1977)

Automobiles § 60— skidding on water — insufficient evidence of negligence

In a passenger's action to recover for injuries received when the car in which he was riding skidded on water and overturned, plaintiff's evidence was insufficient to support an inference that defendant driver was negligent in (1) operating his automobile at an excessive speed, (2) failing to keep a proper lookout, or (3) failing to keep his vehicle under proper control where it tended to show that it was dark and raining heavily; defendant was talking to plaintiff at the time while driving at 35 to 40 miles per hour in a 55 mile-per-hour zone; such speed was reasonable and prudent under existing conditions; the car skidded on a sheet of water one-eighth inch deep, eighteen to twenty feet wide, flowing across the road at right angles; defendant did not see the sheet of water so as to distinguish it from the downpour of rain and recognize the added hazard thus created; and a highway patrolman, traveling in the opposite direction on the other side of a median, did see a similar sheet of water running across his lane because he was already aware of the hazard.

PLAINTIFF appeals from decision of the Court of Appeals, 29 N.C. App. 544, 225 S.E. 2d 159 (1976), upholding judgment of *Collier, J.*, 15 September 1975 Session, RANDOLPH Superior Court. This case was docketed and argued in this Court as case No. 57 at the Fall Term 1976.

This is an action to recover damages for personal injuries sustained while plaintiff was a passenger in an automobile owned by Betty Chaney and operated by Earl Davis Chaney.

Patrolman R. D. Smith, witness for plaintiff, testified that at approximately 9:30 p.m. on 6 July 1974 he was driving north on U. S. Highway 220 just north of Mayodan. U. S. 220 at that point has two lanes for northbound traffic separated by a grass

median from two lanes for southbound traffic. All travel lanes are twenty-four feet wide, and the grass median is twenty feet wide. It had been raining intermittently all day and a heavy rain was falling at the time of the accident in which plaintiff was injured. Patrolman Smith observed an automobile, later determined to be the Chaney car, in a southbound lane coming toward him. At about the same time he saw water, eighteen to twenty feet in width and approximately one-eighth inch in depth, flowing from west to east across his lane of travel. The two automobiles were about equidistant from the flow of water and were approaching it from opposite directions at a speed of 35 to 40 miles per hour. Patrolman Smith knew surface water flowed across U. S. 220 at that point because he had hit and skidded through the flow on a previous occasion. He slowed down as he approached the water and then saw defendant's car hit the water, skid into the median and overturn. Trooper Smith proceeded to the nearest crossover about a quarter of a mile away, crossed into the southbound lane and returned to the overturned Chaney car. In a conversation there at the scene of the accident, defendant Earl Chaney stated: "I hit the water. . . . We were talking and the next thing I knew we were over here in the median. . . . I must have lost it when I hit this water."

Defendants' motion for directed verdict at the close of plaintiff's evidence was allowed. That judgment was upheld by the Court of Appeals with Hedrick, J., dissenting. Plaintiff thereupon appealed to the Supreme Court pursuant to G.S. 7A-30(2).

Ottway Burton, attorney for plaintiff appellant.

Allan R. Gitter and William C. Raper of Womble, Carlyle, Sandridge & Rice, attorneys for defendant appellants.

HUSKINS, Justice.

Defendants moved for a directed verdict at the close of plaintiff's evidence. The motion was allowed, and plaintiff's sole assignment of error is addressed to the propriety of that ruling.

On motion by a defendant for a directed verdict at close of plaintiff's evidence in a jury case, as here, the evidence must be taken as true and considered in the light most favorable to

plaintiff. When so considered, the motion should be allowed if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. G.S. 1A-1, Rule 50(a), Rules of Civil Procedure; *Investment Properties v. Allen,* 281 N.C. 174, 188 S.E. 2d 441 (1972), *vacated on other grounds,* 283 N.C. 277, 196 S.E. 2d 262 (1973); *Adler v. Insurance Co.,* 280 N.C. 146, 185 S.E. 2d 144 (1971); *Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971).

Examination of the complaint reveals that plaintiff alleged negligence on defendant's part in that he (1) operated the automobile at a speed greater than was reasonable and prudent under conditions then existing, (2) failed to keep a proper lookout, and (3) failed to keep the vehicle under proper control. For the reasons which follow, we hold that the evidence offered was insufficient, as a matter of law, to support any of these allegations so as to justify a verdict for the plaintiff.

Only three witnesses—the plaintiff, his wife, and Patrolman R. D. Smith—testified. The testimony of plaintiff and his wife deals with the nature and extent of the injuries, lost wages, pain and suffering, and other matters bearing upon the measure of damages. As to negligence on defendant's part, the case must stand or fall on the testimony of Trooper Smith.

With respect to the speed of the Chaney car, Trooper Smith testified that it was being operated at a speed of 35 to 40 miles per hour in a 55 mile-per-hour zone. The highway on which the accident occurred is a hard-surfaced four-lane road with a 20-foot wide grass median. Each travel lane is twenty-four feet wide. Although the accident occurred at night in a heavy rain, Trooper Smith testified he himself was driving at a speed of 35 to 40 miles per hour and considered that to be a safe speed for the existing conditions. There is no evidence to the contrary —not even from plaintiff himself. Obviously the allegation of negligence based on excessive speed finds no support in the evidence.

Likewise, plaintiff's allegation that defendant failed to keep a proper lookout and failed to keep the vehicle under proper control is unsupported by the evidence. All the evidence tends to show that when the car hit the water flowing across the highway, it immediately skidded into the median and flipped over. Plaintiff himself testified that "[w]e was talking, and about that time we ran into water. I heard it hit under the

car, and the next thing I know the car flipped over." This testimony, absent evidence to the contrary, forestalls every reasonable inference of negligent operation of the car after it began to skid.

The "mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. [Citations omitted.] The skidding of a motor vehicle while in operation may or may not be due to the fault of the driver. [Citations omitted.] Skidding may be caused or accompanied by negligence on which liability may be predicated." *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582 (1964); *accord, Webb v. Clark,* 264 N.C. 474, 141 S.E. 2d 880 (1965).

In *Webb v. Clark, supra,* the plaintiff's evidence established that the road was "wet and icy" generally but not near the point of the accident. A passenger called the driver's attention to a patch of ice *just before the car skidded on it.* This evidence was held to be insufficient to show that the condition of the highway in the area where the skidding commenced was such that skidding could be reasonably anticipated, "and does not show that the skidding of the automobile was caused by any failure of defendant to keep a proper lookout and to exercise reasonable care and precaution to avoid it." The facts in this case are analogous.

Even so, plaintiff argues that defendant's negligence occurred before the car struck the water, skidded and overturned. Plaintiff strongly contends that the failure of the defendant to see the water flowing across the highway, appreciate the threat it posed and reduce his speed accordingly would permit a jury to find that defendant failed to keep a proper lookout resulting in injury to plaintiff, and thus require submission of that question to the jury. He argues that since Trooper Smith saw the water, defendant could and should have seen it also and taken appropriate precautions.

Here, the evidence considered in the light most favorable to plaintiff would permit a jury to find: (1) It was dark and raining heavily; (2) defendant was talking to plaintiff at the time while driving at 35 to 40 miles per hour in a 55 mile-per-hour zone; (3) such speed was reasonable and prudent under existing conditions; (4) the car skidded on a sheet of water one-eighth inch deep, eighteen to twenty feet wide, flowing across the road at right angles; (5) defendant did not see the sheet

the jury retires so as to give the trial judge an opportunity to correct any misstatements; otherwise, any objection to the misstatements will be deemed to have been waived and will not be considered on appeal.

3. **Homicide § 21— first degree murder — defendant as lookout — sufficiency of evidence**

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that the daughter of the victim observed two black males follow her father behind a store counter, one of the males shoot her father, and the blacks flee from the store after the shooting; the black who shot the victim wore a red and black or red and blue bandanna over the lower portion of his face; defendant confessed that he was paid $20 to be a "lookout" for an armed robbery of a store; one of the perpetrators of the crime was noted by defendant in his statement as wearing a red and blue handkerchief around his neck and as being armed with a weapon; and defendant was paid the $20 after the robbery and told not to talk to anyone about the robbery.

APPEAL of right pursuant to G.S. 7A-27(a) from *Braswell, J.*, at the 5 July 1976 Criminal Session of GRANVILLE Superior Court.

Defendant was tried upon an indictment, proper in form, for the murder of Roy Brent Bullock. Upon the return of a verdict of guilty of first degree murder, defendant was sentenced to life imprisonment.

The evidence introduced by the State tended to show that on the evening of 18 November 1975, Roy Brent Bullock was operating the Food Mart in Butner, North Carolina. Between 9:00 and 9:30 p.m. on that evening, Bullock's daughter, Lois Marie, age thirteen, was in a "walk-in" cooler placing merchandise on the display racks of the cooler. The cooler had glass doors which enabled Lois to see her father standing at the counter of the store.

While in the cooler, Lois saw two black males at the counter talking to her father. She then saw a flash of fire come from a gun which one of the men was carrying and she heard two shots. The males then ran from the store. Lois was unable to give a detailed description of the two men. However, she stated that the man who held the gun and fired the shots was wearing a red and blue or red and black bandanna pulled over the bottom half of his face, had short hair, and was taller than the other male.

It was stipulated that Bullock died as a result of the gunshot wounds received on this occasion.

Officer Lorenzo Leathers testified that on 6 December 1975, he questioned defendant concerning certain matters unrelated to this case. After being fully apprised of his constitutional rights, defendant told Leathers that he knew nothing concerning the matters about which he was being questioned. However, defendant stated that he did know about "some matter that had taken place outside Durham." He then indicated he knew something about the robbery which had occurred at Butner, and thereupon made a statement to Leathers. In this statement, defendant admitted that he was paid twenty dollars for acting as the "lookout" during the robbery of a store in Butner. This robbery was committed by Joe Perry, Albert Willis and one "Boo Boo," all of whom were armed—Perry with a .22 automatic pistol, "Boo Boo" with a .41 Magnum pistol and Willis with between a .45 and .25 automatic. He further stated that Joe Perry had a blue and red handkerchief tied around his neck at the time of the robbery. The statement was first reduced to longhand by Leathers and signed by defendant. Later, the statement was typewritten and also signed by defendant.

Defendant testified in his own behalf. He stated that on the evening of 18 November 1975 he was playing cards at the home of his friends, Leroy and Shirlyn Walters. Defendant further testified that he had been coerced into signing the statements prepared by Leathers and that the statements were the creation of Leathers' imagination. Defendant also offered the testimony of the Walters who corroborated defendant's statement that he was at their home on the evening of 18 November 1975.

Other facts necessary to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Elizabeth C. Bunting for the State.

Felix B. Clayton and William Land Parks for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that he was deprived of his liberty without due process of law under the Fifth and Four-

teenth Amendments to the United States Constitution and under Article I, Section 19, of the North Carolina Constitution. This contention is based upon the premise that the felony-murder rule relieves the prosecution of the burden of proving beyond a reasonable doubt every element of the crime of first degree murder. More particularly, defendant objects to the operation of the felony-murder rule upon the ground that it relieves the State of the necessity of proving actual malice on the part of defendant at the time he committed the crime. For this proposition, he cites *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

Defendant's argument is not well taken and has been rejected by this Court in *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). In *Swift*, we held that *Mullaney* did not signal the demise of our felony-murder rule, as stated in G.S. 14-17. The Court in *Mullaney* condemned a law of the State of Maine which affirmatively shifted the burden of proving a critical element of the State's case to the defendant. The holding of the case was that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 704, 44 L.Ed. 2d at 522, 95 S.Ct. at 1892.

The felony-murder rule in this jurisdiction is contained in G.S. 14-17, and provides in pertinent part:

> "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. . . . " (By virtue of the decision of the Supreme Court of the United States in *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), and the provisions of the 1973 Session Laws, c. 1201, s. 7 (1974 Session), the punishment for first degree murder under this statute is now life imprisonment rather than death. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).)

This rule does not place any burden of proof upon a criminal defendant. In present case, the State was required to prove, beyond a reasonable doubt, that a murder was committed in the perpetration or attempted perpetration of a robbery, and that defendant participated in that crime. Upon a finding by the jury that these elements are proved beyond a reasonable doubt, defendant is, by statute, guilty of first degree murder. There is no requirement in the statutory definition of the crime that the State prove malice, premeditation or deliberation. Thus, the State is not relieved of the burden of proving malice, since malice is not an element of the crime. Further, no burden is placed upon a defendant to prove or disprove any of the elements of the crime contained in G.S. 14-17.

In his charge to the jury, the trial judge clearly placed the burden of proving every element of the crime upon the State. The judge also properly charged that the burden of proving an alibi did not rest upon defendant but rather the State had the burden of proving beyond a reasonable doubt that defendant participated in the crime. Accordingly, since no burden of proof was placed upon defendant under G.S. 14-17, we are of the opinion that the felony-murder rule is constitutionally sound and this assignment is without merit. *See State v. Evans,* 349 A. 2d 300 (Md. App. 1975).

[2] Defendant next contends that the trial judge improperly recapitulated the evidence. The improprieties about which defendant now complains were not objected to at trial. Therefore, we apply the rule that objections to that portion of the charge which reviews the evidence and states the contentions of the parties must be made before the jury retires so as to give the trial judge an opportunity to correct any misstatements. Otherwise, any objection to the misstatements will be deemed to have been waived and will not be considered on appeal. *State v. Cawthorne,* 290 N.C. 639, 227 S.E. 2d 528 (1976); *State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). Despite this waiver, we have examined the charge and have been unable to locate any material misstatements in the evidence sufficient to warrant a new trial.

In several assignments of error, defendant contends that there was no evidence which would connect defendant with the robbery and the murder of Mr. Bullock. Defendant did not make

a motion for judgment as of nonsuit or for dismissal pursuant to G.S. 15-173 at the close of all the evidence. Hence, we consider this contention under G.S. 15-173.1 as a challenge to the sufficiency of the State's evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974). Therefore, we review the evidence and apply the well settled and long-standing rule that:

> " . . . On such motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. Only the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. . . . " *State v. Everette*, 284 N.C. 81, 84, 199 S.E. 2d 462, 465 (1973).

[3] In present case, the evidence tended to show that on 18 November 1975, Lois Marie Bullock saw two black males enter the Food Mart in Butner, North Carolina. The two males followed her father, Mr. Bullock, behind the counter of the store. She then saw one of the men shoot her father. The males then fled from the store on foot. The male who shot her father wore a red and black or red and blue bandanna over the lower portion of his face. Mr. Bullock died as a result of the wounds inflicted. From defendant's statement to Officer Leathers, it appeared that defendant was paid twenty dollars to be the "lookout" for an armed robbery of a store in Butner. One of the actual perpetrators of the crime, Joe Perry, was noted by defendant in his statement as wearing a red and blue handkerchief around his neck and as being armed with a weapon. Defendant was paid the twenty dollars after the robbery and told by Perry not to talk to anyone about the robbery. We hold that this evidence considered in the light most favorable to the State is sufficient to be submitted to the jury. This assignment is overruled.

Finally, defendant assigns error to the trial judge's signing of the judgment. For this proposition, he cites no authority but rather he recapitulates certain arguments which were advanced under his other assignments. In *State v. McMorris*, 290

N.C. 286, 225 S.E. 2d 553 (1976), we held that such an exception raises nothing for review under Rule 28 of the North Carolina Rules of Appellate Procedure. Accordingly, since we have already examined all the issues purportedly raised under this assignment and answered them unfavorably to defendant, we overrule this assignment.

Our examination of the entire record discloses that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. MICHAEL COUSIN

No. 39

(Filed 14 April 1977)

1. **Criminal Law § 114.3— instructions — State's intention to seek second degree murder verdict — no expression of opinion**

In a retrial of defendant for murder in which the State was precluded from retrying defendant for first degree murder because of his conviction at his first trial of second degree murder, the trial court did not express an opinion as to the reason the State proceeded on the charge of second degree murder by instructing that the district attorney had announced that the State would not seek a verdict of guilty of first degree murder but would seek a verdict of guilty of second degree murder.

2. **Criminal Law § 122.2— additional instructions — calling jury back at certain time — verdict not coerced**

The trial court did not restrict the jury's time for deliberations and thus coerce a verdict where the court, after giving requested additional instructions at 5:00 p.m., asked the jury "What is your pleasure?" and was told that the jury wished to retire to the jury room, stated to the jury that it should take its time and not hurry, and then stated that he would call the jury back at 5:30, since the court merely sought to ascertain whether the jury wished to recess at that time or continue their deliberations until the usual recess hour of 5:30.

APPEAL by defendant from *Lee, J.*, 26 July 1976 Session of ORANGE County Superior Court.

This is the second time that this case has been before this Court. At the first trial defendant was charged with murder in the first degree and the jury returned a verdict of guilty of

murder in the second degree. Defendant appealed and we granted a new trial for error in the charge. *State v. Cousins,* 289 N.C. 540, 223 S.E. 2d 338. This case is now before us on defendant's appeal from his second trial wherein the court submitted to the jury the charges of murder in the second degree and voluntary manslaughter. The assignments of error presented by this appeal do not require recitation of the facts, which are substantially the same as those recorded in *State v. Cousins, supra.* We think it sufficient to say that there was ample evidence to support the jury's verdict of murder in the second degree.

The jury returned its verdict of guilty of murder in the second degree at 5:25 p.m. on 1 July 1975 and Judge E. S. Preston, Jr., continued prayer for judgment until 9:30 a.m. on the following morning. At the appointed time the district attorney prayed for judgment and it was disclosed that defendant had fled. The trial judge continued prayer for judgment until defendant could be brought before the Superior Court of Orange County to the end that the State might pray judgment on the verdict. Judge Thomas Lee, presiding at a regular criminal session of Orange County Superior Court, imposed a sentence of life imprisonment upon defendant on 29 July 1976.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Barry T. Winston, for defendant.

BRANCH, Justice.

[1] Defendant contends that the trial judge violated the provisions of G.S. 1-180 by expressing an opinion in that he incorrectly charged the jury as to the reason the State did not seek a verdict of murder in the first degree.

Defendant relies on the well-recognized rule that every person charged with a crime has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173. G.S. 1-180 forbids any intimation of the trial judge's opinion in any form whatsoever. *State v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568.

Before the introduction of evidence in instant case Mr. Wannamaker, the Assistant District Attorney, read the bill of

indictment charging defendant with murder in the first degree and stated:

> Let me announce at the outset, Your Honor, that the State is pursuing this offense in the form of second degree murder. . . .

Defense counsel, without any objection or request for a clarification as to the reason the State so proceeded, entered a plea of not guilty to the charge of second-degree murder.

Judge Preston commenced his charge to the jury by stating:

> Ladies and Gentlemen of the Jury:
>
> The defendant, Michael Cousin, is being tried by the State of North Carolina upon a bill of indictment returned by the Grand Jury of Orange County charging said defendant with the offense of first degree murder, this offense alleged to have occurred in this county on the 2nd day of March, 1975.
>
> At the outset of this trial, the District Attorney announced that the State would not seek a verdict of guilty of first degree murder but that the State would place the defendant on trial and seek a verdict of guilty of the crime of second degree murder.

Defense counsel at this point did not object or request any clarification of the introductory instruction.

It is true that defendant's prior conviction of second-degree murder upon a bill of indictment charging murder in the first degree was an implicit acquittal of the charge of murder in the first degree precluding a second trial on that charge. *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056; *Green v. United States,* 355 U.S. 184, 2 L.Ed. 2d 199, 78 S.Ct. 221; *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918; *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838. This record does not disclose that Judge Preston expressed an opinion as to the *reason* the State proceeded on the charge of murder in the second degree. To the contrary, the judge's initial instruction was merely an introductory repetition of the District Attorney's unchallenged statement concerning the charge upon which the State would proceed.

The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence. 7 N. C. Index 2d, Trial, § 32. Obviously, the instruction was given for the purpose of clarifying and arraying the matters which the jury should consider so that the law could be concisely declared and applied to the facts of the case.

We hold that the trial judge did not express an opinion in the challenged instruction.

[2] Defendant next argues that Judge Preston coerced a verdict against him by charging the jury as to the amount of time they had to deliberate. We disagree.

The trial judge has no right to coerce a verdict or in any way to intimidate a jury. A charge which might be reasonably construed by a juror as requiring him to surrender his well-founded convictions or his own will or judgment to the views of the majority is erroneous. *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536; *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767. On the other hand, we have held that an instruction that "we have until Friday night for you to work on this case and no reason to hurry the matter" was not coercive. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652. *See also State v. Gresham,* 290 N.C. 761, 228 S.E. 2d 244; *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52.

Defendant relies upon *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9, which contains the following language:

> The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. *S. v. Jones,* 67 N.C. 285. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. *S. v. Ownby,* 146 N.C. 677, 61 S.E. 630. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. This is so because "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." . . .

We look to the language of the trial judge and the circumstances under which the challenged statements were made. On Thursday, 1 July 1976, after about one hour of deliberation, the jury returned and asked for additional instructions. When the additional instructions were completed, the following exchange took place between the judge and the jury:

> All right. Mr. Wannamaker? All right, sir. Now Ladies and Gentlemen of the Jury, it is 5:00 o'clock. What is your pleasure?
>
> JURY FOREMAN: We wish to retire to the jury room.
>
> All right. Of course, this is an important case; of course, you should take your time. Deliberate means, in essence, take your time and do it orderly and don't rush. If you wish to return to your jury room I will let you do this, and I will call you back at 5:30.

The more reasonable interpretation to be placed upon this exchange is that the trial judge sought the wishes of the jurors as to whether they wished to recess at that time or continue their deliberations until the usual recess hour of 5:30. Upon hearing the foreman's response the judge's rejoinder was not coercive, but merely indicated his assent to the wishes of the jury. It would require some creative imagination to transform the trial judge's inquiry and his admonition "not to rush" into words of coercion and intimidation. Further, there is nothing in this record which indicates that the jury was unable to duly reach a verdict so as to necessitate any urging or suggestion from the trial judge concerning their failure to reach a verdict.

Our careful examination of this record discloses that defendant was accorded a fair trial which was free of prejudicial error.

No error.

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

ARMENTO v. CITY OF FAYETTEVILLE

No. 72 PC.

Case below: 32 N.C. App. 256.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 April 1977.

BATISTE v. HOME PRODUCTS CORP.

No. 55 PC.

Case below: 32 N.C. App. 1.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1977.

BELL v. WALLACE

No. 71 PC.

Case below: 32 N.C. App. 370.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1977.

BOOKER v. MEDICAL CENTER

No. 63 PC.

Case below: 32 N.C. App. 185.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 April 1977.

COCKRELL v. TRANSPORT CO.

No. 58 PC.

Case below: 32 N.C. App. 172.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 April 1977.

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

CONSTRUCTION CO. (JAMES R. EDWARDS) v. HOLLOMAN

No. 61 PC.

Case below: 32 N.C. App. 234.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 April 1977.

CRAWLEY v. SOUTHERN DEVICES, INC.

No. 59 PC.

Case below: 31 N.C. App. 284.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1977.

LATNEY v. REVIER

No. 46 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

LOUGHLIN v. BOARD OF REGISTRATION

No. 80 PC.

Case below: 32 N.C. App. 351.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 April 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1977.

MONTGOMERY v. DEPT. OF MOTOR VEHICLES

No. 33 PC.

Case below: 31 N.C. App. 750.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1977.

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

NEWLIN v. GILL, STATE TREASURER

No. 66 PC.

Case below: 32 N.C. App. 392.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 5 April 1977.

STATE v. BROWN

No. 50 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE v. BUFF

No. 91 PC.

Case below: 32 N.C. App. 395.

Petition by defendant for discretionary review under G.S. 7A-31 denied 29 March 1977.

STATE v. BUTCHER

No. 23 PC.

Case below: 31 N.C. App. 572.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE v. CAMPBELL

No. 68 PC.

Case below: 32 N.C. App. 398.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 April 1977.

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

STATE v. HARRIS

No. 96 PC.

Case below: 32 N.C. App. 599.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE v. KRAUS

No. 41 PC.

Case below: 32 N.C. App. 144.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE v. McDONALD

No. 97 PC.

Case below: 32 N.C. App. 457.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 April 1977.

STATE v. PALMER

No. 48 PC.

Case below: 32 N.C. App. 166.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 5 April 1977.

STATE v. SARVIS

No. 35 PC.

Case below: 32 N.C. App. 234.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

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

STATE v. WATSON

No. 67 PC.

Case below: 32 N.C. App. 399.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE v. WILLIAMS

No. 102.

Case below: 32 N.C. App. 204.

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 April 1977.

STRICKLAND v. KING and SELLERS v. KING

No. 62 PC.

Case below: 32 N.C. App. 222.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 5 April 1977.

WATERS v. PHOSPHATE CORP.

No. 74 PC.

Case below: 32 N.C. App. 305.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 April 1977.

STATE OF NORTH CAROLINA, EX REL COMMISSIONER OF INSURANCE v. NORTH CAROLINA FIRE INSURANCE RATING BUREAU [IN THE MATTER OF ORDER AND DECISION OF THE COMMISSIONER OF INSURANCE OF NOVEMBER 6, 1975, DISAPPROVING APPELLANT'S FILING OF JUNE 27, 1975, PROPOSING RATE LEVEL REVISION ON THE HOMEOWNERS PROGRAM]

No. 13

(Filed 10 May 1977)

1. **Insurance § 116— fire insurance rates — "deemer provision" — effect of setting of hearing**

Action of the Fire Insurance Rating Bureau in placing proposed premium rates into effect pursuant to the "deemer provision" of G.S. 58-131.1 more than 60 days after submission of the rate filing was lawful notwithstanding the Commissioner of Insurance had set the filing for hearing.

2. **Insurance § 116— rates under "deemer provision" — length of effectiveness — refund**

Premium rates made effective by operation of the "deemer provision" continue in effect until disapproved, in whole or in part, by an order of the Commissioner of Insurance issued pursuant to the authority granted him by Chapter 58 of the General Statutes, or until otherwise changed pursuant to such Chapter, and premiums lawfully collected pursuant to such filing are not subject to refund, even though the filing be subsequently disapproved by the Commissioner.

3. **Insurance § 116— effectiveness of rates under "deemer provision" — effect on previously set hearing**

The taking effect of a rate filing pursuant to the "deemer provision" does not abort a hearing previously ordered by the Commissioner of Insurance, and at such hearing the Commissioner may proceed as if the "deemer provision" had not put the filing into effect and, upon the conclusion of the hearing, he may issue such order as would have been within his authority had the filing not taken effect pursuant to the "deemer provision."

4. **Insurance § 116— rates under "deemer provision" — effect of disapproval of filing**

The disapproval of a rate filing after the proposed rates were placed in effect pursuant to the "deemer provision" takes effect from the date of the order but is not retroactive and so does not render unlawful the collection of premiums made prior thereto so as to require, or authorize the requirement of, a refund thereof.

5. **Insurance § 116— fire insurance rate filing — burden of proof**

There is no presumption that a filing by the Fire Insurance Rating Bureau is correct and proper, the burden being upon the Bureau to show that the rate schedule proposed by it is fair and reasonable; that is, the burden is upon the Bureau to prove that

proposed premium rates for homeowners insurance will enable it (considering the Bureau as the composite of all companies writing homeowners insurance in North Carolina) to collect, upon policies to be issued after the effective date of the filing, premiums which will enable it (1) to pay losses to be incurred during the life of such policies at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses, and (3) to retain a fair and reasonable profit and no more.

6. Insurance § 116— homeowners insurance as fire insurance

Homeowners insurance constitutes fire insurance within the meaning of the requirement of G.S. 58-131.2 that "the Commissioner shall give consideration . . . *in the case of fire insurance* to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made."

7. Insurance § 116— fire insurance rates — past experience — form of evidence

The Commissioner of Insurance may not preclude evidence of the companies' past experience from any consideration whatever if it is of a type upon which reasonable persons are accustomed to rely in the conduct of insurance affairs merely because it is not in the form customarily introduced in premium rate hearings.

8. Insurance § 116— fire insurance rates — "Page 14" figures

"Page 14" figures taken from fire insurance companies' reports to the Commissioner of Insurance are competent evidence of the "experience of the fire insurance business" within the meaning of G.S. 58-131.2 and can be given "consideration" by the Commissioner in determining whether to approve a filing by the Fire Insurance Rating Bureau.

9. Insurance § 116— fire insurance rates — weight of factors to be considered

In providing in G.S. 58-131.2 that the Commissioner of Insurance shall give consideration to the matters there specifically enumerated, including "the experience of the fire insurance business" during five years or more, it was not the intent of the Legislature to make any one, or all, of these matters conclusive.

10. Insurance § 116— five insurance rates — five-year experience — weight of experience for each year

G.S. 58-131.2 does not require the Commissioner of Insurance to give equal weight to the experience of the fire insurance companies in each year of the five-year, or longer, period studied where there is evidence that, by reason of inflation or some other circumstance, the more recent years are more indicative of the future need.

11. Insurance § 116— fire insurance rates — credibility and weight of evidence — arbitrary rejection of evidence

While the credibility of evidence, whether offered by the Rating Bureau, the Department of Insurance, or a protestant, and the weight to be given such evidence are to be determined by the Commissioner of

Insurance, in making such determination, he may not act arbitrarily, rejecting as untrustworthy, for no stated or apparent reason, uncontradicted testimony or data submitted through competent and unimpeached witnesses.

12. Insurance § 116— fire insurance rates — arbitrary disapproval of filing

Conclusion of the Commissioner of Insurance that a homeowners insurance rate filing was improper and that the rates, rating schedules and methods proposed in the filing were unwarranted, unreasonable, improper, unfairly discriminatory and not in the public interest was not supported by evidence in the record and was, therefore, legally arbitrary and in excess of his statutory authority, where all of the evidence in the record, taken to be true, indicated that the companies cannot reasonably expect to make any profit whatever by using premium rates in effect at the time the filing was submitted to the Commissioner, and the Commissioner made no findings as to the reasonably anticipated loss experience and operating expenses during the life of policies to be issued in the near future and the percent of earned premiums which will constitute a fair and reasonable profit in that period.

13. Insurance § 116— fire insurance rates — countrywide experience

Nothing in G.S. 58-131.2 indicates a legislative intent to direct the Commissioner of Insurance to accept "countrywide experience" as indicative of losses and expenses to be anticipated in connection with North Carolina business.

14. Insurance § 116— fire insurance rates — continuation of proposed rates — inherent power of court — "deemer provision"

The Court of Appeals erred in continuing in effect proposed homeowners insurance rates "in the exercise of the inherent power of the court," since the appellate courts have no inherent power to fix insurance premium rates; however, where the order issued by the Commissioner of Insurance disapproving the rate filing did not comply with statutory procedures, the rates proposed in the filing and set into effect by the "deemer provision" will remain in effect until changed by a lawfully issued order of the Commissioner of Insurance or by a further filing.

ON *certiorari* to the Court of Appeals to review its decision, reported in 30 N.C. App. 549, 228 S.E. 2d 264, vacating the order of the Commissioner of Insurance and remanding the matter to him for further proceedings.

On 27 June 1975, the North Carolina Fire Insurance Rating Bureau, hereinafter called the Bureau, filed with the Commissioner of Insurance, hereinafter called the Commissioner, for his approval its proposal, hereinafter called the filing, for certain changes in Homeowners insurance policies and premiums, the net effect of which was an increase of 16.2

of water so as to distinguish it from the downpour of rain and recognize the added hazard thus created; and (6) Trooper Smith, going in the opposite direction on the other side of the median, did see a similar sheet of water running across his lane because he was already aware of the hazard, having "slid through it once myself before I found out it was there."

We hold that the foregoing evidence is insufficient to raise a permissible inference that defendant failed to keep a proper lookout or failed to keep his vehicle under proper control. According to Trooper Smith, and his testimony is uncontradicted, the water flowing across the highway was a thin film about one-eighth inch deep. It was raining hard at the time and the surface of the highway was already covered with water from the heavy downpour. Under these conditions it is not perceived how a reasonably prudent person similarly situated could and should have distinguished the flowing water from the rainwater on the roadway in time to realize the added hazard and take precautions to avoid it. Trooper Smith saw it only because he "slid through it once" himself before he found out it was there. We hold that the evidence is insufficient to make out a *prima facie* case of actionable negligence. Defendants' motion for directed verdict was therefore properly allowed.

For the reasons stated the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. WILLIE HENDERSON WOMBLE

No. 28

(Filed 14 April 1977)

1. **Homicide §§ 4, 14; Constitutional Law § 28— felony murder rule — burden of proof on State**

The felony murder rule as stated in G.S. 14-17 does not unconstitutionally relieve the State of the burden of proving beyond a reasonable doubt every element of the crime of first degree murder.

2. **Criminal Law § 163— objections to jury charge — time for making**

Objections to that portion of the charge which reviews the evidence and states the contentions of the parties must be made before

per cent in the premium rates, the Bureau, at the time of the filing, informing the Commissioner that it was not authorized to waive the "deemer provision" of G.S. 58-131.1.

On 21 August 1975, the Commissioner, in writing, notified the Bureau that he had scheduled a public hearing of the matter, to be held 29 October 1975.

On 3 October 1975, the Bureau notified the Commissioner, in writing, that, there having been no disapproval of the filing by the Commissioner within 60 days following its submission, the filing was deemed approved and the Bureau was preparing to put it into effect on 8 October 1975.

On 6 October 1975, the Commissioner, in writing, advised the Bureau that he considered such putting of the filing into effect to be a departure from accepted practices, stating that the scheduling of the public hearing constituted disapproval of the use of the rates and forms contained in the filing prior to such hearing and determination of the matter by the Commissioner.

The Bureau, nevertheless, put the filing into effect on 8 October 1975. Thereupon, the Commissioner held the scheduled hearing at which the Bureau presented evidence in support of the filing. There was no cross-examination of witnesses presented by the Bureau as to the merits of the filing. No evidence relating to its merits was introduced at the hearing by the staff of the Department of Insurance. One insurance agent from Manteo, North Carolina, protested the filing with reference to its application to coastal areas, specifically the Outer Banks, but not with reference to other areas of the State. No other protestants appeared at the hearing.

The staff of the Department of Insurance introduced the testimony of a single witness who confined his testimony to his contention that the notification of the setting of the public hearing constituted a disapproval of the filing within the meaning of the "deemer provision" of G.S. 58-131.1 so as to prevent that provision from taking effect prior to the holding of the hearing and the determination of the matter by the Commissioner.

The evidence of the Bureau at the hearing constituted primarily of the testimony of Mrs. Benfield, an actuary employed in the New York office of Insurance Services Office, found by

the Commissioner to be an expert in the field of Homeowners rate-making, and of exhibits prepared by and introduced through her. The substance of this evidence was:

The Homeowners Insurance Program was introduced in North Carolina in 1960. Since that time there have been two changes in the premium rate level, one a decrease, the other an increase, the result being that, at the time of the filing now in question, the premium rates, taking into account changes in coverage, were 4 per cent higher than in 1960.

The predominant cause of loss under the Homeowners Insurance Program is fire. By reason of substantial increases in material and labor costs, increases in medical care costs, which relate to the public liability portion of the coverage, and an increase in the incidence of burglaries in North Carolina, the loss experience "of the major writers in North Carolina totaling at least 50% of the market" shows substantial increase in losses in 1974 and in the first six months of 1975, in which latter period these companies incurred a composite loss in North Carolina on Homeowners insurance of "seventeen per cent" (presumably 17 per cent of the premiums collected).

In computing this loss, the witness used "countrywide figures" to compute the operating expenses, other than claims expense, of the companies in North Carolina. The witness testified, "We have no reason to think that the expenses in North Carolina would be any different from the countrywide." Such compilations and calculations were made by the Insurance Services Office. (The Commissioner sustained the objection by the counsel for the staff of the Department concerning the use of data reflecting "countrywide figures," saying that the Bureau would have to use North Carolina data for all the companies issuing Homeowners insurance policies in this State.)

Data reported to the Insurance Commissioner by companies operating in North Carolina shows that the industry lost $6,200,000 in 1974 in North Carolina on Homeowners insurance. This North Carolina data, referred to in the record as "page fourteen type figures" (i.e., data reported by the companies to the Commissioner on page 14 of their regular reports to him), "is not purported to be rate-making data as such" but "is to indicate the financial position of the companies in North Carolina."

By reason of inflation of prices, generally, the gross premiums received by the companies increase without a change in the rate for the reason that the policyholders purchase more insurance. This is called the "premium trend," as contrasted with the "loss trend." In the present filing, both trends were considered by the Bureau in its determination of the premium rate level necessary to produce enough revenue to pay future anticipated losses, other expenses and a reasonable profit. Since the policies will cover casualties sustained after the policies are issued, the loss trend was projected by the Bureau one year beyond the contemplated effective date of the filing. The average loss under a one year policy occurs six months after the policy is issued. The trending processes indicate that the ratio of losses to premiums is increasing at the rate of 4.1 per cent a year. The loss-to-premium ratio was 68.3 per cent with reference to policies taking effect 15 September 1975. This, together with the portion of the premium dollar required to pay other expenses, indicates the need of an increase of "15.4% in premium income to make the standard 6% profit." (There was no evidenec in the record purporting to show that the so-called "standard 6% profit" is a reasonable profit.)

After the hearing, the Commissioner issued his order which: (1) Disapproved the filing; (2) continued in effect the previously established rates; and (3) ordered prompt refunds of "premiums illegally collected after October 8, 1975 in excess of the rate in effect on June 27, 1975." The Commissioner set forth in his order 20 findings of fact, of which two contained numerous subdivisions, and 17 conclusions of law. The Bureau excepted to all of the conclusions of law and to all of the findings of fact relating to the merits of the filing and appealed to the Court of Appeals.

Among the findings of fact are the following (summarized):

2. The filing is based upon:

   a. Three years of experience for all companies writing Homeowners insurance in North Carolina;

   b. Statistics for 1972, some based upon approved statistical plans and programs for collecting rate-making data and some not collected under such approved plans;

c. Experience in 1973, based upon data reported to the Commissioner for all companies writing Homeowners insurance in North Carolina but not appropriate for rate-making purposes;

e. Trend factors based on certain countrywide indices for three years;

g. Unsupported expense ratios;

i. The unsupported assumption that 50% of policyholders in North Carolina will purchase policies with a $50.00 deductible provision and the remainder will purchase policies with a $100.00 deductible provision;

4. Changes in premium resulting from changes in "form relativities" have not been supported;

5. Changes in premium resulting from changes in "policy size relativities" have not been supported;

8. Appropriate rate-making statistics for 1973 as well as 1974 were available but were not produced at the hearing.

9. 1973 statistics upon which the filing is based include "farm-owners experience" which was not separated from "homeowners experience."

10. The trend factors used in preparing the filing were not based on experience of all companies writing homeowners insurance in North Carolina as though they were one company.

The Commissioner's conclusions of law set forth in the order include the following (summarized):

5. G.S. 58-131.2 does not permit the Commissioner to approve a rate which is based on experience of less than five years next preceding the year in which the filing is made.

6. It is improper to base trend factors on the experience of less than 100 per cent of all companies writing Homeowners insurance in North Carolina.

7. It is improper to use countrywide adjustment factors based upon the experience of less than 100 per cent of all companies writing Homeowners insurance in North Carolina.

9. A substancial part of the filing is not supported.

10. The written notification from the Commissioner that the matter was being set for a hearing was a written disapproval of the filing, thus preventing the "deemer provision" contained in G.S. 58-131.1 from becoming effective.

15. The Bureau has failed to establish that the filing is fair and reasonable.

16. The Bureau has failed to show that the filing will produce a profit which is fair and reasonable.

17. The filing is improper and the rates, rating schedules and methods proposed therein are unwarranted, unreasonable, improper, unfairly discriminatory and not in the public interest.

In the Court of Appeals, Judge Clark wrote an opinion of which the concluding paragraph states. "The order of the Commissioner of Insurance is hereby vacated, and this cause is remanded to the Commissioner of Insurance for further proceedings *in accordance with this opinion.*" (Emphasis added.) Judge Martin concurred in the result without a separate opinion, thus, apparently, concurring in the direction that the further proceedings before the Commissioner be in accordance with the opinion of Judge Clark. Judge Vaughn concurred only in the part of Judge Clark's opinion which reversed and vacated the order of the Commissioner as being unsupported by material and substantial evidence.

The opinion of Judge Clark was to the effect:

(1) When the Commissioner gave notice of a public hearing to be had upon the filing, the "deemer provision" of G.S. 58-131.1 did not take effect. Thus, the Bureau had no authority to put the proposed rate increase into effect under that provision.

(2) The order of the Commissioner is contrary to law and the evidence, unreasonable and arbitrary. The Commissioner has repeatedly failed to conduct hearings on numerous filings by the Bureau. In the hearing upon the present filing, the Commissioner refused to consider competent evidence of losses and operating expenses of the insurance industry and reasonable factors in making his own projections into the future. The Commissioner and the staff of the Insurance Department failed to cross-

examine the principal witness of the Bureau upon the merits of the filing and offered no evidence to challenge the volumninous and detailed data submitted in its support by the Bureau, which data clearly indicated that the premium rates were so low that the insurers could engage in business only at a loss. The Bureau presented a prima facie case supporting the filing and offered competent evidence to the effect that the premium rate in effect prior to the filing was unfair and confiscatory. The record on appeal discloses persistent procrastination, unfairness and partisan procedures and decisions on the part of the Commissioner. For all of these reasons, the Court of Appeals *"in the exercise of the inherent power of the court"* continued the rate increase in effect "until the Commissioner of Insurance performs his statutory duty in further proceedings and fixes premium rates for Homeowners insurance which will produce a fair and reasonable profit and no more." (Emphasis added.)

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Assistant Attorney General, for the State.

Joyner & Howison by William T. Joyner, Walton K. Joyner and J. E. Tucker for the North Carolina Fire Insurance Rating Bureau.

LAKE, Justice.

In fairness to the Court of Appeals and to the Commissioner of Insurance, it should be observed that at the times of their respective decisions in this matter neither had the benefit of recent decisions of this Court which are largely determinative of matters here involved. *Commissioner of Insurance v. Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977) ; *State ex rel. Commissioner of Insurance v. Automobile Rate Administrative Office,* 292 N.C. 1, 231 S.E. 2d 867 (1977) ; and *Commissioner of Insurance v. Rating Bureau,* 291 N.C. 55, 229 S.E. 2d 268 (1976).

The Bureau was created by G.S. 58-125 and was organized pursuant to G.S. 58-127 by the insurance companies writing fire insurance in North Carolina. The Bureau is not a State agency. It is composed of and controlled by these companies. It acts for them in the establishment of premium rates. It files proposed rates with the Commissioner for his approval. G.S.

58-131.1. "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 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).

The Commissioner has no inherent power to fix premium rates. His authority is confined to that conferred upon him by the General Assembly in Chapter 58 of the General Statutes. *Commissioner of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E. 2d 98 (1973); *In re Filing by Fire Insurance Rating Bureau, supra.*

G.S. 58-131.1 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." (Emphasis added.)

In *Commissioner of Insurance v. Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977), we said:

> "Operation of the 'deemer' provision can be averted only by the approval or disapproval of the Commissioner within 60 days. * * *
>
> "In establishing the rate-making procedures, the Legislature provided three methods by which the Commissioner may dispose of proposed rate changes, to wit: (1) He may approve the proposed rate adjustment; (2) he may disapprove it; or (3) he may do neither for 60 days and the proposal is thereupon deemed approved. G.S. 58-131.1. To avoid the automatic operation of the deemer provision, the Commissioner must approve or disapprove the proposal in writing within 60 days after submission. Approval or disapproval necessarily contemplates *action* by the Commissioner, and a public hearing is required prior to such action upon a proposed material rate change. G.S. 58-27.2(a). * * *

"[W]e find no merit in the contention of the Commissioner that his action in setting a hearing date tolled the running of the 60-day period."

Thus, the Court of Appeals erred in its conclusion that the "deemer provision" of G.S. 58-131.1 did not cause the premium rate changes proposed in the filing to take effect on 8 December 1975.

In the case last cited, we also said:

"Since the 'deemer' provision operates in conjunction with the hearing provisions, it cannot stand alone as a final resolution of the proposal. *Final resolution comes only after a valid approval or disapproval by the Commissioner.* We hold, therefore, that where, as here, the deemer provision is triggered by failure of the Commissioner to validly approve or disapprove a proposed rate adjustment, it operates only as a temporary approval pending valid action by the Commissioner as contemplated by G.S. 58-27.1(c) and G.S. 58-27.2(a). Thus, in the present case, the Bureau is lawfully entitled to place the proposed rates into effect, prospectively, under the deemer provision *until such time as a valid final order is entered by the Commissioner*— either in this proceeding or in a subsequent filing." (Emphasis added.)

Chapter 58 of the General Statutes contains no provision comparable to G.S. 62-134(b) whereby the Utilities Commission is authorized to set for hearing a proposed rate increase by a public utility and to suspend such proposed rates pending such hearing, nor does it contain a provision comparable to G.S. 62-135 whereby a public utility, notwithstanding such suspension, may put its proposed rate increase into effect by filing a bond to assure refund of the collected increase to the extent that it may ultimately be disallowed. The insurance rate-making procedure is, however, somewhat analagous to the provision in G.S. 62-134(b) which limits the authority of the Utilities Commission to suspend a proposed increase in rates, pending hearing, to a period of 270 days and which provides that if the hearing has not been concluded and an order made within such period, "the proposed change of rate shall go into effect at the end of such period" and further provides that "after hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect

thereto as would be proper in a proceeding instituted after it had become effective."

[1-4] In the silence of Chapter 58 of the General Statutes upon this aspect of insurance premium rate regulation, we conclude: (1) Notwithstanding the Commissioner's having set the filing for hearing, the action of the Bureau in putting the proposed premium rates into effect on 8 October 1975, more than 60 days after the submission of the filing, was lawful. (2) Such proposed rates thereupon became as effective as if they had been formally approved by the Commissioner and their subsequent collection, pending further action by the Commissioner, was lawful. (3) The premium rates, so made effective by the operation of the "deemer provision," continue in effect until disapproved, in whole or in part, by an order of the Commissioner issued pursuant to the authority granted him by Chapter 58 of the General Statutes, or until otherwise changed pursuant to such chapter. (4) Premiums lawfully collected, pursuant to such filing, are not subject to refund, even though the filing be subsequently disapproved by the Commissioner. (5) The taking effect of the filing, pursuant to the "deemer provision," does not abort the hearing previously ordered by the Commissioner. (6) At such hearing, the Commissioner may proceed as if the "deemer provision" had not put the filing into effect and, upon the conclusion of the hearing, he may issue such order as would have been within his authority had the filing not taken effect pursuant to the "deemer provision." (7) Such order of the Commissioner, otherwise valid, may approve or may disapprove the filing in whole or in part. (8) Such disapproval takes effect from the date of the order but is not retroactive and so does not render unlawful the collection of premiums made prior thereto so as to require, or authorize the requirement of, a refund thereof.

We come, therefore, to the question of whether the Commissioner's order of 6 November 1975, disapproving the filing, was within his authority so as to terminate, as of that date, the effectiveness of the filing.

[5] There is no presumption that a filing by the Bureau is correct and proper, the burden being upon the Bureau to show that the rate schedule, so proposed by it, is fair and reasonable. *Commissioner of Insurance v. Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977) : *In re Filing by Fire Insurance Rat-*

ing Bureau, supra; In re Rating Bureau, 245 N.C. 444, 96 S.E. 2d 344 (1956). That is, the burden is upon the Bureau to prove that the proposed premium rates will enable it (considering the Bureau as the composite of all companies writing Homeowners insurance in North Carolina) to collect, upon policies to be issued after the effective date of the filing, premiums which will enable it (1) to pay losses to be incurred during the life of such policies at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses, and (3) to retain a fair and reasonable profit and no more. *In re Filing by Fire Insurance Rating Bureau, supra.*

G.S. 58-131.2 provides in part:

> "In determining the necessity for an adjustment of rates, the Commissioner shall give consideration *to all reasonable and related factors,* to conflagration and catastrophe hazards, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made." (Emphasis added.)

Obviously, this provision of the statute is far from clear. Does it mean that evidence of each of the specifically enumerated items to which the Commissioner "shall give consideration" is a *sine qua non* to a determination by the Commissioner of the necessity for a reduction or an increase in premium rates, so that, in absence of evidence of such item, the determination must be adverse to the party having the burden of proof, even though there is ample evidence of other "reasonable and related factors" to support a determination that premium rates presently in effect are producing excessive or inadequate profits for the insurance companies? If evidence as to conflagration hazards points in one direction, due to recent developments, while "the experience of the fire insurance business" over a period of five years or more points in the opposite direction, which controls the determination of the Commissioner?

In re Rating Bureau, supra, involved a proposal by the Bureau for an increase in the premium rate for fire insurance on farm dwellings disproportionate to the simultaneously proposed increase in the premium rate for like insurance on non-

farm dwellings similarly situated, similarly constructed and similarly protected against the hazard of fire. The Court affirmed the Commissioner's order disapproving the proposed increase on the ground that it was discriminatory and thus in violation of G.S. 58-131. The following statements in the opinion of the Court, which spoke through Justice Denny, later Chief Justice, are, therefore, dicta:

> "It is apparent, we think, under the provisions of G.S. 58-131.2, that the General Assembly has never authorized a fire insurance rate to be fixed upon a consideration of hazard alone." (P. 450.)
>
> "At the above hearing [before the Commissioner upon an earlier filing] it appears the Rating Bureau furnished experience on farm dwellings for the year 1953 only. *Naturally, the Commissioner had no right to consider a rate for fire insurance except one based on the experience for a period of not less than five years* next preceding the year in which the review was made and the other factors enumerated in the statute. G.S. 58-131.2." (P. 448.) (Emphasis added.)

In that case, the Court noted (P. 449):

> "In the hearing before the Commissioner on the present request for an increase in fire insurance rates on farm property, the Rating Bureau furnished the experience on farm dwellings sub-Class 024 for the years 1953 and 1954 which showed a loss ratio in 1953 of 93.37% and for 1954 of 96.25%. Since this was for a period of less than five years, as required under G.S. 58-131.2, the Rating Bureau based its request on the loss ratio for Class 021, which includes sub-Classes as follows: 024, Farm Dwellings; 025, Farm Property * * *; 026, Tobacco Curing Barns; 029, Tobacco Pack Barns, 028, Tobacco—Harvested Crop—Farm Floater Form."

The Court, after overruling the Bureau's assignment of error to the Commissioner's rejection of the filing as discriminatory against farm dwellings, said (P. 452):

> "The appellant [Bureau] also assigns as error the conclusion of law [made by the intermediate reviewing court] to the effect that the following finding of fact is supported by substantial evidence in the record and is correct

and proper: 'That the North Carolina Fire Insurance Rating Bureau did not conform to the General Statute 58-131.2, which requires that fire experience on any class be kept for five years and that the Rating Bureau did not present such experience on unprotected farm property, sub-Class 024.

"In view of the fact that the requested increase was based on the loss ratio of Class 021 as a whole, which includes sub-Class 024, in our opinion this latter finding was not essential to the decision reached in the lower court. *Hence, we deem it unnecessary to consider or discuss this assignment of error.*" (Emphasis added.)

Thus, *In re Rating Bureau, supra,* did not determine whether a failure by the Bureau to present evidence of more than two years' experience of the companies would *per se,* and as a matter of law, authorize the Commissioner to disapprove its filing proposing an increase in the insurance premium rate for fire insurance. Our research has disclosed no other decision of this Court in which this question was presented and the briefs of the parties referred to no authorities upon that question. For reasons set forth below, we do not deem the determination of that question essential to our decision upon the present appeal and we do not here determine it.

[6] In its brief, the Bureau asserts that the requirement in G.S. 58-131.2, whatever it may mean, that "the Commissioner shall give consideration * * * *in the case of fire insurance rates* to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made," has no application to this proceeding since we are here dealing with Homeowners insurance, not fire insurance. (Emphasis added.) We reject that contention. The record shows that the expert witness for the Bureau testified that Homeowners insurance first came into use in North Carolina in 1960, some fifteen years after the enactment of G.S. 58-131.2, and that the predominant cause of loss under Homeowners policies is fire. Consequently, we deem Homeowners insurance to be fire insurance within the meaning of G.S. 58-131.2.

In the present proceeding, the Commissioner made these conclusions of law, to each of which the Bureau has excepted:

"1. That the statistics from page 14 of Annual Statements [to the Department of Insurance by all companies

writing homeowners insurance in North Carolina] are not appropriate for ratemaking purposes.

"4. That the filing is based on only three years (3) of appropriate ratemaking statistics.

"5. G.S. 58-131.2 does not permit the Commissioner to approve a rate which is based on experience of less than five years next preceding the year in which the review is requested."

Consequently, the Commissioner did not "give consideration" to this evidence introduced by the Bureau in reaching his determination that the filing should be disapproved. He so refused to "give consideration" to this evidence on the ground that, as a matter of law, it cannot be a basis for a determination by him that the rates in effect prior to the operation of the "deemer provision" are inadequate to produce "a profit which is fair and reasonable." In this we think the Commissioner was in error.

Assuming, without deciding, that G.S. 58-131.2 requires the Rating Bureau to introduce evidence of five years' experience upon the pain of having its filing disapproved, we reach the conclusion that in the hearing before the Commissioner it did so by offering (1) "Three years of experience for the years 1969-1971 utilizing approved [by the Department of Insurance] statistical plans and programs for collecting ratemaking data for all companies writing homeowners insurance in North Carolina," plus (2) for 1972 a combination of such "approved" statistics for many of the companies and what are called "Page 14" statistics for the others, plus (3) "Page 14" statistics for the 1973 experience of all the companies writing homeowners insurance in North Carolina. That the Bureau so supported its filing appears from the Commissioner's findings of fact. It also introduced "Page 14" data concerning 1974 experience.

We find nothing in Chapter 58 of the General Statutes which precludes the Commissioner from giving consideration to "Page 14" statistics in determining the propriety of a filing proposing an increase in premium rates. The rules adopted by the Insurance Advisory Board, pursuant to G.S. 58-27.1(c) concerning hearings to be held by the Commissioner or his authorized representative, remain presently in effect, notwithstanding

the Administrative Procedure Act. G.S. 150A-15. These rules include the following provisions:

Rule 6: "Public hearings shall be conducted in an orderly but informal manner. *The hearing officer shall admit all evidence of any type having reasonable probative value,* and shall include in the evidence any relevant or material evidence which may be made available to him by any records of the Insurance Department or disclosed by any investigation or study of the problem by personnel of the Department. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. *Any evidence of the type upon which responsible persons are accustomed to rely in the conduct of insurance affairs shall be deemed to have reasonable probative value.* A hearing may be continued when such continuation is, in the Commissioner's judgment, warranted." (Emphasis added.)

Rule 7: "The hearing officer shall have authority to require the bureau or company which is the proponent of the rate filing to produce and exhibit such books, documents, records and other data as may be necessary to fulfill the purposes of the hearing."

Rule 13: "Subsequent to a public hearing on a filing made with the Insurance Department, immediate consideration shall be given to all the information available. * * * "

[7] We have said, with reference to evidence submitted to show cost trends: "It is not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future has never before been used in the rate making process. The statute does not contemplate that procedures and methods for determining replacement costs for the future shall be frozen." *In re Filing by Fire Insurance Rating Bureau, supra,* at p. 36. The same is true with reference to evidence of the companies' past experience. Its credibility and weight, as distinguished from its relevancy, are, of course, to be determined by the Commissioner, but he may not preclude it from any consideration whatever if it is of a type "upon which reasonable persons are accustomed to rely in the conduct

of insurance affairs" merely because it is not in the form customarily introduced in premium rate hearings.

With reference to the Bureau's use of "Page 14" data in support of the filing, its expert witness testified:

> "The '74 figures on that exhibit were certainly nothing that could be contested. They are from page fourteen as reported to the Insurance Commissioner and they show that the industry in North Carolina lost six point two million dollars last year from homeowners insurance. * * * [T]he context in which this information is presented is to show the substantial need for increase that the companies have. It's not purported to be ratemaking data as such. * * * It's to indicate the financial position of the companies in North Carolina. * * * With most lines of insurance, the page fourteen is not as valuable as it is for homeowners, for any indication of rate-making. * * * But in homeowners, since losses are paid very, very quickly it is a very good indicator, and comparing the page fourteen results with our later available classified data we get very, very good correlations. So it is a very good indicator of what is happening and what the full and complete rate-making data will result in."

No effort was made by the Department of Insurance to refute this testimony, either by cross-examination or by other witnesses or exhibits.

[8] In a proceeding initiated by the Commissioner to consider the propriety of a reduction in the premium rate because of excessive profits accruing to the companies under existing rates, surely "Page 14" figures taken from the companies' reports to him would qualify as competent evidence of the "experience of the fire insurance business" within the meaning of G.S. 58-131.2 and could be given "consideration" by him. It is equally competent in consideration of a filing by the Bureau.

[9, 10] In providing, in G.S. 58-131.2, that the Commissioner shall give consideration to the matters there specifically enumerated, including "the experience of the fire insurance business" during five years or more, it was obviously not the intent of the Legislature to make any one, or all, of these matters conclusive. The statute directs the Commissioner to give consideration "to all reasonable and related factors." The weight to be

given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise, but he may not arrive at his determination as to the propriety of the filing by shutting his eyes to experience shown by evidence of reasonably probative value simply because it is not presented to him in the customary statistical form. Nor does the status require him to give equal weight to the experience of the companies in each year of the five-year, or longer, period studied where, as here, there is evidence that, by reason of inflation or some other circumstance, the more recent years are more indicative of the future need. *In re Filing by Fire Insurance Rating Bureau, supra.*

The ultimate question for the Commissioner's determination is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave for the insurers (considered as if the Bureau were a single company with the composite experience of all companies issuing Homeowners insurance in North Carolina) a fair and reasonable profit and no more. The purpose of the entire statutory plan is to provide for the public, at reasonable cost, insurance in financially responsible companies. *In re Filing by Fire Insurance Rating Bureau, supra.* The public interest extends as truly to the financial responsibility of the insurer as it does to the reasonable cost of the insurance to the insured, and vice versa.

[11] The credibility of evidence, whether offered by the Bureau, the Department of Insurance or a protestant, and the weight to be given such evidence, are to be determined by the Commissioner. *In re Filing by Fire Insurance Rating Bureau, supra.* However, in this determination, as in other aspects of such rate-making proceeding, the Commissioner may not act arbitrarily, rejecting as untrustworthy, for no stated or apparent reason, uncontradicted testimony or data submitted through competent and unimpeached witnesses.

In the present proceeding, there was no evidence in conflict with that presented by the Bureau, concerning the merits of the filing. There was no cross-examination of witnesses for the Bureau concerning the statistics upon which it based the filing, or otherwise relating to the merits of the filing. No finding of fact or conclusion stated by the Commissioner, in his order disapproving the filing, contains a finding or a

suggestion that any of the statistical data presented by the Bureau, or any expert opinion based thereon, is not credible or is not accurate.

[12] Without impugning the motives of the Commissioner, and without intent to express concurrence in the characterization by the Court of Appeals of his actions and inactions with reference to this and other rate filings, we hold that his Conclusion No. 17 ("That the filing is improper, and the rates, rating schedules and methods proposed in the filing are unwarranted, unreasonable, improper, unfairly discriminatory and not in the public interest") is not supported by evidence in the record and is, therefore, legally arbitrary and in excess of his statutory authority.

We observe that both the Commissioner and the Bureau are enmeshed in a statutory plan for rate-making so ambiguous and unclear that legislative revision appears to offer more likelihood of future harmony between the Commissioner and the Bureau, in their efforts to bring about a realization of the dual legislative purpose of insurance at reasonable cost in financially responsible companies, than does piecemeal construction of the statutes through what is now rapidly assuming the proportions of an interminable series of judicial reviews of orders by the Commissioner.

The order of the Commissioner in the present proceeding is comparable to a judgment of dismissal of a civil action on the ground that the plaintiff's evidence is not sufficient, as a matter of law, to show any right to relief. It is well established that for the purposes of judicial determination of a motion for such a judgment in a civil action, the evidence presented by the plaintiff must be considered as true and the plaintiff must be given the benefit of every reasonable inference to be drawn therefrom. See, Strong, N. C. Index 2d, Trial, § 21, and cases there cited. In the present state of the record, a like rule should be applied in determining the validity of the Commissioner's order disapproving the present rate filing. The order of the Commissioner fails to survive that test.

Given the benefit of such inference and interpretation, the evidence of the Bureau is sufficent to show that the companies writing Homeowners insurance in North Carolina, considered as a composite whole, are not making, and in the reasonably foreseeable future cannot be expected to make, a reasonable

profit if limited to the premium rates in effect at the time the filing was submitted to the Commissioner and heard by him. On the contrary, the evidence of the Bureau, when taken to be true, shows that the companies, so limited, have been sustaining, and will in the future sustain, a substantial loss upon such business. If this be the correct ultimate conclusion, even a substantial number of flyspecks discovered upon the evidence supporting the filing will not contaminate it to the extent justifying a complete disapproval. It is to be remembered that the Commissioner is not required to approve or disapprove the filing *in toto* but may approve it in part. *State ex rel. Commissioner of Insurance v. Automobile Rate Administrative Office,* 292 N.C. 1, 231 S.E. 2d 867 (1977); *In re Filing by Fire Insurance Rating Bureau, supra.*

The evidence of the Bureau was that the companies need an increase of "15.4 per cent in premium income to make the standard 6 per cent profit"; that is, to realize a profit of 6 per cent of the gross premiums received. There is no evidence in the record other than this use of the word "standard" to show that 6 per cent of gross premiums received is a fair and reasonable profit upon Homeowners insurance written in North Carolina. "There is nothing sacrosanct about 6 per cent in this connection. * * * Like construction costs and consumer prices, a 'fair and reasonable profit' varies from time to time." *In re Filing by Fire Insurance Rating Bureau, supra.* However, all of the evidence in the present record, taken to be true, indicates that the companies, considered as a whole, cannot reasonably expect to make any profit whatever by using premium rates in effect at the time this filing was submitted to the Commissioner.

What rates are necessary to entitle the companies to earn a fair and reasonable profit, and no more, "cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the per cent of Earned Premiums which will constitute a 'fair and reasonable profit' in that period." *In re Filing by Fire Insurance Rating Bureau, supra.* The Commissioner made no finding as to any of these matters in the order now before us for review. The Commissioner has not found that the rates in effect at the time the present filing was submitted to him will yield to the companies a fair and reasonable

profit on their Homeowners insurance business in North Carolina.

Obviously, no reasonably accurate prediction of the profit to be realized in the future from the writing of Homeowners liability insurance in North Carolina can be made without first making a reasonably reliable prediction of losses and other operating expenses to be incurred by the companies in connection with their North Carolina business. In making this determination, the Commissioner is not required by the statute to accept the Bureau's conclusion, unsupported by evidence more persuasive than a mere declaration of its expert witness, that the proportion of such losses and expenses to gross premiums collected upon North Carolina policies is the same as the proportion of these items to gross premiums on a "countywide" basis. In the present record, there is no other evidence of this alleged fact.

[13] It is true that G.S. 58-131.2, in the portion above quoted, provides that the Commissioner shall give consideration to "the conflagration and catastrophe hazards, both within and without the State," in determining the necessity for an adjustment of rates, thus indicating the Legislature's intent that he be not limited to North Carolina data in determining reasonable and adequate rates. However, it is further to be observed that this phrase, "both within and without the State," does not appear to have application to the "experience" factor to be considered by the Commissioner. Nothing in the statute indicates a legislative intent to direct the Commissioner to accept "countrywide experience" as indicative of losses and expenses to be anticipated in connection with North Carolina business. On the other hand, nothing in the present record refutes the testimony of the Bureau's expert witness to the effect that she knows of no reason to suppose that it does not fairly represent experience of the companies in connection with their Homeowners insurance business in this State.

It would appear highly improbable that the expenses of the companies, other than the payment of losses, in connection with their North Carolina business vary in direct proportion to gross premiums collected. It is hardly likely that the salaries of filing clerks, secretaries and administrative officers of the company, office rent and many other home and regional office expenses are fixed on this basis. There is, in this record, no evidence that this is or is not true.

[14] The Court of Appeals was in error in continuing in effect the rates proposed in the filing "in the exercise of the inherent power of the court." Neither the Court of Appeals nor this Court has the inherent power to fix rates of insurance premiums. These are fixed by the filing of the Bureau, pursuant to the "deemer provision" in G.S. 58-131.1, subject to the authority of the Commissioner, by a properly supported order, issued after a hearing as prescribed by the statute, to approve or disapprove such rates in whole or in part, and, if they be disapproved in whole or in part, to fix for the then future the rates to be charged.

The order issued by the Commissioner disapproving the filing here in question does not so comply with the statutory procedures in the respects above set forth and, therefore, the judgment of the Court of Appeals vacating that order is hereby affirmed. The consequence is that the rates proposed in the filing and set into effect by the "deemer provision" remain presently in effect and will so remain in effect until changed by a lawfully issued order of the Commissioner or by a further filing.

The proceeding initiated by the submission of the filing here in question to the Commissioner and set by the Commissioner for hearing is hereby remanded to the Court of Appeals with direction that it further remand the proceeding to the Commissioner. Thereupon, the Commissioner may, in his discretion, discontinue this proceeding by withdrawing his order setting it for a hearing, thus leaving in effect the rates put into effect pursuant to the "deemer provision"; or he may again set the matter for a hearing to be conducted and determined pursuant to this opinion; or he may discontinue the present proceeding and, thereupon, institute a new proceeding pursuant to G.S. 58-131.2 "to investigate * * * the necessity for a reduction or increase in rates" now in effect pursuant to the "deemer provision," first giving due notice of such hearing to the Bureau and to the public. *Commissioner of Insurance v. Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977); *Commissioner of Insurance v. Rating Bureau,* 291 N.C. 55, 229 S.E. 2d 268 (1976).

The judgment of the Court of Appeals is, therefore, reversed and the matter is remanded to that court with direction that it issue its judgment further remanding it to the Commis-

sioner of Insurance for further proceedings by him in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. FRANKIE JEROME SQUIRE, JOSEPH SEABORN, ALIAS JOE WILLIE, FAYE BEATRICE BROWN

No. 3

(Filed 10 May 1977)

1. **Constitutional Law § 80; Homicide § 31.1— first degree murder — life sentence substituted for death penalty**

Death sentence imposed upon each defendant in a first degree murder case is vacated and a sentence of life imprisonment is substituted therefor.

2. **Criminal Law § 92.1— felony-murder — three defendants — consolidation proper**

There was no error in consolidating three cases for trial where the three defendants were charged with and tried for a single, identical crime; the theory of the prosecution in each case was that the three defendants, jointly, and pursuant to a common plan, robbed a bank and, while fleeing from the scene of the robbery with its proceeds, shot and killed a state trooper; and nothing in the record indicated the slightest prejudice to the right of any of the defendants to a fair trial by reason of the consolidation of the cases *per se.* G.S. 15A-926(b)(2).

3. **Constitutional Law § 63; Jury § 7— exclusion of jurors for death penalty views — no error**

Defendants' contention that the trial court erred in sustaining the State's challenges for cause to prospective jurors who expressed general opposition to capital punishment fails for two reasons: (1) each juror excused pursuant to the State's challenge in this area stated unequivocally that he or she, by reason of opposition to capital punishment, would vote against a verdict of guilty regardless of the evidence, and (2) the Supreme Court in *Witherspoon v. Illinois,* 391 U.S. 510, made it clear that its decision in that case was limited to the validity of a death sentence, imposed upon a verdict of a jury from which persons generally opposed to capital punishment had been excluded, and did not invalidate a conviction and the imposition of a proper sentence upon a verdict of guilty rendered by a jury so composed.

4. **Criminal Law § 76.5— no specific finding of waiver of counsel — confession properly admitted**

It was not error for the trial court to admit testimony as to a statement made by one defendant to an interrogating officer without

making the specific finding that defendant had waived her right to counsel, since such finding was implicit in the court's conclusion that the statement to the officer was admissible following the court's finding that the officer fully advised defendant of her right to counsel.

5. Criminal Law §§ 10, 11— defendants present at crime scene — no accessories before and after the fact

The trial court in a first degree murder prosecution did not err in failing to submit to the jury the question of defendants' guilt as accessories before the fact and as accessories after the fact where all the evidence was to the effect that the three defendants participated in the robbery of a bank, one of the defendants being the driver of the get-away car parked during the robbery immediately outside the bank, and all the evidence was to the effect that the three defendants, while fleeing from the scene of the robbery, were present at the shooting of a state trooper.

6. Homicide § 4.2— felony-murder — no conviction for underlying felony

In a prosecution for murder committed during the perpetration of a bank robbery, the trial court did not err in failing to submit to the jury the guilt of two of the defendants of armed robbery, since defendants were charged with murder and they could not be convicted of the separate, distinct underlying felony of robbery, an offense not charged in the indictment.

7. Homicide § 4.2— felony-murder — no further prosecution for felony

When the State, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of another felony so as to establish that the murder was a murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the underlying felony.

8. Indictment and Warrant § 9— purpose of indictment

The purpose of an indictment is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense, (2) to enable the court to know what judgment to pronounce in case of conviction.

9. Criminal Law § 74.2— confession implicating codefendant — admission harmless error

In a prosecution for murder committed during the perpetration of a bank robbery, the trial court erred in allowing into evidence a statement made to officers by a nontestifying defendant which implicated another defendant, and the trial court's admonition to the jury to dismiss that portion of the statement from its consideration of the implicated defendant's guilt was insufficient to overcome the error; however, in view of the uncontradicted evidence of the involvement of the implicated defendant in the crime charged, such error was harmless beyond a reasonable doubt.

10. Homicide § 4.2— murder during perpetration of robbery — all conspirators guilty of first degree murder

Where all defendants not only conspire to perpetrate a robbery, but all actually participate actively in its perpetration, and in the course thereof a killing occurs, all participants are guilty of murder in the first degree.

11. Homicide § 4.2— felony-murder — underlying felony not terminated prior to killing

For the purposes of the felony-murder rule, the underlying felony is not deemed terminated prior to the killing merely because the participants have then proceeded far enough with their activities to permit their conviction of the underlying felony.

12. Homicide § 21.6— felony-murder — homicide during robbery escape — sufficiency of evidence

A bank robbery was still in progress and the shooting of a state trooper occurred in the perpetration of it and was first degree murder where less than thirteen minutes elapsed between the departure of the defendant robbers from the bank and the fatal shooting of the trooper at a point 10.3 miles from the bank; the money stolen from the bank was in the car with defendants; they still had with them the weapons used in the robbery; two of the defendants were crouched down hiding in the car; defendants believed the state trooper stopped them because he suspected they were the robbers; and after the shooting defendants fled with the money and weapons, attempting to conceal their vehicle, and then hid in a bean field until flushed out by officers.

APPEAL by defendants from *Webb, J.*, at the 5 January 1976 Session of MARTIN.

Upon indictments, each proper in form, the defendants were tried for and convicted of murder in the first degree, the cases being consolidated for trial over their objections. Each defendant was sentenced to death. Though represented at trial and on appeal by separate counsel, the defendants filed a joint brief on appeal and their appeals were argued jointly by a single counsel.

None of the defendants offered evidence at the trial. That introduced by the State was to the following effect:

At 10 a.m. on 2 September 1975, the Branch Banking & Trust Company in Jamesville was held up and robbed by a Negro man, armed with a sawed-off shotgun, and a Negro woman, armed with a pistol. Without objection, the woman was positively identified in court as the defendant Brown. Without objection, the man was likewise identified in court as

the defendant Seaborn. A few moments prior to the robbery, bank employees had observed these two defendants walking in the bank parking lot and entering a brown Pontiac automobile parked on the street, which automobile immediately departed, thus indicating that it was driven by a third person. Very shortly thereafter, the same automobile returned to the bank and the robbery took place. The police were immediately notified and numerous police vehicles converged upon the Jamesville-Williamston area.

At approximately 10:15 a.m., Trooper Guy Thomas Davis, Jr., of the State Highway Patrol, with the use of his siren and blue flashing light, stopped a brown Pontiac at an intersection in Williamston, 10.3 miles from the bank in Jamesville. Apparently, his reason for doing so was some observed violation of the traffic laws. Trooper Davis approached the Pontiac automobile and spoke to the driver. He was immediately shot in the throat by a shotgun, fired from the back seat of the automobile where the defendant Seaborn was lying. Trooper Davis died almost instantly and the Pontiac automobile drove away. Without objection, a bystander positively identified in court the defendant Squire as the driver of the vehicle.

At approximately 11 a.m., a brown Pontiac was found by the officers, abandoned in a creek bottom. It bore no license plate but there were indications that a license plate had recently been removed therefrom and such plate was discovered in a nearby stream. The owner of this vehicle had lent it to the defendant Seaborn that morning. Bloodstains were found on the outside of the door next to the driver's seat and fingerprints of the defendants Squire and Seaborn were lifted from the interior of the vehicle. The vehicle was positively identified, by employees of the bank, as the one used by the robbers and, by the bystander, as the vehicle so stopped by Trooper Davis.

At approximately 2:30 p.m., a detachment of officers surrounded and began the search of a field of soybeans, growing nearly head-high, not far from the place where the Pontiac car had been discovered in the creek bottom. The downdraft from a police helicopter, hovering over the field, blew aside the bean vines so that one of the officers observed a person lying on the ground beneath the vines. Upon being ordered to come out with their hands raised, the three defendants arose and were handcuffed and taken into custody.

In the immediate vicinity from which the defendant Brown arose, the officers discovered a woman's pocketbook containing a large sum of money, including a package of "bait money," identified as having been taken from the bank in Jamesville in the course of the robbery. A pistol was also found lying on the ground at this point. Approximately an hour later, officers, equipped with a metal detector, searched the area in the soybean field from which the defendant Seaborn had arisen and found, shallowly buried, the stock and barrel of a sawed-off shotgun. The barrel, when so found, contained an exploded shell, which had been fired in that gun. In the back seat of the Pontiac car found in the creek bottom, the officers found a shotgun forearm stock and another shotgun shell. The barrel, stock and forearm stock were fitted together and formed a completed weapon, which was positively identified by a dealer in weapons as one sold by him some time previously to a woman who, in turn, testified that she gave it to her husband as a gift. The husband testified that he had lent this weapon to the defendant Squire approximately a year before the robbery and Squire never returned it.

Shortly after the three defendants were captured in the soybean field, they were taken to the police station in Williamston and, after each was given the customary warning of his constitutional rights as required in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), each was separately interrogated by investigating officers.

In that interrogation, the defendant Seaborn admitted his participation in the bank robbery and that, as the automobile used in the robbery proceeded from the bank toward Williamston, he was lying down in the back seat. He further stated that when the automobile stopped and Trooper Davis walked up to it, he, Seaborn, grabbed for the shotgun lying on the floor of the car and as he started to get up the gun discharged, following which the car started up and moved on and, after it had traveled a short period, it stopped again, whereupon he left the car and fled and hid in the "pea field." He further stated that he shot the trooper but did not intend to do so, the gun firing accidentally.

The defendant Brown told the officer interrogating her that she participated in the bank robbery, following which she got in the car and lay down in the front seat. In a short while she

heard a siren and then a loud shot. Thereafter, she said, the car came to a stop in a wooded area, she got out and went through the woods to the soybean field in which she was arrested.

The defendant Squire told the officer interrogating him that he drove the Pontiac car to the bank and remained in it, that after leaving the bank he drove toward Williamston and, after passing through an intersection, he observed a patrol car behind him, the blue light of which was flashing, so he stopped. He then said that when the officer approached the Pontiac car and looked into the vehicle he, Squire, heard a "blast from a gun" and the officer fell, following which Squire drove away at a rapid rate of speed through Williamston and stopped in a wooded area where he took the license plate off the vehicle and threw the license place into the woods en route to the soybean field where he was arrested. Over objection, the officer testified that Squire told him the shot came from the rear seat of the car and that, just prior to the shot, Squire, himself, said, "Don't, don't, Joe Willie, don't." The court instructed the jury to dismiss the last statement from its consideration in reaching its verdict.

The following timetable of events is disclosed by this evidence:

At 9:30 a.m., defendants Seaborn and Brown were observed walking in the bank parking lot past the drive-in window of the bank and getting in a brown Pontiac car parked upon the street, which car immediately moved off toward Williamston. At 9:55 a.m., the car returned to the bank parking lot. At 10 a.m., the defendants Brown and Seaborn entered the bank armed with a pistol and shotgun, respectively, and a bank employee, then on the telephone, informed the person she was calling that a robbery was in progress. At 10:05 a.m., the robbery was complete and the robbers left the bank. At 10:18 a.m., a fellow officer, having observed Trooper Davis lying on the street 10.3 miles from the bank, made a radio call for the rescue squad. At 11 a.m., the brown Pontiac car was discovered abandoned in the creek bottom. Shortly after 2:30 p.m., the defendants were discovered in the soybean field. At approximately 2:40 p.m., their handcuffing and arrests were completed and they were removed from the field for transportation to the Williamston Police Station. During this ten minute period, the arresting officers discovered the handbag containing the money

and the pistol and looked unsuccessfully for the shotgun. An investigating officer interviewed the defendant Squire, beginning at approximately 3:30 p.m., after giving him the customary Miranda warning, and obtained from him the above mentioned statement. At approximately 5 p.m., this interview ceased. At 3:50 p.m., defendant Brown was interviewed by an investigating officer after she had been advised of her constitutional rights as speciifed in *Miranda v. Arizona, supra.* This interview lasted approximately one hour. At the conclusion of these interviews, the defendants were fingerprinted and photographed.

Before admitting testimony as to the above mentioned admissions by the three defendants, the court conducted extensive voir dire examinations and found facts, fully supported by the evidence at the voir dire as to each such defendant to the effect that such defendant was fully advised of his constitutional rights as stated in *Miranda v. Arizona, supra,* and that each such defendant fully understood those rights and knowingly, voluntarily and understandingly waived his right to counsel and his right to remain silent. Consequently, the court concluded that the said evidence of such admission by such defendant was admissible.

In his charge to the jury, the judge instructed that the State was proceeding as to all three defendants upon the theory of felony murder; that is, that Trooper Davis was shot and killed by a person committing or attempting to commit armed robbery and, as to the defendant Seaborn, the State was also proceeding upon the theory of murder with premeditation and deliberation.

With reference to the theory of felony murder, the court instructed the jury that the State must prove beyond a reasonable doubt, as to the defendant in question, that such defendant "either acting alone or acting together with one or more of the other defendants perpetrated an armed robbery." He instructed that if two or more persons act together with a common purpose to commit an armed robbery, each of them is held responsible for the acts of the others done in the commission of the robbery. He further charged:

> "Now an armed robbery, sometimes called robbery with a firearm, is the taking and carrying away the personal property of another from his person or in his presence

without his consent by endangering or threatening a person's life with a firearm, the taker knowing he was not entitled to take the property and intending to deprive another of its use permanently.

* * * *

"Now a shooting is done in the perpetration of a robbery within the purview of the law when it is linked to the robbery or is part of a series of transactions so connected with the robbery that there is no break in the chain of events leading from the robbery to the shooting. Now flight from the scene of the robbery would be a part of the robbery. So that if you are satisfied from the evidence and beyond a reasonable doubt that any one of the defendants, acting either alone or as part of a plan with either one or both of the other defendants, participated in a robbery and was fleeing from the scene of the robbery without any break in the flight, and that while he or she was so fleeing either he or she or one of the other defendants with whom he or she was so acting shot Guy Thomas Davis, that is evidence from which you may conclude that the said defendant shot Guy Thomas Davis in the perpetration of a robbery. However, you are not compelled to do so. You will consider this evidence along with all the other evidence in this case and be satisfied beyond a reasonable doubt that the shooting occurred in the perpetration of a robbery before you so conclude."

As to the defendant Seaborn, the court instructed the jury that if it were not satisfied beyond a reasonable doubt that Seaborn was guilty of murder in the perpetration of a felony, it must then determine whether or not he was guilty of first degree murder with premeditation and deliberation, instructing the jury as to the elements of that type of first degree murder.

The verdict of the jury does not specify whether the jury found the murder to have been committed in the perpetration of a felony but, since the jury found the defendants Brown and Squire guilty, it is evident that it did so on the theory of felony murder.

Rufus L. Edmisten, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the State.

James S. Livermon, Jr., for defendant Squire.

Charles W. Ogletree for defendant Brown.

Milton Moore for defendant Seaborn.

W. Brian Howell for defendants.

LAKE, Justice.

[1] By virtue of the decision of the Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976), the death sentence imposed upon each of these defendants must be, and is hereby, vacated and a sentence to life imprisonment substituted therefor as hereinafter provided.

[2] There was no error in consolidating the three cases for trial. G.S. 15A-926(b)(2); *State v. Slade,* 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975). The three defendants were charged with and tried for a single, identical crime, the murder of Trooper Davis. The theory of the prosecution in each case was that the three defendants, jointly, and pursuant to a common plan, robbed the bank in Jamesville and, while fleeing from the scene of the robbery with its proceeds, shot and killed Trooper Davis. Nothing whatever in the record indicates the slightest prejudice to the right of any of the defendants to a fair trial by reason of the consolidation of the cases *per se.* We discuss below the contention that a new trial should be ordered because of the admission into evidence of testimony of an investigating officer concerning the extrajudicial statement by the defendant Squire to him.

[3] Defendants next contend that the trial court erred in sustaining the State's challenges for cause to prospective jurors who expressed general opposition to capital punishment. This assignment of error fails for two reasons, each of which is independently sufficient. *First,* the record discloses that no juror was excused because of his or her expression of general opposition to capital punishment. Each juror excused, pursuant to the State's challenge in this area, stated unequivocally that he or she, by reason of opposition to capital punishment, would vote against a verdict of guilty regardless of the evidence. The sustaining of such challenge to such juror was proper under the rule established in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and would not be basis even for vacat-

ing a death sentence, otherwise properly imposed. *Second,* the Supreme Court of the United States in *Witherspoon v. Illinois, supra,* made it clear that its decision in that case was limited to the validity of a death sentence, imposed upon a verdict of a jury from which persons generally opposed to capital punishment had been excluded, and did not invalidate a conviction and the imposition of a proper sentence upon a verdict of guilty rendered by a jury so composed. Speaking through Justice Branch, in *State v. Covington, supra,* at p. 348, this Court said:

> "All defendants, relying upon *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, contend that their constitutional rights were violated by the exclusion of jurors because of their views concerning capital punishment. Their contention requires little discussion in light of the holding in *Woodson v. North Carolina* [*supra*]. In *Witherspoon,* the Supreme Court made it clear that the decision did not invalidate the conviction of a defendant as opposed to a sentence of death. * * * We hold that defendants' constitutional rights were not violated by the exclusion of jurors because of their views concerning capital punishment."

Except with reference to the portion of the statement by the defendant Squire tending to implicate his codefendant Seaborn as the one who shot Trooper Davis, which we discuss below, there was no error in admitting, over objection, testimony of investigating officers as to extrajudicial admissions made to them by the several defendants. As to each such statement, the court, upon objection being interposed, conducted a voir dire in the absence of the jury. The defendant Squire and the defendant Brown offered no evidence at such voir dire. The defendant Seaborn did offer evidence tending to contradict the evidence offered by the State with reference to his having been properly advised of his constitutional rights, his waiver of counsel and the voluntariness of his statement.

As to the defendants Seaborn and Squire, the State offered, on voir dire, signed waivers of counsel and acknowledgments of the reading to them and understanding by them of their said constitutional rights. At the conclusion of the voir dire, the court made findings of fact to the effect that each defendant had been fully advised of his or her said rights, that defendants Seaborn and Squire had each, with full understanding of those

rights, knowingly, voluntarily and understandingly waived his right to counsel and his right to remain silent and that the defendant Brown, having been so advised of her rights and understanding them, knowingly, voluntarily and understandingly waived her right to remain silent. Upon these findings, the court concluded that the statements of the several defendants were admissible in evidence. The investigating officers were thereupon permitted to testify concerning these statements in the presence of the jury.

[4] It is well established that such findings of fact by the trial court upon the voir dire hearing, if supported by evidence, as these findings were, are conclusive on appeal. *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). It will be observed that, as to the defendant Brown, the court did not expressly find that she waived her right to counsel prior to making a statement to the interrogating officer. However, this finding is implicit in the court's conclusion that her statement to the officer was admissible following the court's finding that the officer fully advised her of her right to counsel. That finding is fully supported by the evidence on the voir dire hearing which also showed an express oral waiver by the defendant Brown of her right to counsel. There was no evidence to the contrary. That being true, it was not error for the judge to admit testimony as to the statement by the defendant Brown without making the specific finding that she had waived her right to counsel. *State v. Lynch,* 279 N.C. 1, 15, 181 S.E. 2d 561 (1971); *State v. Bishop, supra,* at p. 291 (1968); *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841 (1966). There was, therefore, no error in the admission of the evidence of the statements by the several defendants to the investigating officers, except to the extent hereinafter set forth.

[5] The defendants Squire and Brown requested the court to submit to the jury, with proper instructions, the question of their guilt as accessories before the fact and as accessories after the fact. This request was denied and in this there was no error. *State v. Phifer,* 290 N.C. 203, 225 S.E. 2d 786 (1976). Assuming, for the sake of argument, that the offense of being an accessory before the fact, or the offense of being an accessory after the fact, is a lesser included offense within the charge of murder, as to which see the several opinions of our predecessors on this

Court in *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961), it is well established that the trial court is under a duty to instruct the jury upon, and to submit for its consideration, a lesser included offense only when there is evidence tending to show the commission of such lesser offense. *State v. Phifer, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Foster,* 284 N.C. 259, 277, 200 S.E. 2d 782 (1973); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

All persons present, actually or constructively, and participating in a criminal offense are principals therein, either in the first or second degree, and not accessories. *State v. Phifer, supra,* at p. 217; *State v. Overman,* 284 N.C. 335, 200 S.E. 2d 604 (1973); *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970). "An accessory before the fact is one *who was absent from the scene when the crime was committed* but who procured, counseled, commanded or encouraged the principal to commit it." (Emphasis added.) *State v. Benton, supra.* "An accessory after the fact under G.S. 14-7 'is one who, *knowing* that a felony has been committed by another, receives, relieves, comforts, or assists such other, the felon, or in any manner aids him to escape arrest or punishment.' *State v. Potter,* 221 N.C. 153, 19 S.E. 2d 257 (1942)." *State v. Overman, supra,* at p. 341. In the present case, all of the evidence is to the effect that the three defendants participated in the robbery of the bank in Jamesville, Squire being the driver of the get-away car parked during the robbery immediately outside the bank, and all the evidence is to the effect that the three defendants, while fleeing from the scene of the robbery, were present at the shooting of Trooper Davis.

[6] Likewise, there was no error in the failure of the court to submit to the jury the guilt of the defendants Squire and Brown of the offense of armed robbery. The jury was properly instructed as to the elements of armed robbery as the felony underlying the alleged murder. The argument of these defendants upon this contention is to this effect: The evidence was overwhelming that these defendants had participated in the robbery of the bank; if the jury determined that the robbery was not in progress at the time Trooper Davis was killed, the jury could not convict these defendants of murder; "The jury was not, under any circumstances, going to find them not guilty"; thus, under the circumstances of this case, robbery was a lesser in-

cluded offense and should have been submitted to the jury as to these defendants as an alternative to convicting them of murder; otherwise, the jury was virtually forced to find the robbery was still in progress at the time Trooper Davis was shot. The sufficient answer is that on this trial the defendants were not charged with armed robbery, but with murder.

[7, 8] It is true that the State was proceeding in the murder case on the theory of felony-murder; that is, that the murder was committed in the perpetration of the felony of robbery. It is also true that, when the State, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of another felony so as to establish that the murder was a murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the underlying felony. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972). It does not follow, however, that upon an indictment charging murder alone, the defendant can be convicted of a separate, distinct underlying felony such as armed robbery. He may be convicted only of the offense charged in the indictment. "It is a universal rule that an indictment must allege all the elements of the offense charged. A defendant is entitled to be informed of the accusation against him and to be tried accordingly." *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970). "A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged." *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14 (1965). "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviciton.' *State v. Burton,* 243 N.C. 277, 90 S.E. 2d 390 (1955); *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953); *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967)." *State v. Russell,* 282 N.C. 240, 192 S.E. 2d 294 (1972). Since the defendants Squire and Brown could not have been lawfully convicted, upon the present indictments, of the crime of armed robbery, it was not error to refuse to submit their guilt of that offense to the jury.

We come now to the question of the effect upon the convictions of these defendants of the admission in evidence of the testimony of the investigating officer concerning the extrajudicial statement made to him by the defendant Squire, which statement implicated the defendant Seaborn as the one who fired the fatal shot.

The admission of this statement was not error as to the declarant, Squire. As above noted, the statement was lawfully obtained and admissible insofar as the procedures followed by the interrogating officer are concerned. "A confession legally obtained is clearly competent against the defendant who made it and the best evidence of his guilt." *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968).

The statement by Squire did not refer to the defendant Brown, directly or indirectly. The defendant Brown's own statement to the officer interrogating her was to the effect that when the shot was fired, she was lying in the front seat of the car. There was no evidence to the contrary. Thus, Squire's statement that the shot was fired from the back seat of the car would not imply or indicate that the defendant Brown was the person who actually fired it. The admission of this evidence was, therefore, not prejudicial to the defendant Brown. Thus, neither the defendant Squire nor the defendant Brown would be entitled to a new trial because of the admission of the testimony of this statement by the defendant Squire.

[9] As to the defendant Seaborn, the admission of the officer's testimony concerning this statement by the codefendant Squire was error, this being, clearly, hearsay evidence that Seaborn fired the fatal shot. Obviously, in a separate trial of Seaborn such testimony would not have been admissible over his objection. The trial judge, obviously taken by surprise by this testimony of the officer in the presence of the jury, immediately sought to rectify the error by instructing the jury to dismiss that portion of Squire's statement to the officer from its consideration of Seaborn's guilt. However, since the decision of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), it is well settled that such admonition to the jury is not sufficient to overcome the error as to the codefendant so implicated by the statement of the declaring defendant. Where, as in *Bruton v. United States, supra*, and as in the present case, the declarant does not, himself, take the witness stand and thus subject himself to cross-examination by his

codefendant implicated by the statement to the officer, the codefendant's constitutional right to confront his accusor is violated. This violation of his constitutional right of confrontation is not erased by the admonition of the trial judge to the jury to strike the offending evidence from its consideration. Thus, speaking through Justice Sharp, now Chief Justice, we said in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968):

> "The result [of *Bruton v. United States, supra*] is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant * * * and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation."

It does not follow, however, that the defendant Seaborn is entitled to a new trial. Like any other defendant, Seaborn was "entitled to a fair trial, not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). In *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed. 2d 340 (1972), the Supreme Court of the United States expressly applied the well established doctrine of harmless error to a recognized violation of the rule declared in *Bruton v. United States, supra,* saying, through Mr. Justice Rehnquist:

> "The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.
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> * * *
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> "Having concluded that petitioner's [the complaining defendant's own] confession was considered by the jury, we must determine on the basis of 'our own reading of the record and on what seems to us to have been the

probable impact * * * on the minds of an average jury,' * * * whether Snell's [the declaring codefendant's] admissions were sufficiently prejudicial to petitioner as to require reversal. * * * Thus, unless admitted evidence contributed to the conviction, reversal is not required. See *Chapman v. California,* 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 704 (1967). The Supreme Court of the United States, speaking through Mr. Justice Black, said:

"We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be doomed harmful. * * * We decline to adopt any such rule. * * * We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

* * *

"We, therefore, do no more than adhere to the meaning of our *Fahy* Case [*Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963)] when we hold, as we now do, that before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

This doctrine of harmless error is likewise firmly established in the law of this State. *State v. McCotter,* 288 N.C. 227, 217 S.E. 2d 525 (1975); *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972), cert. den., 409 U.S. 1043; *State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972), cert. den., 414 U.S. 1160. In the latter case, we said, through Justice Huskins:

"We have consistently held that the admission of evidence which is technically incompetent will be treated as harmless unless it is made to appear that defendant was

prejudiced thereby and that a different result likely would have ensued had the evidence been excluded."

The defendant Seaborn's own statement to the officer interrogating him following his arrest, evidence as to which was properly admitted by the trial court as above seen, was that he was in the back seat of the car when Trooper Davis approached, that he reached for the shotgun lying on the floor of the car and, as he raised up, the gun discharged and inflicted the fatal wound. Seaborn's statement to the officer was that he did not intend to kill Trooper Davis, the firing of the gun being accidental. The admitted testimony as to the statement of the defendant Squire is not inconsistent with this assertion by Seaborn.

The evidence is overwhelming, including the statements of each of three defendants, that all three of the defendants participated actively in the robbery of the bank in Jamesville, Squire being the driver of the car used to transport Seaborn and Brown to the bank for the purpose of robbery and of escape. The uncontradicted evidence is: The robbery was completed at 10:05 a.m.; at 10:18 a.m., Trooper Davis lay mortally wounded on the street, 10.3 miles distant from the bank, following a shotgun blast from the car in which the three defendants were making their escape; the shotgun used in the bank robbery fired the exploded shell found in the breach end of the barrel thereof following the killing of Trooper Davis and the arrest of the defendants in the soybean field; following the shooting of Trooper Davis, the three defendants drove the car to a point in a creek bottom where they abandoned it, after removing the license plate therefrom, and then fled on foot with the proceeds of the bank robbery to the point where they were arrested, hiding under a growing crop of soybeans; beside them was a woman's pocketbook containing the proceeds of the bank robbery and the pistol used by the defendant Brown in the robbery; shallowly buried within a few feet from where they were hiding were the barrel and the stock of the shotgun. In the face of this uncontradicted evidence, it would be preposterous to suggest that the jury would not have convicted Seaborn but for the statement by his codefendant Squire tending to put Seaborn in the back seat of the car and to show that the actual shot came from that portion of the car. The error in admitting the incompetent testimony of Squire must, therefore, be deemed harmless beyond a reasonable doubt.

It is true that the court submitted to the jury as to the defendant Seaborn both felony-murder and first degree murder by premeditation and deliberation. However, a finding of the guilt of Squire and Brown was limited in the court's instruction to the possibility of guilt of felony-murder. The verdict of the jury, finding all three guilty of first degree murder, shows clearly that the jury found the killing of Trooper Davis occurred while the defendants were engaged in the perpetration of the felony of bank robbery.

G.S. 14-17 declares that a murder committed in the perpetration of any robbery shall be deemed murder in the first degree. In *State v. Thompson, supra,* speaking through Chief Justice Bobbitt, this Court said:

> "An interrelationship between the felony and the homicide is prerequisite to the application of a felony-murder doctrine. * * * A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute 'when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction.' 40 Am. Jur. 2d, Homicide § 73."

As Justice Sharp, now Chief Justice, said in *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970):

> "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree."

[10] To the same effect is *State v. Covington, supra.* Necessarily, where all of the defendants not only conspire to perpetrate a robbery, but all actually participate actively in its perpetration, and in the course thereof a killing occurs, all participants are guilty of murder in the first degree. *State v. Phifer, supra.*

[11] For the purposes of this rule, the underlying felony is not deemed terminated prior to the killing merely because the participants have then proceeded far enough with their activities to permit their conviction of the underlying felony.

In the annotation entitled "Felony Murder Rule-Termination Of Felony," 58 A.L.R. 3d 851, it is said:

> "The vast majority of cases within the scope of this annotation support the view that escape is ordinarily within the *res gestae* of the felony and that a killing committed during escape or flight is ordinarily within the felony-murder rule."

The Supreme Court of California so held in *People v. Salas*, 7 Cal. 3d 812, 103 Cal. Rptr. 431, 500 P. 2d 7, 58 A.L.R. 3d 832 (1972), cert. den., 410 U.S. 939, saying:

> "In the present case * * * the homicide was committed before defendant had reached a place of safety while he 'was in hot flight with the stolen property and in the belief that the officer was about to arrest him for the robbery.' Deputy O'Neal commenced to follow defendant's vehicle within three minutes of the time defendant left the bar [the scene of the robbery] and the killing [of the officer] occurred within six or seven minutes of that time. Thus the robbery was still in the escape stage, as conceded by the defendant at trial."

[12] In the present case, less than thirteen minutes elapsed between the departure of the defendant robbers from the bank and the fatal shooting of Trooper Davis at a point 10.3 miles from the bank. The money stolen from the bank was in the car with the defendants. They still had with them the weapons used in the robbery. According to the defendants' own statements, one was hiding, crouched down in the back seat, another hiding, crouched down in the front seat. Pursuant to the alarm, police officers in various vehicles were converging upon the area. The defendant Squire, the driver of the get-away car, had observed three such vehicles, with flashing lights, meeting him as the officers drove toward the robbed bank. It is apparent that the defendants believed, though seemingly erroneously, that Trooper Davis had stopped them because he suspected they were the robbers. After the shooting, they fled with the money and the weapons, attempted to conceal their vehicle and then lay hiding in a bean field until flushed by the pursuing officers. Obviously, the defendants had not reached what they regarded as a place of temporary safety from pursuing officers when the shooting of Trooper Davis occurred. Thus, the robbery was still in prog-

ress and the shooting occurred in the perpetration of it and was first degree murder.

By virtue of the decision of the Supreme Court of the United States in *Woodson v. North Carolina, supra,* we must, and do, vacate the sentence of death imposed upon each of the defendants and, under the authority of Session Laws of 1973, Chapter 1201, § 7, substitute a sentence of life imprisonment as to each such defendant. Accordingly, this cause is remanded to the Superior Court of Martin County, with direction that the Presiding Judge, without requiring the presence of the defendants, or any of them, shall enter, as to each defendant, a judgment sentencing such defendant to life imprisonment in lieu of the sentence of death heretofore imposed upon him or upon her for the first degree murder of which the defendants have been convicted. Further, in accordance with this judgment, the Clerk of the Superior Court will issue, as to each defendant, a new commitment in substitution for the commitment heretofore issued. At the same time, the Clerk will furnish to each defendant and to his or her attorney a copy of the judgment and commitment as revised in accordance with this opinion.

No error as to the verdict.

Death sentence vacated and remanded for imposition of sentence to life imprisonment as to each defendant.

STATE OF NORTH CAROLINA v. GREGORY HUDSON JONES

No. 2

(Filed 10 May 1977)

1. **Criminal Law § 122.2— inability of jury to agree — additional instructions — coercion of verdict**

Where the trial court knew that some members of the jury had "abnormal conflicts" during the weekend and consequently promised two of the jurors that court would not be held on Saturday and Sunday, the court intimidated the jury and coerced a verdict when he gratuitously called the jury back into court on Friday night, spoke to them of their duty to agree, and threatened to keep them through the weekend unless they reached a verdict.

2. **Criminal Law § 46— evidence of flight**

An accused's flight is admissible as evidence of consciousness of guilt and thus of guilt itself.

3. Criminal Law § 46.1— shooting of officer during flight — admissibility

Testimony by a highway patrolman that defendant shot him numerous times when he stopped defendant for speeding on the morning after the commission of the crimes for which defendant was on trial at a point 110 miles from the crime scene was competent to show flight by defendant even though the testimony disclosed defendant's commission of a separate and distinct offense.

4. Criminal Law § 46.1— shooting of officer during flight — offer to stipulate flight

Defendant's offer to stipulate to the fact of flight did not render inadmissible a highway patrolman's testimony that defendant shot him numerous times when he stopped defendant for speeding at a point 110 miles from the crime scene since flight is "relative" proof which must be viewed in its entire context to be of aid to the jury in the resolution of the case.

DEFENDANT appeals from judgments of *Martin (Perry), J.*, 16 February 1976 Session, NEW HANOVER Superior Court.

Defendant was tried upon eight separate bills of indictment, consolidated for purposes of trial, charging him with the commission of the following crimes:

1. First degree murder of Peter Fearing on 16 October 1975. He was convicted on this charge and sentenced to death.

2. Assault with a deadly weapon with intent to kill inflicting serious injuries upon Clyde Melvin Herring on 9 October 1975. He was convicted of assault with a deadly weapon inflicting serious injury and sentenced to eight to ten years in prison to commence at the expiration of sentence pronounced in case No. 3 listed below.

3. Assault with a deadly weapon with intent to kill inflicting serious injuries upon Ronald Elkins on 16 October 1975. He was convicted as charged and sentenced to eighteen to twenty years in prison, to commence at the expiration of sentence pronounced in case No. 5 listed below.

4. Assault with a deadly weapon with intent to kill inflicting serious injuries upon Bryan Jones on 16 October 1975. He was convicted of assault with a deadly weapon inflicting serious injuries and sentenced to eight to ten years in prison, to commence at the expiration of sentence in case No. 2 listed above.

5. Aggravated kidnapping of Ronald Elkins on 9 October 1975 for the purpose of facilitating the commission of the felonies of assault with a deadly weapon inflicting serious injury, burglary and murder. He was convicted of kidnapping and sentenced to twenty years in prison, to commence at the expiration of sentence pronounced in case No. 6 listed below.

6. First degree burglary of the dwelling house of Mrs. Donna Rowe (mother of Peter Fearing) with intent to commit murder therein on 16 October 1975. He was convicted of first degree burglary and sentenced to life imprisonment to commence at the expiration of the death sentence imposed in case No. 1 listed above.

7. Felonious breaking and entering of the residence of Melvin and Diane Herring with the intent to commit larceny therein. He was convicted of nonfelonious breaking or entering and nonfelonious larceny and sentenced to two years in prison to commence at the expiration of the sentence pronounced in case No. 8 listed below.

8. Felonious breaking and entering of a motor vehicle (1966 Oldsmobile owned by Donna Davis Rowe which contained the goods and valuables of Peter Fearing valued at $140) with the intent to commit larceny therein. He was convicted of breaking or entering a motor vehicle and sentenced to not less than four nor more than five years to commence at the expiration of the sentence pronounced in case No. 4 listed above.

The State offered evidence tending to show that on 8 October 1975 at about 10 p.m. Ronald Elkins, age seventeen, and Peter Fearing, age nineteen, were hitchhiking and defendant picked them up in his light blue Volkswagen. He said he had some pot he wanted them to sell for him and took them to his house in Wilmington where all three of them smoked a joint of marijuana. Defendant talked at length to Peter Fearing and then took the two boys home. The following day Butch Herring, Elkins and Fearing rode to Wrightsville Beach in Herring's Plymouth. Herring stayed in his car while Elkins and Fearing went onto the beach to look for defendant. Very soon defendant came out of the water and took off his diving equipment which all of them carried to his Volkswagen parked near Butch Her-

ring's car. Defendant told Elkins "he hoped nobody was trying to rip him off or he would collect a little bit of interest."

Later Elkins and Herring went to another section of the beach where they waited for defendant and Peter Fearing to arrive in defendant's car. When defendant arrived he took a metal box out of his Volkswagen and he and Fearing walked up the beach where they joined the other two. All four of them smoked a joint of marijuana which defendant took from the metal box. In due course they all smoked a second and a third joint at defendant's invitation. After it became dark on the beach, defendant noticed his "bag of pot" was missing and inquired as to its whereabouts. Then Butch Herring said, "Look out, Peter. He's got a gun," and ran away. Peter Fearing ran up the dunes with the box that contained the marijuana but, when defendant pointed the gun at him, dropped the box and ran away. Defendant pointed his gun at Elkins, cursed him, picked up the metal box, returned to his Volkswagen and left.

A short while later defendant, in his Volkswagen, accosted Elkins walking across the bridge at Wrightsville Beach, drew his gun, and ordered Elkins to get in the Volkswagen. He drove to where Butch Herring's car was parked and forced Elkins to take a jack and some tapes out of Herring's car and place them in defendant's Volkswagen. Defendant then drove to Peter Fearing's residence, parked three houses away, and forced Elkins to get a tape player, some headphones, a speaker and a couple of tapes out of Peter Fearing's car, and a Coleman stove out of the garage, and put them in defendant's Volkswagen. In the same fashion Elkins was forced to get some tires and place them in defendant's vehicle. Defendant then drove to Elkins' home at 1102 Browning Drive. After inspecting the Elkins premises for things he might want to steal, defendant told Elkins to take him to Butch Herring's house on Barnett Avenue, which he did. They went inside and nobody was home. Defendant forced Elkins to get the stereo and tapes, a coffee table, a bar and bar chairs, a black light bulb, and other articles which were loaded into defendant's vehicle. Then defendant drove to a spot on Market Street where he told Elkins to get out and consider himself lucky; that he and Peter Fearing had better get out of town because the next time he saw them he was going to kill them. Elkins hitchhiked a ride home, arriving about 5 a.m. on 7 October 1975.

Later on the same morning Elkins went to Peter Fearing's home and called the police. He and Fearing talked to the police and told them what had happened the previous night.

On 16 October 1975 Elkins went to Peter Fearing's house at 1537 Fielding Drive where he spent most of the day. That night they went out to obtain drinks at a 7-11 store and returned about 11:30 p.m. When they walked in the house they heard a noise "like something fell" and turned off the lights. Shortly thereafter Bryan Jones, age sixteen, arrived and the three of them smoked marijuana. Ten minutes later Elkins was shot in the back. As Elkins turned, he saw defendant in the hallway with a gun pointed at him. No one knew defendant was in the house until that time. Elkins had not seen him since 10 October. Elkins then heard more shots in rapid succession. Defendant then shot Elkins in the head. After awhile Elkins arose and saw Peter Fearing lying between the sofa and the book shelf. Defendant was gone. Elkins stumbled to the house next door where he told what had happened. The rescue squad arrived and took Elkins to the hospital where he spent seventeen days.

The rescue squad also entered the house to pick up Peter Fearing who died later at the hospital.

The State's evidence further tends to show that after defendant shot Peter Fearing and Ronald Elkins, Bryan Jones, who was seated in a chair, started to get up and defendant shot him in the leg. Jones fell and defendant walked toward him, pointed the gun at Jones' head and pulled the trigger. The gun clicked but was out of ammunition. Defendant grabbed the gun "toward the bottom where the clip is and then ran away." Jones was then able to escape.

Harry Stegall, a member of the State Highway Patrol, testified that on 17 October 1975 at approximately 8:15 a.m. he first saw defendant traveling west on U. S. 74 in an orange and red Volkswagen station wagon. At that time defendant was 110 miles from Wilmington, N. C. and moving at 65 miles per hour in a 55-mile zone. Trooper Stegall pursued the Volkswagen approximately one mile in a marked patrol car and finally succeeded in stopping the vehicle. Defendant remained in the Volkswagen and Trooper Stegall approached the driver's side and observed that defendant was the only occupant of the vehicle. He asked defendant for his operator's license. After

examining the license he advised defendant that he had been clocked at 65 miles per hour in a 55-mile zone and it would be necessary for defendant to follow the officer to Laurinburg to post bond. Defendant said nothing. As Trooper Stegall turned toward the rear of the Volkswagen to return to his patrol car, defendant said "Hey," raised a .380 automatic pistol and fired five shots into the officer's body. One bullet entered directly over the heart; one pierced a lung; one hit the collarbone and went across the officer's chest, severing the brachial plate in the shoulder and paralyzing the right arm; and one bullet entered the neck and lodged in the jaw. As Trooper Stegall fell, defendant shot him in the side of the face. While the officer lay on the ground, defendant got out of the Volkswagen, ran toward the officer in a low crouched position and fired two more shots—one in the shoulder and the other in the leg. He then took Trooper Stegall's gun, reentered the Volkswagen and drove away. The officer's weapon was recovered when defendant was captured the next day.

Defendant testified in his own behalf. He said he was twenty-six years of age and had spent two years in the Army. He was born in Virginia, went to high school and college in New Jersey, and came to Wilmington to go to school at the Cape Fear Technical Institute in the fall of 1975. He met Peter Fearing and Ronnie Elkins on the day he picked them up. They offered him marijuana cigarettes which all of them smoked, and he invited them to his house where they listened to music. Afterwards, defendant took them home.

A day or two later Peter Fearing told defendant he was a scuba diver and expressed the wish that they dive together. On 9 October defendant went scuba diving at Wrightsville Beach and when he came out of the water it was dark. He met Peter Fearing and Ronnie Elkins near the jetty and they helped him carry some of his gear to his Volkswagen. On the way they passed a green Dodge in which Butch Clyde Herring, whom defendant had never met, was seated. While defendant changed his clothing, Peter Fearing left to talk to Butch Herring. Soon Peter Fearing returned and said, "We will meet you. You know we want you to meet Butch. We will meet you at the Surf Club." With Peter Fearing giving directions they went north up the beach to a building with no lights in it which Peter Fearing said was the Surf Club. Defendant became nervous and slipped his pistol into his pants pocket. Defendant and Peter Fearing then

walked down to the dunes on the berm of the beach where they joined Ronnie Elkins and Butch Herring. There they smoked pot, moved further down the beach and smoked another marijuana cigarette. All of a sudden Butch pulled defendant's body completely off the ground with a tire tool wrapped around defendant's throat. Peter Fearing held defendant's feet while his house keys and car keys were taken from his belt loop. Peter got the metal box and Elkins got the diver's light. Defendant grabbed his gun from his back pocket and shot Butch Herring, firing it over his shoulder. Butch Herring dropped the tire tool and ran down the beach. Peter Fearing released defendant's feet and started running toward the dunes with the metal box and defendant's keys. Defendant pointed the pistol at Fearing who dropped everything and kept running. Ronald Elkins tried to run but fell on his face. As defendant reclaimed his light, he told Elkins, "I ought to shoot you."

Defendant gathered his things together, drove home and attended classes the following day. On returning home he found his television and couch were missing, and things were all over the floor in the dining room and living room. While delivering an item to his next door neighbor, he noticed the police at his door, and, thinking perhaps Butch Herring had died from his "over-the-shoulder" shot, he hid under the house until they left. He then hitchhiked to Carolina Beach and from there to Atlanta to visit friends. He then returned to Wilmington to find out why the police were after him and to get $600 he had in his Wilmington bank account.

When he got to his house in Wilmington about everything was gone—the stereo, desk, school books, scuba gear, even the rugs in the bedroom. He drove to Carolina Beach where he stayed for several days and then, about midnight on 15 October, he returned to Wilmington to see Peter Fearing. When he got to Peter's house he entered the garage but failed to see any of his furniture or his stereo. He heard voices inside, knocked, and Bryan Jones opened the door. He saw Peter Fearing standing at the end of the couch and just walked past Jones into the living room. He asked Peter what he had done with defendant's furniture. Ronald Elkins was in a chair near the stereo. Defendant had a .380 automatic in his pants pocket. While arguing with Peter Fearing, defendant was kicked in the back and fell to the floor. Peter then hit defendant in the face and Elkins ran over with a heavy ceramic object and hit defendant about

the ear and side of the head with it. Then Peter Fearing, Ronald Elkins and Bryan Jones all started pounding and kicking defendant until he became semiconscious and his vision was blurred. Peter Fearing was behind defendant with a big knife—like a hunting knife—in his hand. Defendant shoved him over the coffee table towards the door and saw Elkins coming at him again. At that point defendant took the pistol from his pocket and fired two rounds in Peter's direction. Ronald Elkins grabbed the gun and every time he pulled on it the gun would fire. It went off three or four times, bullets striking the coffee table twice. Bryan Jones had his right arm around defendant's throat and defendant shot at him. Jones fell, then got up and went out the door. Defendant went up the hall and reloaded his pistol. He then fired again at Elkins who was "reaching for something." Finally, defendant left the house through a window and rode his motorcycle back to Carolina Beach.

Defendant started hitchhiking toward Atlanta. The third ride he caught was in a red Volkswagen and the driver requested defendant to drive. While driving down the highway he ran the radar trap that Trooper Harry Stegall testified about. Defendant, scared because he had heard on the radio that he was wanted for murder, panicked when Trooper Stegall pulled him over. He thought the officer was arresting him for murder. He didn't intend to kill Trooper Stegall but only intended to disarm him. After shooting Trooper Stegall, defendant drove a mile or two and abandoned the vehicle—just got out of the red Volkswagen, leaving his baggage in it, and started walking through the woods. He was apprehended a day or two later and taken back to Wilmington.

Sentence of death for the first degree murder of Peter Fearing was pronounced at the conclusion of the trial on 20 February 1976. Prayer for judgment was continued in all other cases until 4 October 1976. At that time the district attorney prayed judgment and judgments were pronounced as above set out.

Defendant appealed the sentences of death and life imprisonment to the Supreme Court as of right pursuant to G.S. 7A-27(a). We allowed motion to bypass the Court of Appeals on all remaining convictions to the end that all matters pertaining to this trial be initially reviewed by the Supreme Court.

Rufus L. Edmisten, Attorney General; James E. Magner, Jr., Assistant Attorney General, for the State of North Carolina.

George H. Sperry, attorney for defendant appellant.

HUSKINS, Justice.

It has long been held in this State that "[e]very person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951); *accord, State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1966); *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173 (1954). Responsibility for enforcing this right necessarily rests upon the trial judge. *State v. Manning,* 251 N.C. 1, 110 S.E. 2d 474 (1959). He must conduct himself with the "utmost caution in order that the right of the accused to a fair trial may not be nullified by any act of his." *State v. Carter, supra.* "He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855 (1907).

In this regard we said in *State v. McVay,* 279 N.C. 428, 183 S.E. 2d 652 (1971), quoting 3 Strong, N. C. Index 2d, Criminal Law § 122, that:

> "Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be."

Under certain circumstances language which informs the jurors that they may be kept for a specified period of time unless they reach a verdict may amount to coercion, tainting the verdict. *Pfeiffer v. State,* 35 Ariz. 321, 278 P. 63 (1929); *Canterbury v. Commonwealth,* 222 Ky. 510, 1 S.W. 2d 976 (1928). It was said long ago in *Green v. Teflair,* 11 How. Pr. (N.Y.) 260 (1853), that "[a]n attempt to influence the jury, by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they are so

pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified."

Nevertheless, whether prejudicial error arises from additional instructions urging the jury to agree on a verdict is largely dependent on the facts and circumstances of each case. *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966). In *State v. McVay, supra*, the trial judge instructed as follows:

> "COURT: Members of the jury, you may reconcile any differences you have under the evidence and render a verdict. The Court will express the hope that you will do so. If this jury fails to render a verdict, it would then become necessary to call upon another jury to pass upon the cases. I have no reason to believe that another would have more intelligence and be better qualified than this jury to make the decisions. Even so, the Court would have the jury bear in mind that each person is a keeper of his own conscience and the Court would not have a juror to do violence to his own conscience nor to render verdict. *However, we have until Friday night for you to work on this case and no reason to hurry the matter.* So take your time and deliberate further, please. Please retire." (Emphasis added.)

The statement was given in response to the inquiry of the jury foreman that, "we have reached an impasse. Shall we continue?" This Court held that in the context of that case "[t]he additional statement that the jury had until Friday to work on the case was given simply to assure the jury that they need not rush their deliberations and that they had ample time in which to consider their verdict." *State v. McVay, supra; accord, People v. Haacke*, 34 Cal. App. 516, 168 P. 382 (1917); *State v. Gresham*, 290 N.C. 761, 228 S.E. 2d 244 (1976); *State v. McKissick, supra; Butler v. State*, 185 Tenn. 686, 207 S.W. 2d 584 (1948). We now apply these principles to the facts of our case.

During the State's rebuttal testimony the following transpired:

> "COURT: Well, while you gentlemen are apparently thinking, let me inquire of the jurors who were empaneled Tuesday what, if anything, I said to you about sessions beyond today. I do recall telling the jurors, or at least two of them, upon their inquiry that we would not have court on Saturday or Sunday. Do you recall if I made any statement to you about Friday evening, meaning after 6:00 p.m.

MR. GORE (Juror): Could I say something, sir?

COURT: If it is about what I am talking about, yes, sir.

MR. GORE: I was going to say that my preference would be to continue tonight instead of having to come back Monday. I mean, that's my preference.

COURT: Juror No. 2, I think I promised you we would not have court tomorrow, is that right?

MRS. BROCK (Juror No. 2): Yes, sir, and Sunday.

COURT: How about tonight? Did I promise you anything about tonight?

MRS. BROCK (Juror No. 2): No, that was because I have conflicts on Saturday and Sunday and I still do have the same conflicts.

COURT: You explained that before you were selected. I understand that, but you do not have any tonight except for the normal conflicts that most people have?

MRS. BROCK: Mine are really abnormal, sir."

Immediately prior to the charge to the jury Judge Martin entered the following order:

"COURT: It is now apparent to the court that this trial cannot be concluded during its regular hours assigned by law for this session of court which expires at 5:00 p.m. on this day. Therefore pursuant to the authority vested in me as presiding judge under G.S. 15-167 I extend this court by virtue of the fact that the trial of a felony is in progress on the last Friday of this session of court and it appears to my satisfaction that it is unlikely that such trial can be completed before 5:00 p.m. Therefore, as the presiding judge, I extend this session of court as it shall be necessary for the purpose of the completion of this court to be completed today, tonight or tomorrow.

This the 20th day of February, 1976. 4:20 p.m."

The charge was completed and the jury sent to deliberate at a few minutes past six o'clock on that Friday. The jury returned of its own volition twice: once to view an exhibit and once to ask that the instructions regarding self-defense be

repeated. At 9:20 the court called the jury back, inquired as to its progress and then made the following statement:

> "Ladies and Gentlemen of the Jury, I realize this has been a long trial and I am not making any effort to rush you, particularly at this time, because we do not have to rush. I can very easily make arrangements for you to spend the night here, which I shall start doing immediately; not here but in quarters that will be provided for you in a convenient lodging area in the City of Wilmington and we can come back tomorrow; and if we don't finish tomorrow we can come back Sunday. Please understand that I am not trying to rush you, but since you say, Mr. Foreman, that you are making progress very slowly I would remind you Ladies and Gentlemen of the Jury what a disagreement means, and remind you again of what I told you in one of the final parts of my charge—that a jury is composed of twelve individuals and you are a deliberative body. It is not usually wise for a juror to take an adamant position at the commencement of deliberations from which they say they will not recede under any circumstances. That's the reason that you have twelve jurors rather than one for to take such an adamant position at the commencement of deliberations may possibly cause you embarrassment further on in the deliberations if you find that your original position was erroneous; so I presume that you Ladies and Gentlemen of the Jury realize what a disagreement would mean, that is, unable to reach a verdict. It means, of course, that there will be another week of Court when the time of the Court will have to be consumed in the trial of these actions again by another jury. You have heard all of the evidence in this case and the charge of the Court as to the law, which appears to be reasonably easy to understand."

[1] It is our view that, in the context of this case, this language amounts to improper pressure upon the jury to arrive at a verdict. Judge Martin knew that some members of the jury had "abnormal conflicts" and consequently had promised two of the jurors that court would not be held on Saturday or Sunday. When he gratuitously called the jury back into court, spoke to them of their duty to agree and threatened to keep them through the weekend unless they reached a verdict, his actions could have no other effect than to intimidate and to coerce the jury to reach a verdict.

Viewed in its totality, we find that the language embodied in the additional instructions to the jury was coercive and intimidating so as to deprive the jurors of "that freedom of thought and of action so very essential to a calm, fair and impartial consideration of the case." *State v. Windley,* 178 N.C. 670, 100 S.E. 116 (1919). Defendant must therefore be given a new trial. *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536 (1967).

While these utterances alone compel us to grant a new trial, they do not comprise the totality of Judge Martin's role in the deliberations of the jury. Close examination of the record reveals numerous remarks by him in the presence of the jury during the course of the trial, the cumulative effect of which suggests judicial leaning. Whether, by making these remarks, the judge intended to express an opinion is not controlling; rather, the prejudicial effect of judicial utterances flows from the probable meaning attached to them by the jury. *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973).

In view of this disposition of defendant's appeal we find it necessary to pass on only one other assignment of error, to wit: the admission into evidence of the testimony of Trooper Harry Stegall.

Defendant contends the testimony of Trooper Stegall should have been excluded in that, by putting before the jury evidence of the defendant's assault on Trooper Stegall, it showed defendant had committed a separate, distinct offense in contravention of the rule discussed in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). Not so. We hold the testimony was properly admitted.

[2, 3] The testimony of Trooper Stegall established salient facts concerning the *flight* of the defendant. An accused's flight is "universally conceded" to be admissible as evidence of consciousness of guilt and thus of guilt itself. Wigmore on Evidence § 276 (1940). In North Carolina it has long been held that "[s]ubsequent acts, including flight . . . are competent on the question of guilt. [Citations omitted.] The basis of this rule is that a guilty conscience influences conduct." *State v. Steele,* 190 N.C. 506, 130 S.E. 308 (1925); *accord, State v. Irick,* 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697 (1973); *State v. Godwin,* 216 N.C. 49, 3

S.E. 2d 347 (1939); *State v. Tate,* 161 N.C. 280, 76 S.E. 713 (1912); *State v. Nat,* 51 N.C. 114 (1858).

Even though the evidence of flight may disclose the commission of a separate crime by defendant, it is nonetheless admissible. *State v. White,* 101 Ariz. 164, 416 P. 2d 597 (1966); *State v. Nelson,* 261 La. 153, 259 So. 2d 46 (1972); *State v. Ross,* 92 Ohio App. 29, 108 N.E. 2d 77 (1952); *Broyles v. State,* 83 Okl. Crim. 83, 173 P. 2d 235 (1946), *cert. denied,* 329 U.S. 790 (1946).

Thus in *State v. Irick, supra,* we held that where immediately following a burglary the defendant attempted to elude police and fired shots at them, such evidence of flight was evidence of guilt and therefore admissible. *See, e.g., Fulford v. State,* 221 Ga. 257, 144 S.E. 2d 370 (1965) (defendant apprehended pursuant to arrest warrant for a separate crime); *People v. Anderson,* 17 Ill. 2d 422, 161 N.E. 2d 835 (1959) (defendant resisted arrest and shot officer); *People v. Gambino,* 12 Ill. 2d 29, 145 N.E. 2d 42 (1957), *cert. denied,* 356 U.S. 904 (1958) (car stolen in armed escape); *Meredith v. State,* 247 Ind. 233, 214 N.E. 2d 385 (1966) (defendant killed police officer during flight); *State v. Nelson, supra* (theft of automobile to facilitate flight); *State v. Neal,* 231 La. 1048, 93 So. 2d 554 (1957) (defendant jumped bail); *State v. Ball,* 339 S.W. 2d 783 (Mo. 1960) (defendant assaulted police officer and resisted arrest); *State v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590 (1945) (threats and statements made to taxi driver when cab commandeered to aid defendant's escape); *State v. Payne,* 213 N.C. 719, 197 S.E. 573 (1938) (defendant evaded arrest and shot at officers during flight); *State v. Ross, supra* (burglaries and larcenies to facilitate flight); *Broyles v. State, supra* (policeman shot during flight); *Johnson v. State,* 156 Tex. Crim. 534, 244 S.W. 2d 235 (1951) (defendant shot at police officer during flight). Applying these rules we hold the testimony of Trooper Stegall describing defendant's flight competent and admissible.

[4] Nevertheless, defendant contends that by virtue of his offer to stipulate to his identity, to his flight and to the weapon used in the murder for which he is now on trial, there is no real issue on these facts. He argues that the probative value of evidence concerning the shooting of Trooper Stegall is greatly outweighed by the prejudice to the defendant of the evidence of

the shooting and thus should not be admitted. Whatever the merits, if any, of this position with regard to identity of the defendant and the weapon, this argument clearly has no merit with respect to the flight of defendant. *See State v. Payne, supra.* Flight is not an element of homicide, the presence of which must be answered by a yes or no; rather, as we have noted, it is "evidence of consciousness of guilt and thus of guilt itself." It is only a circumstance bearing on defendant's guilt. *State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963). It is open to explanation and rebuttal by the defendant. 2 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 178 and cases cited. Thus the degree or nature of the flight is of great importance to the jury in weighing its probative force. *See State v. Hairston,* 182 N.C. 851, 109 S.E. 45 (1921); *State v. Malonee,* 154 N.C. 200, 69 S.E. 786 (1910). For example, it is likely that a jury would attach a different significance where a defendant fled a short distance to a friend's house following the alleged commission of a crime than where, as here, the defendant attempted to flee the state and in doing so assaulted a law enforcement officer. Flight is "relative" proof which must be viewed in its entire context to be of aid to the jury in the resolution of the case. Stipulation to the *fact of flight* is not sufficient under these circumstances. The testimony of Trooper Stegall was properly admitted.

For the reasons stated there must be a new trial in each of the eight cases. It is so ordered.

New trial.

STATE OF NORTH CAROLINA v. LEROY THOMAS AND WILLIE WILKINS

No. 104

(Filed 10 May 1977)

1. Criminal Law § 66.10— in-court identification — pretrial confrontation at sheriff's office — no taint

The in-court identification of each of the defendants by each of two armed robbery victims had its origin in their observations of the defendants at the scene of the robbery immediately before and during

its perpetration and was not tainted by the unintentional, unplanned confrontation of the defendants by one of the victims in the office of the sheriff, or by the viewing by either victim of photographs at the sheriff's office.

2. **Robbery § 4— armed robbery — sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for armed robbery where it tended to show that the robbery was committed; five minutes earlier defendants were in a black Volkswagen immediately outside the office where the robbery occurred; the robbers wore shirts similar in appearance to those then worn by defendants; one of the robbers wore conspicuous gloves, similar in appearance to gloves worn by one of the defendants five minutes before the robbery; defendant Thomas was identified by two of the victims as one of the robbers; the robbers left the crime scene in the same Volkswagen earlier observed by two of the victims, the keys of which one of the defendants had in his pocket one hour after the robbery; and the robbers left at the crime scene a pistol owned by one defendant's brother with whom he lived.

3. **Criminal Law § 168.5— jury instructions — evidence misstated — failure to object**

Trial judge's misstatement of the State's evidence with respect to the robbers' shirts was of no substantial consequence; moreover, defendants' failure to call this error to the attention of the court before the jury retired to consider its verdict rendered their assignment of error of no avail.

4. **Criminal Law § 122.2— failure to reach verdict — additional instructions — no coercion**

Where the jury returned to the courtroom after four hours of deliberation and reported that it had not reached a verdict as to one of the defendants, that defendant was not prejudiced by the trial court's instruction to the jury to "try again" but not "to reach a verdict that your consciences forbid you to reach," since the instruction did not coerce the jury but left them free to disagree and thus return no verdict.

5. **Criminal Law § 101.4— reading of direct examination testimony by reporter — failure to read cross-examination testimony — no error**

Defendant was not prejudiced where the jury, after having begun its deliberations, returned to the courtroom and requested the court to have the court reporter read a specified portion of the testimony on direct examination of a named witness, and the court allowed such request, but denied defendant's request that the witness's testimony on cross-examination be read to the jury, since there was no testimony of the witness on cross-examination which was in conflict with or in contradiction of the testimony on direct examination so read back to the jury in response to its request.

APPEAL by defendants from *Tillery, J.*, at the 25 October 1976 Criminal Session of WAYNE.

By separate indictments, four against each defendant, all proper in form, each defendant was charged with armed robbery on 2 April 1976 of four individuals, James P. Moore, Patricia Henry, Shafford Britt and Ralph Mills, in the office of the Moore Lumber Company near Goldsboro. Without objection, the cases were consolidated for trial. The jury found each defendant guilty of each of the alleged robberies. Each defendant was sentenced to prison for life in each of the four cases, the sentences to run concurrently.

Neither defendant offered any evidence. The evidence for the State was to the following effect:

Shortly after noon on 2 April 1976, the four robbery victims were in the small office of the lumber company. Suddenly, two or more Negro men, armed with pistols, each wearing a ladies' stocking over his head and face, one stocking being knotted, burst into the office, forced the four victims to lie upon the floor, kicked and stomped them and struck Mr. Moore in the face with a pistol, as the result of which the pistol fired, no one being struck by the bullet. The intruders took money from each of the four victims and from the office cash box, left the office and drove away in a black Volkswagen on which there was no license plate, the entire episode being completed in from one to three minutes. While one of the intruders was stomping Mr. Britt, another said Mr. Britt had had a heart attack so they had better "take it easy on him." One of the robbers left his pistol, a Charter Arms .44 caliber revolver, containing five live bullets and one exploded shell, in the office.

Mr. Britt, an employee of the lumber company, had sustained a heart attack some months earlier and, because of this, his fellow employees had watched over him. At that time the defendant Thomas had been an employee of the lumber company, working with Mr. Britt. The robbery occurred on the mill's regular pay day.

Some twenty minutes prior to the robbery, Mr. Moore, while in the lumber yard outside the office, observed a black Volkswagen driving about near the intersection of the public road and the path leading to the lumber yard office. He later observed this vehicle drive along the path, past the mill into a field, and then back up rapidly toward the office, almost striking a parked car. He walked over to the Volkswagen and, observing three or four Negro men in it, asked them what they

wanted. He saw that the car did not have a license plate on it but did have a red, green and black tag just below the place where the license plate is customarily carried. Its left front fender was dented. Its motor "was very peppy and revved up fast and had a good sound to it."

At this time, Mr. Moore was about two feet from the driver, who looked him straight in the face, and whom Mr. Moore identified, in court, as the defendant Wilkins. They talked for about two minutes, the occupants of the car asking directions to Slocumb Street. Mr. Moore then concluded that the occupants of the car were "up to no good" because the car carried no license plate and also because he observed the defendant Thomas, his former employee, whose name he did not then recall, in the vehicle and knew that Thomas knew the way to Slocumb Street. While so standing beside the Volkswagen, Mr. Moore looked at Thomas, sitting in the back seat, for two or three minutes and got a good mental picture of him. In court, Mr. Moore identified Thomas as the man he observed in the back seat of the Volkswagen. Both the driver and the man in the back seat wore "sporty" type shirts of "silky" texture.

The Volkswagen drove away and Mr. Moore went into the office. Some five minutes thereafter, Mr. Moore heard the same car drive up to the office, identifying it by the sound of the motor. He told Mrs. Henry, his secretary, to look out the window and see if it was the same Volkswagen. Before she could do so, the robbers burst into the office. They wore the same type of shirts he had just observed upon the driver of the Volkswagen and the occupant of its rear seat.

When the robbers left the office, Mr. Moore heard the motor of their car "rev up," the sound being exactly the same as that which he had heard some five minutes earlier, when the Volkswagen had departed after his conversation with the driver. Mr. Moore immediately ran out of the office and looked at the departing car, then about 20 yards away. He recognized it as the same Volkswagen. It had the same red, green and black tag on its rear and no license plate.

Mr. Britt testified that he knew Leroy Thomas, who had worked some three months under his supervision at the mill. At the time of Mr. Moore's conversation with the occupants of the Volkswagen, just a few minutes prior to the robbery, Mr. Britt was in the office and saw the Volkswagen, a picture of which

he identified in court. He then observed, from a distance of 15 or 20 feet, the driver's face so that he got a mental picture of him. He also observed that the driver was wearing white gloves with black polka dots. One of the robbers wore such gloves. In court, he identified the defendant Wilkins as the driver of the Volkswagen at that time. After the robbery, Mr. Britt observed the robbers' car going down the path to the public road. It appeared to be the same vehicle.

Mr. Britt further identified Thomas, in court, as one of the robbers, testifying that he recognized him "through the stocking" as someone he had known before but whose name he did not recall. For this reason, he did not tell the police officers, who responded to the call, Thomas' name but did tell one of them that the robber so observed by him had worked at the mill.

The pistol left in the office by one of the robbers had been purchased new from a dealer six days prior to the robbery by a brother of the defendant Wilkins, with whom the defendant Wilkins lived on Slocumb Street at the time of the robbery.

After receiving from the victims general descriptions of the Volkswagen and of the robbers, the investigating officers, within about an hour, found a black Volkswagen in a parking lot on Slocumb Street. It bore no license plate but one tag lay upon the back seat. A picture of it was identified by Mr. Moore and other witnesses as fairly representing the Volkswagen observed at the lumber mill. The officers, after interviewing its registered owner, interviewed the defendant Wilkins who voluntarily produced from his pocket keys which fit the Volkswagen. Two ladies' stockings, one knotted, found under the passenger seat of this Volkswagen, were identified by Mr. Moore and Mr. Britt as similar to those worn by the robbers.

Wilkins was then arrrested and taken to the sheriff's office. Thomas, found in his company by the officers, was not then arrested but the officers requested him to go to the office for questioning, which he did. Mr. Moore was also requested to go to the sheriff's office to give the officers further information, which he did, as did Mr. Britt. Neither of them had previously mentioned Thomas' name to the officers. At the sheriff's office, Mr. Moore saw Thomas in the lobby and told the deputy he was one of the robbers. Thereupon, Thomas was arrested.

Prior to trial, the defendants moved to suppress evidence of identification. Thereafter, the case came on for trial at which the presiding judge, Browning, J., conducted a voir dire and made findings of fact. That trial resulted in a mistrial for reasons not appearing in the present record. At the trial from which the present appeal is taken, presided over by Tillery, J., the findings of fact so made by Browning, J., were adopted by Tillery, J. The evidence at the voir dire, conducted by Browning, J., was to the following effect:

Mr. Moore testified to the circumstances of the robbery and to his observation of the Volkswagen and its occupants substantially as set forth above. He then testified that approximately an hour after the robbery he went to the sheriff's office at the request of the sheriff who wanted to ask further questions about the robbery. While he sat in the office of one of the deputies, he saw Thomas sitting in the lobby and Wilkins drinking at the water fountain therein. Then, when the deputy asked him to describe the robbers, Mr. Moore told the deputy that he had just seen them in the lobby. No one had suggested to him that the two men were suspects or that any suspect had been arrested. Subsequently, the officers showed Mr. Moore photographs, among which he identified a photograph of Thomas but did not identify one of Wilkins. No suggestion was made to him as to any person or photograph whom or which he should identify. He testified that his identification of Wilkins as the driver and Thomas as the passenger was based on his observation of them in the Volkswagen five minutes before the robbery and he is positive they are those men. He recognized Wilkins in the lobby of the sheriff's office by his clothing, protruding lips and hair on his face.

Mr. Britt testified at the voir dire substantially as above stated concerning his identification of the defendants. When he observed Wilkins in the driver's seat of the car prior to the robbery, he saw him very well as Wilkins looked straight at Mr. Britt. He is quite sure that Wilkins was the driver. He recognized Thomas, notwithstanding the stocking mask, being within four or five feet of Thomas and looking straight into his face. He is quite sure that Thomas was one of the robbers on the basis of what he saw at the robbery. He did not see either Thomas or Wilkins at the sheriff's office. He was shown some photographs without any indication as to which one he ought to

identify. From these he picked out a picture which he said looked like Thomas, whose name he did not at that time remember.

Deputy Sheriff Flowers testified that immediately after the robbery he got from Mr. Moore a general description of the robbers. Thereafter, the defendant Wilkins was arrested and taken to the Sheriff's Department. Shortly thereafter, about an hour and a half after the robbery, Mr. Moore came to the sheriff's office and was invited to have a seat in the private office of the Chief Deputy, Mr. Britt being also therein. Mr. Moore sat with his back to an open door leading to the lobby. Mr. Britt sat looking at the floor. As they so sat, Wilkins was brought through the lobby en route to an interrogation room from the jail for further questioning and stopped at the water fountain to get a drink. Without any known reason for his doing so, Mr. Moore turned and saw Wilkins drinking at the water fountain. No one had told him anyone was under arrest for the robbery. No officer had arranged for any confrontation between Mr. Moore and Wilkins. When Mr. Moore observed Thomas in the lobby, Thomas was free to go wherever he pleased. After he saw the two men, Mr. Moore advised Deputy Flowers he was very sure he had seen both of them in the Volkswagen just prior to the robbery. Thereupon, Thomas was arrested. As he brought Wilkins into the lobby, Deputy Flowers knew that Mr. Moore and Mr. Britt were then in the sheriff's office. He did not "take any particular safeguards" to eliminate the possibility of a viewing of Wilkins by Mr. Moore, except that, as he walked ahead of Wilkins, he glanced into the office where Mr. Moore and Mr. Britt were and observed that Mr. Moore had his back turned to the door and Mr. Britt was staring down at the floor.

Deputy Stocks testified that after Mr. Moore had so identified the defendants at the sheriff's office, he was shown two groups of eight photographs, each group contaning the picture of one of the defendants. The photographs were chosen for similarities of the subjects. No suggestion was made to Mr. Moore or Mr. Britt as to which photograph was that of a suspect. Mr. Moore picked the photograph of Thomas and said that Thomas was one of those who had robbed him. He did not identify the photograph of Wilkins. Neither Mr. Moore nor Mr. Britt ever identified a photograph of anyone else as being a photograph of one of the robbers. Nothing on any of the photo-

graphs would have aided either Mr. Moore or Mr. Britt in making such identification.

Judge Browning made, and Judge Tillery adopted as his, detailed findings of fact as to the opportunities of Mr. Moore and Mr. Britt to observe the defendants at the lumber mill and as to their previous acquaintance with the defendant Thomas. These findings were in accord with the above mentioned evidence. The court further made findings as to the arrest of the defendant Wilkins by the investigating officer and found "that Wilkins had been in a holding area of the jail and that Wilkins was being escorted for further interrogation when he stopped at a water fountain; that the witness Moore turned around and looked at the defendant Wilkins for ten to fifteen seconds; that at the time the witness Moore did not know any persons accused of the crime were in custody; that no suggestion had been made to Mr. Moore that he should look and identify the person at the water fountain as being a person who robbed him; that about the same time the defendant Leroy Thomas was seated in the lobby of the Sheriff's Department and the witness Moore saw him seated in that position; that at that time the defendant Thomas was not under arrest; that at the time the witness Moore identified both the defendant Thomas and the defendant Wilkins as being persons who perpetrated the robbery; that thereafter the witness Moore was shown photographs of the two defendants in a photographic type lineup which included black males of similar characteristics; that of the photographic lineups the witness Moore failed to choose any of the persons who perpetrated the robbery; that the defendant Thomas' and the defendant Wilkins' photographs were included in the photographic lineup; that the witness Britt was also shown the same pictures for the possibility of identifying the subjects that had robbed him and that of the photographs which contained a picture of the defendant Thomas and the defendant Wilkins, that the witness Britt failed to identify either of those persons as the person that perpetrated the robbery."

Upon those findings of fact the court concluded that the identifications by Mr. Moore and Mr. Britt were made under circumstances such as did not violate the constitutional rights of either defendant; that Mr. Moore's identification of each defendant was based upon his having seen that defendant at the lumber yard on the date of the robbery, not upon the photographic procedures or upon seeing either of the defendants at

the Sheriff's Department. The court further found that the identification by Mr. Britt of each defendant was based upon Mr. Britt's having seen such defendant at the lumber yard on the date of the robbery and not upon the photographic lineup or the chance confrontation at the Sheriff's Department.

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

W. Dortch Langston for Defendant Thomas.

Louis Jordan for Defendant Wilkins.

LAKE, Justice.

The evidence on the voir dire hearing fully supports the findings of the court that when Mr. Moore, seated in the office of a deputy sheriff, turned and saw Wilkins, as Wilkins drank from the water fountain in the lobby of the sheriff's office, Mr. Moore did not know that anyone, suspected of being a participant in the robbery, was in custody and that no suggestion was made to him that he should look at the person who was drinking at the water fountain to see if he could identify him as one of the robbers. The evidence at the voir dire hearing further supports the finding of the court that when Mr. Moore saw the defendant Thomas seated in the lobby of the sheriffs' office Thomas was not under arrest. There was no evidence to the contrary. No one told Mr. Moore Thomas was a suspect or suggested that Mr. Moore look at Thomas. These findings of fact are conclusive upon appeal. *State v. Legette,* 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Yancey,* 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Hunt,* 287 N.C. 360, 372, 215 S.E. 2d 40 (1975); *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884 (1974); *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 177 S.E. 2d 874 (1970).

The court's conclusions (actually, further findings of fact) that the in-court identifications by Mr. Moore of the two defendants were based upon his having seen them at the lumber yard and not upon his seeing them at the sheriff's office, or upon his inspection of photographs at the sheriff's office, are also supported by the evidence upon the voir dire examination and, therefore, are binding upon this Court. The court's further finding that the identifications of the two defendants by the witness Britt were based upon Mr. Britt's seeing the defendants

at the lumber yard and not upon his examination of photographs in the sheriff's office or upon any confrontation at that office are likewise so supported by the evidence at the voir dire hearing and conclusive upon appeal.

The uncontradicted evidence upon the voir dire hearing leads inescapably to the determination that the viewing of the two defendants by Mr. Moore at the office of the sheriff was not a confrontation planned by the officers. All of the evidence is to the effect that Mr. Britt, seated in the same room with Mr. Moore, did not see either of the defendants as they sat in or passed through the lobby of the office or see them elsewhere at the sheriff's office. All of the evidence is to the effect that no effort was made by any police officer to direct the attention of either Mr. Moore or Mr. Britt to either of the defendants. Neither witness had been told that any suspect had been taken into custody. The lobby of the sheriff's office is a public place. Thomas was actually not in custody but was free to go when and where he chose. Wilkins was in custody and was accompanied by a deputy sheriff, but there is nothing to indicate that he was handcuffed or otherwise under visible restraint. Mr. Moore and Mr. Britt had been requested by the sheriff to come to his office, not to identify anyone suspected of participation in the robbery but for the purpose of giving the officers further information concerning the offense and the participants therein. Not more than two hours elapsed between the robbery and the unexpected viewing of the defendants in the sheriff's office by Mr. Moore. There was nothing suggestive about the confrontation except the locality in which it occurred. We do not deem this sufficiently conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice—the test of due process. *Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969); *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *State v. Yancey,* supra.

If, however, the circumstances under which Mr. Moore saw the two defendants in the lobby of the sheriff's office could be deemed so unnecessarily suggestive as to make that confrontation a violation of the constitutional right of either of the defendants, it does not follow that the identification of both of them by either or both of these witnesses was improperly admitted before the jury. The witness Britt did not see either

defendant in the sheriff's office and no effort was made by the officers to have him do so.

The evidence on the voir dire hearing was to the effect that after Mr. Moore had identified both defendants at the sheriff's office as participants in the robbery, the defendants were photographed and these photographs, along with others of persons similar in appearance, were exhibited to Mr. Moore and to Mr. Britt. Neither identified the photograph of Wilkins. Mr. Moore identified the photograph of Thomas, whom he had already pointed out in person as one of the robbers, but Mr. Britt was not able to do so with certainty. Consequently, the photographs viewed by these witnesses did not contribute to their in-court identification of the defendants as participants in the robbery.

In *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974), speaking through Justice Branch, we said:

> "The practice of showing suspects singly to persons for purposes of identification has been widely condemned. *Stovall v. Denno, supra; State v. Wright* [274 N.C. 84, 161 S.E. 2d 581 (1968)]. However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances.
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> "Our Court has held that there was no violation of due process when there were 'unrigged' courtroom and station house confrontations which amounted to single exhibitions of the accused. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884; *State v. Bass* [280 N.C. 435, 386 S.E. 2d 384]; *State v. Haskins* [278 N.C. 52, 178 S.E. 2d 610]; *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. Similarly, we have recognized that a confrontation which takes place when a suspect is apprehended immediately after the commission of the crime may be proper. *State v. McNeil* [277 N.C. 162, 176 S.E. 2d 732].
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> "It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin."

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), the Supreme Court of the United States, speaking through Mr. Justice Powell, held there was no violation of the defendant's constitutional rights in permitting an in-court identification by the victim of the alleged criminal offense, notwithstanding a pretrial identification of him by the victim at an out-of-court confrontation, the defendant being the only person then viewed by the witness. The Court said:

> "In *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), the Court held that the defendant could claim that 'the confrontation conducted * * * was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.' Id., at 301-302, 18 L.Ed. 2d 1199. This, we held, must be determined 'on the totality of the circumstances.'
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> "Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:
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> > '[W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968).
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> "Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S., at 384, 19 L.Ed. 2d 1247, 88 S.Ct. 967. * * * Suggestive confrontations are disapproved because they increase the likelihood of misidentification and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as

Stovall makes clear, the admission of evidence of a showup without more does not violate due process.

* * *

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

[1] Considered in the light of the totality of the circumstances, in the present case, we think it clear that the in-court identification of each of the defendants by each of the witnesses, Mr. Moore and Mr. Britt, had its origin in their observations of the defendants at the scene of the robbery immediately before and during its prepetration and were not tainted by the unintentional, unplanned confrontation of the defendants by Mr. Moore in the office of the sheriff, or by the viewing by either Mr. Moore or Mr. Britt of photographs at the sheriff's office.

The trial court's findings of fact support the conclusion that the in-court identifications of the two defendants by Mr. Moore and Mr. Britt were competent evidence and were properly admitted over objection. Consequently, there was no error in allowing the in-court identification of the defendants by these witnesses as participants in the robbery, notwithstanding the unarranged confrontation at the sheriff's office. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1971); *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969).

The failure of both witnesses to recognize and identify the photograph of the defendant Wilkins at the sheriff's office and the then uncertainty of Mr. Britt as to the photograph of the defendant Thomas were brought to the attention of the jury through the cross-examination of these witnesses by the defendants. Otherwise, there was no reference to the photographs

in the evidence presented before the jury. This went to the credibility of their in-court identifications of the defendants, not to their competency. *State v. Bass, supra.*

[2] Obviously, there is no merit in the contention of each defendant that, as to him, a judgment of nonsuit should have been entered. The evidence is abundant to show that a robbery was committed, as alleged in the indictment, and that each defendant was a participant therein. It is axiomatic that "[U]pon motion for nonsuit, the question for the court is whether, upon consideration of the evidence in the light most favorable to the State, there is reasonable basis upon which the jury might find that the offense charged in the indictment has been committed and the defendant was the perpetrator or one of the perpetrators of the crime." *State v. Covington,* 290 N.C. 313, 226 S.E. 2d 629 (1976). *Accord: State v. Yancey,* 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974). So considered, the uncontradicted evidence for the State is sufficient to show: The robbery was committed. Five minutes earlier Wilkins and Thomas were in a black Volkswagen immediately outside the office where it occurred. The robbers wore shirts similar in appearance to those then worn by Wilkins and Thomas. One of them wore conspicuous gloves, similar in appearance to gloves worn by Wilkins five minutes before the robbery. Thomas was one of the robbers. The robbers left the scene in the same Volkswagen, the keys of which Wilkins had in his pocket one hour later. The robbers left at the scene a pistol owned by Wilkins' brother with whom he lived.

[3] In reviewing the evidence in his charge to the jury, the judge said that Mr. Moore had testified that two of the robbers were wearing "the same two shirts" which he had observed on Wilkins and Thomas as they sat in the Volkswagen some five minutes prior to the robbery. Actually, Mr. Moore testified that two of the robbers were wearing shirts of the same type as those he had observed on Wilkins and Thomas as they sat in the Volkswagen. We do not think that this variance between the evidence and the judge's summary of it was of any substantial consequence, but, in any event, it is sufficient to note that neither defendant called this error to the attention of the court before the jury retired to consider its verdict. Their failure to do so renders this assignment of error of no avail. *State v. McAllister,* 287 N.C. 178, 185, 214 S.E. 2d 75 (1975); *State v. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971); *State v. Virgil,* 276 N.C.

217, 230, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[4] There is no merit in the contention that the court, by its instructions, put undue pressure upon the jury to reach a verdict. After retiring and considering the case for some four hours, the jury returned to the courtroom and reported that it had not reached a verdict as to the defendant Thomas, thus implying that it had reached a verdict as to Wilkins. The court sent the jury back to consider the case further, saying:

> "I'm sure all of you know without me saying what it will mean if you are ultimately unable to agree in your verdict. It would mean that the matter would have to be retried. It would mean that some other jury would have to be chosen. It would mean that another week would have to be calendared for the trial of the case. I don't want to force or coerce any of you into trying to reach a verdict that your consciences forbid you to reach, but it is your duty, ladies and gentlemen, to do everything as reasonable men and women to try to reconcile your differences. You've heard all the evidence in the case, and, of course, a mistrial would mean that some other jury would have to do it all over. I realize sometimes there are times when juries cannot agree and it ultimately turns out that's how it stands, so be it, but I am asking, I am going to ask you to go back to the jury room and in the light of what I have said to you and commune together again for a while if you will and see if you can come to some agreement and with that please try again."

This instruction clearly informed the jurors that the court was not seeking to coerce any of them into a verdict contrary to his or her conscience. It left the jurors free to disagree and thus return no verdict. It left them as free to reach an agreement upon a verdict of "not guilty," as upon a verdict of "guilty." At the time the instruction was given, the court had no information as to how the jury stood with reference to the defendant Thomas, whether the majority believed him guilty or not guilty. The further deliberations requested by the court might well have resulted in a verdict of "not guilty" as to Thomas, which would have been far more beneficial to him than a mistrial. We find in this instruction no basis for a new trial as to Thomas. Obviously, it was not prejudicial to Wilkins,

for the clear indication was that the jury had already agreed upon its verdict as to him.

It is said in 4 Strong, N. C. Index 3d, Criminal Law, § 122.2, "Generally, where the jury have retired but are unable to reach a verdict, the court may call the jury back and instruct them as to their duty to make a diligent effort to arrive at a verdict, so long as the court's language in no way tends to coerce or in any way intimate any opinion of the court as to what the verdict should be." Instructions similar to that of which the defendants here complain were found to be free from error in *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 433, 183 S.E. 2d 652 (1971); *State v. Barnes,* 243 N.C. 174, 90 S.E. 2d 321 (1955); and *State v. LeFevers,* 216 N.C. 494, 5 S.E. 2d 552 (1939).

[5] After the jury had retired and begun its deliberations, it returned to the courtroom and requested the court to have the court reporter read a specified portion of the testimony on direct examination of Mr. Moore. This the court permitted to be done. The defendant Wilkins assigns as error the denial of his request that the testimony of the witness Moore on cross-examination be read to the jury. In this we see no error justifying the granting of a new trial. The defendants do not challenge the accuracy of the reporter's reading. The record does not disclose any testimony of Mr. Moore on cross-examination which was in conflict with or in contradiction of the testimony on direct examination so read back to the jury in response to its request. While we do not approve the practice of having read back to the jury the testimony of a witness as recorded by the court reporter, this assignment of error is not directed to that ruling but to the court's refusal to have read back the evidence given by this witness on cross-examination. In this instance, no prejudice to the defendant Wilkins by this refusal of his request is shown.

Other assignments of error by the defendants have been carefully considered by us and we find no merit therein. It would serve no useful purpose to discuss these in detail.

No error.

STATE OF NORTH CAROLINA v. ANTHONY PAYNE SILER

No. 49

(Filed 10 May 1977)

1. **Criminal Law § 75.10— waiver of right to counsel — affirmative showing required**

When the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel.

2. **Criminal Law § 76.5— confession — voir dire — necessity for findings**

When no material conflict in the evidence on *voir dire* exists, it is not error to admit a confession without making specific findings of fact, although the better practice is always to find all facts upon which the admissibility of the evidence depends. In such case, the necessary findings are implied from the admission of the confession into evidence.

3. **Criminal Law § 75.11— failure to request counsel — no waiver of right**

A defendant's failure to request an attorney is not an effective waiver of the right to counsel.

4. **Criminal Law § 75.11— confession — right to counsel — waiver by silence**

Although failure to request an attorney after the *Miranda* warnings have been given does not ordinarily constitute a waiver, a waiver by silence can be inferred where subsequent comments of the defendant indicate that he intended his silence as a waiver of his right to an attorney during interrogation.

5. **Criminal Law § 75.4— confession — failure to show counsel waived — admission improper**

The trial court erred in admitting an incriminating statement made by defendant where uncontradicted evidence was insufficient to show a waiver of the right to counsel and where there was conflicting evidence, which the trial court did not resolve, as to whether defendant asked for an attorney immediately after being informed of his rights.

6. **Criminal Law § 75.9— volunteered statements — admissibility**

The trial court properly allowed into evidence incriminating statements made spontaneously by defendant immediately following an officer's reading to defendant of an arrest warrant for rape, and the fact that defendant had requested an attorney but no attorney had been appointed did not render the volunteered statements inadmissible.

7. **Criminal Law § 76— involuntary confession — subsequent confession — presumption of involuntariness**

Where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior

influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence, the burden being upon the State to overcome this presumption by clear and convincing evidence.

8. **Criminal Law § 76— involuntary confession — admissibility of subsequent confession**

Defendant's second confession was properly admitted into evidence notwithstanding the inadmissibility of his first confession, since no threats or promises were used to extract the first confession.

9. **Criminal Law § 75.12— inadmissible first statement — subsequent similar statement — admission of first statement harmless**

Because defendant's inadmissible first statement was in all material respects identical to his admissible second statement, error in admitting the first statement was harmless beyond a reasonable doubt.

10. **Criminal Law § 75.12— statements made during custodial interrogation — admissibility — waiver of right to counsel required**

An effective waiver of the right to counsel is a prerequisite to the admissibility of *any* statement made by a defendant during custodial interrogation.

11. **Criminal Law §§ 75.12, 96— improper custodial interrogation — evidence erroneously admitted — no prejudice**

Though it was error to allow an officer to testify that during an improper custodial interrogation defendant told him that he "had been in trouble ever since he was 15 or 16 years old" and that he "started off stealing hubcaps in Philadelphia," defendant was not prejudiced, since the court immediately instructed the jury that the evidence was incompetent and they should not consider it.

12. **Criminal Law § 21.1— probable cause hearing — continuances — no denial of statutory right**

Defendant failed to show that his statutory rights pursuant to G.S. 15A-606 were violated where he did not show that the trial court failed to make necessary findings before granting continuances of his probable cause hearing, nor did defendant show that his case was prejudiced in any way by either the delay in holding the probable cause hearing or the lack of "timely" notice of continuances.

13. **Robbery § 4; Rape § 5— armed robbery — first degree rape — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree rape and armed robbery where it tended to show that on the morning of the crimes the victim noticed a white Plymouth Fury automobile parked outside behind the hospital where she worked; other hospital employees observed the same car parked in the same spot as they came to work; the victim placed her pocketbook containing $10 on her desk when she arrived at work; a strange black man appeared shortly thereafter in the kitchen and grabbed the victim; he showed her a gun and told her he'd kill her if she did not keep quiet; the man forced her to a dark supply room and there had inter-

course with her after striking her and breaking her jawbone in two places; while he still held the gun, the victim told him her purse was on the desk; he tied her up with pantyhose; two other employees observed a strange man standing behind a column at the back of the kitchen next to the supply room door; the victim's wallet was discovered lying on the floor where the man had been seen, but no money was in it; the white Plymouth was found in a ditch later the same morning three to four miles from the hospital with a gun holster on the front seat; defendant had possession of the car and the holster that morning; defendant fled from the police; and defendant admitted robbing and tying up a lady at the hospital to police officers.

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

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgment of *Lee, J.*, entered 26 August 1976, CHATHAM County Superior Court. Defendant's conviction of armed robbery was certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) on 27 January 1977.

On indictments, proper in form, defendant was charged with armed robbery and first degree rape. The jury returned verdicts of guilty as to both charges. The court imposed a sentence of thirty years imprisonment for the armed robbery conviction and a life sentence for the rape conviction to commence at the expiration of the armed robbery sentence.

The State's evidence tended to show that on 14 September 1975, Erline McMasters, a widow aged sixty-two, was employed as diet supervisor at Chatham Hospital in Siler City. Shortly after 5:30 a.m. on 14 September 1975, Mrs. McMasters walked to work as was her custom. She entered the hospital by the emergency entrance and went downstairs to the basement where she unlocked the doors to the kitchen. She placed her pocketbook on her desk and unlocked the back entrance door for the other employees to come in. At that time she observed a white Plymouth Fury automobile parked at the back of the hospital.

Inside the kitchen, as she started to turn on the electric stove, she noticed a black man weighing about 200 pounds standing a few feet away. He was wearing a toboggan and a sweater. At trial, Mrs. McMasters could not positively identify the defendant as the man she saw. She greeted the man with "Good morning. Did you come to work?" because the hospital manager sometimes hired men to work. The man did not answer but asked something about a patient. Before she could

direct him to the patient floor, he approached her and grabbed her around the waist with his left arm. He showed her a gun in his right hand and asked "Do you know what this is?"

The man pulled her to a dark supply room at the back of the kitchen and closed the door. The victim weighed around 110 pounds. She did not resist because of the gun. In the back room he hit her hard several times in the stomach. He indicated that he was going to attack her sexually and called her a "white bitch." He ordered her to take off her clothes. When she did not, he pulled off her shoes, pantyhose and panties. While she was on the floor, he struck her two hard blows to the face. Several times the man told her to "Be quiet or I'll kill you." He then raped her. When he got up he said "you are no good." He turned her over on her stomach and tied her hands and one foot behind her back with her pantyhose.

Mrs. McMasters could not remember what, if anything, the man said about money but she did recall telling him, while he still had the gun, that her money was on the desk.

Other employees arrived soon after and found a strange man in the kitchen standing behind a column at the back near the milkbox. The employees could not identify the man because the back of the kitchen was unlighted. They went upstairs to call the police but when they returned the man was gone. Mrs. McMasters was found and untied. Her jawbone was broken in two places and about $10.00 was missing from her pocketbook. Mrs. McMasters' pocketbook had been removed from the desk at the front of the kitchen to the milkbox. Her billfold was discovered on the floor behind the column next to the milkbox.

Other witnesses had also observed a white Plymouth car with a dent in the rear parked in back of the hospital early that morning. This car was found later the same morning in a ditch three to four miles from the hospital with a gun holster on the front seat. The police began looking for the defendant after learning that he had possession of the car, the holster, and a pistol and a shotgun on the morning of 14 September 1975. Defendant was apprehended at a mobile home of a friend at 11 a.m. on 14 September 1975. Prior to his arrest, he had told the friend that he was in trouble for beating up a *guy* "real bad." After his arrest, defendant confessed twice to the police that he robbed and tied up a lady at the hospital but insisted that he did not rape or beat her. (A pistol belonging to the de-

fendant found by the police at the mobile home at the time of the arrest was ordered suppressed by the trial court.)

The defendant offered no evidence.

Other facts necessary to the decision will be related in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General David S. Crump for the State.

Robert L. Gunn and Paul S. Messick, Jr. for defendant appellant.

COPELAND, Justice.

Defendant assigns as error the court's failure to suppress two inculpatory statements made by him during in-custody interrogation in the absence of counsel and the subsequent admission of these statements into evidence over objection. Defendant claims there was no effective waiver of his constitutional right to counsel prior to interrogation.

Upon defendant's motions to suppress, two pre-trial hearings were held to consider the admissibility of these confessions. Judge Edwin S. Preston, Jr. presided at both the 17 February 1976 and the 18 May 1976 hearings.

The State's evidence at both suppression hearings indicated that the defendant was not interrogated until after he was taken to the Siler City Police Station and advised of his constitutional rights on 14 September 1975. The defendant read but refused to sign the written waiver of rights form. He informed the investigating officer, Sergeant Randall Stevens, that he (defendant) knew his rights better than the officer did.

Under questioning, the defendant admitted going to the hospital and robbing a woman and tying her up with pantyhose because "he needed money to get back to Philly on. . . . " When asked about beating and raping the woman, defendant allegedly said, "I told you I robbed her and tied her up with her pantyhose, but I did not rape or beat her. If you are going to try to put something on me I didn't do, I want a lawyer." At that point, the questioning halted and the officers tried unsuccessfully to find an attorney for the defendant. Defendant was charged in a warrant with armed robbery and assault on a female and removed to the Chatham County Jail in Pittsboro.

The next day after visiting the victim in the hospital, Sergeant Stevens obtained a warrant for the defendant charging him with first degree rape. Two days after the arrest, Sergeant Stevens served the rape warrant on the defendant in the Chatham County Jail. No attorney was present at the time and the defendant was not readvised of his *Miranda* rights. The officer read the rape warrant to the defendant without asking any questions. The defendant responded "I told you I didn't rape her. I robbed her and tied her up. I didn't rape her. What are you trying to do to me?"

[1] "[W]hen the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel." *State v. Biggs*, 289 N.C. 522, 531, 223 S.E. 2d 371, 377 (1976); *accord, State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L.Ed. 2d 694, 726, 86 S.Ct. 1602, 1630 (1966).

Both of defendant's alleged statements were made while he was in custody and the first statement was undeniably made during police interrogation. Thus, before the first incriminating statement can be admissible at trial, the State must demonstrate (1) that the full *Miranda* warnings were given and (2) that defendant effectively waived both his right to remain silent and his right to counsel after receiving the warnings.

On this appeal defendant contests only the waiver of his right to counsel. Judge Preston found as a fact at the first suppression hearing that the defendant did *not* waive his right to counsel *in writing*. There were *no* findings at either hearing that the defendant *orally* waived his right to counsel.

[2] As a general rule, the trial judge *should* at the conclusion of the *voir dire* hearing make findings of fact to show the bases of his ruling. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). *State v. Biggs, supra*. When there is a material conflict in the evidence on *voir dire*, the court *must* make findings resolv-

ing the crucial conflicts. *State v. Riddick, supra; State v. Biggs, supra; State v. Smith,* 278 N.C. 36, 178 S.E. 2d 597 (1971), *cert. denied,* 403 U.S. 934, 29 L.Ed. 2d 715, 91 S.Ct. 2266. When no material conflict in the evidence on *voir dire* exists, it is not error to admit a confession without making specific findings of fact, although the better practice is always to find all facts upon which the admissibility of the evidence depends. *State v. Riddick, supra; State v. Biggs, supra; State v. Whitley,* 288 N.C. 106, 215 S.E. 2d 568 (1975); *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 such a case, the necessary findings are implied from the admission of the confession into evidence. *State v. Riddick, supra; State v. Biggs, supra; State v. Whitley, supra.* But where there is neither evidence nor findings to show that the defendant waived his right to counsel, the admission of an inculpatory statement made during in-custody interrogation is error. *State v. White, supra; State v. Thacker, supra; State v. Turner,* 281 N.C. 118, 187 S.E. 2d 750 (1972).

[3, 5] The uncontradicted evidence and findings by the court at the first hearing (defendant did not testify at the first hearing) showed that defendant was given the full *Miranda* warnings prior to questioning; that he understood his rights; that no promises or threats were made to induce his statement, and that he did not request an attorney until after he had confessed to the robbery. These facts standing alone are insufficient evidence of a waiver of the right to counsel. We have held repeatedly that a defendant's failure to request an attorney is not an effective waiver. "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver." *Miranda v. Arizona, supra* at 470, 16 L.Ed. 2d at 721, 86 S.Ct. at 1626; *accord, State v. Thacker, supra; State v. Blackmon, supra.* "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . . 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'" *Miranda v. Arizona, supra* at 475, 16 L.Ed. 2d at 724, 86 S.Ct. at 1628; *accord, State v. White, supra; State v. Blackmon, supra.*

Sergeant Stevens testified at the first suppression hearing that prior to questioning, defendant was asked if he was willing to answer a few questions. Defendant reportedly answered, "Ask them, then I'll tell you whether I'll answer them or not." While we may interpret this statement by defendant as an implied waiver of the right to remain silent, we do not construe it additionally as an implied waiver of the right to counsel.

[4, 5] The State's evidence at both hearings indicates that the defendant, upon being questioned about the rape, stated "If you are going to try to put something on me I didn't do, I want a lawyer." According to Sergeant Stevens, the defendant had not mentioned an attorney previously and had talked freely about the robbery. Although failure to request an attorney after the *Miranda* warnings have been given does not ordinarily constitute a waiver, we believe a waiver by silence can be inferred where subsequent comments of the defendant indicate that he *intended* his silence as a waiver of his right to an attorney during interrogation. However, on this appeal, we find that this interpretation of the facts is not open to us. In determining the admissibility of a confession, we are required to look to the *entire* record. *Davis v. North Carolina,* 384 U.S. 737, 16 L.Ed. 2d 895, 86 S.Ct. 1761 (1966); *Blackburn v. Alabama,* 361 U.S. 199, 4 L.Ed. 2d 242, 80 S.Ct. 274 (1960); *State v. Silver,* 286 N.C. 709, 213 S.E. 2d 247 (1975); *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970). The State's version of defendant's request for counsel does not stand uncontradicted at both hearings. In the instant case the defendant testified at the second suppression hearing that he asked for an attorney *immediately* after being informed of his rights and that Sergeant Stevens nevertheless continued to interrogate him. Judge Preston did not make findings resolving this material conflict in the evidence, as he was required to do under *State v. Biggs, supra.* Under these circumstances, we are constrained to find that the admission of the first incriminating statement was erroneous.

[6] At the time the second inculpatory statement was made, two days after his arrest, defendant had requested an attorney but no attorney had been appointed. This fact, however, does not necessarily render the statement inadmissible. The United States Supreme Court has indicated that its decision in *Miranda* set forth rules of police procedure applicable to "custodial interrogation" which it defined as *"questioning initiated by law*

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis supplied.) *Miranda v. Arizona, supra* at 444, 16 L.Ed. 2d at 706, 86 S.Ct. at 1612; *accord, Oregon v. Mathiason,* ... U.S. ...; 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977); *c.f. Brewer v. Williams,* ..... U.S. ....., ... L.Ed. 2d ....., 97 S.Ct. 1232 (1977). "Volunteered statements of any kind are not barred by the Fifth Amendment. . . . " *Miranda v. Arizona, supra* at 478, 16 L.Ed. 2d at 726, 86 S.Ct. *supra* at 1630.

In the present case, the findings of the trial court and the evidence support the conclusion that defendant's alleged second confession on 16 September 1975 was not the product of "custodial interrogation" but rather was a spontaneous response to the reading of the second warrant. The court found as a fact that "the State of North Carolina served a warrant upon this defendant charging him with rape, and at that time he made a statement to the police officers; that the statement was made by defendant immediately after the reading of the arrest warrant by the officers and without any attempt by said officers to question the defendant further. . . . " Defendant's testimony at the second hearing established that, "They [the officers] did not ask me any questions that day." Standing alone then, the second confession is clearly admissible.

[7] We next consider the effect of the first confession on the admissibility of the second confession. It is well settled in this jurisdiction that " 'where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence.' (Citation omitted.) The burden is upon the State to overcome this presumption by clear and convincing evidence. (Citations omitted.)" *State v. Silver, supra* at 718, 213 S.E. 2d at 253 (1975). As this rule is broadly stated, it would seem to apply to the instant case.

[8] This rule which predates the *Miranda* decision arises out of a concern that where the first confession is procured through promises or threats rendering it involuntary as a matter of law, these influences may continue to operate on the free will of the defendant in subsequent confessions. *See, e.g., State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193 (1954); *State v. Gibson,* 216 N.C. 535, 5 S.E.

2d 717 (1939); *State v. Moore,* 210 N.C. 686, 188 S.E. 421 (1936). In the case at bar, Judge Preston found, and these findings are supported by uncontradicted evidence, that no promises or threats were made to the defendant "in connection with his interrogation or thereafter." Thus, where no threats or promises were used to extract the first confession, as in this case, the reason for the rule giving rise to the presumption does not exist. In addition, we question whether this presumption was ever intended to apply to subsequent statements by a defendant that are spontaneous utterances as opposed to subsequent confessions that are the product of interrogation. We hold that defendant's second confession was properly admitted into evidence, notwithstanding the inadmissibility of his first confession.

[9] It remains to be determined whether the erroneous admission of the first inculpatory statement constitutes prejudicial error so as to require a new trial. Ordinarily, where a confession made by the defendant is erroneously admitted into evidence, we cannot say beyond a reasonable doubt that the erroneous admission of the confession did not materially affect the result of the trial to the prejudice of the defendant. *State v. Blackmon, supra.* But because in this case defendant's inadmissible first statement was in all material respects identical to his admissible second statement, we conclude the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

[11] At trial, Sergeant Stevens testified that, in addition to the first inculpatory confession considered in the previous assignment of error, defendant told him on 14 September 1975 that he (defendant) "didn't belong in society," that he "had been in trouble ever since he was 15 or 16 years old" and that he "started off stealing hubcaps in Philadelphia." Upon the introduction of this testimony at trial, defense counsel made a motion to strike, which was allowed, and a motion for a mistrial, which was denied. The court immediately instructed the jury that this evidence was incompetent and not to consider it. Defendant assigns as error the court's denial of his motion for a mistrial. Defendant claims these statements were inadmissible because (1) they were obtained from the defendant during custodial interrogation without the accused having effectively waived his right to counsel and (2) because the State did not disclose its intention to use these statements at trial when it

responded to defendant's request for discovery under G.S. 15A-902 and in contravention of the continuing duty to disclose provided in G.S. 15A-907. Because of the prejudicial nature of these statements, defendant argues the only appropriate remedy was a mistrial. *See* G.S. 15A-910(a)(4).

[10] We agree with defendant's position that these statements were inadmissible because they were elicited during the custodial interrogation on 14 September 1975 discussed previously. An effective waiver of the right to counsel is a prerequisite to the admissibility of *any* statement made by a defendant during custodial interrogation. *Miranda v. Arizona, supra.* Thus, even if the State had complied with the discovery rules and revealed its intent to use the statements, the statements would nevertheless have been objectionable.

Ordinarily, where objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed because under our system of trial by jury we assume that jurors are people of character and sufficient intelligence to fully understand and comply with the court's instructions and they are presumed to have done so. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); 4 Strong's N. C. Index, Criminal Law § 96 (1976). In some instances where the incompetent evidence is of such a serious nature that its prejudicial effect cannot be cured by an instruction, we have held that a mistrial should have been granted. *See, e.g., State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59 (1967).

[11] We find the objectionable evidence in this case curable by instruction. The jurors were merely informed that the defendant had been in some unspecified "trouble" since an early age, with the gravest and only crime mentioned being larceny of some hubcaps. It should not have been difficult for the jurors to have ignored this information upon proper instruction. The assignment of error is overruled.

[12] In his next assignment of error, defendant maintains the trial court erred in denying his pretrial motion to dismiss the charges against him. Defendant filed the motion to dismiss and a supporting affidavit on 17 February 1976, claiming that his constitutional rights were violated because the probable cause hearing was not held within the time limits prescribed by G.S. 15A-606. Defendant apparently contends that the procedures

outlined in G.S. 15A-606 are mandated by the due process clauses of the State and Federal Constitutions and that unless the statute is strictly complied with, due process requires that the charges against a defendant be dropped. The statute itself does not explain its purpose or specify any sanctions for the failure to comply with its provisions.

We note first that defendant's probable cause hearing was held approximately one month after his arrest and that he does not claim his constitutional right to a speedy trial was abridged in any way. Assuming, without deciding, that due process requires a probable cause hearing to be held within a reasonable time after arrest, defendant's constitutional rights have not been infringed. We cannot conceive that due process requires that a probable cause hearing be held within a *specific* number of days following arrest. The questions for resolution then become were defendant's statutory rights violated and, if so, is dismissal of the charges against him the proper remedy?

G.S. 15A-606 provides in pertinent part as follows:

> "(d) If the defendant does not waive a probable-cause hearing, the district court judge must schedule a hearing not later than 15 working days following the initial appearance before the district court judge; if no session of the district court is scheduled in the county within 15 working days, the hearing must be scheduled for the first day of the next session. The hearing may not be scheduled sooner than five working days following such initial appearance without the consent of the defendant and the solicitor.
>
> * * *
>
> "(f) Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable-cause hearing."

Defendant's initial appearance before the district court took place on 17 September 1975. His probable cause hearing was first scheduled for 3 October 1975, twelve working days after his initial appearance and within the time prescribed by statute. On 2 October 1975, on motion of the State, the hearing was continued until 10 October 1975. On 9 October 1975 the hearing was again continued at the request of the State until 17 October 1975.

Under the statute, a timely motion for a continuance is properly granted if "good cause" is shown and a motion for a continuance made less than 48 hours before the scheduled hearing is considered timely if "extraordinary cause" is shown. The determinations of good cause and extraordinary cause are for the trial court.

Defendant has not shown that the trial court failed to make these findings or that its findings were not supported by evidence. Nor has defendant shown that his case was prejudiced in any way by either the delay in holding the probable cause hearing or the lack of "timely" notice of the continuances. Finally, we question whether the specific provisions that defendant alleges were violated were designed to provide him with additional rights, rather than as rules for the orderly and efficient administration of justice. For example, it appears from the Official Commentary to G.S. 15A-606 that the forty-eight hour notice requirement for a motion for a continuance was imposed solely to prevent inconvenience to the witnesses who will testify at the probable cause hearing and not for the protection of defendants.

In sum, on the facts of this case, we cannot say that defendant's statutory rights were violated, assuming that G.S. 15A-606 was designed to provide him additional rights. Our holding renders it unnecessary to decide whether the remedy defendant requested, dismissal of the charges, is the appropriate sanction for a failure to comply strictly with G.S. 15A-606. The assignment of error is overruled.

Defendant claims the court committed error in denying his motions to dismiss the case made at the close of the State's evidence and at the close of all the evidence. Considering the evidence, as we must, in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, we conclude there was sufficient evidence of the commission of an armed robbery and a first degree rape and of defendant's role as perpetrator to withstand a motion for nonsuit. *State v. Cousin,* 291 N.C. 413, 230 S.E. 2d 518 (1976); *State v. Harding,* 291 N.C. 223, 230 S.E. 2d 397 (1976).

[13] The evidence when considered in the light most favorable to the State shows the following: (1) Very early on the morning of 14 September 1975, Mrs. McMasters noticed a white Plym-

outh Fury automobile parked outside behind the hospital; (2) other hospital employees observed the same car parked in the same spot as they came to work; (3) Mrs. McMasters placed her pocketbook containing approximately $10.00 on her desk when she arrived at work; (4) a strange black man appeared shortly thereafter in the kitchen and grabbed Mrs. McMasters; (5) he showed her a gun and told her if she did not be quiet that he would "kill her"; (6) the man forced her to a dark supply room at the back of the kitchen and removed her shoes, pantyhose, and underpants; (7) he struck her several hard blows, breaking her jawbone in two places; (8) he penetrated her private parts with his private parts; (9) while he still held the gun, the victim told him her pocketbook was on the desk; (10) he tied her up with her pantyhose; (11) two other employees observed a strange man standing behind a column at the back of the kitchen next to the milkbox and the supply room door; (12) Mrs. McMasters' pocketbook was found on the milkbox thirty feet from her desk; (13) her billfold was discovered lying on the floor behind the column next to the milkbox; (14) no money was in the billfold; (15) the white Plymouth was found in a ditch later the same morning three to four miles from the hospital with a gun holster on the front seat; (16) defendant had possession of the automobile and the holster that morning; (17) defendant fled from the police; (18) defendant admitted robbing and tying up a lady at the hospital to police officers. These facts and the reasonable inferences arising thereon are sufficient to withstand a motion for nonsuit on the charges of first degree rape and armed robbery. The assignment of error is overruled.

Defendant's brief has other assignments of error as follows: Nos. 4, 7, 10, 13, 14, 16, 17, 20, 28, 29, 30, 32, 33, 34, 40. We have examined all of these and find them to be without merit. In addition, due to the serious nature of the crimes for which defendant has been convicted, we have searched the record for errors other than those assigned by the defendant and have found none.

It has been difficult for us to ascertain the facts from the briefs submitted by the defendant and the State. Neither brief gives a statement of the essential facts except as discussed in the assignments of error. We note that Rule 28(b)(2) of the Rules of Appellate Procedure, among other things, requires the appellant's brief to "additionally contain a short, non-argumen-

tative summary of the facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review." The State is not required by Rule 28(c) to state the facts unless there is some disagreement. A summary of essential facts would have been most helpful in this case. We note also that it is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief. The State's failure to do so further complicated our review of this case.

In the trial we find

No error.

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

WEYERHAEUSER COMPANY v. GODWIN BUILDING SUPPLY CO., INC.

No. 69

(Filed 10 May 1977)

1. **Contracts § 29.2— breach of contract — damages**

Such damages are allowed for breach of contract as may reasonably be supposed to have been in the contemplation of the parties when the contract was made or which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed.

2. **Contracts § 29.2; Damages § 3.5— breach of contract — lost profits**

While damages for breach of contract may include, in a proper case, damages for lost profits, such damages may not be awarded where the evidence permits no more than speculation.

3. **Contracts § 29.2; Damages § 3.5— breach of contract — lost profits — insufficiency of evidence**

The trial court erred in permitting the jury to consider possible lost profits as an element of damages in a breach of contract action where there were no facts offered in evidence to support the probability that there would be profits or the estimate of their amount.

4. **Appeal and Error § 62.2— partial new trial on damages issue**

A partial new trial on the issue of damages alone should not be awarded in an action for breach of contract where the jury's verdict provides no basis for ascertaining which of several theories of the

breach supported its award of damages and where the measure of damages might vary according to the breach proven.

5. **Contracts § 21.1; Trial § 42— jury findings that both parties breached contract**

A jury finding that defendant had breached the contract sued on did not preclude a jury finding that plaintiff had also breached the contract where the jury did not find that defendant's breach was material or that it excused plaintiff's performance.

ON petition for discretionary review of a decision of the Court of Appeals, 29 N.C. App. 235, 223 S.E. 2d 837 (1976), which, on plaintiff's appeal from a judgment of *Hall, J.*, entered at the 1 April 1975 Session of HARNETT County Superior Court, found error and remanded the case for a new trial solely on the issue of damages. Docketed and argued as Case No. 67 at the Fall Term 1976.

Edgar R. Bain and Robert W. Hutchins, Attorneys for plaintiff appellant.

Johnson and Johnson by W. A. Johnson, Attorneys for defendant appellee.

EXUM, Justice.

[4] We allowed this petition to determine whether a partial new trial on the issue of damages alone should be awarded in an action for breach of contract where the jury's verdict provides no basis for ascertaining which of several theories of the breach supported its award of damages. We hold that in such a case where the measure of damages might vary according to the breach proven it is not proper to allow a partial new trial solely on the damages issue.

This case originated in an action by plaintiff Weyerhaeuser to recover payment for materials and services rendered to defendant Godwin Building Supply, Inc., (hereinafter "Godwin") pursuant to a written contract. Godwin counterclaimed for damages allegedly resulting from Weyerhaeuser's breach of the contract. The jury found that both parties had breached the contract and awarded damages of $7,541.00 to plaintiff and $100,000.00 to defendant. Defendant did not perfect its appeal. Plaintiff's appeal concerns only the counterclaim.

The evidence adduced at trial tended to show plaintiff contacted O. W. Godwin, Jr., president and executive manager

of Godwin in January 1968 for the purpose of interesting Godwin in participating in the Weyerhaeuser Registered Homes Program. Negotiations resulted in the signing by both parties of a "Marketing Agreement" on May 9, 1968. Godwin proceeded to lease a site in Carpenter, North Carolina, to build a plant, equip it with machinery and materials, staff it and generally put it in readiness to begin the manufacture of components for Weyerhaeuser Registered Homes.

Not a single home was built pursuant to the agreement. Defendant's testimony attributed this to Weyerhaeuser's failure to find a primary investor to provide mortgage financing. There is abundant testimony that both parties anticipated that the financing of the homes would depend on Weyerhaeuser's finding a primary investor for a 75 percent first mortgage. If agreeable to the first mortgagee, Weyerhaeuser would take a second mortgage of 15 percent. The primary investor would service both mortgages in return for a service fee paid by Weyerhaeuser. This procedure was apparently Weyerhaeuser's general custom in financing Weyerhaeuser Registered Homes.

In this case, Godwin and others testified that he was told Weyerhaeuser would secure the first mortgage commitments from Metropolitan Life Insurance Company. The commitments were to be provided through local correspondents, in this case Stockton White and Company for the Raleigh-Durham-Chapel Hill area and Branch Banking and Trust Company for the Wilson area. No commitments were ever provided, apparently because Metropolitan Life had withdrawn from the North Carolina market due to the effects of this state's usury laws in an atmosphere of rising interest rates. The contract was terminated by Weyerhaeuser on October 21, 1969.

Only five issues were submitted and answered by the jury as follows:

"1. Did the plaintiff and the defendant enter into a contract as alleged in the complaint?

"Answer: Yes

"2. Did the defendant breach the contract by failing to make payments as required by the terms of said contract?

"Answer: Yes

"3. What amount, if any, is the plaintiff entitled to recover of the defendant?

"Answer: $7,541.00

"4. Did the plaintiff breach the contract entered into by the plaintiff and the defendant?

"Answer: Yes

"5. What amount of damages, if any, is the defendant entitled to recover of the plaintiff?

"Answer: $100,000.00"

Judgment was entered on the verdict.

In his instructions on the fifth issue, the trial judge properly charged that "in no event may an award of damages be based on conjecture, speculation or guess." After some elaboration on this point, however, he proceeded to give the following instruction:

"Now, recovery for the loss of future profits may be had where they are reasonably certain in character and are the proximate result of the breach of contract. The proof must pass beyond the realm of conjecture, speculation or opinion not founded on facts and must consist of actual facts which a reasonably, accurate conclusion regarding the cause and the amount of the loss can be logically and rationally determined."

The Court of Appeals held this instruction to be error, requiring a partial new trial solely on the issue of damages on the counterclaim. We agree that the giving of the instruction was prejudicial error. The only evidence in the record even arguably pertinent to loss of future profits was testimony of two witnesses that W. T. Roetzer, an employee of Weyerhaeuser, had prepared an $800,000.00 projected budget for Godwin, showing a projected profit for the first year of $80,000.00. Instead, Mr. Godwin claimed the business actually suffered a net loss of $93,432.22 during the fiscal year ending April 30, 1969. This evidence provides no basis for an award of damages for lost profits, since any estimate of Godwin's expected profits must on the evidence presented be based solely upon speculation.

[1, 2] This Court has held that such damages are allowed for breach of contract as "may reasonably be supposed to have been

in the contemplation of the parties when the contract was made," *Troitino v. Goodman,* 225 N.C. 406, 412, 35 S.E. 2d 277, 281 (1945), or which "will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed," *Norwood v. Carter,* 242 N.C. 152, 155, 87 S.E. 2d 2, 4 (1955). This measure has been held to include, in a proper case, damages for lost profits. *Service Co. v. Sales Co.,* 259 N.C. 400, 131 S.E. 2d 9 (1963); *Tillis v. Cotton Mills* and *Cotton Mills v. Tillis,* 251 N.C. 359, 111 S.E. 2d 606 (1959).

Such damages, however, may not be awarded where the evidence permits no more than speculation. "Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." *Service Co. v. Sales Co., supra* at 417, 131 S.E. 2d at 22, quoting *Tillis v. Cotton Mills, supra.* The difficulty of showing, with any degree of reliability, either the probability of the occurrence of profits or their amount, has led to the observation that ordinarily "[i]n an action for damages for a breach of contract . . . the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as a part of the compensation." *Lawrence v. Stroupe,* 263 N.C. 618, 622, 139 S.E. 2d 885, 887-88 (1965); *Steffan v. Meiselman,* 223 N.C. 154, 25 S.E. 2d 626 (1943).

[3] Certainly, in the case at bar, where there were no facts offered in evidence to support the probability that there would be profits or the estimate of their amount, it was error to allow the jury to consider possible lost profits as an element of damages.

[4] This conclusion leads us to the consideration of the propriety of remanding this case for a new trial solely on the issue of damages. We recognized long ago that a new trial on the issue of damages alone may be allowed in a contract case. *See Crawford v. Manufacturing Co.,* 88 N.C. 554 (1883); *Jones v. Mial,* 89 N.C. 89 (1883). Our most recent definitive statement on whether a partial new trial should be awarded was made by Justice Huskins writing for the Court in *Robertson v. Stanley,* 285 N.C. 561, 568-69, 206 S.E. 2d 190, 195 (1974): "Courts are reluctant to grant a new trial as to damages alone unless it is

clear that the error in assessing damages did not affect the entire verdict. The rule is stated as follows: 'As a condition to the granting of a partial new trial, it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters.' " (Citations omitted.) The Court quoted with approval *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164 (1911) as follows: " 'It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication.' . . . *Accord, Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131 (1967); *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1 (1965)." *Robertson v. Stanley, supra* at 568, 206 S.E. 2d at 195. We have also said, "Before a partial new trial is ordered, 'it should clearly appear that no possible injustice can be done to either party.' *Jarrett v. Trunk Co.,* 144 N.C. 299, 56 S.E. 937 (1907)." *Id.*

In considering the application of these rules to the facts, we perceive some possibility of confusion resulting from a partial new trial. Defendant alleged in its final Amended Answer and Counterclaim several breaches of the contract as follows:

> "17. That the plaintiff willfully and wrongfully breached and violated its contract and agreement with the defendant in that, among other things:
>
> "(a) It failed to provide or arrange marketing services as required by its contract and agreement with the plaintiff;
>
> "(b) It failed to arrange ninety per cent (90%) conventional financing as it had contracted and agreed to do;
>
> "(c) It failed to assist the defendant in arranging interim construction and mortgage financing for Weyerhaeuser Registered Homes as it had contracted and agreed to do; and
>
> "(d) It failed to provide plans and planning services as it had contracted and agreed to do."

We cannot ascertain from the record the nature of the services anticipated by the parties to be performed by Weyer-

haeuser under the contractual provisions which obligated it to "provide or arrange marketing services," or to "provide plans and planning services." Were these services to have been required only when there were customers financially able and willing to buy the homes for which Godwin was manufacturing components or in order to help Godwin build homes to attract the customers? The pertinent portion of the contract, to which all of defendant's allegations of breach obviously relate, is of little assistance. It provides:

"3. Weyerhaeuser shall provide Dealer with or arrange the following marketing services:

(a) Recommended methods for operation of a dealer home design service.

(b) A planning service which will help Dealer to adapt conventional plans into modular plans and shop drawings.

(c) The Weyerhaeuser Registered Home Architectural Advisory Service.

(d) A management manual of recommended best procedures covering:

I. Methods of accounting

II. Scheduling procedures

III. Other general management procedures

(e) Business management assistance to more efficiently manage the home package operation.

(f) Manuals on recommended methods for fabricating and erecting components.

(g) Production engineering assistance to enable Dealer to more efficiently produce, package, and transport the materials comprising the WRH component package.

(h) Technical personnel for field visits as required in order to insure proper quality control of shop fabrication of components for the Weyerhaeuser Registered Home.

(i) An advertising program, adapted to meet Dealer's specific needs and local requirements, to the extent provided in Section 1.C.1.

(j) Through a Weyerhaeuser approved correspondent system, assist Dealer in arranging interim and permanent mortgage financing for Weyerhaeuser Registered Homes."

The evidence further obfuscates the issues. The plaintiff variously contends: defendant must have constructed a model home before Weyerhaeuser incurred any obligation in relation to financing; financing was impossible to procure; financing was readily available from other sources than Metropolitan Life; defendant requested no assistance; defendant was furnished plans and manuals; and defendant never requested plans. Although nearly all of the 100 pages of the record summarizing the evidence pertains to the lack-of-financing theory of breach, Mr. Godwin testified that:

"Weyerhaeuser did not provide any planning service to help us adapt conventional plans into modular plans and shop drawings. They did not provide an architectural advisory service after the plant was completed. They did not provide my company business management assistance to more efficiently manage the home package operation. Weyerhaeuser did not provide or arrange for furnishing manuals on recommended methods for fabricating and erecting components."

In rebuttal to these contentions, Weyerhaeuser presented one witness, an employee in design and engineering, whose testimony was dedicated exclusively to refutation of those allegations of breach which did not pertain to financing.

While relating defendant's contentions, the trial court charged that "the defendant contends that the plaintiff breached the contract by failing to comply with the terms of it including the terms that the plaintiff assist in financing." The issue submitted to the jury failed to specify the nature of the breach; consequently the verdict is a general one.

With the record in such a state it is impossible for us to determine upon what theory the jury relied in finding a breach and whether the different theories of breach would have resulted in different measures of damages.

Faced with a quite similar situation in principle, the United States Supreme Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) held the Court of Appeals for the First Circuit erred in awarding a partial new trial on the issue of damages with regard to defendant's counterclaim in a contract action. The trial jury had returned a verdict for both the plaintiff and the defendant on, respectively, the claim and counterclaim. The court of appeals found error in the trial court's instructions with respect to the measure of damages on the counterclaim and ordered a new trial restricted to that issue only. The Supreme Court held that while there was no need to retry the plaintiff's claim, the counterclaim must under the circumstances be tried in its entirety. It noted that it was impossible to tell from the record the precise nature of the breach which the jury must have found and said, 283 U.S. at 499-500:

> "The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract . . . .
>
> . . . .
>
> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. (Citations omitted.) Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

In *Hawk v. Lumber Co.*, 149 N.C. 10, 16, 62 S.E. 752, 754 (1908) this Court, finding error only in the admission of evidence with regard to damages in a contract action, nevertheless awarded a new trial on all issues. The Court said:

> "We think that, under the peculiar circumstances of this case, the new trial, which we award, should extend to all the issues, for the reason, among others which are controlling, that the facts of the case may be more fully developed and the questions intended to be presented, more clearly presented. To do otherwise might result in injustice to one or both of the parties. We grant the new trial gen-

erally in the exercise of the discretion which belongs to this court, as has been so often decided."

This is a case wherein appropriate definition of the issues during the pre-trial conference, or even later during trial, might have saved the parties the expense of full relitigation of the counterclaim. A similar suggestion under similar circumstances in a contract action was made to the parties in *Edgerton v. Taylor,* 184 N.C. 571, 581, 115 S.E. 156, 161 (1922). Such definition never having been achieved, we find that on the present record the question of damages on defendant's counterclaim is so intertwined with the issue of liability that to grant a new trial on the issue of damages only might well result in confusion and uncertainty and in injustice to one or both of the parties. For these reasons and to insure that all the facts bearing on the issue of damages are fully developed and the issue itself more clearly presented, we are constrained to award a new trial on the entire counterclaim.

It remains for us to address briefly certain of plaintiff's remaining contentions. We find the Court of Appeals ruled correctly that plaintiff's motions for directed verdict, for judgment notwithstanding the verdict and for summary judgment on defendant's counterclaim were properly denied. Whatever plaintiff's theory of defense, the evidence, taken in the light most favorable to defendant, was clearly sufficient to allow the jury to consider it.

[5] Plaintiff's next argument, that the court should have set aside the verdicts on the issues pertaining to the counterclaim because, once having found defendant to have breached the contract, the jury could not find plaintiff to have done so as well, is frivolous. The jury found only that defendant had breached the contract, not that the breach was material or that it excused plaintiff's performance. *See Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534 (1953); *Edgerton v. Taylor,* 184 N.C. 571, 115 S.E. 156 (1922); *Westerman v. Fiber Co.,* 162 N.C. 294, 78 S.E. 221 (1913); 17A C.J.S. Contracts § 474; *see also Gasoline Products Co. v. Champlin Refining Co., supra.*

Because our holding necessitates a new trial on the counterclaim, it is unnecessary to address the remaining issues.

The decision of the Court of Appeals remanding the case for a new trial only on the issue of damages is modified and this case is remanded to the Court of Appeals with direction

that it be remanded to the superior court for a new trial on defendant's counterclaim in its entirety.

Modified and affirmed.

STATE OF NORTH CAROLINA v. BOBBY LEE WILLARD

No. 34

(Filed 10 May 1977)

1. **Criminal Law § 29— competency to stand trial — sheriff's "personal feeling" — absence of prejudice**

In a pretrial hearing to determine defendant's competency to stand trial, defendant was not prejudiced by a sheriff's testimony that it was his "personal feeling" defendant's attitude and manner of speech changed because prisoners from Central Prison who were placed in jail with defendant had talked to him, even if such testimony was incompetent, where it does not appear that the trial judge based his findings on the incompetent evidence.

2. **Criminal Law § 29— test of mental competency to stand trial**

The test of defendant's mental competency to stand trial is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

3. **Criminal Law § 29.1— determination of mental competency to stand trial**

The issue of defendant's mental competency to stand trial may be determined by the trial court with or without the aid of a jury.

4. **Criminal Law § 29.1— competency to stand trial — non-jury hearing — conclusiveness of findings**

When the trial court conducts an inquiry without a jury to determine defendant's competency to stand trial, the court's findings of fact, if supported by competent evidence, are conclusive on appeal.

5. **Criminal Law § 29— competency to stand trial — conflicting evidence**

Although a psychiatrist who examined defendant in July and August 1976 was of the opinion that defendant was mentally incompetent to stand trial in August 1976, the trial court's determination that defendant was mentally competent to stand trial was supported by (1) defendant's score of 26 on the Competency Screening test in November 1975, which was well within the range of competency to stand trial according to standards established by the National Institute of Mental Health; (2) another psychiatrist's expert opinion that when he examined defendant in November 1975 defendant was

competent to stand trial; and (3) testimony of the sheriff, who observed defendant in jail from the time of his arrest until trial (except for the periods he was in a State hospital), that defendant was a normal prisoner and carried on normal conversations until recently when he started "rambling in his talk" after he had been placed with some prisoners from Central Prison.

6. **Criminal Law § 29; Constitutional Law § 32— amnesia — competency to stand trial — fair trial**

Amnesia concerning the events of the crime does not *per se* render a defendant incapable of standing trial or of receiving a fair trial.

7. **Criminal Law § 63.1— evidence of legal insanity**

A defendant who pleads insanity in bar to a criminal charge is entitled to introduce evidence relevant to *legal* insanity.

8. **Criminal Law § 63.1— insanity — exclusion of expert's testimony**

The trial court did not err in refusing to permit a psychiatrist to testify as to his findings that defendant suffered from simple schizophrenia and alcohol pathological intoxication at the time of the crime where the witness was permitted to state his opinion that defendant suffered from some type of psychosis at the time of the crime, no proper foundation was laid for the witness's opinion as to simple schizophrenia and alcohol pathological intoxication, and the witness stated that he was unable to form an opinion as to whether defendant knew right from wrong at the time of the crime, which was the relevant consideration.

9. **Criminal Law § 5— insanity — M'Naghten Rule — constitutionality**

The ability to distinguish between right and wrong test [M'Naghten Rule] for legal insanity is constitutional.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from judgments of *Walker, H. H., J.*, entered 26 August 1976, STOKES Superior Court. Defendant's conviction of felonious assault with a deadly weapon with the intent to kill inflicting serious injury was certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a) on 21 December 1976.

On indictments, proper in form, defendant was charged with first degree burglary, aggravated kidnapping, assault with intent to commit rape, and assault with a deadly weapon with intent to kill inflicting serious injury.

Defendant entered a general plea of not guilty and a special plea of not guilty by reason of insanity to each indictment. The assault with intent to commit rape charge was dismissed upon motion of the district attorney at the close of the State's evidence. Defendant was found guilty of the remaining offenses. The court imposed the mandatory life sentence for the first

degree burglary conviction, life imprisonment for the aggravated kidnapping conviction to commence at the expiration of the burglary sentence, and a sentence of ten years imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction to commence at the expiration of the kidnapping sentence.

The evidence for the State tended to show the following:

On the evening of 4 November 1975, Alma M. Joyce, aged 74, was living by herself at her home in Prestonville, North Carolina. She went to bed about 10:30 p.m. and before retiring, closed and locked all the outside doors and windows. She was awakened about 11:00 p.m. when she heard a "scrambling" under her bed. The defendant jumped out from under the the bed. Mrs. Joyce ran through the house and out the front door, which she found half open, towards her daughter's house. The defendant gave chase and caught her at the mail box. Putting his hands over her mouth, he forced her back into the house. In the kitchen he said, "I am bloodthirsty and I came to kill you" and proceeded to cut Mrs. Joyce with a pocket knife across her face and throat.

The defendant then pushed her into the bedroom where he kept her confined for five or six hours. During the night, he cut the telephone cord, the refrigerator and some calendars in the kitchen. Periodically, he resumed his assaults, cutting the victim numerous times on the hands, arms, breast, back and other parts of the body. He slit Mrs. Joyce's dresses that were hanging in the bedroom and cut off her night clothes. At 6:30 a.m. he finally left. Shortly thereafter, Mrs. Joyce heard a gunshot. Defendant had previously told the victim that he had left a gun outside beside a tree.

After defendant had gone, Mrs. Joyce staggered out of the house onto the steps and slumped down. Neighbors responded to her screaming and she was taken to the hospital where she remained for two weeks. She was on the operating table for five hours and received 400 stitches to close her wounds.

Mrs. Joyce had known the defendant before the attack. The defendant, on occasion, had stayed with his brother who farmed Mrs. Joyce's land and had assisted his brother in packing tobacco and carrying it to market. Mrs. Joyce and the defendant had never exchanged any cross words prior to the assault.

Mrs. Joyce described the defendant as calm during the entire evening. He smoked cigarettes all through the morning from a Winston package. When she inquired if he was drunk, he told her that he was not but that he had smoked some "LSD cigarettes."

According to the SBI Laboratory report, a button found at Mrs. Joyce's house was similar to one missing off a shirt belonging to the defendant. A knife recovered from the defendant revealed bloodstains of the same type as Mrs. Joyce's blood (defendant's own blood type was different). A flashlight and some shotgun shells were discovered near Mrs. Joyce's house. The screen door on the front of her house had been damaged.

Prior to trial, defendant was twice committed to the State mental hospital, Dorothea Dix, for a period of observation and treatment pursuant to G.S. 15A-1002. He was hospitalized November 10-21, 1975, and July 23-August 20, 1976. After each period of hospitalization, he was returned to the Stokes County Jail.

Prior to jury selection, counsel for the defendant moved presumably for a continuance because "the defendant was unable to plead his case and understand the nature of the charges and is unable to stand trial because of mental incompetency."

At the hearing on the motion, defendant's evidence tended to show that Dr. Billy Williamson Royal, a staff psychiatrist, had examined the defendant during the months of July and August 1976 while he was at Dorothea Dix Hospital. The examination revealed that the defendant was illiterate and had an IQ of 53, which is regarded as mild to moderate retardation. According to Dr. Royal's diagnosis, the defendant was also suffering from schizophrenia, simple type, which is a "type of illness that comes on insidiously or slowly so there is not an acute sudden onset." At the hospital defendant experienced auditory hallucinations and paranoia according to Dr. Royal. In addition, the defendant was diagnosed as having suffered from alcohol pathological intoxication on the evening of the crime. The defendant had no memory of the offense and thought he had already been tried for it. This mental amnesia, in the opinion of Dr. Royal, was attributable to his alcohol pathological condition and possible drug use on the night of the crime.

Dr. Royal testified that alcohol pathological intoxication is very unusual. "It is a condition in which a person is not aware of what they were doing. They are operating with what may be called a deranged mental mechanism in terms of what they are doing. Having in essence no control over their operation. In lay terms, crazy or psychotic. In other words, it is a condition that person is in when he commits a perfectly senseless crime which is unexplained. It is an unusual condition brought on by alcohol in some people on some occasions, in a very low percentage of cases. It is a form of drunkenness or the effects of alcohol upon the mind. . . . From a *psychiatric* standpoint a person in this condition is simply not responsible for what he is doing or does not know any better." (Emphasis supplied.) Defendant told Dr. Royal that he consumed a fifth of alcohol, plus some beer, on the day in question. Defendant admitted customarily drinking substantial amounts of alcohol on weekends. The alleged crime was comitted on a weekday.

Dr. Royal was of the opinion that as of 20 August 1976 the defendant was not capable of assisting with his defense. Specifically, Dr. Royal did not think the defendant had the mental capacity to comprehend his position and the nature and object of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may be interposed. Dr. Royal stated the defendant did understand the difference between right and wrong at the time of his examination.

Dr. Royal felt that the defendant's mental condition had deteriorated since the time of his first commitment to Dorothea Dix Hospital and Dr. Royal based his opinion that the defendant was incapable of standing trial on this deterioration in mental state.

The defendant's sister and mother both testified that the defendant's personality had changed for the worse while he was in jail and confirmed his amnesia concerning the events of the crime.

The State's evidence in opposition to the motion tended to show that Dr. James Groce, a staff psychiatrist at Dorothea Dix Hospital, had examined the defendant when he was first sent to the hospital in November 1975. It was the opinion of Dr. Groce that the defendant could understand his position in the court and the nature of the charges against him and could

intelligently cooperate with his attorney in preparing his defense.

Dr. Groce indicated that alcohol pathological intoxication was rare. He testified that the fact that the assault took place over a five to six hour period, and that no alcohol was consumed during this time, made it less likely that the defendant was in a state of pathological intoxication. Dr. Groce felt that over this period of time, with no further consumption of alcohol, a person would sober up or at least his alcohol pathological intoxication would diminish.

Dr. Groce found no simple schizophrenia or other psychosis. Defendant had no problems with delusions or hallucinations during his first stay at the hospital. The doctor was of the opinion that the defendant knew the difference between right and wrong at the time he examined him. His only diagnosis was mild mental retardation. The defendant reported drinking alcohol on the day of the crime but did not report the use of any drugs to the doctor.

During the November 1975 commitment, defendant was administered the Competency Screening Test, designed by the National Institute of Mental Health to assist in determining a person's capacity to proceed to trial. The maximum score on the test is 40, and a score above 20 is evidence of capacity to proceed to trial. The defendant scored 26.

Sheriff Tony Blalock of Stokes County testified that he had observed the defendant in jail during his incarceration and had normal conversations with him from time to time. When defendant first returned from Dorothea Dix in November 1975, he was permitted to do small jobs around the jail and appeared to be a normal prisoner. After the last term of superior court the defendant's attitude changed and his speech became "rambling." (We take judicial notice that the "last term" was the 7 June Session of Stokes Superior Court.) Several prisoners from Central Prison were placed in the county jail for that session of court and these people had talked "a lot" to the defendant. It was the Sheriff's feeling that these conversations had something to do with the change in the defendant.

At the close of the evidence, the court made findings of fact and based on those findings concluded that "the defendant is capable of standing trial at this time and [is able] to plead

to the bills of indictment against him." More specifically, the court concluded that "the defendant at this time does in fact have the mental capacity to comprehend his position and to understand the nature and the object of the proceedings against him and to conduct his defense in a rational manner and to cooperate with his attorney to the end that any available defense may be interposed." Whereupon, defendant's motion was denied and the matter proceeded to trial.

Other facts necessary to the decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General James Wallace, Jr. for the State.

James L. Dellinger, Jr. for defendant appellant.

COPELAND, Justice.

[1] Defendant first contends the court erred when it allowed Sheriff Blalock at the pretrial hearing on defendant's motion to express a personal opinion as to why defendant's mental condition had changed.

The record of the hearing discloses the following testimony by Sheriff Blalock on direct examination:

> "When Bobby came back from the hospital the first time back in November, the jailer let him out on different occasions to do small jobs around the jail and he appeared to be a normal prisoner. The unusual something came up right before the last term or right after the last term of Superior Court. That is when I noticed a change in Bobby. There was a change in Bobby's attitude. He started sort of rambling in his talk rather than talking about specific things. I might add that at the time that we had Superior Court we had several prisoners here from Central Prison as we have at this time and my own personal feeling is ....."
>
> "MR. DELLINGER: Objection.
>
> "COURT: Overruled.
>
> "A. It is my feeling and my observation that these people talked a lot to Bobby and I feel that is one reason why he changed.

"MR. DELLINGER: Objection.

"COURT: Overruled."

A layman who has had a reasonable opportunity to form an opinion based on observation may testify as to the mental capacity of a defendant in a criminal case. *State v. Hammonds,* 290 N.C. 1, 224 S.E. 2d 595 (1976); 1 Stansbury's N. C. Evidence, § 127 (Brandis Rev. 1973); *see State v. Thompson,* 285 N.C. 181, 203 S.E. 2d 781 (1974). Assuming, *arguendo,* that a lay opinion as to the *cause* of a change in a defendant's mental state would nevertheless be incompetent, then the latter portion of Sheriff Blalock's testimony would be objectionable. However, we assume that when the court is the trier of fact, as is generally true on a pretrial motion, it will not consider incompetent evidence. *Brown v. Boger,* 263 N.C. 248, 139 S.E. 2d 577 (1965); *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668 (1958).

In a " 'hearing before the judge on a preliminary motion, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found.' (Citations omitted.)" *State v. Davis,* 290 N.C. 511, 540, 227 S.E. 2d 97, 115 (1976). Absent affirmative evidence to the contrary, this Court presumes that the trial judge disregarded incompetent evidence in arriving at his decision. *State v. Davis, supra; Bizzell v. Bizzell, supra.*

With respect to the challenged testimony in the instant case Judge Walker made the following finding of fact:

> "That he [Sheriff Blalock] did however notice recently a change in the defendant after he had been placed with several persons from either Central Prison or the Department of Correction System, inmates from the Department of Correction, and that the defendant had started rambling in his talk."

This finding was based solely on Sheriff Blalock's competent testimony. The trial court properly ignored the Sheriff's arguably incompetent statement of opinion which had earlier been admitted over defendant's objection. We note, however, that the safer practice is for the trial judge to adhere to the rules of

evidence at a hearing on a pretrial motion. *State v. Davis, supra.* But where, as here, it does not affirmatively appear that the trial judge based his findings on the incompetent evidence the assignment of error will be overruled.

In his next two assignments of error, defendant contends the trial court erred in finding that he was mentally capable of standing trial.

[2-4] The test of a defendant's mental capacity to proceed to trial is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968); *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458 (1948); 4 Strong's N. C. Index 3d, Criminal Law § 29 (1976). The issue may be determined by the trial court with or without the aid of a jury. *State v. Cooper, supra; State v. Propst, supra; State v. Sullivan, supra.* When the trial judge conducts the inquiry without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Cooper, supra; see State v. Thompson, supra.*

Defendant assails the court's conclusion that he was capable of standing trial because at the hearing on the motion (1) the most recent expert medical evidence indicated the defendant was mentally incapable of standing trial and (2) uncontradicted medical evidence showed the defendant suffered from amnesia regarding the events of the crime.

[5] The trial court's findings and conclusions as to the defendant's capacity to stand trial were supported by (1) defendant's score of 26 on the Competency Screening Test in November 1975, which was well within the range of competency to stand trial according to standards established by the National Institute of Mental Health; (2) Dr. James Groce's expert opinion that when he examined the defendant in November 1975, defendant was competent to stand trial; (3) the testimony of Sheriff Blalock, who observed the defendant in jail from the time of his arrest until trial (except for the periods he was at Dorothea Dix Hospital), which indicated that defendant was a normal prisoner and carried on normal conversations until recently

when he started "rambling in his talk" after he had been placed with some prisoners from Central Prison.

Dr. Groce's examination of defendant preceded Dr. Royal's examination by some nine months. Dr. Groce admitted he could not agree or disagree with Dr. Royal's opinions because they were based on data and a time period unavailable to him, and further admitted that defendant's competency could have changed since his examination. We would be inclined to agree with the defendant that the test data and Dr. Groce's examination were too remote in time to support the trial court's conclusion on defendant's competency to stand trial in light of Dr. Royal's examination but for Sheriff Blalock's observation that defendant's personality changed only after he was placed with other prisoners.

The trial court could reasonably have believed from all the evidence that the defendant decided, after coming in contact with other prisoners, that it was to his advantage to feign the auditory hallucinations and delusions which led to Dr. Royal's diagnosis of simple schizophrenia. It appears from the record that simple schizophrenia, combined with defendant's mild mental retardation and amnesia, were the basis for Dr. Royal's opinion that the defendant was incompetent to stand trial. Dr. Royal testified that schizophrenia, simple type, is a disease that comes on "insidiously or slowly so *there is not an acute sudden onset.*" (Emphasis supplied.) By contrast, Sheriff Blalock's testimony disclosed a *sudden* change in the defendant's personality. Dr. Royal also admitted that it was possible for defendant to fake the hallucinations. Under these circumstances, we think Judge Walker's findings and conclusions are sufficiently supported by the evidence and therefore, are conclusive on appeal. *State v. Cooper, supra.*

[6] Defendant's alleged amnesia concerning the events of the crime would not prevent him from comprehending his position and understanding the nature and object of the proceedings against him. Nor would his partial amnesia prevent him from conducting his defense in a rational manner or cooperating with his counsel in presenting any available defenses. Obviously if defendant is unable to recall the events of the crime, his available defenses may be limited. We do not believe this fact alone renders him incompetent to stand trial or denies him a fair trial in view of the fact that the State has the burden of proving

beyond a reasonable doubt that the crime charged was committed and that the defendant was the perpetrator. The general rule in other jurisdictions, which we adopt, is that amnesia does not *per se* render a defendant incapable of standing trial or of receiving a fair trial. Annot., 46 A.L.R. 3d 544, 553 (1972). *See, e.g., State v. McClendon,* 103 Ariz. 105, 437 P. 2d 421 (1968) ; *State v. Pugh,* 117 N.J. Super. 26, 283 A. 2d 537 (Super. Ct. App. Div. 1971), *cert. denied,* 60 N.J. 22, 285 A. 2d 563 (1972) ; *Cummins v. Price,* 421 Pa. 396, 218 A. 2d 758, *cert. denied,* 385 U.S. 869, 17 L.Ed. 2d 96, 87 S.Ct. 136 (1966). Partial amnesia places a defendant in no worse a position than the defendant who cannot remember where he was on a particular day because of the passage of time, or because he was insane, very intoxicated, completely drugged, or unconscious at the time. *Cummins v. Price, supra.* In each of these cases, the defendant's available defenses may be limited or impaired because of his present inability to reconstruct a past period of his life.

In deciding this same issue, the Arizona Supreme Court noted that, "amnesia 'is nothing more than a failure of memory concerning facts or events to which an individual has been exposed' and that 'every individual's memory process is marked by some distortion which may occur at any point' and 'as a result, *no one's memory is in fact complete, even under ideal conditions . . . every one is amnesic to some degree.*' (Emphasis supplied.) 71 Yale Law J. 109-111 (1961-62)." *State v. McClendon, supra* at 107, 437 P. 2d at 423. The Pennsylvania Supreme Court, in considering the issue which now confronts us, pointed out that, "[i]f in fact the condition of amnesia is *permanent,* defendant's contention (1) would require Courts to hold that such amnesia will permanently, completely and absolutely *negate all* criminal responsibility and (2) will turn over the determination of crime and criminal liability to psychiatrists, whose opinions are usually based in large part upon defendant's self-serving statements, instead of to Courts and juries, and (3) will greatly jeopardize the safety and security of law-abiding citizens and render the protection of Society from crime and criminals far more difficult than ever before in modern history. (Emphasis in original.) *Cummins v. Price, supra* at 406, 218 A. 2d at 763.

We find the reasoning of our sister courts persuasive on this issue. We note that nothing in the record suggests that this defendant's alleged amnesia was merely a temporary condition,

a fact which might have influenced the court to delay the trial. *State v. McClendon, supra.* We have previously held on a related issue that amnesia is no defense to a criminal charge. *State v. Bock,* 288 N.C. 145, 217 S.E. 2d 513 (1975) ; *see State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975). The assignments of error relating to defendant's mental capacity to stand trial are overruled.

In his next assignment of error, defendant maintains the trial court erred by excluding certain medical testimony as to the mental condition of the defendant. Defendant argues that because the burden of proving insanity to the satisfaction of the jury rests upon him, he should be allowed to introduce any evidence bearing on his mental condition. We disagree.

[7] True, defendant has the burden of proving to the satisfaction of the jury that he was insane at the time the crime was committed. *State v. Harris,* 290 N.C. 718, 228 S.E. 2d 424 (1976) ; *State v. Hammonds, supra; State v. Caddell, supra.* This burden, however, is to show that defendant was insane *in a legal sense at the time of the crime. State v. Swink,* 229 N.C. 123, 47 S.E. 2d 852 (1948). The test of *legal* insanity asks whether, at the time the accused committed the act, he was laboring under such a defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act or, if he did know this, incapable of distinguishing between right and wrong in relation to such act. *State v. Harris, supra; State v. Cooper, supra; State v. Swink, supra.* It follows that a defendant who pleads insanity in bar to a criminal charge is only entitled to introduce evidence relevant to the issue of *legal* insanity.

[8] Defendant complains that Dr. Royal was not allowed to testify at trial concerning his findings of schizophrenia, simple type, and alcohol pathological intoxication. Dr. Royal was permitted to give the following testimony:

> "I am not able to state whether or not he [defendant] knew right from wrong at the time that the crime was committed . . .
>
> "I am not able to state because the charged person indicated and has indicated consistently amnesia for the time of the alleged crime and so that is an area that we were unable to discuss. My thought is that he was operating

under a psychotic condition and at times those people are able to determine right from wrong even when psychotic, but unless you interview the person at the time that they are in that condition that is impossible to say with certainty.

"A psychotic condition generally means a deranged mind within which a person has certain thought processes going on that are unrealistic."

Thus, it appears the doctor was allowed to state his opinion that the defendant was suffering from some type of psychosis at the time of the crime. The fact that the doctor was not permitted to place a label on the specific type of psychosis would not be reversible error. We also note that no proper foundation for the doctor's opinions as to simple schizophrenia and alcohol pathological intoxication was laid and thus the objections to this testimony were properly sustained. *State v. Bock, supra.* The doctor did state that he was unable to form an opinion as to whether the defendant knew right from wrong at the time of the crime, which was the relevant consideration. This assignment of error is overruled.

[9] Defendant next challenges the constitutionality of the test for legal insanity in this State, the so-called "M'Naghten Rule." M'Naghten's Case, 10 Cl. & Fin. 200 (H.L. 1843). Defendant concedes that our Court has on many occasions rejected this argument, *see e.g., State v. Harris, supra,* and that the only United States Supreme Court decision on point is contra to his position. *Leland v. Oregon,* 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002 (1952). Defendant nevertheless asks this Court to reconsider the issue. Suffice it to say, that we have adhered to the "right and wrong" [M'Naghten] test for many years and are not disposed to depart from it now. *State v. Harris, supra; State v. Hammonds, supra; State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51 (1975); *State v. Cooper, supra.* This assignment of error is overruled.

Lastly, defendant claims the court erred when it refused to grant defendant's motion to set aside the verdict as being against the greater weight of the evidence. At motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court and is not reviewable on appeal. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546

(1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971). The assignment of error is without merit and overruled.

Due to the serious nature of the offenses charged, we have searched the record for errors other than those assigned and have found none.

In the trial we find

No error.

STATE OF NORTH CAROLINA v. BENJAMIN FRANKLIN HOPPER

No. 17

(Filed 10 May 1977)

1. **Criminal Law § 102.8— defendant's failure to testify — district attorney's jury argument — no prejudice**

Defendant was not prejudiced by the district attorney's allegedly improper argument to the jury concerning defendant's failure to present witnesses to contradict the State's evidence since (1) defense counsel did not object to the challenged remarks at the time nor was the attention of the court called to them; (2) the impropriety in the argument, if any, was not gross and the court was not required to censure the argument and give curative instructions *ex mero motu;* (3) defendant, having offered no evidence, had the closing argument to the jury, and counsel was thus afforded an opportunity to answer effectively any and all remarks of the prosecuting attorney; and (4) the trial court's charge to the jury contained an admonition with respect to defendant's failure to testify which was sufficient to remove any prejudice that might have resulted from the challenged remarks of the prosecuting attorney.

2. **Criminal Law § 113.1— plea bargaining by witness — jury instruction — summary of evidence**

The trial court's jury instruction concerning the plea bargaining of a witness amounted to a summary of the witness's own testimony and did not permit the jury to conclude that the trial judge was endorsing the testimony of the witness.

3. **Criminal Law § 113— jury instructions — law arising on evidence — no hypothetical facts**

Defendant's contention that "the court in attempting to explain common law robbery stated affirmatively, where it should have stated hypothetically the matter" is without merit, since G.S. 1-180 requires the court to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts.

4. **Jury § 6— examination of prospective jurors — limitation not prejudicial**

Defendant's right to examine prospective jurors was not unreasonably restricted where one question to which the State objected was clearly improper and another to which the State objected was answered by the prospective juror anyway; both prospective jurors involved were excused; and defendant exhausted only eleven of his fourteen peremptory challenges.

5. **Criminal Law §§ 95, 162.2— objectionable evidence — time for objecting — limiting instruction**

Defendant was not prejudiced by the admission of testimony from a sheriff in Georgia concerning a message received by him about defendant from a sheriff in N. C., since defendant lodged no objection until the entire message from the N. C. sheriff had been read to the jury; moreover, even if admission of the message was error, the limiting instruction given by the court was sufficient to erase any possible prejudice.

6. **Criminal Law § 89.3— witness's prior statements — admissibility for corroboration**

The trial court did not err in allowing into evidence pretrial statements made by a State's witness where the court restricted the admissibility of the statements to corroborative purposes only.

7. **Homicide § 21.5— first degree murder — sufficiency of evidence**

Where there was evidence of premeditation and deliberation as well as evidence of murder committed in the perpetration or attempt to perpetrate robbery in violation of G.S. 14-17, the trial judge was well within the law when he submitted first degree murder as a permissible verdict.

8. **Criminal Law § 15— change of venue — special venire — discretionary matters**

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings thereon will not be disturbed on appeal.

9. **Constitutional Law § 80; Homicide § 31.1— first degree murder — life sentence in lieu of death penalty**

A sentence of life imprisonment is substituted for the death penalty imposed in this first degree murder prosecution.

DEFENDANT appeals from judgment of *McConnell, J.*, 14 June 1976 Session, ROCKINGHAM Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Earl Junior Manuel on 27 February 1976 in Rockingham County.

The State's evidence tends to show that Earl Junior Manuel left his mother's home on 27 February 1976, as usual, to go to

work at Stoneville Furniture Company. It was pay day and he was paid $79.79 that date. He kept his money on his person in two pocketbooks and a change purse.

Randy Dalton testified that he went to Doug's Poolroom in Madison around 2:30 p.m. on 27 February 1976 and that soon thereafter defendant Benjamin Franklin Hopper, Roger Dalton and Danny Ray "Slick" Dalton arrived. Earl Junior Manuel walked by the poolroom carrying a suitcase and requested someone to drive him to Mayodan. The defendant and Danny Ray "Slick" Dalton took him away in defendant's truck and later returned to Doug's Poolroom without him. On that trip defendant said, "Let's get Junior's money. . . . I can get him with one lick." "Slick" Dalton, however, refused to go along with this plan and it was abandoned.

Later that evening defendant and Randy Dalton saw Earl Junior Manuel in Lefty's Poolroom in Mayodan. Manuel was drunk. Apparently due to their conduct all three were requested to leave and did so. They left in defendant's truck and drove for fifteen or twenty minutes. Defendant stopped, got out of his truck with Earl Junior Manuel, and when they had walked a distance of about twenty feet, defendant swung a liquor bottle at Manuel who hollered and "went down." Defendant then began stabbing Manuel with a knife and told Randy Dalton he must stab Manuel also or else defendant would stab him. Randy Dalton was afraid, took the knife and, guarding the blade so as not to stab deeply, stabbed Manuel five to eight times. Defendant and Randy Dalton then loaded Manuel onto the pickup truck, took him to the Lindsey Bridge nearby and threw him into the Dan River. Defendant then gave Randy Dalton a pocketbook which he threw out the window. It was later found near the bridge abutment with $9 in it and two $20 bills nearby.

Randy Dalton and defendant then went to the home of Earl and Mary Duncan. Mary Duncan is defendant's sister. Upon entering the house, defendant announced in an agitated tone, "We just killed somebody." Randy Dalton then told the Duncans that defendant had just killed somebody but did not detail any of the circumstances. After twenty to thirty minutes, Randy Dalton left and went to his home. Later Randy Dalton talked to the officers investigating the case, initially lied about the matter but later told the whole story. He pled guilty to second degree murder with a plea-bargaining agreement that his punishment

should not exceed twenty years. Under that arrangement, he testified as a witness for the State.

Earl Junior Manuel's body was recovered from the river about 800 yards below the bridge. It was determined that Manuel had .33 percent alcoholic content of the blood at the time of his death.

Dr. Page Hudson, a specialist in pathology, testified that he examined the body of Earl Junior Manuel and found a cluster of wounds on the right chest, all of which were superficial. On the left chest, however, there were many deep wounds, some penetrating into the lungs, the liver and the heart. The cause of death was hemorrhage or blood loss secondary to multiple stab wounds in the chest or heart.

Other evidence relative to decision of the case will be narrated in the opinion.

Defendant offered no evidence.

Defendant was convicted of murder in the first degree and sentenced to death. Errors assigned upon appeal to this Court will be discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Henry H. Burgwyn, Associate Attorney, for the State of North Carolina.

John E. Gehring and Ronald M. Price, attorneys for defendant appellant.

HUSKINS, Justice.

[1] Defendant contends that the district attorney's argument to the jury was improper and that the court erred in permitting the prosecutor to comment on defendant's failure to testify. The challenged argument is apparently located on pages 79, 80 and 92 of the record.

We note at the outset that defense counsel did not object to the challenged remarks at the time nor was the attention of the court called to them.

It has long been the law that:

> "[E]xception to improper remarks of counsel during the argument must be taken before verdict. [Citations omitted.] The rationale for this rule, which has been frequently

quoted, . . . is thus stated in *Knight v. Houghtalling*, 85 N.C. 17: 'A party cannot be allowed . . . to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost.'

We have modified this general rule in recent years so that it does not apply to death cases, when the argument of counsel is so prejudicial to the defendant that in this Court's opinion, it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given."

State v. Smith, 240 N.C. 631, 83 S.E. 2d 656 (1954); *accord, State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542 (1947).

We further note that defendant, having offered no evidence, had the closing argument to the jury. This afforded counsel an opportunity to answer effectively any and all remarks of the prosecuting attorney. The argument of defense counsel is not contained in the record on appeal, as it should be when the district attorney's argument is challenged, *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975), but it is reasonable to assume that counsel took full advantage of that opportunity. *See State v. Smith and Foster*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976).

Notwithstanding defendant's failure to object or otherwise bring to the court's attention the alleged improper argument now complained of, we have examined the challenged remarks of the prosecutor appearing at pages 79, 80 and 92 of the record and find no gross impropriety which required the court, even in the absence of objection, to correct *ex mero motu*.

The argument appearing on page 92 is entirely proper and so innocuous it merits no comment. The argument appearing on pages 79-80 reads as follows:

"Let me at this point say again, as I will later, that by the defendant's plea of 'not guilty' he is presumed to be innocent and the burden is on the State to satisfy you beyond a reasonable doubt of his guilt and the State assumed that burden in this case and the defendant's plea of 'not

guilty' denies every single thing that the State says in this case. Denies every particle of evidence that the State has offered but let me point out the difference between a denial and a contradiction.

There is not a single witness brought here by the defendant to contradict a single piece of evidence that the State has offered in this case. Now I may come back to that. Now what is missing here, well if Benjamin Hopper was not driving that truck, if he was not the man who was managing the motions and movements of that crowd and that after if he did not have anythng to do with it where was he? Where was he? Where had he been when he showed up there at his brother-in-law? Had he been killing hogs somewhere? Somebody knows where he was but no witness came here to tell you that Benjamin Hopper was not driving that Dodge truck back and forth between the sandhole and Wes Ray's place and over across the Lindsey Bridge. It is simply another indication that Randy Dalton was telling the truth and there is not a witness that contradicts anything that Randy Dalton had to say."

Had the quoted argument been brought to the court's attention by timely objection that it violated G.S. 8-54, the trial judge could have given immediately a mild curative instruction to remove all possibility that the jury might have been prejudiced by the argument. This was not done. The impropriety, if such it be, was not gross and the court was not required to censure the argument and give curative instructions *ex mero motu*. The law on this point has been fully discussed in recent cases, including *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976) ; *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568 (1976) ; *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). Moreover, the record discloses that the court's charge to the jury contained the following admonition:

"The defendant in this case has not testified. Any defendant may or may not testify in his own behalf and his failure to testify shall not create any presumption against him. . . . Now, members of the jury, in this case the defendant has not offered evidence as I have just stated and that shall not be used against him, therefore you must be careful not to let his silence influence your decision."

This instruction was sufficient to remove any prejudice that might have resulted from the challenged remarks of the prosecuting attorney. *See State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Lindsay,* 278 N.C. 293, 179 S.E. 2d 364 (1971). The first assignment discussed in defendant's brief is overruled.

The second assignment of error discussed in defendant's brief is based on Exceptions 24A and 25A appearing, respectively, on pages 104 and 117 of the record. Defendant contends the trial judge in his charge to the jury expressed an opinion as to the weight and credibility of the evidence in violation of G.S. 1-180.

[2] Exception No. 24A relates to a portion of the charge in which the judge is recapitulating the testimony of the witnesses. In connection with the testimony of Randy Dalton, the court said:

> "Randy Dalton is named as a co-defendant and is charged with first degree murder and he testified or it was brought out in the trial that prior to going on the stand that he entered into a plea negotiation through his attorney, Mr. Vernon Cardwell, with the District Attorney. The Supreme Court of the United States has said that plea bargaining may be entered into and is proper and he said the plea bargaining was that he was to plead guilty to second degree murder and the Solicitor or District Attorney would recommend that he receive a punishment within the range of voluntary manslaughter which carries punishment up to twenty years and he said that he understood that."

Defendant argues the quoted language, although a true statement, refers to a matter that should not have been brought before the jury and permits the jury to conclude that the trial judge is endorsing the testimony of the witness. This contention has no merit.

The witness Randy Dalton had testified on both direct and cross-examination that he had entered into a plea-bargaining arrangement and gave the details. G.S. 15A-1054 and 15A-1055 sanction plea arrangements and provide that the bargain reached may be brought out at the trial by any party. Here, the court was simply summarizing such testimony of the witness Randy Dalton before applying the law to the different factual

aspects of the case. Moreover, no prejudice to defendant occurred in any event. Insofar as the plea arrangement is concerned, the challenged language of the judge merely accentuated defendant's argument that Randy Dalton's credibility was suspect in that he was testifying to protect his own interest.

[3] Exception No. 25A challenges the sentence in parentheses appearing in the following portion of the judge's charge:

> "I charge for you to find the defendant guilty of murder in the first degree by the killing of a human being by a person committing or attempting to commit a robbery, the State must prove beyond a reasonable doubt first, that the defendant stabbed or cut the deceased Earl Junior Manuel with a knife while he was engaged—While he, the defendant, was engaged either by himself or in concert with Randy Dalton in committing or attempting to commit the felony of robbery. Robbery, as I have heretofore stated, common law robbery is the taking and carrying away of the personal property of another from the person's presence and without his consent by endangering or threatening that person's life. (In this case by threatening him with a knife, the taker, that is the defendants Ben Hopper and Randy Dalton knowing that they were not entitled to take the property and intending to deprive the owner of its use permanently.)"

Defendant's only argument with respect to this exception is that "the court in attempting to explain common law robbery stated affirmatively, where it should have stated hypothetically the matter." This contention is obviously without merit. G.S. 1-180 "requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts." *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277 (1955); *accord, State v. Campbell,* 251 N.C. 317, 111 S.E. 2d 198 (1959). This assignment is overruled.

[4] Defendant next contends the trial court erred by unreasonably restricting his right to examine prospective jurors and cross-examine witnesses. During selection of the jury de-

fense counsel posed the following questions to prospective jurors Barker and Shelton respectively:

> 1. "Let me ask you what is your opinion of our court system in North Carolina today, do you think that justice is done?"
>
> OBJECTION SUSTAINED.
> EXCEPTION NO. 3
>
> 2. "Mr. Shelton, what comes to your mind when someone is indicted for a crime, do you form any opinion?"
>
> OBJECTION SUSTAINED.
> EXCEPTION NO. 4

Notwithstanding that the State's objection to the second question was sustained, the following answer appears in the record:

> "I would make up my mind according to the evidence that I heard and vote according to my conscience. If the State did not prove their case I don't know if I would vote not guilty. I don't know how I would vote the case."

The record further discloses that the defendant excused both jurors to whom the questions had been addressed.

We find no merit in these exceptions. The first question is clearly improper and the second was answered. Since defendant excused both prospective jurors and only exhausted eleven of his fourteen peremptory challenges, it is not perceived how he has been prejudiced.

With respect to his contention that he was not allowed to fully examine witnesses, defendant's only argument in his brief is that "trial counsel should have been allowed to delve more deeply into the prior lies of Randy Dalton, upon whose testimony [the State] had built its case."

During cross-examination of State's witness Randy Dalton, the witness stated: "I had my first meeting with the law enforcement officers four days after the stabbing. At one of the meetings I lied to the officers." Objection was then sustained to the next question: "So you lied to them?" The witness on further cross-examination stated that he was pleading guilty to second degree murder. Counsel then asked: "Are you guilty of second degree murder?" The State's objection thereto was sus-

tained. This exchange apparently forms the basis for defendant's contention that he was not permitted to fully examine the witnesses. It suffices to say that neither prejudice nor error is shown. The assignment of error grounded on these matters is overruled.

[5] William A. Anderson, Sheriff of Richmond County, Georgia, testified that he received a message from the Sheriff of Rockingham County, North Carolina, on 10 March 1976 informing him that defendant Benjamin Franklin Hopper was wanted for the murder of Earl Junior Manuel and that Hopper was staying in Room 8 at a motel on U.S. 1 in Augusta, Georgia. After giving some details respecting the motor vehicle Hopper was driving, the message closed with this statement: "[H]e is armed with a .38 caliber pistol and is extremely dangerous." Upon objection by defendant, the court said: "Sustained. The jury is not to consider that portion of the letter about him being dangerous." (Exception No. 14) Defendant contends that the entire message was hearsay and irrelevant and that the closing statement in the letter was highly prejudicial to him.

The record shows that no objection was lodged until the entire message from the Rockingham County Sheriff had been read to the jury. " . . . [I]f it be conceded that the testimony offered is incompetent, objection thereto should have been interposed to the question at the time it was asked as well as to the answer when given. An objection to testimony not taken in apt time is waived." *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598 (1943); *accord, State v. Merrick*, 172 N.C. 870, 90 S.E. 257 (1916).

Even if admission of the message be error, in our view the limiting instruction given by the court was sufficient to erase any possible prejudice. The law presumes that the jury follows the judge's instructions. *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972). If defendant desired a different, more limiting instruction, he should have requested it at that time.

[6] Included in this assignment is defendant's contention that the court erred "in allowing repeated evidence of former statements of Randy Dalton into evidence which may have given the jury the impression the judge gave weight to Randy Dalton's testimony. . . . The court allowed the original statement of Dalton into evidence as well as three supplemental statements." The record discloses that at the time each of the chal-

lenged pretrial statements by Randy Dalton was admitted into evidence the court instructed the jury: "This is allowed only for the purpose of corroborating Randy Dalton, this and any statement that he made to this officer, is allowed only for the purpose of corroborating Randy Dalton, if it does corroborate him and for no other purpose," or similar wording. Prior consistent statements of the witness are competent for corroborative purposes. *State v. Warren,* 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Rose,* 270 N.C. 406, 154 S.E. 2d 492 (1967). *See* 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 51. And an examination of the record reveals that the statements do in fact corroborate Randy Dalton's testimony given at the trial. Moreover, in the body of the judge's charge to the jury he again restricted the admissibility of these statements to corroborative purposes only. There is no merit in the assignment of error challenging their admission.

Denial of defendant's motion for nonsuit on the capital charge at the close of all the evidence constitutes his next assignment of error. He contends there was no evidence to show that "any money or other property" was taken from the deceased and that the felony murder rule therefore does not apply.

[7] We note that the bill of indictment is drawn under G.S. 15-144 and the State, as it had a right to do, proceeded on both the theory of felony murder and murder committed after premeditation and deliberation. *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970). *See State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972). The jury found defendant guilty of first degree murder and it is not clear upon which theory the jury reached its verdict. It makes no difference here. There is evidence of premeditation and deliberation as well as evidence of murder committed in the perpetration or attempt to perpetrate a robbery in violation of G.S. 14-17. Completion of the robbery or other felony is not required to sustain a conviction under the felony murder rule. *See State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970). There was evidence tending to show that robbery was the motive for the killing. Thus the judge was well within the law when he submitted first degree murder as a permissible

verdict, and the jury was well within the evidence when it found defendant guilty. This assignment is overruled.

The next assignment of error discussed in defendant's brief is addressed to denial of his motion for a change of venue or, in the alternative, for a special venire from another county. G.S. 1-84; G.S. 9-12.

[8] Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings thereon will not be disturbed on appeal. *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). Defendant argues that the public might have been inflamed by this murder but cites nothing in support of that assertion. No abuse of discretion having been shown, this assignment is without merit and is overruled.

[9] Defendant's final assignment of error challenges the validity of the death sentence imposed. This assignment is well taken and must be sustained.

On 2 July 1976 the Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978, 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. A sentence of life imprisonment is 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 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 Rockingham County with directions (1) that the presiding judge, without requiring the presence of defendant, enter 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 commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish

to the 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.

INTERSTATE EQUIPMENT COMPANY v. C. CHRISTOPHER SMITH, RECEIVER FOR BOLLINGER CONSTRUCTION COMPANY, GREAT AMERICAN INSURANCE COMPANY, AND NELLO L. TEER COMPANY (INC.)

No. 56

(Filed 10 May 1977)

1. **Principal and Surety § 10— contractor's bond — intended beneficiaries — action against surety**

The intended beneficiaries of a contractor's or subcontractor's bond may maintain an action against the surety on the bond.

2. **Principal and Surety § 10— contractor's bond — notice charged to surety**

A compensated surety on a contractor's bond must be charged with notice of its principal's plant, equipment and financial integrity, and the surety is further charged with notice of the contract between its principal and the contractor.

3. **Principal and Surety § 10— payment bond for "labor and materials" — equipment rental payments covered**

Where a highway construction contract obligated the subcontractor to furnish all labor and materials, including equipment, which were necessary to perform the contract properly and further obligated the subcontractor to pay all indebtedness arising from its operations on the highway project, and the payment bond provided by the subcontractor covered "payment to all persons supplying labor and material," rental payments for equipment constituted an indebtedness for labor and materials for which the surety could be held liable.

4. **Principal and Surety § 10— highway construction bond — no "private bond"**

A highway subcontractor's payment bond covering "labor and materials" is not treated as a "private bond" covering only those items expressly included in the bond, since the machines in question were used to construct a public road; payment bonds are construed liberally for the protection of those who furnish labor and materials in the prosecution of public works; and the differences between "public" and "private" bonds which the surety urges are artificial and not supported by the contract and bond in this case.

5. Principal and Surety § 10— payment bond for "labor and materials" — leased equipment repair — tire use charge — liability of surety

Surety on a highway subcontractor's payment bond which covered "labor and materials" could be held liable for repairs to leased machinery, in excess of ordinary wear and tear, and for "abnormal" tire wear, as provided in the lease agreement between plaintiff and the subcontractor; however, it is impossible to tell from the record whether plaintiff was entitled to the amounts claimed for repairs and tire adjustments since it was not clear whether the repairs were necessitated by the subcontractor's use of the machinery on the road construction project or whether the repairs were necessitated by ordinary wear and tear; there was insufficient evidence to show that the tire wear was "abnormal" or in excess of ordinary tire wear; and there was no evidence of any agreement by the subcontractor to be bound by the determination of Carolina Tire on the issue of abnormal tire wear as contended by plaintiff.

6. Interest § 2; Contracts § 29.5— breach of contract — allowable interest

Plaintiff lessor was not entitled to collect "service charges" computed at the rate of 1½% per month on the outstanding balance of the rental account where there was no provision in the lease permitting a service charge, and there was no evidence tending to show that the lease was modified by the parties to provide for such; however, plaintiff was entitled to recover the legal rate of interest from the date on which each rental payment became due, until such amounts were paid. G.S. 24-1.

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

ON petition for discretionary review of the decision of the Court of Appeals, reported in 31 N.C. App. 351, 229 S.E. 2d 241, affirming summary judgment entered by *Collier, J.*, on 5 February 1976, IREDELL Superior Court, in favor of defendant Great American Insurance Company.

The facts of this case are not seriously in dispute. On 17 April 1974, defendant Bollinger Construction Company (Bollinger) entered into a contract with Nello L. Teer Company (Teer) under which Bollinger was to perform certain excavation work on a highway project in Bland County, Virginia. Teer was not the prime contractor on this job, but was a subcontractor. The contract between Bollinger and Teer, portions of which will be set forth in the opinion, required that Bollinger furnish Teer a satisfactory payment bond.

On 29 April 1974, Bollinger entered into a payment bond agreement with Great American Insurance Company (Great American). The bond provided, *inter alia,* that:

> "WHEREAS the Principal [Bollinger] and the Obligee [Teer] have entered into a written contract, hereinafter called the Contract, a copy of which is or may be attached hereto, dated the 17th day of April, 1974, for
>
> EXCAVATION SUBCONTRACT, VA. HIGHWAY, CONTRACT
>
> No. 0077-010-102, P402, P403, BLAND COUNTY, VIRGINIA
>
> NOW, therefore, the condition of the foregoing obligation is such that if the Principal shall well and truly perform and promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and in all duly authorized modifications of said contract that may hereafter be made, then this obligation shall be void, otherwise it shall remain in force."

In an agreement dated 23 May 1974, plaintiff, Interstate Equipment Company (Interstate), leased to Bollinger for six months two "Model 229G Wabco Scrapers." The rental fee was $3000 per month per machine. In the lease agreement, Bollinger agreed to pay for all repairs and damages to the machinery, normal wear and tear excepted, and to pay for any abnormal tire wear. In a letter dated 22 May 1974 from Interstate to Bollinger, it was stated: "It is also agreed that if there is excessive tire wear, that we will have Carolina Tire look at the tires and we will both abide by their decision."

The two Wabco scrapers were taken to Bland County, Virginia, and used by Bollinger in the performance of its contract with Teer. The machines remained at the Bland County job site at least through 23 November 1975—the expiration of the six-month lease period.

On 23 June 1975, Interstate brought this action to recover: (a) the unpaid balance under the lease agreement, plus applicable North Carolina taxes; (b) certain amounts alleged to be due for damages and repairs to the machinery; (c) charges for excessive tire wear as determined by Carolina Tire Company; and (d) interest at the rate of 1.5% per month on the unpaid balance of the lease.

Interstate voluntarily dismissed Teer from the action and obtained summary judgment against the receiver of Bollinger —who was properly substituted as a party to this action. Both Interstate and Great American moved for summary judgment. After a hearing on the motions, the trial court entered summary judgment in favor of Great American dismissing the action. This judgment was affirmed by the Court of Appeals. We granted Interstate's petition for discretionary review.

Raymer, Lewis, Eisele & Patterson by Douglas G. Eisele for plaintiff appellant.

Haywood, Denny & Miller by John C. Martin for Great American Insurance Company, defendant appellee.

MOORE, Justice.

Great American, as surety, contends that it cannot be held liable for the amounts alleged to be due Interstate from the principal Bollinger for rental payments, repairs, tire adjustments and interest, for the reason that the amounts claimed to be due are not "labor and materials" under the condition of its bond with Bollinger.

[1] It has long been established that a third party, for whose benefit a contract has been made, may maintain an action for breach of that contract. *See, e.g., Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329 (1965); *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720 (1899). This principle also applies to the intended beneficiaries of a contractor's or subcontractor's bond, and such a beneficiary may maintain an action against the surety on the bond. *Glass Co. v. Fidelity Co.,* 193 N.C. 769, 138 S.E. 143 (1927). The bond executed between Bollinger and Great American was a payment bond for the protection of those supplying labor and materials to Bollinger. Interstate, occupying the position of one who has supplied labor and materials to Bollinger, is an intended beneficiary of the bond agreement and may maintain this action against the surety.

In *Overman v. Indemnity Co.,* 199 N.C. 736, 155 S.E. 730 (1930), Mulligan Construction Company entered into a contract with the State Highway Commission to build a road. Mulligan executed a bond which was conditioned upon Mulligan's paying all persons furnishing labor and materials "for which the

contractor is liable." The surety argued that the clause "for which the contractor is liable" limited its obligation on the bond to the labor and materials for which the contractor was directly responsible, thus excluding all claims by those persons who had supplied labor and materials to the subcontractors. In rejecting this argument, the Court held that the obligation of a bond must be read in conjunction with the contract which the bond was given to secure. Further, the extent of the surety's obligations is ordinarily measured by the terms of the principal's agreement. Thus, since the contract between Mulligan and the State Highway Commission provided that all persons furnishing labor and materials in the construction of the roadway would be paid, the surety was properly held liable for claims against the subcontractors. *See also Dixon v. Horne,* 180 N.C. 585, 105 S.E. 270 (1920); *Fidelity and Casualty Co. v. Copenhaver Contracting Co.,* 165 S.E. 528 (Va. 1932). Accordingly, this Court should construe the surety's liability in conjunction with the contract underlying the bond.

In determining the extent of a surety's obligation, we are guided by the statement of Chief Justice Stacy in *Wiseman v. Lacy,* 193 N.C. 751, 753, 138 S.E. 121, 123 (1927):

> "The principle to be deduced from these and other like decisions is that such bonds are construed liberally for the protection of those who furnish labor and materials in the prosecution of public works *(Electric Co. v. Deposit Co.,* 191 N.C. 653), and it is not thought that the surety can complain at such holding, or that any hardship is imposed thereby, because in entering into the contract the surety is chargeable with notice, not only of the financial ability and integrity of the contractor, but also with notice as to whether he possesses the plant, equipment, and tools required in undertaking the particular work, or will be compelled to rent and hire the same, or some part thereof, all of which matters are factors to be considered in determining the risk, and upon which the surety fixes the premiums exacted for executing the bond. *Sherman v. Amer. Surety Co.,* 173 Pac. (Cal.), 161." *See also Owsley v. Henderson,* 228 N.C. 224, 45 S.E. 2d 263 (1947).

In *Wiseman v. Lacy, supra,* plaintiffs leased to the contractor a steam shovel and a boiler which were used by the contractor in the construction of the road in question. On appeal,

the contractor's surety resisted liability on the ground that a bond conditioned upon the payment of all claims for "labor and material" would not cover rental payments for equipment. In rejecting this contention, the Court held:

> "The renting of the machines in question was but the substitution of mechanical power for manual labor. *Taylor v. Connett,* 277 Fed., 945; *Bricker v. Rollins & Jarecki,* 173 Pac. (Cal.), 592; *Hansen v. Remer,* 200 N.W. (Minn.), 839; *Multnomah County v. U.S.F. and G. Co.,* 180 Pac. (Ore.), 104." 193 N.C. at 752, 138 S.E. at 122.

In *United Bonding Insurance Co. v. M. D. Moody and Sons, Inc.*, 213 So. 2d 263 (Fla. App. 1968), Moody leased road building equipment to a subcontractor which was bonded by United, as surety. Upon default of the subcontractor, Moody instituted action against the subcontractor and its surety. The surety contended that rental payments for equipment were not covered by a bond obligating the surety to pay for "labor and materials." The court held that rental payments were covered by such a bond since "[t]he fair rental value of equipment so furnished is as much incorporated in the job as the sweat of a laborer's brow or the concrete from a supplier's mixer." 213 So. 2d at 264. In reaching this conclusion, the court reasoned that a surety is chargeable with notice of the extent of its principal's plant and equipment, and of the principal's capability of performing the contract. *See also United Bonding Ins. Co. v. Donaldson Engineering, Inc.*, 222 So. 2d 447 (Fla. App. 1969); *C. S. Luck and Sons v. Boatwright,* 162 S.E. 53 (Va. 1932).

[2] We find the reasoning of the above cited cases to be persuasive. A compensated surety is not a ward of the court and it must be charged with notice of its principal's plant, equipment and financial integrity. The surety is further charged with notice of the contract between its principal and the contractor. This is particularly true in the case at bar, wherein the bond states: "WHEREAS the Principal [Bollinger] and the Obligee [Teer] have entered into a written contract . . . dated the 17th day of April 1974. . . . "

[3] In the case at bar, the contract between Bollinger and Teer, in part, provided:

> "You [Bollinger] will finance your operations in every detail and promptly, or upon demand, pay all indebtedness arising out of your operations hereunder. . . .
>
> * * *
>
> "You are to furnish us satisfactory Payment bond being in the full amount of this subcontract.
>
> " . . . You shall have available the necessary workmen and equipment so as to be ready to begin work immediately following our direction to do so. . . .
>
> * * *
>
> "You will furnish all supervision, labor and materials, including equipment and incidentals, to do properly the items of work listed below at the designated unit prices and in accordance with the contract, plans, specifications, special provisions and directions of our representative who is in charge of the project."

The contract in present case obligated Bollinger to furnish all labor and materials, including equipment, which were necessary to properly perform the contract. It further obligated Bollinger to pay all indebtedness arising from its operations on the Bland County project. Reading the bond in conjunction with the contract, we are of the opinion that the rental payments constitute an indebtedness for labor and materials for which Great American may be held liable as surety.

[4] Great American contends, however, that the bond in present case is a "private bond" and therefore only those items expressly included in the bond should be covered. In support of this conclusion, Great American cites 17 Am. Jur. 2d, Contractors' Bonds § 7 (1964), which states that the costs of renting equipment are not covered by a "private" bond agreement guaranteeing payment for labor and materials. This proposition is supported by *Great American Ins. Co. v. Busby*, 150 So. 2d 131 (Miss. 1963), and *Western Cas. and Sur. Co. v. Stribling Bros. Mach. Co.*, 139 So. 2d 838 (Miss. 1962). To the contrary, in *Annot.*, 77 A.L.R. 21, 51 (1932), which thoroughly analyzes the cases on point, the author states: "[T]here is little or no distinction between public and private contractor's bonds, as

regards the rights of laborers and materialmen." *See also Standard Oil Co. v. National Surety Co.*, 29 S.W. 2d 29 (Ky. 1930); *Ochs v. M. J. Carnahan Co.*, 76 N.E. 788 (Ind. 1906).

We see no valid reason to follow the law of Mississippi or to construe the language of the bond in present case any differently than if the bond were "public." The machines in question were used to construct a public road. As stated by Chief Justice Stacy in *Wiseman v. Lacy, supra,* at 753, 138 S.E. at 123: "[S]uch bonds are construed liberally for the protection of those who furnish labor and materials in the prosecution of public works." Further, the reasoning in *Wiseman v. Lacy, supra,* has been adopted by our General Assembly for bonds required on public contracts by enacting G.S. 44A-25(5) which, in part, provides: " 'Labor or materials' shall include . . . rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract."

The differences between "public" and "private" bonds which Great American urges upon this Court are artificial and not supported by the contract and bond in this case. By the bond, Great American unquestionably agreed to pay all persons supplying labor and materials to the Bland County construction project. Great American had notice, either actual or constructive, of the equipment, capability, and financial condition of its principal, Bollinger. Great American also had notice of the fact that there was a contract between Bollinger and Teer, and had the opportunity to ascertain the extent of Bollinger's obligations arising from that contract. These are all factors which the surety could consider in evaluating the risk associated with writing the bond and in establishing the premium to be paid therefor. In addition, the surety could have declined to write the bond. However, upon voluntarily deciding to execute the bond, Great American became liable according to the law of this jurisdiction, just as any other compensated surety—regardless of whether the project was "public" or "private."

From the record before this Court, it is established that Interstate's claim for rental payments represents the charges for the period during which the two Wabco scrapers were used on the Bland County project. Under the law of this jurisdiction, these rental payments were covered by the bond on which Great American was surety. Accordingly, the trial court erred

in denying Interstate's motion for summary judgment, and in granting Great American's motion to dismiss. Thus, we hold that Interstate is entitled to recover the balance due on the lease of the two Wabco scrapers, plus the applicable North Carolina sales taxes.

[5] Interstate further alleges that certain amounts representing charges for repairs upon the machinery and charges for excessive tire wear should be recoverable under the bond. The lease agreement entered into between Interstate and Bollinger provided:

> "5. The lessee agrees to maintain said machinery and equipment in the same condition as when delivered to it by the lessor, usual wear and tear excepted . . . and to pay for all damages to the equipment, except the usual and ordinary wear and tear, during the life of this contract, and to return said property in as good condition as when received. . . . If the leased equipment or any part thereof has rubber tires, the lessee agrees to maintain said tires in the same condition as when delivered to it by the lessor, usual wear and tear excepted. Lessee will be liable for additional charges for abnormal cuts, wear, sections and reinforcements of said tires.
>
> * * *
>
> "10. In the event of accident to, or breakage of, any part of the equipment lessee may have the same repaired by any competent person, firm or corporation at its own expense or, upon notice to the lessor as to such breakage or accident, the lessor may repair said machinery for the lessee . . . and the lessee agrees to pay the lessor its regular charges for any material or labor furnished in making said repairs. . . . "

In their briefs and at oral argument, Interstate and Great American contend that the resolution of this issue involves whether a surety's bond may be construed to cover the labor and materials used to repair equipment used by the contractor. *See Annot.*, 67 A.L.R. 1232 (1930). *See also Nelson v. Hagen*, 146 N.W. 2d 873 (N.D. 1966); *Carpenter v. Susi*, 121 A. 2d 336 (Maine 1956). Because of the contractual language quoted above and the provisions contained in the bond, we do not deem it necessary to decide this issue as contended by the parties.

Rather, we are of the opinion that the claims of Interstate for repairs to the machinery, in excess of ordinary wear and tear, and for "abnormal" tire wear are as much a part of the lease agreement on which Great American is surety as are the rental payments. Accordingly, Great American may be held liable for these charges.

From the record, we are unable to determine whether Interstate is entitled to recover the amounts alleged to be due for repairs and tire adjustments. It is well settled that "the coverage of the bond is limited to the obligation arising under the particular contract." *Carpenter v. Susi, supra* at 340. However, it is not clear from the record whether the repairs were necessitated by Bollinger's use of the scrapers on the Bland County job, or whether the repairs were necessitated by ordinary wear and tear. Further, there is insufficient evidence presently before this Court to show that the tire wear was "abnormal" or in excess of ordinary wear. Finally, we are unable to locate in the record any agreement on the part of Bollinger to be bound by the determination of Carolina Tire on the issue of abnormal tire wear. Accordingly, we remand this case for a determination of these issues and the amount of damages, if any, Interstate is entitled to recover therefor.

[6] In addition to the amounts claimed to be due for rentals, repairs and tire adjustments, Interstate seeks to collect amounts which were assessed as "Service Charges." These amounts were computed at the rate of 1½% per month on the outstanding balance of the rental account.

We are of the opinion that Interstate is not entitled to recover the amounts alleged to be due as "Service Charges." The lease between Bollinger and Interstate provided (in boldfaced type): "Both lessor and lessee agree that no modification of this agreement shall be binding upon them or either of them, unless such modification shall be in writing and duly accepted in writing." There is no provision in the lease permitting an assessment of interest or a service charge of 1½% per month upon any outstanding balance, and there is no evidence in the record tending to show that the lease was modified to provide for such. *See Clement v. Clement,* 230 N.C. 636, 55 S.E. 2d 459 (1949); *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92 (1947).

The trend in North Carolina is, however, toward allowing interest in almost all cases involving breach of contract, *Rose*

v. Materials Co., 282 N.C. 643, 194 S.E. 2d 521 (1973), and where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach. G.S. 24-5; *Rose v. Materials Co., supra; General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963); *Bond v. Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914). In the absence of an agreement, the injured party is entitled to interest at the legal rate of six percent. G.S. 24-1; *Rose v. Materials Co., supra.* Accordingly, since there is no evidence before the Court that there was an agreement providing for interest or a modification to provide therefor, Interstate is entitled to recover the legal rate of interest from the date on which each rental payment became due, until such amounts are paid.

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to that court with direction that it be remanded to the Superior Court of Iredell County for further proceedings in accordance with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JERRY LEE BEESON

No. 50

(Filed 10 May 1977)

1. Criminal Law § 91.1— motion for continuance — constitutional right — appellate review

A motion for continuance is ordinarily addressed to the sound discretion of the trial judge and the ruling thereon will not be reviewed in the absence of an abuse of discretion; however, if the motion is based upon a right guaranteed by either the United States or North Carolina Constitution, the issue is one of law and the decision of the lower court is reviewable on appeal.

2. Constitutional Law § 46— refusal to remove appointed counsel

An attorney appointed by the court to represent an indigent defendant was properly required to continue as defense counsel where no "substantial reason" was shown for his removal, since an indigent defendant has no right to select the attorney to be appointed by the court.

3. Criminal Law § 91.4; Constitutional Law § 48—appointment of additional counsel — denial of continuance — effective assistance of counsel

Defendant was not denied the effective assistance of counsel by the trial court's denial of his motion for continuance so that a second attorney appointed by the court to assist previously appointed counsel could prepare for trial where original counsel was appointed approximately six months before trial; although defendant expressed dissatisfaction with his original counsel, there was no indication that defendant and original counsel differed on trial tactics or procedures; original counsel conducted the trial with the assistance of the newly appointed counsel; original counsel had thoroughly prepared for trial and subpoenaed witnesses for defendant; and there is no indication that original counsel did not effectively represent defendant at trial as his chief counsel.

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

APPEAL by defendant pursuant to G.S. 7A-27(a) from the judgment entered by *Wood, J.*, at the 23 August 1976 Session of RANDOLPH Superior Court.

Defendant was tried upon an indictment, proper in form, charging him with the murder of Joseph Dougin Rogers. He was convicted of second degree murder and sentenced to life imprisonment.

The record on appeal does not contain the evidence introduced at trial. However, from the charge of the court to the jury, it appears that the State offered evidence tending to show that defendant struck Rogers numerous times on the head with a rifle. Rogers died as a result of the injuries so inflicted. Defendant's evidence tended to show that Rogers initiated the affray and that he struck Rogers in self-defense.

Attorney General Rufus L. Edmisten, Assistant Attorney General James Wallace, Jr. and Associate Attorney James E. Scarbrough for the State.

Archie L. Smith, Jr. and T. Worth Coltrane for defendant appellant.

MOORE, Justice.

The sole question presented for review is whether defendant was denied effective assistance of counsel by the trial judge's denial of a motion for a continuance made at the beginning of trial.

To determine this issue, it is necessary to review the history of the case and the continuances which had been previously granted. The alleged murder occurred on 12 February 1976. On 17 February 1976, defendant was adjudged an indigent and attorney T. Worth Coltrane was appointed to represent him. The case was calendared to be tried during the 22 March 1976 Session of RANDOLPH Superior Court. The case, however, was continued on the ground that defendant was in the process of employing private counsel. At the next session of court, 7 June 1976, defendant requested that he be committed to a mental institution to determine his capacity to assist in his defense and to determine his mental condition at the time of the commission of the crime. This request was granted and defendant was committed to a State mental hospital for examination. Defendant was found to be competent to stand trial and responsible for his acts. He was then returned to Randolph County for trial.

Defendant's case was again calendared for trial during the 12 July 1976 session of court. The case was called and the jury was selected. However, prior to empaneling the jury, the State informed defense counsel that a codefendant had agreed to testify for the State and was entering a plea of guilty to the crime of accessory after the fact of murder. Defendant moved for and was granted a continuance on the ground of surprise.

The next session of court was 23 August 1976. Again, defendant's case was called for trial, and again defendant moved for a continuance on the grounds that certain medical examinations had not been performed; that defense counsel was unable to locate two witnesses; that defendant had not cooperated with his court-appointed counsel; and that defendant was about to retain private counsel. The State announced that it was ready for trial and that its ten witnesses were present in court. These witnesses included two agents from the State Bureau of Investigation in Raleigh and three doctors from the medical examiner's office in Chapel Hill. After extended arguments by both the prosecution and the defense, the motion for continuance was denied.

After denying defendant's motion for a continuance, and after being subjected to several abusive and profane outbursts by defendant, the trial judge appointed attorney Archie Smith to assist previously appointed counsel, Mr. Coltrane. Mr. Smith assisted in the selection of the jury, examined defendant on

direct examination, and made an argument to the jury. Otherwise, Mr. Coltrane conducted the trial of the case. Upon being appointed, Mr. Smith immediately moved for a continuance to enable him "to adequately prepare a defense," since defendant had informed him that he did not want Mr. Coltrane to conduct any part of the trial. The motion for a continuance made by Mr. Smith was denied. The denial of this motion is the only issue raised by this appeal.

[1] A motion for a continuance is ordinarily addressed to the sound discretion of the trial judge and the ruling thereon will not be reviewed in the absence of an abuse of discretion. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112 (1975). However, if the motion is based upon a right guaranteed by either the United States or North Carolina Constitution, the issue is one of law and the decision of the lower court is reviewable by this Court. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296, *cert. denied,* 409 U.S. 1047 (1972). *See also State v. Smathers, supra.* In present case, defendant contends that the denial of his motion for a continuance to enable Mr. Smith to prepare a defense infringed upon his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution which was made applicable to the states through the Fourteenth Amendment in *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). Thus, we address the issue of whether defendant was accorded effective assistance of counsel.

While it is a well established rule that all defendants are entitled to effective assistance of counsel, we held in *State v. McNeil,* 263 N.C. 260, 270, 139 S.E. 2d 667, 674 (1965), that:

> " . . . An indigent defendant in a criminal action, in the absence of statute, has no right to select counsel of his own choice to defend him, and we have no statute in North Carolina that gives him the right to select counsel. In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. . . . "

In *State v. Sweezy,* 291 N.C. 366, 230 S.E. 2d 524 (1976), defendant was indigent and at trial requested that his two court-appointed attorneys be removed because he felt that they were not going to properly represent him. In upholding the trial

judge's refusal to remove defense counsel, this Court reiterated the rule that a defendant has the right to conduct his defense without assistance of counsel, but he does not have the right to select the attorney to be appointed by the court. Further, the Court held that mere dissatisfaction with an attorney's services would not be a sufficient basis for removal of court-appointed counsel. *See also State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174 (1976).

[2] In present case, defendant did not request that he be permitted to present his own defense. To the contrary, he repeatedly requested that he be given additional time within which to employ private counsel, or that another attorney be appointed by the trial court. Since defendant was indigent, he had no right to select an attorney and we are unable to find a "substantial reason" for the removal of Mr. Coltrane from the case. Thus, Mr. Coltrane was properly required to continue as defense counsel. We are therefore faced with the question of whether the appointment of Mr. Smith as additional counsel required a continuance. We think not.

In *United States v. Abshire,* 471 F. 2d 116 (5th Cir. 1972), the trial court, as in the case at bar, appointed defense counsel approximately six months prior to trial. This counsel thoroughly prepared the case for trial—making pretrial motions, interviewing witnesses, *et cetera.* Shortly before trial, the trial court appointed a second attorney to assist previously appointed counsel in the trial of the case. The newly appointed counsel moved for a continuance, which was denied. In the trial of the case, the first appointed counsel was present at all times and actively assisted new defense counsel. Under these facts, the Fifth Circuit Court of Appeals held that defendant had received effective assistance of counsel and that the denial of the continuance was proper.

Similarly, in *Sykes v. Virginia,* 364 F. 2d 314 (4th Cir. 1966), defendant petitioned for habeas corpus relief, alleging lack of effective assistance of counsel. The evidence tended to show that defendant and his court-appointed counsel disagreed on the issue of whether defendant should plead guilty. As a result, the trial judge appointed another attorney to assist previously appointed counsel. Three days prior to trial, new defense counsel requested a continuance, which was denied. When the case came on for trial, defendant stated that he would waive a

jury trial. The prosecution, however, refused to waive a jury and the trial judge ordered that the trial be by jury. Defense counsel then requested a continuance on the ground that they were prepared for a nonjury trial but not for a jury trial. The trial judge gave defense counsel two hours within which to prepare for a jury trial and denied the motion for a continuance. The Fourth Circuit held that this denial of a continuance did not deprive defendant of effective assistance of counsel in light of the fact that the first appointed defense counsel had fully prepared the case for trial and had full knowledge of the witnesses and their expected testimony. *See also United States v. Gower*, 447 F. 2d 187 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Cohen v. Wainwright*, 418 F. 2d 565 (5th Cir. 1968), *cert. denied*, 399 U.S. 933 (1970).

[3] The record in present case does not support defendant's contention that he has been denied his constitutional right of effective representation by counsel. Despite any differences between defendant and his counsel, Mr. Coltrane did represent him and there is no indication that he did not represent him effectively. Neither is there any indication that Mr. Coltrane and defendant differed on trial tactics or procedures before or during the trial. Mr. Coltrane moved for and obtained a mental examination of defendant. When taken by surprise in finding that a codefendant had entered a plea of guilty and was planning to testify for the State, Mr. Coltrane moved for and obtained a continuance. On two or three occasions in seeking a continuance, Mr. Coltrane stated to the court that he would withdraw as appointed counsel in order that defendant could employ private counsel to represent him. Apparently, defendant, an indigent, was unable to obtain such counsel, although he had six months in which to do so.

Mr. Coltrane issued subpoenas for defendant's witnesses and obtained the assistance of the sheriff and the State Bureau of Investigation in attempting to locate these witnesses. He conducted the trial with the assistance of Mr. Smith and was successful in convincing the jury to return a verdict of guilty of second degree murder, rather than first degree murder for which defendant was being tried. Mr. Coltrane, throughout the trial, continued to act as defendant's chief counsel. It was only after several outbursts by defendant in open court that the trial

judge, who patiently endured derogatory remarks by defendant, appointed Mr. Smith.

In appointing Mr. Smith, the trial judge made it clear that he was appointing him only to assist Mr. Coltrane, stating:

> "The Court will find in addition to what I [have] already found as to this continuance that the defendant had ample time to employ private counsel, and I am appointing you [Mr. Smith] to assist Mr. Worth Coltrane, who has been the defendant's counsel since February. . . .
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> * * *
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> "Mr. Coltrane is still counsel, and I have appointed you to assist him so I could be sure that the defendant, without any scintilla of question in my mind that this defendant is being provided not just adequate counsel, but more than adequate counsel."

Mr. Coltrane was found by the trial court to be an excellent lawyer and was thoroughly prepared for trial. He advocated his client's position at all times and was, at least, partially successful in the trial of the case. Accordingly, the fact that Mr. Smith, who was appointed only to assist Mr. Coltrane, was not fully prepared for trial will not support the contention that defendant was not effectively represented by counsel.

The facts in present case show no abuse of discretion on the part of the trial judge in denying a continuance of the case and no violation of defendant's constitutional rights. Rather, they show a conscientious judge using every effort to see that an unruly defendant was adequately represented and finally brought to trial. The verdict and judgment of the trial court must therefore be upheld.

No error.

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

STATE OF NORTH CAROLINA v. EDWARD ANTHONY McFADDEN

No. 57

(Filed 10 May 1977)

1. **Criminal Law § 91.1— motion for continuance — constitutional right — appellate review**

A motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion; however, when the motion is based on a constitutional right, the question presented is a reviewable question of law.

2. **Criminal Law § 91.4; Constitutional Law § 40— right to counsel of own choice — denial of continuance — retained counsel in another court — trial by associate**

The denial of defendant's motion for continuance violated defendant's constitutional right to counsel of his own choice where defendant had retained counsel to represent him; on the day of trial a junior associate of retained counsel moved for a continuance because retained counsel was engaged in a trial in a federal court; the associate stated that he knew nothing about the case, that retained counsel was the only one prepared to try it, and that defendant wanted his retained counsel to represent him; and the court ordered that the trial proceed and that associate counsel represent defendant.

3. **Criminal Law § 91.4; Constitutional Law § 48— effective assistance of counsel — denial of continuance — retained counsel in another court — trial by associate**

The denial of defendant's motion for continuance violated his constitutional right to the effective assistance of counsel because counsel who represented him at trial did not have a reasonable time to prepare and present a defense where a junior associate of defendant's retained counsel moved for a continuance because the retained counsel was engaged in a trial in a federal court; the trial court ordered that the trial proceed with associate counsel representing defendant; all of the preliminary hearings and preparations for trial had been handled exclusively by retained counsel; the associate met and talked with defendant for the first time about ninety minutes before the case was called for trial; the associate had practiced law for eighteen months and had previously tried only one jury case; and defendant indicated that he wanted his retained counsel to represent him.

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

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

Defendant was charged in a bill of indictment with the felonious sale and delivery of cocaine. He employed Mr. Harrell Powell, Jr., to represent him. The case was set and called for trial on 21 January 1976. On that date Mr. Carl Parrish, one of Mr. Powell's junior associates, appeared in court and informed Judge Rousseau that Mr. Powell was engaged in a trial in the United States District Court for the Middle District. He stated that Mr. Powell, who had handled the case from its inception, was the only person prepared to try the case; that he knew nothing about the case and did not even know what type of drug was involved. He further stated that defendant indicated to him that morning that he wanted his retained counsel, Mr. Powell, to represent him in the case. For these reasons Mr. Parrish requested that the case be continued or held open for trial in the event that Mr. Powell should become available.

The record discloses that Mr. Powell had been employed for a period of about five months and that the offense had allegedly occurred on 21 February 1975. Mr. Powell had obtained one previous continuance because of incomplete fee arrangements with his client. On Friday of the previous week, Mr. Powell had asked the District Attorney to continue the case because of his pending case in the United States District Court. The District Attorney advised Mr. Powell that he had subpoenaed his witnesses and that he intended to try the case. He further told Mr. Powell that if he wanted a continuance he would have to get it from the court. In response to the court's inquiry, Mr. Parrish said there were seven other lawyers associated with Mr. Powell.

After hearing Mr. Parrish and the District Attorney, Judge Rousseau ordered that the trial proceed and directed Mr. Parrish to represent defendant. The jury returned a verdict of guilty as charged and the trial judge entered judgment imposing a prison sentence of seven to ten years.

Defendant appealed and the Court of Appeals found no error.

Defendant appealed pursuant to G.S. 7A-30(1) and also petitioned this Court for discretionary review pursuant to G.S. 7A-31. The Attorney General moved to dismiss the appeal on the ground that no substantial constitutional question was presented. On 31 January 1977, we denied the Attorney General's

motion to dismiss and allowed defendant's petition for discretionary review.

Attorney General Edmisten by Associate Attorney Wilton E. Ragland, Jr. and Associate Attorney Jane Rankin Thompson, for the State.

White & Crumpler by Harrell Powell, Jr. and Carl F. Parrish, for defendant.

BRANCH, Justice.

The sole question presented by this appeal is whether the trial judge erred in denying defendant's motion for a continuance. Defendant argues that the denial of his motion deprived him of his constitutional rights (1) to select counsel of his choice and (2) to have the effective assistance of counsel. We will consider these arguments in the order stated.

[1] It is well established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion. *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526; *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112; *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386; *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389. The denial of defendant's motion in this case presents constitutional questions.

Justice Ervin, speaking for the court in *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294, unequivocally declared: "Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. N. C. Const., Art. I, sec. 11; U. S. Const., Amend. XIV." The United States Supreme Court recognized this constitutional right in *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, with this language: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." We note parenthetically that this constitutional right does not guarantee to an indigent defendant that the court must appoint counsel of his choice. *State v. Sweezy,* 291 N.C.

366, 230 S.E. 2d 524; *State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174.

The holding in *United States v. Bergamo,* 154 F. 2d 31, is consistent with *Speller* and *Powell.* There a judge in the Middle District of Pennsylvania refused to permit counsel who was licensed in New Jersey to represent defendants charged with the crime of possessing counterfeit gas and sugar stamps. Upon this ruling associate counsel, a member of the Pennsylvania bar, moved for a continuance on the ground that he was not familiar with the case. The motion to continue was denied. Granting a new trial, the Third Circuit Court of Appeals stated:

> The Sixth Amendment provides inter alia that "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." The Supreme Court has held that right to the assistance of counsel includes the right to counsel of the defendant's choosing. In *Glasser v. United States,* 315 U.S. 60, 70 [62 S.Ct. 457, 464, 86 L.Ed. 680], Mr. Justice Murphy citing *Powell v. Alabama,* 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527], stated that " * * * the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment * * * ." Cf. *In re Mandell,* 2 Cir., 69 F. 2d 830, 831, and *Smith v. United States,* 53 App. D.C. 53, 288 F. 259. In *People v. Price,* 262 N.Y. 410, 412, 187 N.E. 298, 299, the Court of Appeals of New York stated, "Under both our Federal and State Constitutions, a defendant has the right to defend in person or by counsel of his own choosing," citing inter alia the Sixth Amendment. See also *Burnham v. Brush,* 176 Misc. 39, 26 N.Y.S. 2d 397, 399 and *Kerling v. G. W. Van Dusen & Co.,* 109 Minn. 481, 483, 124 N.W. 235, 236, 372. The decisions are in accord upon this fundamental proposition.

The case of *People v. Brady,* 275 Cal. App. 2d 984, 80 Cal. Rptr. 418, recognizes that the right to be defended by chosen counsel is not absolute. The defendant in that case was convicted of grand theft. On the night preceding the date set

for trial defendant decided to replace his retained counsel because he thought he would fare better with a local, white attorney. His motion for a continuance to secure new counsel was denied. The California Court of Appeals held that, in light of defendant's own inexcusable delay, the refusal of his motion for continuance did not violate due process. We quote from that opinion:

> . . . Due process is not denied every defendant who is refused the right to defend himself by means of his chosen retained counsel; other factors, including the speedy disposition of criminal charges, demand recognition, particularly where defendant is inexcusably dilatory in securing legal representation. . . .

Accord: People v. Simeone, 132 Cal. App. 2d 593, 282 P. 2d 971.

In *People v. Crovedi,* 65 Cal. 2d 199, 417 P. 2d 868, 53 Cal. Rptr. 284, defendant was prosecuted for conspiracy to commit grand theft, grand theft and burglary. He retained as his counsel a Mr. Chain, who represented defendant through the fourth day of the trial, at which time he suffered a heart attack and was hospitalized. Three days prior to the date set for the resumption of the trial, the court informed Mr. Younger, a law partner of Mr. Chain, that he was appointed to represent defendant for the remainder of the trial. A one-week continuance was granted during which time defendant unsuccessfully attempted to retain counsel of his own choice. The court ordered the trial to continue with Mr. Younger representing the defendant. The jury returned verdicts of guilty and defendant appealed. The Supreme Court of California, holding this to be a denial of due process of law, stated:

> . . . [T]hough it is clear that a defendant has no *absolute* right to be represented by a particular attorney, still the courts should make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney. . . . This is especially so when defendant is in no way responsible for the absence of his retained counsel. . . .
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> . . . [T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself

in whatever manner he deems best, using any legitimate means within his resources—and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.

We note the case of *Gomez v. Heard*, 218 F. Supp. 228, *aff'd.* 321 F. 2d 88, because of its factual likeness to the case *sub judice*. In that case defendant was charged with receiving and concealing stolen property. He employed an attorney, Mr. Bernard Golding, to defend him. When the case was called for trial, defendant appeared without counsel and moved for a continuance. His motion was supported by an affidavit signed by attorney Golding stating that Golding was at that time engaged in the trial of a case in another state and praying that the case be continued until such reasonable time as the attorney could appear. The trial judge denied the motion for a continuance, appointed another attorney to represent defendant and proceeded, over defendant's objections, to try the case. The District Court for the Southern District of Texas held in a habeas corpus proceeding that defendant "was denied the right of assistance of counsel of his own choice and that such was a denial of due process of law."

In our opinion *Lee v. United States*, 235 F. 2d 219, clearly states the rule that should be adopted and applied to the facts of the case before us. There the defendant was convicted of assault with a dangerous weapon and assault with intent to kill. He employed two attorneys, Mr. Koonin and Mr. Smith, to represent him. After several continuances the case was set for trial on June 17, 1955, a Friday. That morning attorneys Koonin and Smith obtained the court's permission to withdraw from the case. Defendant advised the court that he had retained another attorney, Mr. Hughes, who was prepared to try the case. When the case was called, Mr. Hughes informed the trial judge that he had previously represented the government's chief witness. Because of a possible conflict of interest, Mr. Hughes was allowed to withdraw from the case. The trial judge thereupon appointed Mr. Koonin, who had withdrawn earlier, to defend the case. The judge denied defendant's request to employ counsel of his choice and refused to continue the case until Mon-

day. Defendant appealed and the Court of Appeals for the District of Columbia, holding this to be error, declared:

> . . . It is a fundamental principle that an accused be permitted to choose his own counsel, the practice of assigning counsel being reserved for cases where the accused cannot or does not select his own. . . .
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> . . . [T]he accused's "right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same." But appellant bore no responsibilitiy for being without counsel on the eve of his trial. He had appeared for trial with counsel of his own choosing, and the record does not show that he had anything to do with that counsel's withdrawal by leave of court. However that withdrawal may have obstructed the processes of the court, such obstruction is clearly not chargeable to the appellant and cannot be made the occasion for denying him his constitutional right to counsel of his own choosing. Assuming the trial court has discretion in the matter of how much opportunity is to be afforded the accused for selecting counsel, we think it would abuse that discretion by refusing to continue the trial over a weekend for that purpose unless it clearly appeared that the accused would not find counsel of his own choosing. . . .

[2] In instant case defendant timely exercised his right to select counsel of his choice long before the case was called for trial. The record does not disclose that he had in any way contributed to his counsel's absence. The fact that his counsel had accepted other employment which prevented his presence at the trial cannot be charged to defendant so as to deny him his constitutional right to counsel of his own choice. We find nothing in this record that indicates that defendant exercised his right to select counsel of his choice in a manner calculated to disrupt or obstruct the orderly progress of the court.

[3] The effect of the denial of the defendant's constitutional right to be represented by counsel of his choice is so interrelated with his right to *effective* assistance of counsel that we deem it proper to consider the latter of defendant's two-pronged argument.

It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335; *State v. Phillip, supra; State v. Speller, supra; State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520; *State v. Farrell*, 223 N.C. 321, 26 S.E. 2d 322. In instant case defendant, who was charged with a felony, met and talked with Mr. Parrish for the first time about ninety minutes before the case was called for trial. Mr. Parrish had practiced law for eighteen months and had previously tried only one jury case. He knew nothing about this case until he arrived in court. All of the preliminary hearings and preparations for trial had been handled exclusively by Mr. Powell. Defendant indicated to Mr. Parrish on the day of the trial that he wanted his retained counsel to represent him. Under these circumstances defendant was denied effective assistance of counsel because he and Mr. Parrish did not have a reasonable time in which to prepare and present a defense.

We wish to make it abundantly clear that we do not approve of tactics by counsel or client which tend to delay the trial of cases. Our clogged court dockets and the tortoise-like progress of cases through our courts have caused criticism of, and disrespect for, the entire court system. The public is demanding and the legal profession should be searching for means to expedite the trial of criminal and civil cases without depriving litigants of a fair trial. The judiciary possesses powers to regulate and discipline attorneys who deliberately or negligently impede the progress of our courts. Likewise an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial. It might well be said that defendant's chosen counsel acted improvidently in that he did not consult the trial judge concerning a continuance, or in that, being associated with a reputable firm of able lawyers, he did not take steps to prepare one of them for the trial of the case and consult defendant as to the possibility that his associate might proceed with the trial in the event that a continuance was not obtained. However, any fault of counsel without defendant's concurrence cannot be imputed to defendant so as to preclude him from obtaining counsel of his choice.

We hold that under the circumstances of this case, the trial court erred by denying defendant's motion for a continuance, thereby depriving him of a reasonable time in which to obtain counsel of his choice.

This cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of Forsyth County for trial in accordance with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. STEVEN LEE

No. 4

(Filed 10 May 1977)

1. **Jury § 5— juror's relationship with police officers — challenge for cause — denial improper**

The trial judge erred by refusing to grant defendant's challenge for cause as to a juror who (1) had been a police officer's wife for eleven years, (2) had been on friendly terms with policemen who worked with her husband and attended parties given by the Police Auxiliary of which she was a member, (3) initially stated that she would have a tendency to lend more credibility to the testimony of the police officers than to that of a stranger, (4) only in reply to the questioning of the trial judge stated that she would not be swayed by her husband's employment, and (5) knew the State's chief investigating officer, by whose testimony the State sought to buttress the credibility of its only eyewitness.

2. **Jury § 5— juror's relationship with police officer — challenge for cause**

A juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause.

3. **Homicide § 25— first degree murder where deadly weapon is used — improper instruction**

The trial court in a first degree murder prosecution erred in submitting to the jury the offense of "first-degree murder where a deadly weapon is used," since no such offense exists and since the jury could infer from such an instruction that when a person is killed by the use of a deadly weapon, his assailant is, without further proof, guilty of murder in the first degree.

State v. Lee

APPEAL by defendant from *Tillery, J.*, 8 March 1976 Session of WILSON County Superior Court. Defendant entered a plea of not guilty to a charge of first-degree murder.

The State's evidence consisted primarily of the testimony of Dennis Barnes. On direct examination Barnes testified that at about 10:00 p.m. on 20 December 1975 he and defendant left a night spot in Wilson, North Carolina, known as "Ford's Place." They walked to an apartment building in an area known as the "School Yard" to look for defendant's girl friend. There they went to an apartment where they bought wine. Barnes noticed that "Dusty" Battle, who was also there buying wine, carried a wallet with some money in it. Barnes left to go to a house next door, but before going inside he turned and saw defendant pick up an object resembling an ax handle and strike "Dusty" Battle on the head. Defendant then bent down over the body of "Dusty" Battle for a moment. He summoned Barnes and the two of them returned to "Ford's Place." Defendant told Barnes that he had taken some money from the man he had hit and threatened to "come looking" for Barnes if he told anyone what he had done.

On cross-examination the witness Barnes related a different sequence of events on the night of 20 December 1975, but reasserted that he observed defendant strike "Dusty" Battle. He also contradicted his testimony on direct examination by admitting that he had drunk a substantial quantity of wine on the night in question.

Detective Moore of the Wilson Police Department testified as to a prior statement made to him by the witness Barnes, which tended to corroborate Barnes' testimony at the trial. The State also offered the testimony of a witness who saw defendant and a companion in the "School Yard" area at about 10:55 p.m. on the night in question.

It was stipulated that the immediate cause of "Dusty" Battle's death was acute brain injury resulting from multiple blows to the head.

Defendant presented the testimony of several witnesses who stated that defendant had been at a night spot called "Diggins' Place" from 7:00 p.m. on 20 December 1975 until about 9:00 or 9:30 p.m. At about 10:00 p.m. he was seen in the vicinity of "Ford's Place" in downtown Wilson. Teresa Best, defend-

ant's girl friend, testified that she woke up at about 10:57 p.m. and heard defendant's voice coming from the kitchen of her home. Orlando Hutchinson, who was present at Teresa Best's home, also stated that he had recognized defendant's voice at that time. Angela Best testified that she saw defendant sitting in the kitchen from about 10:57 p.m. until 11:15 p.m. Teresa Best further testified that she had met defendant at "Ford's Place" at 11:45 p.m. and they had then gone to the Cherry Hotel where they had spent the night together.

Defendant also offered the testimony of Jessie Thompson who stated that he had seen "Dusty" Battle at about 9:30 or 10:00 p.m. in the company of another man.

The jury returned a verdict of guilty of murder in the first degree and the trial judge entered judgment imposing the death penalty.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr. and Associate Attorney George J. Oliver, for the State.

Vernon F. Daughtridge, for defendant.

BRANCH, Justice.

Defendant assigns as error the rulings of the trial judge during the selection of the jury.

We first consider the denial of defendant's challenge for cause of the juror Frances Norvell. This ruling was made after defendant had exhausted all of his peremptory challenges.

The *voir dire* examination of prospective juror Norvell disclosed that her husband was a police officer employed by the City of Wilson. He had been a police officer for a period of ten or eleven years and she had been married to him during that entire period. Mrs. Norvell knew most of the Wilson police officers and was acquainted with police officer Johnny Moore, the chief investigating officer in this case who testified in corroboration of the State's principal witness, Dennis Barnes. She was also acquainted with Captain Tom Smith and Captain Hayes, the Chief of Police of Wilson. Mrs. Norvell and her husband had visited in Captain Hayes' home and Mrs. Hayes had visited in their home. She was friendly with numerous members of the Wilson Police Department. Her brother-in-law was a

detective on the Wilmington police force. Prospective juror Norvell stated that she was a member of the Wilson Police Auxiliary and was acquainted with Officer Johnny Moore's wife who was also a member of that organization. The Auxiliary occasionally gave parties which were attended by police officers and their spouses. Her husband on rare occasions discussed with her the cases in which he was involved and they had discussed his view on capital punishment.

The following exchanges occurred between defense counsel and the prospective juror and between the trial judge and the prospective juror:

Q. I ask you, Mrs. Norvell, since you know Mr. Moore and Tom Smith and your husband is on the Wilson Police Department, if they should testify in this case, would you tend to put more weight on what they said about the case than some witness you had never seen before?

A. I don't think so.

Q. But, you are not sure about that?

A. No, sir.

Q. It is possible that you might believe what they said more than somebody you didn't know?

A. I would have a tendency to.

MR. DAUGHTRIDGE: If the Court please, we would challenge her for cause.

COURT: Let me ask you one or two things myself. I don't think anybody can make a positive statement as to who they would believe until they heard what they had to say. Do you have some genuine concern in your own mind that you might be swayed because of your husband's employment?

A. No, sir.

COURT: Do you feel you could be fair and impartial and give to the defendant's testimony or that of his witnesses the same weight you would give to somebody else?

A. Yes, sir.

COURT: I don't think you have established enough.

Q. But, I did understand you to say that knowing Mr. Moore and Mr. Smith, you might tend to believe them more than somebody you don't know at all?

OBJECTION by Mr. Brown.

OVERRULED.

A. It's hard for me to say.

* * *

Q. I asked you do you feel that there is a genuine possibility by reason of your knowledge of Mr. Moore and Mr. Smith, that you might believe their testimony in this case more so than some witness who you had never seen before?

A. I don't think there's a genuine possibility.

Q. Well, is there a possibility, Mrs. Norvell?

A. There might be.

Both the defendant and the State are entitled to a fair and unbiased jury. Either party may challenge for cause, without limit, a juror who is prejudiced against him. A party to an action does not have the right to select a juror prejudiced in his favor, but only to reject one prejudiced against him. In short, the primary purpose of the *voir dire* of prospective jurors is to select an impartial jury. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833.

Unquestionably the trial judge is vested with broad discretionary powers in determining the competency of jurors and that discretion will not ordinarily be disturbed on appeal. G.S. 9-14; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750; *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698. We note the existence of a line of cases to the effect that "[t]he ruling in respect of the impartiality of the juror . . . presents no reviewable question of law." *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523. *See also, State v. Bailey,* 179 N.C. 724, 102 S.E. 406; *State v. Bohanon,* 142 N.C. 695, 55 S.E. 797. In those cases the question was whether a preconceived opinion adverse to the defendant would prevent the juror from basing his verdict solely on the evidence. The case *sub judice* differs from that line of cases in

that it involves an objective relationship which permits the reviewing court to assess the effect of that relationship upon the juror's ability to act impartially.

In addition to statutory challenges for cause (as provided in G.S. 9-15), the courts have recognized that under certain circumstances there are relationships which impair a juror's ability to give a defendant an impartial trial. We briefly review some of those decisions.

In *State v. Allred, supra,* the defendant was charged with murder. This Court found error in the trial judge's refusal to excuse a prospective juror for cause and, speaking through Justice Bobbitt (later Chief Justice), stated:

> We do not hold that relationship within the ninth degree between a juror and a State's witness, standing alone, is legal ground for challenge for cause. This is in accord with the weight of authority in other jurisdictions. Annotation, "Relationship to prosecutor or witness for prosecution as disqualifying juror in criminal case," 18 A.L.R. 375; 31 Am. Jur., Jury § 192; 50 C.J.S., Juries § 218(b)(1). Even so, where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. Ordinarily, if the testimony of the witness will be directed to proof of some formal matter or to some minor facet of the case, there would be no substantial basis for challenge for cause. Here we are considering a radically different factual situation.

The accused was granted a new trial in *State v. Jackson,* 43 N.J. 148, 203 A. 2d 1, because of the trial judge's refusal to excuse juror Carolan. This juror had originally stated that he was not personally acquainted with any law enforcement officers, but it was thereafter elicited that certain members of the Elizabeth, New Jersey, police force were neighbors and friends with whom he had grown up and attended church. He had known Detecive Lynes for about twenty years and regarded him as a close friend. This officer was a major witness for the State and his credibility was subject to attack by the defense. Nevertheless, the prospective juror stated that if other wit-

nesses contradicted the testimony of Detective Lynes he would not be inclined to give more credence to the Detective's testimony because of their friendship. Defendant exhausted his peremptory challenges and challenged prospective juror Carolan for cause. In its opinion, the New Jersey Supreme Court, *inter alia,* declared:

> We, of course, recognize that the trial court is vested with broad discretionary powers in determining the qualifications of jurors and that its exercise of discretion will ordinarily not be disturbed on appeal. See *State v. Simmons,* 120 NJL 85, 90, 198 A 294 (E & A 1938). Nevertheless we are satisfied that, under the particular circumstances here, the refusal to excuse Mr. Carolan constituted error which impaired the right of the defendants to competent and impartial jurors. His close relationship with members of the Elizabeth police department, particularly Detective Lynes, suggests inability to deal with the evidence with the measure of impartiality required by the law. It must be borne in mind that Detective Lynes was an important State's witness whose credibility was under direct attack. Though Mr. Carolan may have been wholly sincere in his statement that his long and close friendship with Detective Lynes would have no bearing whatever on the issue of credibility, we find it difficult to accept for it runs counter to human nature. Surely the defendants were amply justified in refusing to accept it and when their objection to his serving was voiced in timely fashion it should have been honored, if for no other reason than to insure their confidence in the basic fairness of the trial. In any sound judicial system it is essential not only that justice be done but also that it appear to be done. . . .

The court also quoted with approval the following language from *United States v. Chapman,* 158 F. 2d 417:

> . . . A juror's answer to questions touching his state of mind is primary evidence of his competency, but the ultimate question is a judicial one for the court to decide, and in case of doubt, justice demands that the challenge be allowed. *Scribner v. State,* 3 Okl. Cr. 601, 108 P. 422, 35 L.R.A., N.S., 985; *Temple v. State,* 15 Okl. Cr. 176, 175 P. 733, 736; *Crawford v. United States,* 212 U.S. 183, 197, 29 S.Ct. 260, 53 L.Ed. 465 [471], 15 Ann. Cas. 392; 31 Amer.

Juris., p. 638. Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the high traditions of our jury system. We must make sure that the lamentations of the unsuccessful litigant is without foundation, either in fact or circumstance." . . .

In *State v. Joiner*, 163 La. 609, 112 So. 503, the defendant was charged with murder and a prospective juror stated on *voir dire* that he was a personal friend of the witness for the State and had been a friend of the deceased. He further said that although he had previously formed an opinion about the case, it would not influence his consideration of defendant's guilt or innocence. He indicated that he would not give more weight to his friend's testimony than to the conflicting testimony of a stranger. Holding that the trial judge erred by allowing this juror to sit, the Supreme Court of Louisiana, in part, stated:

These declarations of the juror, however, must be tested, like all other human testimony, according to the common knowledge, experience, and observation of mankind.

It is the natural impulse of all men, with rare exceptions, when the direct question is put to them, especially by one in authority, such as a district attorney or a trial judge, to declare that they believe they can disregard a preconceived opinion and render a fair and impartial verdict upon the evidence submitted to them. In general, they are sincere in their statement and belief. The declaration, however, should not only proceed from the mouth of the venireman, but it should be made in connection with a state of facts showing that it is probably true.

* * *

. . . Nor do we believe that the juror, without questioning the sincerity of his statement on his voir dire, was in a position to weigh the evidence of his friend against the evidence of strangers and of the defendant, accused of murdering his intimate friend, so as to strike a balance between them such as the law requires.

* * *

The court is not bound by the answers of the juror on his voir dire when they are opposed to and inconsistent

with the facts and circumstances disclosed by his examination. *State v. Barnes,* 34 La. Ann. 395.

See also: *Wright v. Bernstein,* 23 N.J. 284, 129 A. 2d 19; *Johnson v. Reynolds,* 97 Fla. 591, 121 So. 793.

[1] In instant case the position of juror Frances Norvell was such that she was subject to strong influences which ran counter to defendant's right to a trial by an impartial jury. We can judicially notice that the forces of law and order, which are most strongly represented by our police officers, are constantly at war with those who commit crimes and those charged with the commission of crimes. To assume that juror Norvell, a police officer's wife for eleven years, who had been on friendly terms with policemen who worked with her husband and attended parties given by the Police Auxiliary of which she was a member, could assume the roles of impartiality is to ignore human reactions. This juror may have well felt that in the eyes of her husband, his fellow officers, and his superior officers, she would have given comfort to the opposition had she voted to return a verdict of not guilty. We further note that the juror Norvell initially stated that she would have a tendency to lend more credibility to the testimony of the police officers than to a stranger. It was only in reply to the questioning of the trial judge that she stated that she would not be swayed by her husband's employment and that she could give the testimony of defendant and his witnesses the same weight as that of others. It is natural that a lay witness in response to a direct question by one in authority, such as this trial judge, would be strongly inclined to state that he could impartially render a verdict in accord with the evidence. *State v. Joiner, supra.* Finally, Officer Johnny Moore, with whom the juror was acquainted, was an important State's witness. He was not only the State's chief investigating officer, but it was by his corroborative testimony that the State sought to buttress the credibility of its only eyewitness.

[2] Under the particular circumstances of this case, we do not believe that juror Norvell could qualify as a disinterested and impartial juror. However, we hasten to add that a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause.

We hold that the trial judge erred by refusing to grant defendant's challenge for cause as to the juror Norvell.

Defendant assigns as error several portions of the trial judge's charge. We deem it necessary to consider only one of the assignments of error directed to the trial judge's instructions.

[3] On three occasions, including his final mandate to the jury on the charge of first-degree murder, the trial judge submitted to the jury the offense of "first-degree murder where a deadly weapon is used." We do not approve this instruction.

G.S. 14-17 defines murder in the first degree as follows:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree . . . .

This instruction creates a new offense without benefit of statute or court decision. It is true that when a killing resulting from the intentional use of a deadly weapon is established, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice. *State v. Biggs,* 292 N.C. 328, 233 S.E. 2d 512. An unlawful killing with malice is murder in the second degree. *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24. Obviously the use of a deadly weapon does not furnish the elements of premeditation and deliberation, necessary to a conviction of first-degree murder. The vice of this instruction is that a jury could infer that when a person is killed by the use of a deadly weapon, his assailant is, without further proof, guilty of murder in the first degree.

We do not deem it necessary to discuss the remaining assignments of error since they may not recur at the next trial.

For the reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. TIMITHY RAY GAINEY

No. 71

(Filed 10 May 1977)

1. **Automobiles § 113.1— involuntary manslaughter — failure to stop at intersection — exceeding safe speed — sufficiency of evidence**

In a prosecution for involuntary manslaughter evidence was sufficient to support a finding that defendant drove into an intersection without stopping, a violation of G.S. 20-158; that at the time he approached and entered it he was driving at a greater speed than was reasonable and prudent under the conditions then existing; and that defendant's violation of these two statutes constituted culpable negligence which proximately caused the death of a passenger in the vehicle with which defendant collided.

2. **Automobiles § 114.1— involuntary manslaughter — criminal negligence and proximate cause — instructions proper**

The trial court's instructions in an involuntary manslaughter prosecution were sufficient where they informed the jury that the State must prove beyond a reasonable doubt (1) that defendant had violated a safety statute (either G.S. 20-141(a) or G.S. 20-158) in a criminally negligent manner and (2) that such violation was the proximate cause of a passenger's death; and the court explained the term "proximate cause," explained what was required for a violation to be criminally negligent, and defined a reckless violation.

APPEAL by the State pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals vacating the judgment entered by *Collier, J.*, at the 1 December 1975 Session of the Superior Court of ROWAN, 29 N.C. App. 653, 225 S.E. 2d 843 (1976). This appeal was docketed and argued as Case No. 69 at the Fall Term 1976.

Upon an indictment charging him with the unlawful and felonious slaying of Carrie Freeze, defendant was tried and convicted of involuntary manslaughter. From a sentence of three to five years he appealed to the Court of Appeals.

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

At approximately 8:00 p.m. on 7 October 1973 Mrs. Julia Ann Freeze was operating a pickup truck in a westerly direction on West C Street in Rowan County. Her nephew and her mother, Mrs. Carrie Freeze, were riding in a detachable camper unit, fastened to the truck bed with four steel cables. As Mrs. Freeze approached the "T" intersection of West C and Winona

Streets near Kannapolis, she was driving at a speed of 30 mph. The lights on her vehicle were burning. At the same time defendant was approaching the intersection on Winona Street. He was driving his 1963 Ford at a speed in excess of 35 mph. Both streets were paved roads, but the intersection was not controlled by any traffic light. There was a stop sign on Winona Street; none on West C Street. As Mrs. Freeze entered the intersection she saw that defendant's vehicle was also entering and "in a flash it came out." Her truck hit the side of his car and the vehicles overturned. The camper was torn from the truck, and both it and the Ford were turned upside down. The vehicles were totally destroyed and the back of the camper was demolished. Mrs. Carrie Freeze died three weeks later from the head and chest injuries she suffered in the collision.

The investigating patrolman, J. E. Everett, did not know the posted speed limit on Winona Street as it approached the intersection. He found no skid marks within the area of the intersection. He detected a "moderate odor of some alcoholic beverage" from defendant's breath, and he "observed four or five beer cans in the [defendant's] vehicle. There was the odor of some alcoholic beverage." Defendant "indicated" to the patrolman that "something had happened to his car." The next day Everett examined the car in a garage in Kannapolis. He depressed the brake pedal and "it was a full brake pedal," which did not go to the floor. In his opinion it was adequate to stop a vehicle.

Defendant's evidence, consisting of his testimony only, tended to show:

At the time of the collision he had traveled about one half a mile on Winona Street. Where he came on to the street, "there is a sharp curve to the right, and then it goes right back to the left" and "straight up to C Street. . . . The sharp curve is about three, four-tenths miles to West C Street." Defendant was returning to his home in Concord from the Charlotte Motor Speedway, where he had spent the day and the latter half of the preceding night in a camper with friends. He had just left the home of one who lived "off Winona Street." When defendant was "already right at the intersection" of Winona and West C Streets he saw the camper coming and applied his brakes. When they went all the way to the floor he pumped them but was unable to stop. He entered the intersection at a speed of

about 35 mph. He didn't intentionally enter West C Street without stopping, but when he saw the camper coming he knew there was no way for him to get out of its path. A few days after the collision defendant personally checked the brakes on his car, and "they were showing a little over half a pedal." After he was charged with manslaughter he "had a man" examine the brakes, but "he said he didn't see anything wrong."

Defendant testified that he had drunk three beers during the day of the collision; that he had consumed the last one prior to 4:00 p.m.; that on the back seat of his car he had a cooler containing seven bottles of beer and the collision "busted the beers" and he "was wet from it."

On 7 October 1973, in consequence of his collision with Mrs. Freeze's camper, defendant received a citation charging him with a "stop sign violation." He "paid it off"; he had "always paid them off." In addition to this violation on 7 October 1973, between May 1968 and August 1975, defendant was seven times convicted of speeding, once for failing to yield the right-of-way, and once for "running a red light."

Upon defendant's appeal from his conviction of manslaughter, the Court of Appeals ordered a new trial upon the ground that Judge Collier had committed error in his charge to the jury.

Attorney General Rufus L. Edmisten, Special Deputy Attorney General John R. B. Matthis, and Associate Attorney Jo Anne Sanford Routh for the State.

Robert M. Davis for defendant appellee.

SHARP, Chief Justice.

[1] Applying the well-established rules for testing the sufficiency of the State's evidence to carry the case to the jury, the Court of Appeals correctly held that the evidence adduced at the trial survived defendant's motions for nonsuit. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Clearly, the State's evidence was sufficient to establish that defendant failed to bring his vehicle to a stop on Winona Street before entering its intersection with C Street; that his failure to yield the right-of-way to the Freeze pickup truck approaching on West C Street, a designated "main-travelled or through highway," was a violation of G.S. 20-158(a) (1965); and that this statutory

violation was culpable negligence which proximately caused the death of Mrs. Freeze. We hold, however, that the Court of Appeals erred when it concluded that the State had offered no evidence tending to show that at the time defendant approached and entered the intersection he was operating his vehicle at an unlawful rate of speed and that the trial judge had, therefore, committed prejudicial error in charging upon a state of facts not presented by the evidence.

Since the evidence fails to disclose the presence of any signs giving notice that a lower speed limit had been established for the *locus in quo,* we must assume that the speed limit for that area was 55 mph. G.S. 20-141(b)(4) (1965). No witness testified that defendant was traveling at a speed in excess of 55 mph. However, a speed less than the maximum limit designated in the statute is not per se a lawful speed, for G.S. 20-141(a) (1965) provided, "No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." The meaning and intent of this section was fully stated in G.S. 20-141(c) (1965) as follows:

"The fact that the speed of a vehicle is lower than the [statutory] limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

(Here we note that the section quoted above was not specifically reincorporated in G.S. 20-141 when it was rewritten by 1973 Sess. Laws, ch. 1330, § 7, effective 1 January 1975. Notwithstanding its omission, G.S. 20-141(a) (1975) still encompasses all its provisions. *See Cassetta v. Compton,* 256 N.C. 71, 74, 123 S.E. 2d 222, 224 (1961).)

The State's evidence tended to show that defendant approached the "T" intersection in the nighttime at a speed "exceeding 35 miles per hour" and, without stopping or slowing

down, entered it "just like a flash of light." Defendant's version was, "My speed was 35 miles per hour. I didn't try to make a turn after I entered the intersection because I didn't see the car until I was right on the intersection. There was no use to turn." When the Freeze pickup truck hit the side of defendant's Ford, both vehicles were overturned and destroyed. The camper was turned upside down and Mrs. Carrie Freeze, who was riding in it, received fatal injuries.

Defendant testified that after he came on Winona Street he negotiated two sharp curves and then drove four-tenths of a mile on a straight, dry, paved road before he entered the intersection. He offered no explanation of his failure to see the approaching Freeze truck and camper, and his statement that his brakes failed was not corroborated either by the investigating highway patrolman or defendant's "man," both of whom examined his brakes after the accident.

Clearly, the foregoing evidence was sufficient not only to support a finding that defendant drove into the intersection without stopping, a violation of G.S. 20-158 (1965), but also that at the time he approached and entered it he was driving at a greater speed than was reasonable and prudent under the conditions then existing, a violation of G.S. 20-141(a) (1965). It is equally clear that the evidence was entirely adequate to support a finding that defendant's violation of these two statutes constituted culpable negligence as that term is defined in *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883 (1968) and the cases cited therein.

[2] Apprehending that the trial judge "could have left the impression with the jury that a mere violation of G.S. 20-158, proximately resulting in death, would warrant a conviction of involuntary manslaughter," the Court of Appeals held the following instruction to be prejudicial error:

"So I charge that if you find from the evidence beyond a reasonable doubt that on or about October 7, 1973, at about 7:55 p.m., Timithy Ray Gainey intentionally or recklessly drove his motor vehicle at a speed that was greater than reasonable and prudent under the conditions then and there existing, or drove his vehicle through a stop sign without braking his vehicle to a stop, thereby proximately causing the death of Carrie Freeze, and that the violation or violations did not result from brake failure on the defendant's car, it would be your duty to

return a verdict of guilty of involuntary manslaughter. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty, but would return a verdict of not guilty."

Standing alone, the foregoing mandate would be inadequate. However, it is axiomatic that the trial judge's charge must be considered as a whole and construed contextually. The fact that some expressions, standing alone, might require amplification, will afford no ground for reversal when the charge as a whole presents the law fairly and clearly to the jury. *E.g., State v. Lee,* 277 N.C. 205, 214, 176 S.E. 2d 765, 770 (1970); 4 Strong's N. C. Index 3d, *Criminal Law* § 168 (1976).

Immediately preceding the portion of the charge quoted above the judge had instructed the jury that in order to convict defendant of involuntary manslaughter the State must prove beyond a reasonable doubt (1) that defendant had violated a safety statute (either G.S. 20-141(a) or G.S. 20-158) in a criminally negligent manner and (2) that such violation was the proximate cause of Carrie Freeze's death, that is, "A real cause, a cause without which [her] death would not have occurred." He also charged that "for a violation to be criminally negligent it must have been committed intentionally or recklessly," and he defined a reckless violation as one which, when judged by the rule of reasonable foresight, shows the violator to have been "heedlessly indifferent to the safety and rights of others."

The evidence in this case was brief and uncomplicated. Except for the issue of brake failure, it was relatively free from conflict. As a result, we cannot believe the jury could have misunderstood either the court's definition of criminal negligence or instruction that before they could convict defendant of involuntary manslaughter they must be satisfied beyond a reasonable doubt that *criminal* negligence on the part of defendant was a proximate cause of the death of Carrie Freeze.

We hold, therefore, that the charge of the trial judge meets the requirements of this case. At the same time, however, we are constrained to say that the fuller and more explicit exposition of the law of culpable negligence contained in such cases as *State v. Weston, supra; State v. Hancock,* 248 N.C. 432, 435, 103 S.E. 2d 491, 494 (1958); and *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933) is more likely to enlighten the jury and

to pass muster on appeal. For many years the carefully phrased statements of Chief Justice Stacy in *State v. Cope, supra,* have served both trial and appellate court judges well when they were called upon to explain the difference between civil and criminal negligence, and we recommend their continued use.

The decision of the Court of Appeals vacating the judgment from which defendant appealed and ordering a new trial is reversed; and this cause is remanded with directions that it be returned to the Superior Court of Rowan for the reinstatement of the judgment.

Reversed and remanded.

JAMES F. BOWEN AND JAMES G. BOWEN BY HIS GUARDIAN *ad litem*, JAMES F. BOWEN v. HODGE MOTOR COMPANY

No. 78

(Filed 10 May 1977)

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

While the general rule is that an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio,* the trial judge still retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. Also, the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the case.

2. **Appeal and Error § 16.1— pending appeal — motion directed to judgment — appearance at hearing — no abandonment of appeal**

In an action in which plaintiffs gave notice of appeal from judgment directing a verdict for defendant, plaintiffs' post-trial Rule 41(a)(2) motion for voluntary dismissal without prejudice and the subsequent appearance of the parties for the hearing of this motion did not constitute an abandonment of plaintiffs' appeal which revested jurisdiction in the trial judge for the purpose of hearing and ruling on the motion; therefore, plaintiffs' appeal was still pending, and where the session of court at which the judgment appealed from had ended, the trial judge had no jurisdiction to entertain plaintiffs' motion for voluntary dismissal.

ON defendant's petition for further review of a decision of the Court of Appeals, 29 N.C. App. 463, 224 S.E. 2d 699

(1976), which affirmed an order of the district court, *Washington, J.*, presiding, allowing plaintiffs' motion for a voluntary dismissal of their action without prejudice. Docketed and argued as Case No. 119, Fall Term 1976.

Henson & Donahue by Perry C. Henson and Richard L. Vanore, Attorneys for defendant appellant.

Bencini, Wyatt, Early & Harris, by A. Doyle Early, Jr., Attorneys for plaintiff appellees.

EXUM, Justice.

We allowed defendant's petition for further review in order to determine whether the trial judge had jurisdiction to entertain plaintiffs' Rule 41(a)(2) motion for voluntary dismissal without prejudice. We hold that under the circumstances here presented he did not.

This action for property damages to an automobile which burned allegedly because of defendant's negligent repair of the carburetor was tried before judge and jury at a one-week session beginning on 28 July 1975 of Guilford District Court, High Point Division. The trial began on 30 July 1975. Defendant's motions for directed verdict were denied at the close of the plaintiffs' evidence and again at the close of all the evidence. The court then adjourned for the day.

On Thursday, 31 July 1975, the court, on reconsideration, allowed defendant's motion for directed verdict at the close of all the evidence. Plaintiffs gave notice of appeal in open court and the court directed defendant's attorney to present a formal judgment. The court then adjourned for the session. The minute entries for 31 July 1975 are:

> "Court convened at 9:30 a.m. and the following proceedings were had:
>
> "July 28, 1975 Jury Session
> High Point Division
> District Court Minutes
>
> "74 CvD 19751 James F. Bowen and James G. Bowen, BHGAL James F. Bowen
> v
> Hodge Motor Company

"At the close of the evidence, defendant's motion for directed verdict is allowed. Plaintiff gives notice of appeal. The Court directs Richard Vanore to present judgment.

"75CvD 277 Daniel C. Mann and Dwane F. Swaim

v

H. C. Lanning and Mrs. H. C. Lanning

Continued for the Session, not reached.

Court expires.

Thursday, July 31, 1975"

On Friday, 1 August 1975, plaintiffs filed a motion to be permitted to take a voluntary dismissal without prejudice pursuant to Rule 41(a)(2). The motion was grounded upon the proposition that plaintiff had additional evidence which it had not presented, some of which was not known to plaintiffs' attorney at the time of trial. This motion was heard and allowed by the district court on 5 August 1975.

Defendant then filed a motion to set aside the order allowing plaintiffs' dismissal without prejudice on the ground that plaintiffs' notice of appeal entered on 31 July 1975 divested the trial court of jurisdiction to entertain such a motion. Defendant's motion, filed 7 August 1975, was heard and denied by the district court on 12 August 1975. Defendant appealed to the Court of Appeals assigning as error the allowance of plaintiffs' voluntary dismissal without prejudice and the denial of defendant's motion to set aside the order by which the voluntary dismissal was allowed. The Court of Appeals affirmed the orders of the trial court.

[1] The Court of Appeals correctly recognized our longstanding general rule that an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio*. The rule is subject to two exceptions and one qualification. The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain

jurisdiction of the cause. *Machine Co. v. Dixon,* 260 N.C. 732, 735-36, 133 S.E. 2d 659, 662 (1963).

[2] The Court of Appeals concluded, however, that although the session of the trial court terminated on 31 July 1975, the plaintiffs' Rule 41(a)(2) motion filed 1 August 1975 and the subsequent appearance of the parties for the hearing of this motion constituted an abandonment of plaintiffs' appeal and the trial judge thereby regained jurisdiction of the case for the purpose of hearing and ruling on this motion. In this we think the Court of Appeals erred.

The controlling case on this point is *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971). The trial in that case was before the superior court without a jury. At the close of plaintiff's evidence the trial judge entered a judgment dismissing the action. Plaintiff gave notice of appeal in open court. Thereafter plaintiff moved to set the judgment aside and for a new trial pursuant to Rules 59 and 60 on the grounds of newly discovered evidence. This motion was heard and the trial judge ordered his judgment of dismissal set aside and awarded plaintiff a new trial. An additional defendant appealed from the order setting aside the judgment of dismissal and awarding a new trial. This Court vacated that order. Although the Court recognized the exceptions and qualification to the general rule than an appeal takes a case out of the jurisdiction of the trial court, we found no occasion to apply either the exceptions or the qualification in that case. The opinion was concerned essentially with whether motions filed pursuant to Rules 59 and 60 might properly be addressed to the trial court pending an appeal. The holding was that they might not. There was no suggestion in the case that the mere filing of the motions and the appearance of the parties for a hearing thereon constituted an abandonment of the appeal by the moving party.

The Court of Appeals' reliance on *Sink v. Easter,* 288 N.C. 183, 217 S.E. 2d 532 (1975), was misplaced. This case should not be interpreted as holding that the mere filing of a motion directed to an order or judgment from which an appeal has previously been taken and the appearance at a hearing thereon constitutes an abandonment of the prior appeal, nothing else appearing. In *Easter,* as a cursory examination of the entire opinion will show, a great deal more did appear. In *Easter* this Court was faced with a complicated procedural tangle remi-

niscent of the Gordian knot of Greek mythology. Unlike Alexander, whose solution for the intricacies of the knot was to sever it with one blow of his sword, we attempted painstakingly to unravel the tangle.

In *Easter* on 21 March 1974 the trial judge pursuant to defendant's motion entered a judgment dismissing plaintiff's action for want of jurisdiction. Thereafter plaintiff filed a motion under Rule 60(b) asking that this judgment be set aside. On 28 March 1974 the trial judge denied plaintiff's Rule 60(b) motion as a matter of law and not in the exercise of his discretion. On this same date plaintiff gave notice of appeal from the denial of her motion and from the judgment dismissing her action. On 1 April 1974 at a new session of court the trial judge in open court informed the parties that, on his own motion, he was setting aside his order denying plaintiff's Rule 60(b) motion on the ground that he should have determined it in the exercise of his discretion and not as a matter of law and he proceeded to conduct a hearing on the motion. Thereafter on 9 May 1974 plaintiff submitted a "withdrawal and abandonment" of her appeal previously taken from the judgment dismissing her action, and on 15 May 1974 the trial judge signed an order allowing the abandonment of plaintiff's appeal. On 16 May 1974 the trial judge entered an order allowing plaintiff's Rule 60(b) motion, setting aside the judgment of dismissal, and denying defendant's motion to dismiss for lack of jurisdiction. It was from this order that defendant appealed. It is important to note that until this order was entered the 21 March 1974 judgment dismissing plaintiff's action remained in effect. The 16 May 1974 order was, then, *vis-a-vis* the judgment of dismissal, the only really operative order entered by the trial judge since his order of 28 March 1974 denying plaintiff's Rule 60(b) motion. *Before* the entry of the 16 May 1974 order plaintiff had expressly sought to abandon her appeal and the trial judge had allowed the abandonment.

The Court's statement in the opinion that "[w]e construe the proceedings appearing in the record on 1 April 1974 to constitute an adjudication by the court that plaintiff's prior appeal from the denial of her Rule 60(b) motion had been abandoned and that plaintiff, by appearing at said hearing, gave proper notice of her intention to abandon the same," *id.* at 198, 217 S.E. 2d at 542, must be considered in the entire procedural context as it was presented to this Court. Plaintiff's

position relative to her appeal on 1 April 1974 must be considered in the context of her later *express* abandonment of that appeal and the court's order allowing the abandonment. Both events took place *before* the trial judge's 16 May 1974 order, which was, as we have noted, the substantively operative order from which the appeal was taken.

The cases of *Leggett v. Smith-Douglass Co.*, 257 N.C. 646, 127 S.E. 2d 222 (1962) and *Williams v. Contracting Co.*, 257 N.C. 769, 127 S.E. 2d 554 (1962), relied on by the plaintiff and in part by the Court of Appeals are clearly distinguishable. These cases dealt with our old voluntary nonsuit practice under which plaintiff had an absolute right voluntarily to nonsuit his action without prejudice up to the time a verdict was rendered against him. *Mitchell v. Jones*, 272 N.C. 499, 158 S.E. 2d 706 (1968); *Insurance Co. v. Walton*, 256 N.C. 345, 123 S.E. 2d 780 (1962). Furthermore in *Leggett* the plaintiff failed to perfect his appeal and thereafter took a voluntary nonsuit. In *Williams*, although the time for perfecting his appeal had not yet expired when plaintiff filed his voluntary nonsuit in the trial court, plaintiff thereafter failed to perfect his appeal and it was ultimately dismissed in the Supreme Court.

On this record there is neither notice nor proper showing by the plaintiffs that they abandoned their appeal nor any judgment by the trial court to that effect. The appeal, then, was still pending when plaintiffs filed their Rule 41(a)(2) motion and when it was heard and ruled on by the trial court.

While both parties agree that 28 July 1975 was the first day of a one-week session of court at which this case was tried, plaintiffs contend that the court was still in session when it filed its motion for voluntary dismissal on Friday, 1 August 1975. There is simply nothing in the record to support this contention. The minutes of the court show clearly that the court adjourned for the session on Thursday, 31 July 1975. The conclusion of the Court of Appeals on this point for the reasons stated therein was correct. *See* G.S. 7A-192; *Sink v. Easter, supra; Green v. Insurance Co.*, 233 N.C. 321, 64 S.E. 2d 162 (1951).

Since plaintiffs' appeal was pending and the session of court at which the judgment appealed from was entered had ended, the trial court had no jurisdiction to entertain plaintiffs'

motion for voluntary dismissal without prejudice. The decision of the Court of Appeals affirming the district court's order allowing the motion is, therefore,

Reversed.

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

ACCEPTANCE CORP. v. DAVID

No. 105 PC.

Case below: 32 N.C. App. 559.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

AYERS v. ROWLAND

No. 78 PC.

Case below: 32 N.C. App. 599.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 May 1977.

CARDING SPECIALISTS v. GUNTER & COOKE

No. 95 PC.

Case below: 32 N.C. App. 485.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 May 1977.

GAMBILL v. BARE

No. 89 PC.

Case below: 32 N.C. App. 597.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 May 1977.

GIBBS v. DUKE

No. 99 PC.

Case below: 32 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

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

IN RE TAYLOR

No. 106 PC.

Case below: 32 N.C. App. 742.

Petition for discretionary review under G.S. 7A-31 allowed 3 May 1977.

LEWIS CLARKE ASSOCIATES v. TOBLER

No. 79 PC.

Case below: 32 N.C. App. 435.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

McRORIE v. QUERY

No. 81 PC.

Case below: 32 N.C. App. 311.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 May 1977.

NELSON v. HARRIS

No. 77 PC.

Case below: 32 N.C. App. 375.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 May 1977.

SCHOFIELD v. TEA CO.

No. 93 PC.

Case below: 32 N.C. App. 508.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

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

SNIDER v. DICKENS

No. 84 PC.

Case below: 32 N.C. App. 388.

Petition by third party defendant Kenneth Douglas Snider for discretionary review under G.S. 7A-31 allowed 3 May 1977.

STATE v. CRAFT

No. 82 PC.

Case below: 32 N.C. App. 357.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. CUMBER

No. 85 PC.

Case below: 32 N.C. App. 329.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. DANGERFIELD

No. 116 PC.

Case below: 32 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. HAGLER

No. 98 PC.

Case below: 32 N.C. App. 444.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

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

STATE v. JONES

No. 100 PC.

Case below: 32 N.C. App. 408.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1977.

STATE v. LEWIS

No. 86 PC.

Case below: 32 N.C. App. 471.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. LILLY

No. 87 PC.

Case below: 32 N.C. App. 467.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. PAGE

No. 83 PC.

Case below: 32 N.C. App. 478.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE v. STEWARDSON

No. 88 PC.

Case below: 32 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1977.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY MAY

No. 62

(Filed 13 June 1977)

1. **Criminal Law § 34.7— murder during robbery — earlier robbery — admissibility to show intent**

In a prosecution of defendant for murder committed during the perpetration or attempt to perpetrate a robbery of a confectionery store employee, the trial court did not err in allowing evidence of defendant's participation in an armed robbery at a dry cleaning business five days earlier in which defendant allegedly used the same sawed-off shotgun which he used in the confectionery store robbery, since that evidence was competent to show defendant's intent and *quo animo;* furthermore, admission of the evidence of the robbery at the dry cleaners did not violate due process by denying defendant a fair trial.

2. **Criminal Law §§ 101.2, 114.2— defendant's age — effect on juror — allowing juror to continue to serve — jury instruction — no expression of opinion**

Where a juror in a first degree murder prosecution informed the judge during trial that she had heard outside of court that defendant was seventeen years of age and had she known of defendant's age during jury selection "her opinion concerning the death penalty might have been different," the trial court did not violate G.S. 1-180 by permitting the juror to continue to serve and then granting the State's request for a supplemental instruction concerning defendant's age, since there was no evidence that the juror who was permitted to remain on the jury after having spoken to the judge ever conveyed her concern or knowledge to the other jurors; her statement to the judge was in all probability favorable to defendant; the judge expressly found that the juror could continue to serve on the jury without prejudice to the State or defendant; and the judge's instruction with respect to defendant's age was simply an explanation of the law as it applied to the case.

3. **Criminal Law § 112.4— defendant's guilt of separate offense — degree of proof required — jury instructions proper**

In a prosecution for murder committed during the perpetration or attempt to perpetrate an armed robbery where the State, for the purpose of showing intent, offered evidence of defendant's commission of another armed robbery, the trial court did not err in failing to require the jury to be satisfied beyond a reasonable doubt that defendant committed the other robbery, since every fact or circumstance relied upon by the State need not be proved beyond a reasonable doubt, though each element, of which the facts and circumstances of a case are a part, must be so proved.

4. **Criminal Law § 34.7— defendant's guilt of separate offense — connection with offense charged — determination for trial judge**

In a prosecution for murder committed during the perpetration or attempt to perpetrate an armed robbery of a confectionery store

employee where the State offered evidence of defendant's commission of an earlier armed robbery at a dry cleaning establishment, the trial court did not err in failing to instruct the jury that it must find a "causal relation or logical and natural connection between the two acts [the robbery at the cleaners and the murder at the confectionery]" since the determination of the connection between the robbery and the murder was for the trial judge in making his determination of the admissibility of the robbery evidence.

5. **Constitutional Law § 30— discovery — evidence allegedly withheld — evidence not material or exculpatory**

Defendant's contention that the State failed to comply with his pretrial request for voluntary discovery is without merit where the evidence allegedly withheld was not shown to be material or exculpatory. G.S. 15A-902.

6. **Criminal Law § 104— defendant's exculpatory statements — introduction by State — rebuttal by State proper**

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements; however, the introduction by the State of an exculpatory statement made by a defendant does not preclude the State from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the State contradicts or rebuts defendant's exculpatory statement.

7. **Homicide § 21.6— first degree murder — defendant's exculpatory statement — sufficiency of evidence**

In a prosecution for murder committed during the perpetration or attempt to perpetrate an armed robbery, evidence was sufficient to be submitted to the jury notwithstanding the State's introduction of defendant's exculpatory statement which tended to show self-defense, since the State offered evidence on each element of murder in the perpetration of a felony and also offered evidence sufficient to contradict and rebut defendant's exculpatory statement.

8. **Homicide § 19.1— self-defense — deceased's criminal record — testimony properly excluded**

In a prosecution for murder committed during the perpetration or attempt to perpetrate an armed robbery where defendant contended that he acted in self-defense, defendant was not prejudiced by the trial court's refusal to allow a witness to respond to defendant's question concerning the witness's knowledge of the victim's prior convictions for assault with a deadly weapon, since the excluded testimony was that the witness knew nothing about the victim's prior criminal record, and such testimony was of no probative value and added nothing to defendant's contention that he acted in self-defense.

9. **Homicide § 12.1—first degree murder — indictment in statutory language — premeditation and deliberation — perpetration of felony**

An indictment drawn in accordance with G.S. 15-144 is sufficient to sustain a verdict of guilty of murder in the first degree based

upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony.

10. **Constitutional Law § 80; Homicide § 31.1— first degree murder — life imprisonment substituted for death penalty**

A sentence of life imprisonment is substituted for the death sentence imposed upon conviction of first degree murder.

Justice EXUM dissenting.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Long, J.*, at the 17 November 1975 Session of FORSYTH Superior Court.

Defendant was tried and convicted of first degree murder of Elijah Whitaker Jones and was sentenced to death. This case was docketed and argued as No. 18 at the 1976 Fall Term.

The State introduced evidence tending to show that on 13 February 1975 Mrs. Etta G. Ross saw defendant enter Jones' Confectionery store on North Trade Street in Winston-Salem. Mrs. Ross then heard a "boom" and saw defendant leave the store. She noticed that defendant appeared to be pulling up his belt as he left and that he was walking with a limp. Defendant walked around the store and across a vacant lot in the direction of Main Street. Shortly thereafter, Elijah Whitaker Jones, proprietor of Jones' Confectionery, was found dead in the store. His death was caused by injuries inflicted from a shotgun blast which opened a hole in his chest approximately 4.8 centimeters in diameter.

Mr. Paul Richard Hanes testified that during the early afternoon of 13 February he was delivering mail along Main Street in Winston-Salem. While so engaged, Mr. Hanes witnessed defendant staggering up Main Street. After several steps, defendant fell in a state of semiconsciousness. Mr. Hanes and several other men went to defendant's aid. The men discovered a sawed-off shotgun tucked in the waistband of defendant's trousers. One of the men checked the gun to see if it was loaded. The gun was found to contain one spent shell and one live round. Upon further examination of defendant, it was determined that he had been shot in the chest. Defendant was then taken to the hospital.

Upon defendant's release from the hospital, he made a statement to police. In this statement, defendant stated that he had entered Jones' Confectionery to purchase a package of cigarettes. After purchasing the cigarettes and receiving his change, defendant turned and began walking toward the door. As he looked over his shoulder, defendant saw that Mr. Jones was about to shoot him with a pistol. He turned his body, and Mr. Jones shot defendant on his left side. Defendant then took the sawed-off shotgun from his right hip pocket and shot Mr. Jones. At this time, defendant stated that he was between twelve and fifteen feet from Mr. Jones. Defendant then put the gun back in his pants and staggered to Main Street.

The State further offered the testimony of Katie Ferguson who testified that she was employed at the XL Cleaners in Winston-Salem. At approximately 2:15 p.m. on 8 February 1975, Ms. Ferguson stated that defendant entered the cleaners and asked for laundry in a fictitious name. Defendant then brandished a sawed-off shotgun and asked for, and received, the money contained in the cash register. Ms. Ferguson then identified the sawed-off shotgun used in the XL Cleaners robbery as being the same gun that was recovered from defendant as he lay prostrate upon Main Street on 13 February. This identification was corroborated by Ms. Ferguson's prior identification of the gun from photographs shown to her by police officers.

Other facts necessary to the decision of this case will be set forth in the opinion.

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

David B. Hough for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that the evidence of his participation in the robbery of the XL Cleaners on 8 February 1975 was improperly admitted and that the admission of such evidence constitutes reversible error. This contention is based upon defendant's assertion that the evidence was not probative of any issue in the case and was introduced solely to inflame the jury, to the prejudice of defendant.

In the oft-cited case of *State v. McClain,* 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954), Justice Ervin set forth the well established rule "that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. [Citations omitted.]" There are, however, certain equally well established exceptions which permit the admission of evidence of the commission of other offenses. *State v. McClain, supra,* and cases cited therein. *See also* 1 Stansbury, N. C. Evidence §§ 91, 92 (Brandis rev. 1973) ; 1 Wharton, Criminal Evidence §§ 240-264 (13th ed. 1972). In present case, one exception which is set out in *State v. McClain, supra,* at 175, 81 S.E. 2d at 366, is relevant to defendant's appeal:

> "2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. [Citations omitted.]"

As stated in *State v. Fowler,* 230 N.C. 470, 473, 53 S.E. 2d 853, 855 (1949) :

> "[P]roof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. [Citations omitted.]"

In determining whether another offense is properly admitted into evidence, we are guided by the following principle:

> "' . . . The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. . . . Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally

spurious presumption of guilt in the minds of the jurors.' " *State v. McClain, supra,* at 177, 81 S.E. 2d at 368.

In the case at bar, defendant was convicted of murder committed in the perpetration of a felony under G.S. 14-17, which, in pertinent part, provides:

> "A murder which shall be . . . committed in the perpetration or attempt to perpetrate any . . . robbery . . . or other felony . . . shall be deemed to be murder in the first degree and shall be punished with death. . . . "

Thus, in present case, the State had the burden of proving beyond a reasonable doubt that defendant murdered Elijah Jones during the perpetration or attempted perpetration of an armed robbery. *See State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970); *State v. Lane,* 166 N.C. 333, 81 S.E. 620 (1914).

Under G.S. 14-87, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. An attempted armed robbery occurs when a defendant "with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person." *State v. Price,* 280 N.C. 154, 157-58, 184 S.E. 2d 866, 869 (1971). By the terms of G.S. 14-87, the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapons. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968). The attempt itself is a violation of the statute and is a felony. To sustain its burden of proof that defendant was involved in perpetrating or attempting to perpetrate a robbery, the State was required to show that defendant possessed a specific intent to rob Elijah Jones.

In *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972), the State introduced evidence that defendant and two cohorts entered a Gulf station in Charlotte and endeavored to rob the attendant by the threatened use of a pearl-handled pistol. The attendant began to "tussle" with one of the would-be robbers and successfully foiled the robbery. Defendant testified that the "tussle" was not caused by an attempted robbery, but rather

was caused by a dispute over a refund alleged to be due from a vending machine. In rebuttal, the State introduced testimony concerning the defendant's participation in the robbery of a convenience store, which occurred about three weeks prior to the robbery of the Gulf station. It appeared that during the convenience store robbery defendant had acquired the pearl-handled pistol which was used in the Gulf station robbery. In upholding the admission of the evidence concerning the robbery of the convenience store, this Court held that the convenience store robbery was competent as substantive evidence of defendant's intent at the time he entered the Gulf station. The Court further held that this intent was a critical disputed element of the State's attempted robbery case, and that the evidence of the prior robbery clearly tended to prove intent. *See State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Fowler, supra; State v. Beam*, 184 N.C. 730, 115 S.E. 176 (1922); *State v. Pannil*, 182 N.C. 838, 109 S.E. 1 (1921); *State v. Simons*, 178 N.C. 679, 100 S.E. 239 (1919); *State v. Parish*, 104 N.C. 679, 10 S.E. 457 (1889); *State v. Murphy*, 84 N.C. 742 (1881), for similar cases. *See also Annot.*, 42 A.L.R. 2d 854, 858 (1955), and later case service for a compilation of cases admitting evidence of other offenses to show intent.

In the case at bar, we are of the opinion that the evidence of defendant's participation in the robbery at the XL Cleaners was admissible. At trial, there was evidence of overt acts designed to bring about the robbery and endanger human life. Defendant entered Jones' Confectionery carrying a sawed-off shotgun concealed in his trousers. While in the store, defendant shot the proprietor at close range and then fled on foot. When he was apprehended, he was found to possess a fresh pack of cigarettes but no money or identification. Further, defendant lied as to his name and address when questioned by police officers. These acts furnish a sufficient basis for an inquiry into defendant's state of mind when he entered the store. The evidence of the robbery at the XL Cleaners, during which defendant used the same sawed-off shotgun as in present case, sheds light upon defendant's intent and *quo animo*. The XL Cleaners evidence clearly tends to prove a material, hotly contested and crucial issue in the State's case. Thus, under the facts of this case, we hold that the requisite connection between the extraneous criminal transaction and the crime charged exists and

makes the evidence of the XL Cleaners robbery admissible on the question of intent.

In his charge, the trial judge limited the use of the XL Cleaners robbery to the issues of intent and identity. Because of our disposition of the case on the issue of intent, we do not deem it necessary to decide whether the admission of the evidence to show identity was proper. *But see State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969). *See also* 2 Stansbury, N. C. Evidence § 166 (Brandis rev. 1973). There was never any issue concerning identity raised during trial. In fact, defendant openly admitted that he shot Jones. Hence, if any error was committed by instructing the jury to use the evidence on the issue of identity, it could not have reasonably affected the verdict and was harmless. *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966).

Defendant further contends that the admission of the evidence of the robbery at the XL Cleaners violated due process by denying him a fair trial. To support his position, he cites *Boyd v. United States,* 142 U.S. 450, 35 L.Ed. 1077, 12 S.Ct. 292 (1892), wherein the United States Supreme Court held that, under the facts of that case, evidence of five prior robberies committed by one or both defendants was inadmissible because the evidence "did not, in the slightest degree, elucidate the issue before the jury, namely, whether the defendants murdered John Dansby. . . . " 142 U.S. at 454, 35 L.Ed. at 1078, 12 S.Ct. at 294. The Court, however, further stated:

> "If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. . . . " 142 U.S. at 457-58, 35 L.Ed. at 1080, 12 S.Ct. at 295.

We feel that defendant's contention may not be sustained under the holding in *Boyd.* In *Wood v. United States,* 41 U.S.

(16 Pet.) 342, 360, 10 L.Ed. 987, 994 (1842), the United States Supreme Court stated:

> "[W]here the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent, or motive in the particular act, directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

The United States Supreme Court has permitted the introduction of evidence of other crimes to prove intent and motive in numerous cases. *See Annot.*, 93 L.Ed. 185 (1950), for a sampling of these decisions. That Court has further held that the states are free to promulgate rules concerning relevance, and that evidence of other crimes may be admitted to establish intent if done in accordance with those rules of relevance. *Lisenba v. California*, 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280 (1941). *Cf. Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606, 87 S.Ct. 648 (1967), (upholding the admission of evidence of other crimes in the trial of a recidivist). Accordingly, we do not find any decision from the United States Supreme Court which would bar the admission of the evidence of the XL Cleaners robbery. Thus, we overrule this assignment.

[2] Defendant next contends that the trial judge violated G.S. 1-180 by expressing an opinion during the course of the trial and during his charge. In the record there appears an *ex parte* entry by the trial judge concerning a discussion he had with a juror. The juror approached the judge and stated that she had heard outside of court that defendant was seventeen years of age. The juror indicated to the judge that had she known of defendant's age during jury selection "her opinion concerning the death penalty might have been different." The judge instructed the juror not to disclose this information to any of the other jurors and stated that he would rule upon whether to remove her from the jury after all the evidence was received. During the course of the trial, defendant's age was received in evidence. In his entry, the trial judge found "that the out-of-

court information received by [the juror] was non-prejudicial to either the State or the defense."

After the trial judge had completed his instruction to the jury, the following transpired:

> "Are there any requests for further instructions other than those—I believe there is one request from the State here that I have not covered.
>
> MR. YEATTS: Your Honor, may I approach the bench prior to giving you that instruction?
>
> THE COURT: Yes.
>
> (Mr. Hough and Mr. Yeatts approach the bench.)
>
> THE COURT: Members of the jury, the State has requested that I instruct you that the age of the defendant is not material to the issue of his guilt. Sympathy or pity or prejudice based on age should not influence your findings in this case."

Defendant contends that by permitting the juror to continue to serve, and then granting the State's request for a supplemental instruction concerning defendant's age, an opinion was expressed adverse to defendant.

G.S. 1-180 requires that a judge "declare and explain the law arising on the evidence given in the case" and prohibits any expression of opinion by the judge. As was stated in *State v. Canipe*, 240 N.C. 60, 65, 81 S.E. 2d 173, 177 (1954):

> "Whether the conduct or the language of the judge amounts to an expressison of his opinion on the facts is to be determined by its probable meaning to the jury. . . ." *See also State v. Carriker*, 287 N.C. 530, 215 S.E. 2d 134 (1975); *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Williamson*, 250 N.C. 204, 108 S.E. 2d 443 (1959).

We are unable to conclude that the actions of the trial judge conveyed to the jury any expression of opinion as to defendant's guilt or innocence. There is no evidence that the juror who was permitted to remain on the jury after having spoken to the trial judge ever conveyed her concern or knowledge to the other jurors. Her statement to the judge was in all

probability favorable to defendant. Further, the trial judge expressly found that the juror could continue to serve on the jury without prejudice to the State or defendant. The instruction with respect to defendant's age could not be construed as an expression of opinion. In response to a request by the State, the trial judge was simply explaining the law as it applied to the case. This assignment is overruled.

[3] Defendant next contends that the following portion of the charge was erroneous:

> "Now, if you believe this evidence, you may consider it—that is, if you believe the evidence relating to the alleged robbery of XL Cleaners, you may consider that evidence for one purpose only, or for these two purposes only, that is tending to show the identity of the person who may have committed the alleged homicide and that the defendant intended to rob Jones' Confectionery on the date in question. You may not consider the evidence relating to any robbery of XL Cleaners for any other purpose other than these limited purposes."

Under this assignment, defendant contends that by not requiring the jury to be satisfied beyond a reasonable doubt that defendant committed the robbery at the XL Cleaners, the State was relieved of its burden of proving each element of its case beyond a reasonable doubt.

In *State v. Crane*, 110 N.C. 530, 15 S.E. 231 (1892), the defendant requested that the court charge the jury as follows:

> "In this case the State relies in a large measure upon evidence of circumstances, and it is incumbent on the State, therefore, to prove all the circumstances on which it relies, beyond a reasonable doubt, and it is the duty of the jury in passing upon the guilt or innocence of the defendant to discard any and all circumstances that are not so proven."

The trial judge declined to give this instruction and the defendant excepted. In upholding the trial judge, this Court stated:

> "The prayer for instruction was properly refused. When the State relies upon a chain of circumstances, such that each circumstance is a necessary link in the chain, it would then be proper to charge that 'a chain is no stronger than its weakest link'; but when various facts and circum-

stances are relied on, as in this case, to prove a fact, it would not be correct to charge, as asked, that 'It was incumbent upon the State to prove all the circumstances on which it relies, beyond a reasonable doubt.' . . . 'upon the whole evidence,' the jury must be satisfied beyond a reasonable doubt of defendant's guilt, and if not, they must acquit him." *State v. Crane, supra,* at 536-37, 15 S.E. at 232. *See also State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329 (1944) ; *State v. Trull,* 169 N.C. 363, 85 S.E. 133 (1915) ; 2 Stansbury, N. C. Evidence § 211 (Brandis rev. 1973).

From these authorities, we are of the opinion that every fact or circumstance relied upon by the State need not be proved beyond a reasonable doubt. Each element, of which the facts and circumstances of a case are a part, must be so proved. Thus, it is sufficient for conviction that the jury is satisfied upon the whole evidence that each element of the crime has been proved beyond a reasonable doubt.

Other jurisdictions have taken a similar approach where evidence of other crimes has been offered on the question of intent. In *Scott v. State,* 141 N.E. 19 (Ohio 1923), defendant was convicted of soliciting and accepting a bribe. During trial, evidence of defendant's commission of other similar offenses was introduced on the issue of intent. During the trial court's charge, the jury was instructed: "In determining the intent . . . you may consider the testimony as to other [crimes] . . . by the defendant, if any you find from the evidence has been [committed]." 141 N.E. at 25. Defendant assigned as error the omission from the charge that the other crimes must be proved beyond a reasonable doubt. In rejecting this contention, the court reasoned that, in order to convict, the State must prove each material element of the crime beyond a reasonable doubt. The State was not, however, required to prove every fact beyond a reasonable doubt. In conclusion, the court stated:

"Now, the intent is one of the elements that must be established to prove the crime of bribery. The testimony as to other similar previous offenses committed by the defendant, not too remote in period of time, is admissible in a bribery case to prove intent. Intent, the ultimate material fact of intent, must be established beyond a reasonable doubt, and the court must so charge. To hold, however, that other similar crimes which tend to establish intent

must be proved beyond a reasonable doubt is to extend the rule far beyond all reason. If carried to its logical conclusion such a doctrine would require that every probative fact offered in the case be established beyond a reasonable doubt, which is certainly not the law." 141 N.E. at 26.

The reasoning and holding of the court in *Scott v. State, supra,* appears to represent the majority view of other jurisdictions. *See People v. Allen,* 88 N.W. 2d 433 (Mich. 1958); *State v. Everett,* 302 N.E. 2d 723 (Ill. App. 1973); *State v. Drews,* 144 N.W. 2d 251 (Minn. 1966); *State v. Mitchell,* 545 P. 2d 49 (Ariz. 1976); *Territory v. Awana,* 28 Haw. 546 (1925); 1 Wharton, Criminal Evidence § 263 (13th ed. 1972). *But see Curry v. State,* 333 S.W. 2d 375 (Tex. Crim. App. 1960), for the minority view.

Throughout the charge in present case, the trial judge emphasized that the State bore the burden of proving each element of the crime beyond a reasonable doubt in order for the jury to find the defendant guilty. Intent was one of the elements of the crime charged. The defendant's participation in the XL Cleaners robbery was but a fact which was probative of the element of intent and, under our decisions, was not required to be proved beyond a reasonable doubt. Reading the charge as a whole, the jury was fully and properly instructed on the burden and quantum of proof necessary for conviction. *State v. Henderson,* 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Cannon,* 227 N.C. 338, 42 S.E. 2d 344 (1947); *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465 (1947). We find no merit in this contention.

[4] Under this same assignment of error, defendant further contends that the jury should have been instructed that it must find a "causal relation or logical and natural connection between the two acts [the robbery of the XL Cleaners and the murder at Jones' Confectionery] . . . . " For this proposition he cites *State v. Beam,* 184 N.C. 730, 115 S.E. 176 (1922). The cited portion from *State v. Beam, supra,* dealt with the factors to be used by the trial judge in determining whether the proffered testimony is admissible and competent to be introduced at trial. As was stated in *State v. McClain, supra,* at 177, 81 S.E. 2d at 368:

> " ' . . . Whether the requisite degree of relevancy exists is a judicial question . . . . Hence, if the court does not

clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.' [Citations omitted.]"

Accordingly, the determination of the connection between the XL Cleaners robbery and the Jones' Confectionery murder was for the trial judge in making his determination of the admissibility. Having properly admitted this testimony, the weight and probative force of the evidence was for the jury. *See* 1 Stansbury, N. C. Evidence § 8 (Brandis rev. 1973).

[5] Prior to trial, defendant made a request for voluntary discovery pursuant to G.S. 15A-902. In his request for information, defendant asked for all information which "would in any manner and to any degree (no matter how slight) tend to exculpate the Defendant in this case." The State responded by giving defense counsel the opportunity to "inspect and copy or photograph any of the material or physical evidence in question."

At trial, Ms. Ferguson, the person robbed at the XL Cleaners, testified: "The police officers came to my premises after this particular incident and dusted the counter for fingerprints." Later, Ms. Ferguson also testified that she had looked at three stacks of photographs furnished by police in an attempt to identify defendant. Officer L. T. Cann stated: "I did take some fingerprints, dusted some Coca-Cola bottles that were there in [Jones' Confectionery]. I dusted one that was on the counter. I made two latent lifts from that particular bottle, meaning lifts of fingerprints." Cann further testified that the fingerprints did not match those of defendant. There was also evidence that a "gunshot test" was performed on the victim, Elijah Jones. No objection was lodged at trial to the admission of the evidence outlined above. However, defendant contends that this evidence was exculpatory and that its suppression violated *Giles v. Maryland,* 386 U.S. 66, 17 L.Ed. 2d 737, 87 S.Ct. 793 (1967), and *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963).

In *State v. Gaines,* 283 N.C. 33, 45, 194 S.E. 2d 839, 847 (1973), this Court stated:

"The standards enunciated in *Brady* by which the solicitor's conduct in this case is to be measured require us

to determine whether there was (a) suppresssion by the prosecution after a request by the defense (b) of material evidence (c) favorable to the defense. Obviously, under *Brady* a refusal to grant a pretrial motion for discovery is not reversible error unless the movant shows that evidence favorable to him *was suppressed.* In order to do so, he must certainly show what that evidence was. Defendant has made no such showing here. The solicitor stated he had no evidence favorable to the defendant and nothing in this record contradicts him. '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.' *Moore v. Illinois,* 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972)." *See also State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975).

In the case at bar, there is no indication that the fingerprints, photographs and "gunshot test" were material or exculpatory. Defendant was afforded the opportunity to cross-examine the witnesses regarding the evidence and to place in the record how the evidence would have been material and favorable to the defense. In the absence of any such showing, this assignment must be overruled.

[6] Defendant assigns as error the failure of the trial court to enter judgment as of nonsuit at the close of all the evidence. Specifically, the defendant contends that he comes within the purview of the rule stated in *State v. Carter,* 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *See also State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972). However, the introduction by the State of an exculpatory statement made by a defendant does not preclude the State from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the State contradicts or rebuts defendant's exculpatory statement. *State v. Bolin, supra; State v. McKnight,* 279 N.C. 148, 181 S.E. 2d 415 (1971); *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407 (1953).

On motion for judgment as of nonsuit, all of the admitted evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. *State v. Bolin, supra; State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. McKnight, supra; State v. Cutler,* 271 N. C. 379, 156 S.E. 2d 679 (1967).

[7] In the case at bar, the State's evidence tended to show that on 8 February 1975, defendant had possession of the weapon (a sawed-off shotgun wrapped in black electrical tape) used in the shooting of Elijah Jones and that defendant used this weapon to rob the XL Cleaners on 8 February. Thereafter, on 11 February 1975, defendant secreted the weapon in some bushes adjacent to his house. On 13 February, defendant entered Jones' Confectionery with the murder weapon concealed in his trousers. While in the store, defendant shot the proprietor, Elijah Jones, apparently at close range. Following the shooting, defendant fled the scene of the crime. *See State v. Bolin, supra.* Defendant then lied to a police investigator about his name and address.

Defendant's statement was to the effect that he had entered Jones' Confectionery to purchase a pack of cigarettes. Defendant purchased the cigarettes—giving the proprietor Jones fifty cents and receiving two cents in change. As he was walking out the door, defendant turned and was shot by Jones with a pistol. Defendant then pulled a sawed-off shotgun from his right hip pocket and shot Jones.

Defendant offered no explanation as to why Jones, the stepfather of defendant's close friend and a man who had never been known by his neighbors to cause trouble, would shoot the defendant. Defendant stated that he purchased cigarettes and received two cents in change. Yet, defendant was found with a package of cigarettes and no change. Defendant stated that he shot Jones with a sawed-off shotgun while standing at the door of the store—approximately twelve to fifteen feet by defendant's estimation. Yet, Jones's wound was only 4.8 centimeters in diameter—indicating he was shot at close range. The State's evidence is sufficient to contradict and rebut defendant's ex-

culpatory statement, and casts great doubt upon the credibility of defendant's statement.

Considering the evidence in the light most favorable to the State, the evidence is sufficient to carry the case to the jury. As we have previously discussed in this opinion, the State introduced evidence on each element of murder in the perpetration of a felony. With respect to defendant's exculpatory statement, we turn to the words of Justice Exum in *State v. Hankerson,* 288 N.C. 632, 638, 220 S.E. 2d 575, 581 (1975):

> "While none of these circumstances taken individually flatly contradicts defendant's statement, taken together they are sufficient to 'throw a different light on the circumstances of the homicide' and to impeach the defendant's version of the incident. The State is not bound, therefore, by the exculpatory portions of defendant's statement. The case is for the jury."

Hence, it was for the jury to say whether defendant's guilt was established beyond a reasonable doubt. The jury has spoken.

[8] Mrs. Etta Ross, a witness for the State, testified without objection that she had never seen any trouble in the deceased's store in her life. On recross-examination, Mrs. Ross further testified without objection: "I never saw him give any trouble to anybody in that store. I have never heard of him giving any trouble, never seen him giving any trouble in that store. I have not heard him give any trouble to anybody, anywhere at all." Mrs. Ross was then asked by defendant's lawyer: "Mrs. Ross, were you aware of the fact that Mr. Jones had been arrested and convicted on four different occasions of assault with a deadly weapon?" The State objected to this question and the objection was sustained. Mrs. Ross was allowed to answer for the record: "No, I don't know nothing about it."

Defendant contends that prejudicial error was committed by denying him the opportunity to place before the jury the response of Mrs. Ross to the question concerning Elijah Jones's past criminal activities. Assuming for the sake of argument that such matters could be brought out in this case, we find no prejudicial error in the exclusion of the evidence. The excluded testimony of Mrs. Ross was of no probative value and added nothing to defendant's contention that he acted in self-defense. Mrs. Ross stated that she did not know of any criminal

record Elijah Jones may have had. As was stated in *State v. Mundy,* 182 N.C. 907, 910, 110 S.E. 93, 94 (1921), "it is clear that the excluded evidence added nothing . . . and that if the same had been admitted it could have had no appreciable effect on the result." Mrs. Ross's testimony could not have affected the result of this case. Hence, we overrule this assignment.

Defendant next insists that the trial court erred in instructing the jury on the doctrine of felony-murder since the bill of indictment only charged:

> "THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Michael Anthony May, late of the County of Forsyth, on the 13th day of February, 1975, with force and arms, at and in the said County, feloniously, willfully, and of his malice aforethought, did kill and murder Elijah Whitaker Jones contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

[9] The indictment set out above is in the form expressly authorized by G.S. 15-144. In numerous cases, this Court has held that an indictment drawn in accordance with G.S. 15-144 is sufficient to sustain a verdict of guilty of murder in the first degree based upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony. *See, e.g., State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970). If defendant had deemed it necessary, he could have moved for a bill of particulars to ascertain the theory which the State intended to rely upon at trial. *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970); G.S. 15A-924, 925. This was not done. Hence, we find no merit in this assignment.

[10] In *Woodson v. North Carolina,* 428 U.S. 280, 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 indicted, convicted and sentenced. Thus, by authority of the provisions of Section 7, Chapter 1201 of the 1973 Session Laws (1974 Ses-

sion), a sentence of life imprisonment must be substituted for the death sentence.

Our examination of the entire record discloses no error affecting the validity of the verdict returned by the jury. Defendant's conviction must therefore be upheld. The sentence of death imposed upon defendant must be vacated, however, and life imprisonment imposed. To the end that a sentence of life imprisonment may be substituted, the case is remanded to the Superior Court of Forsyth 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 of superior court 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.

Justice EXUM dissenting:

I dissent for the reason that it was prejudicial error in this case to permit the state to offer evidence of defendant's participation in an earlier, distinct, and separate robbery for the purpose of proving that defendant was robbing or attempting to rob Jones' Confectionery at the time he shot Mr. Jones. While the majority attempts to justify the admission of this evidence as tending to prove defendant's "intent," it seems clear to me that the real and only conceivable purpose of the evidence was to show *what happened* inside the confectionery. Clearly it could not be offered for this purpose. "Logically, the commission of an independent offense is not proof in itself of the commission of another crime." *State v. McClain,* 240 N.C. 171, 173-74, 81 S.E. 2d 364, 365 (1954), *quoting Shaffner v. Commonwealth,* 72 Pa. 60, 13 Am. R. 649, which was also quoted with approval in *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193 (1904). "A person cannot be convicted of one offense upon proof that he committed another . . . . " *Peo-*

ple v. Molineux, 168 N.Y. 264, 292, 61 N.E. 286, 294, 62 L.R.A. 193, 237 (1904), *quoting Coleman v. People*, 55 N.Y. 81 (1873). "One who commits a crime may be more likely to commit another; yet, logically, one crime does not . . . tend to prove another unless there is such a relation between them that proof of one tends to prove the other." *State v. Beam*, 184 N.C. 730, 734, 115 S.E. 176, 178 (1922). *See also State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976) and *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974) where evidence of other crimes was admitted but the Court was careful to note in both cases that *what happened* was not really at issue. The crucial question in those cases was the identity of the perpetrator.

The real factual question, as a close examination of the evidence will show, is what happened inside Jones' Confectionery, not defendant's intent, *mens rea*, or state of mind. The state *contends* defendant was robbing or attempting to rob Jones at the time of the shooting. There is, however, no direct evidence of what happened other than defendant's out-of-court statement offered by the state in which he denied committing or attempting to commit a robbery. His statement was that he took the gun to his brother's house near North Trade Street apparently for the purpose of leaving it with his brother. Upon finding his brother not at home, he left with the gun. He walked into Jones' Confectionery for the purpose of buying a pack of cigarettes. After he bought the cigarettes and while he was leaving, the shooting took place which resulted in his being wounded and Jones' being killed. Other evidence in the case showed that Jones' stepson was a friend of defendant and that it was customary for defendant to visit the confectionery.

In an effort to discredit this out-of-court statement which it offered *and* to prove that in fact defendant was committing or attempting to commit an armed robbery, the state offered evidence that five days before defendant robbed another establishment with the same or a similar shotgun. Merely discrediting defendant's statement would not, of course, establish a robbery or its attempt.

To say that under these circumstances evidence of the prior crime is offered on the question of defendant's intent, demonstrates misunderstanding of this exception to the general rule of exclusion of evidence of other crimes and extends the exception far beyond anything this Court has heretofore per-

mitted. In each of the cases I have found on the subject, evidence of another criminal offense offered to prove defendant's criminal intent with regard to the crime being tried was admitted only after proof of an overt act of defendant which, if done with criminal intent, would constitute a crime.

In *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972), relied on by the majority, the defendants were charged with attempted armed robbery of one Charles Stewart, a service station attendant. There was plenary evidence of what happened inside the service station. The state's evidence tended to show that defendants, one of whom was brandishing a pistol, demanded that Stewart open the cash register. Stewart resisted, a tussle ensued, and the defendants ran, their efforts foiled. Defendants testified that they were not trying to rob Stewart but the gun was brandished and the tussle was caused because Stewart would not give them a refund when one of them received no merchandise after putting money in a vending machine. Thus, when defendants rested, the crucial issue in the case was not what happened but what kind of intent accompanied the brandishing of the gun. Was it drawn with the intent to rob or in an effort to obtain a refund to which defendants were entitled?

To resolve this ambiguity, the state *in rebuttal* offered evidence that on a prior occasion one of the defendants had robbed a Little General Store in the process of which he stole the very pistol used in the crime on trial.

Long presents the classic case of the state's having proved an ambiguous act—an act which, done with the necessary criminal intent is a crime, but, done without that intent, is not.

All the cases relied on by the majority are similar to *Long*, and reach similar results. They are, however, materially unlike the case at bar in that in this case there is no proof of any overt act by defendant which could be construed as constituting a robbery or an attempt to rob the confectionery. The facts that defendant entered the store with a shotgun; shot Jones; fled the scene after the shooting; and lied to the officer at the hospital about his true name and address do not constitute such proof. While the majority says the shotgun was "concealed" on the defendant when he entered the store, there is no testimony whatever that it was. The only state's witness who saw him enter was sitting on her front porch across the street, some distance

away from the confectionery. She testified simply that she did not see the gun at that time. The state's evidence also tends to show that Jones shot first. It is, of course, mere speculation, but it is possible that defendant entered the store to buy cigarettes with a gun. Jones, mistakenly believing he was going to be robbed, shot defendant who then returned the fire. The point is, assuming defendant's statement is disregarded, we don't know what actually happened inside the store.

Robbery, as the majority correctly notes, requires the taking of personal property of another from his person or in his presence and without his consent. Even an attempted robbery as the majority also notes requires "*some overt act* calculated and designed to bring about the robbery. . . ." (Emphasis supplied.) Until there is evidence in the case of some overt act which could be construed as constituting a taking or an attempt to take the property of another, the question of defendant's intent simply does not arise. Though the suspicion aroused may be strong, there is absolutely no evidence that defendant was taking anything or that he was attempting to take anything at the time the shooting occurred.

The effect of the majority's ruling is far-reaching. It amounts to this: The state, lacking evidence of what actually happened, may bootstrap itself around this deficiency by offering evidence of what defendant did on some other occasion. This, according to the majority, proves defendant's intent to do on the occasion in question what the state contends he did. This, in turn, somehow proves that he did it. Under the majority's holding the rule against admitting such evidence is totally abrogated. The state may use it in any case, but particularly in those cases where there is no other evidence as to what happened.

One theory upon which evidence of the 8 February robbery might be admisible to prove the commission or attempted commission of a robbery on 13 February is that evidence of both events tends to prove a scheme, plan, or design on the part of the defendant to rob both establishments. "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design." 2 Wigmore on Evidence § 304 at 202 (3d. ed. 1940). Conduct which constitutes

another crime is admissible on this theory "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain, supra* at 176, 81 S.E. 2d at 367.

When, however, another crime is offered as conduct tending to show defendant's plan to do an act which in turn tends to prove that the act was done, there must be more than merely some similarity between the other crime and the crime sought to be proved. The incidents must be so strikingly alike in detail that evidence of both raises a reasonable inference of the existence of a plan out of which both sprang. "But where the conduct offered [to prove a plan] consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing Intent. . . . The added element then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" 2 Wigmore on Evidence § 304 at 202 (3d. ed. 1940). (Emphasis the author's.)

The only similarity shown by the evidence between the XL Cleaners' incident and that at Jones' Confectionery was that a similar type gun was used in both. This is not enough to permit a reasonable inference that the two incidents sprang from a common plan. The dissimilarities in the two incidents are, really, more striking and tend to negate the existence of such a plan. The XL robber wore a cap hiding his hair and used an alias in robbing an establishment where he was not known and which was apparently frequently manned by two persons. In contrast, defendant made no attempt to conceal his identity at Jones' Confectionery. Indeed, he wore trousers with his first name embroidered on them. He was known to Jones and was a friend of Jones' son. The confectionery was entirely a one-man operation. Because of a lack of evidence as to precisely what happened inside the confectionery there can be no comparison in any detail of defendant's *modus operandi* in the two incidents. *Compare, e.g., State v. Tuggle, supra.*

This evidence then falls far short of tending to show that both the 8 February and the 13 February incidents arose out

of a common plan devised by defendant to rob both establishments. Rather, when closely examined, it tends to negate such a plan. *See People v. Molineux, supra,* where evidence of different motives for otherwise similar crimes precluded one from being offered in the trial of the other on the common plan theory *Molineux* was distinguished on this ground in *State v. Smoak,* 213 N.C. 79, 195 S.E. 72 (1938).

The difference between the criminal intent, or scienter, exception and the common plan exception to the rule generally excluding other crimes evidence is subtle but important to maintain. Criminal intent or scienter is always one of the essential elements of the crime sought to be proved, or if not technically an element, at least a state of mind without which there can be no crime. The rule as stated by Justice Ervin in *State v. McClain,* 240 N.C. 171, 175, 81 S.E. 2d 364, 366 (1954) makes this clear:

> "2. Where a specific mental intent or state *is an essential element of the crime charged,* evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. [Citations omitted.]" (Emphasis supplied.)

This criminal intent consequently is always one of the ultimate facts sought to be proved by the state. It is not a fact from which other facts such as overt acts of the defendant may be inferred. Indeed the question of intent does not arise really until some overt act which could constitute the crime is proven. A plan or design to commit a crime, on the other hand, like criminal intent, may exist in the mind of the defendant; but it is not a mental state which is a *sine qua non* of the crime. It is not an ultimate fact sought to be proved by the state. It is a mere evidentiary fact which, if properly established, may tend to prove the crime.

Neither do I believe the evidence is admissible on the question of identity. Evidence of other crimes offered for this purpose is admissible "[w]here the accused *is not definitely identified* as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person . . . . " *State v. McClain, supra,* 240 N.C. at 175, 81 S.E. 2d at 367. (Emphasis supplied.) This, of course, is not a case where the accused is

not definitely identified. There was no real issue regarding defendant's identity except that raised theoretically by his plea of not guilty. The state's evidence clearly and unequivocally identified him as the perpetrator of the homicide. Defendant offered no evidence to the contrary. *Compare State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975), where the defense was alibi; *State v. Tuggle, supra,* where defendant expressly denied his participation in the robbery; *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972), where identification of defendant was a key factual issue; and *State v. Thompson, supra,* 290 N.C. at 441, 226 S.E. 2d at 493, where "[t]he crucial issue in the trial was . . . whether defendant . . . was one of the two men who participated in the crime." The Iowa Supreme Court has aptly observed in *State v. Wright,* 191 N.W. 2d 638, 640 (Iowa 1971):

> "There must be some factual issue raised to permit evidence of other crimes under the noted exceptions. If no such issue exists, then the evidence is unnecessary and the exception may not be relied upon. . . . Here the defendant presented no evidence, and the State's theory posed an uncomplicated factual situation for jury determination. . . . There is no real issue . . . to justify the admission of testimony of other crimes, nor can it be seriously argued that the evidence was admissible to prove identity."

For these reasons I would hold that admitting the evidence in this case of the 8 February robbery was improper, highly prejudicial, and entitles defendant to a new trial.

RGK, INC. v. UNITED STATES FIDELITY AND GUARANTY COMPANY, CECIL'S, INC., AND FAIRWAY PROPERTIES, A LIMITED PARTNERSHIP

No. 111

(Filed 13 June 1977)

1. Principal and Surety § 10— private construction project — action on payment bond — necessity for attachment of prime contract

A materialman who sues on a prime contractor's payment bond is not required to set forth in his complaint, by attachment or otherwise, the contract between the contractor and the owner in order to resist successfully a motion to dismiss.

2. Principal and Surety § 10— private construction project — action on payment bond — sufficiency of complaint

Plaintiff subcontractor's complaint was sufficient to state a claim for relief against the surety on the prime contractor's payment bond without the attachment of the prime contract to the complaint where the complaint alleged: the prime contractor and the owner contracted for the construction of an apartment complex on the owner's land; the prime contractor and the surety executed a payment bond naming the owner as obligee for the use and benefit of claimants, including plaintiff by definition, whereby they undertook that the prime contractor would promptly pay all claimants for labor and material used or reasonably required for use in the performance of the prime contract; pursuant to two other attached contracts between the plaintiff, the prime contractor, and the owner, the plaintiff performed clearing and grading work and installed storm sewers upon the owner's property; the prime contractor and owner have failed and refused to pay for such work; the labor and materials furnished by plaintiff were used or reasonably required for use in the performance of the prime contract; by reason of this default by the prime contractor, the surety is indebted to plaintiff in a specified amount under provisions of the payment bond; and plaintiff notified the surety of the prime contractor's default and made demand upon it for the performance of its obligation under the bond.

3. Principal and Surety § 10— action on contractor's payment bond — effect of default of owner

An assertion that the owner defaulted in payments to the prime contractor of a private construction project does not, as a matter of law, bar the right of a subcontractor which furnished labor and materials for the project to recover from the surety upon a bond securing payment by the prime contractor of materialmen and laborers.

4. Principal and Surety § 10— private construction bond — materialman as third-party beneficiary

Plaintiff materialman was a third-party beneficiary of the prime contractor's payment bond and was thus entitled to maintain an action thereon in its own name against the surety on the bond if it alleged a breach of the condition of the bond.

5. Principal and Surety § 10— private construction bond — consideration of prime contract

Where the prime contract was incorporated by reference into the prime contractor's payment bond, the provisions of the prime contract must be considered in construing any ambiguous language in the condition of the bond itself.

6. Principal and Surety § 1— compensated surety — construction of contract

The contract of a compensated surety is to be interpreted liberally in the interest of the promisee and beneficiaries rather than strictly in favor of the surety.

Justice EXUM concurring in result.

Chief Justice SHARP concurs in concurring opinion.

ON *certiorari* to the Court of Appeals to review its decision, reported in 31 N.C. App. 708, 230 S.E. 2d 600.

The matter was heard in the Superior Court before *McLelland, J.*, upon the motion of the United States Fidelity & Guaranty Company, hereinafter called USF&G, under Rule 12(b)(6), that the plaintiff's action against it be dismissed for failure of the complaint to state a claim upon which relief could be granted against USF&G. Treating this as a motion for judgment on the pleadings under Rule 12(c), McLelland, J., granted the motion, found there was no just reason for delay and granted final judgment for USF&G so as to permit an immediate appeal. The Court of Appeals reversed.

The material allegations of the amended complaint, summarized and renumbered, are as follows:

(1) RGK entered into two similar contracts with Fairway and Cecil's which contracts are attached to and made part of the complaint. By these contracts, RGK promised to clear and grade and to install storm sewers upon a described tract of land owned by Fairway, upon which tract Fairway and Cecil's had entered into a third contract (not attached to the complaint and not set forth in the record on this appeal) for the construction of an apartment complex. By the contracts so made by it with the said two defendants, RGK promised to furnish "labor, equipment and supervision" for such clearing, grading and storm sewer construction and Fairway and Cecil's promised to pay RGK specified amounts for the performance of such work, payments to be made by them monthly as the work progressed, pursuant to estimates, and final payment to be made within 30 days after completion. RGK further promised in these contracts "to turn said work over to Cecil's, Inc., and Fairway Properties in good condition, free and clear from all claims, encumbrances, and liens of any person, firm or corporation other than RGK growing out of the performance of" such contracts.

(2) On 21 March 1974, Cecil's, as principal, and USF&G, as surety, entered into a "labor and material payment bond" the provisions of which, material to this appeal, are:

"KNOW ALL MEN BY THESE PRESENTS:

"That Cecil's, Inc., * * * as Principal, * * * and United States Fidelity & Guaranty Company, * * * as Surety, * * * are held and firmly bound unto Fairway Properties, * * *

as Obilgee [sic], hereinafter called Owner, for the use and benefit of claimants as hereinbelow defined in the amount of Two Million, Six Hundred Forty-eight Thousand, Two Hundred and Ninety and No/100—Dollars ($2,648,-290.00**) for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

"WHEREAS, Principal has by written agreement dated December 4, 1974, entered into a contract with Owner for Construction of The Wellington Apartments, Burlington, North Carolina, in accordance with drawings and specifications prepared by James D. Miller, AIA, which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

"(1) A claimant is defined as one having a direct contract with the Principal or with a sub-contractor of the Principal for labor, material, or both used or reasonably required for use in the performance of the contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

"(2) The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit. * * * "

(3) Beginning 1 March 1974 and continuing through 8 May 1975, RGK furnished materials and labor pursuant to its said contracts with Fairway and Cecil's and continued the performance of such contracts, the labor and materials so furnished by it being "used or reasonably required for use in the performance of the contract between Cecil's, Inc., and Fairway Properties" for the construction of the said apartment complex.

(4) Cecil's and Fairway have failed and refused to pay RGK for its performance under its said contracts with them and Cecil's has failed and refused to pay the plaintiff "for the labor and/or materials furnished for use in the construction of the Wellington Apartments pursuant to the December 4, 1974 contract between Cecil's, Inc. and Fairway Properties." By reason of such default by Cecil's, USF&G is indebted and obligated under the provisions of the said bond to the plaintiff in the amount of $16,294.60 with interest.

(5) By letter dated 6 November 1975, the plaintiff notified USF&G of Cecil's default under the terms of the bond and made demand upon it for performance of its obligation as surety under such bond.

The prayer of the complaint is for the recovery from the defendants, jointly and severally, of $16,294.60 with interest and costs and that the said amount be declared a lien upon the property and for an order directing the sale of such property for the satisfaction of such lien.

This action was originally instituted 10 July 1975 against Cecil's and Fairway only. On 13 August 1975, by order of the Bankruptcy Judge of the United States District Court for the Middle District of North Carolina all persons were enjoined from instituting or taking further steps in any proceedings or suits against Fairway or its properties, bankruptcy proceedings having been instituted against Fairway pursuant to Chapter XII of the Bankruptcy Act.

Cecil's filed its answer to the original complaint admitting the making of the contracts with RGK and admitting that the plaintiff furnish certain labor and materials to the described tract of land but demanding strict proof as to the amount owed by Cecil's to RGK and asserting a counterclaim against RGK, in an unspecified amount, for damage sustained by Cecil's as the result of alleged delay by RGK in its performance of the said

contracts and as the result of RGK's performance thereof in an "unworkmanlike manner." To this counterclaim RGK filed its reply, denying any such delay or improper performance by it.

USF&G was made a party to the action by the plaintiff's amended complaint on 11 December 1975.

Cecil's and USF&G filed a joint answer to the amended complaint, wherein Cecil's reaffirmed its defenses set forth in its original answer and USF&G adopted these. The answer to the amended complaint admitted the execution of the bond above mentioned and further admitted that "the labor and/or materials furnished by the plaintiff, as alleged in the original complaint, were used or reasonably required for use in the performance of the contract between Cecil's, Inc., and Fairway Properties * * * for the construction of" the above mentioned apartment complex. It denied that anything was due and owing RGK from either Cecil's or Fairway under the said bond.

Vernon, Vernon & Wooten, P.A., by John H. Vernon III for RGK, Inc., James H. McAdams, d/b/a McAdams Masonry and General Electric Company.

Brooks, Pierce, McLendon, Humphrey and Leonard by L. P. McLendon, Jr., and M. Daniel McGinn for USF&G.

LAKE, Justice.

The sole question before us on this appeal is the correctness of the judgment on the pleadings in favor of the defendant, the alleged basis of which is the failure of the complaint to state a claim on which relief may be granted. Thus, we are not concerned here with whether the plaintiff, if permitted to proceed with trial of this action, can hit a home run or will strike out but only with whether, on the facts alleged, he is entitled to come to bat. In our opinion he is and, therefore, the judgment of the Court of Appeals should be affirmed.

Rule 8 of the Rules of Civil Procedure, G.S. 1A-1, provides:

"*General rules of pleadings.*

"(a) *Claims for relief.*—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain

"(1) A short and plain statement of the claim sufficiently particular to give the court and the parties

notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

"(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * *

"(e) *Pleading to be concise and direct; consistency.*—

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

* * *

"(f) *Construction of pleadings.*—All pleadings shall be so construed as to do substantial justice."

"A motion for judgment on the pleadings 'is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader.' 51 Am. Jur., Pleadings, § 336." *Powell v. Powell,* 271 N.C. 420, 156 S.E. 2d 691 (1967); *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18 (1964). In the leading case on this question in this Court, we said that a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is the modern equivalent of a demurrer under our former Code of Civil Procedure. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). We there said, "[W]e conclude that the legislature intended to relax somewhat the strict requirements of detailed *fact* pleading and to adopt the concept of 'notice pleading.' * * * Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata,* and to show the type of case brought." We also 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." Nevertheless, the plaintiff's complaint must allege enough "to give the substantive elements of his claim." 5 Wake Forest Intra. L. Rev. 70, 73; *Sutton v. Duke,*

supra. USF&G contends the complaint in this action does not do this.

In *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E. 2d 476 (1968), we said, "In an action for breach of a building or construction contract—just as in any other contract case—the complaint must allege the existence of a contract between plaintiff and defendant, the specific provisions breached, *the facts constituting the breach*, and the amount of damages resulting to plaintiff from such breach." In *Wilmington v. Schutt*, 228 N.C. 285, 45 S.E. 2d 364 (1947), speaking through Justice Barnhill, later Chief Justice, this Court said, omitting citations:

> "There is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts which constitute his cause of action. The production of evidence to support the allegations thus made may and should await the trial."

In *Sossamon v. Cemetery, Inc.*, 212 N.C. 535, 193 S.E. 720 (1937), speaking through Chief Justice Stacy, this Court said, omitting citations:

> "The question for decision is whether it is mandatory in an action on a written contract to make the entire writing a part of the complaint. The answer is 'No,' especially where the part omitted from the complaint, as in the instant case, is in the possession of the defendant. An allegation containing the substance of the agreement, as in the present complaint, will suffice as against a demurrer."

This principle of pleading, well established under the former Code, is not specifically set forth in the present Rules of Civil Procedure, G.S. Chapter 1A, but it is implicit in the present requirement of Rule 8 that the plaintiff's claim for relief be set forth in "a short and plain statement of the claim" and that "each averment of a pleading shall be simple, concise, and direct."

[1] Relying upon *Builders Corp. v. Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155 (1952), which we shall discuss below, the defendant contends that the complaint is deficient because the bond,

on which the plaintiff sues, a copy of which is attached to and made part of the complaint, expressly incorporates into itself, by reference, the construction contract between Cecil's and Fairway and this contract is not attached to or set forth in the complaint. It is a matter of common knowledge that such contracts, themselves, usually incorporate, by reference, the specifications and plans, including blueprints, of the architect pursuant to which the prime contractor promises to build the structure upon the land of the owner. To hold that, in order to resist successfully a motion to dismiss, a materialman, who sues on a contractor's payment bond, must set forth in his complaint, by attachment or otherwise, the contract between the builder and the owner, including all plans and specifications for the construction of an apartment complex, would make a farce of the requirement of the present rules that the plaintiff state his claim in a "short and plain statement * * * simple, concise, and direct." If the complaint, sufficient upon its face to "give the court and the parties notice of the transactions * * * intended to be proved showing that the pleader is entitled to relief," does not correctly allege the contractual undertaking of the defendant, it is a simple matter for the defendant, in his answer, to deny the making of the alleged contract and put the plaintiff to his proof thereof, whether the supposed inaccuracy be due to some provision in the document incorporated by reference into the contract sued upon or otherwise.

[2] This complaint alleges in substance: Cecil's and Fairway contracted for the construction of an apartment complex on land owned by Fairway; Cecil's, as principal, and USF&G, as surety, executed a payment bond naming Fairway as obligee for the use and benefit of claimants, including the plaintiff by definition, whereby they undertook that Cecil's would promptly pay all claimants for labor and material used or reasonably required for use in the performance of the contract between Cecil's and Fairway; pursuant to two other contracts between the plaintiff, Cecil's and Fairway, which contracts, in full, are attached to and made part of the complaint, the plaintiff agreed to perform, and Cecil's and Fairway agreed to pay for, the clearing and grading of and the installation of storm sewers upon the said property owned by Fairway; the plaintiff performed the agreed work; Cecil's and Fairway have failed and refused to pay the plaintiff for such work; the labor and materials so furnished by the plaintiff were used or reasonably required for use in the

performance of the contract between Cecil's and Fairway for the construction of the apartment complex; by reason of this default by Cecil's, USF&G is indebted to the plaintiff, under the provisions of the said payment bond, in the amount of $16,294.60 with interest; the plaintiff notified USF&G of the default by Cecil's and made demand upon it for the performance of its said obligation as surety under the said bond. It would be difficult to imagine a simpler, plainer, more concise statement of the plaintiff's claim against USF&G. In what respect does it fall short of giving to the court and to the defendants notice of the transactions intended by the plaintiff to be proved or fail to give the substantive elements of its claim?

While the sufficiency of the complaint is to be determined upon the face of the complaint, we note that the answer filed jointly by Cecil's and USF&G admits the making by Cecil's and Fairway of the contracts with the plaintiff for the grading, clearing and storm sewer installation, admits the execution by Cecil's and by USF&G of the payment bond and admits that the labor and materials furnished by the plaintiff were used or reasonably required for use in the performance of the contract between Cecil's and Fairway for the construction of the apartment complex. Thus, it is admitted that the plainitff is a "claimant" as defined in the bond and, as such, "may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereof."

USF&G contends that, assuming everything alleged in the complaint is true and can be proved by the plaintiff, the plaintiff cannot recover from USF&G on its bond because the plaintiff has not alleged a default by Cecil's in its performance of its contract with Fairway for the construction of the apartment complex. In support of that contention, it relies upon *Builders Corp. v. Casualty Co., supra.* We find no merit whatever in this contention. That is not the contract, performance of which is secured by the bond on which plaintiff sues.

[3] It is asserted in the brief of USF&G in the Court of Appeals that, in the course of the construction of the apartment complex, some controversy arose between Fairway and Cecil's as to the quality of the work done by Cecil's, whereupon Fairway wrongfully cut off payments to Cecil's and Cecil's thereafter suspended work on the project. That is, USF&G asserts,

in its brief, that Fairway, not Cecil's broke the prime contract. However that may be, these circumstances are not referred to in any way in the pleadings, do not appear elsewhere in the record and cannot form a basis for the judgment of the Superior Court dismissing the action for failure of the complaint to state a claim for which relief can be granted, or a basis for granting a motion for judgment on the pleadings. The plaintiff has not alleged or admitted these supposed facts. We have no way of knowing, from the record before us, that any breach of the prime contract by either party thereto has occurred. If, however, USF&G's assertion in this respect be true, does that, as a matter of law, bar plaintiff's right to recover from USF&G upon its bond securing payment by Cecil's of materialmen and laborers? We think the answer must be, "No."

[4] It is indisputable that, although Fairway is the named obligee in the payment bond, the plaintiff is a third-party beneficiary thereof and is thus entitled to maintain an action thereon in its own name against the surety if it alleges a breach of the condition of the bond. *Builders Corp. v. Casualty Co., supra; Bristol Steel & Iron Works v. Plank,* 163 Va. 819, 178 S.E. 58, 118 A.L.R. 50 (1935); Corbin on Contracts, § 798; Restatement of Contracts, §§ 136, 139; Restatement of Security, § 165; 17 Am. Jur. 2d, Contractor's Bonds, § 4. The obligation of the principal and the surety to the plaintiff materialman, upon their bond, is separate and independent from their obligation, if any, thereon to the owner, the named obligee.

Obviously, the surety (USF&G) is not liable to the third-party beneficiary (RGK) upon its bond unless there has been a breach *of the condition of the bond* by its principal (Cecil's). *Builders Corp. v. Casualty Co., supra.* It is equally obvious that the complaint in the present case alleges such breach of the condition of the bond by Cecil's, also a defendant in this action, in that it alleges Cecil's contracted directly with the plaintiff for the performance by the plaintiff of labor and the furnishing by the plaintiff of materials in connection with the construction of the apartment complex on the property of Fairway and Cecil's promised to pay the plaintiff the agreed price for such work, which payment Cecil's has not made. Plaintiff also alleges Fairway too was a party to its contracts and is liable to it, but that is immaterial to this appeal. Nothing else appearing, this is sufficient to impose liability upon the surety (USF&G) under its bond.

The condition of the bond on which plaintiff sues is not performance by Cecil's of its contract with Fairway, but is that Cecil's "shall promptly make payment to all claimants, as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the contract" between Cecil's and Fairway. It is acknowledged that the plaintiff's claim is for such labor and materials and that Cecil's has not paid the plaintiff therefor. Cecil's counterclaim for an unspecified amount is not material to this appeal. As Professor Corbin states in his treatise on Contracts, § 800: "Words of 'condition' are not words of 'promise' in form; but in the case of a penal bond they must be construed to be words of promise, inasmuch as the only express words of promise are those in which payment of the penal sum is promised. The alternative seems to be between enforcing the penalty and construing the words of condition as a promise and enforcing that. The courts have adopted the latter alternative, penalties being no longer collectible." Thus, the bond here in suit is a contract by Cecil's, as principal, and USF&G, as surety, that Cecil's will pay plaintiff for its work and if Cecil's does not, USF&G will.

[5, 6] The contract between Fairway and Cecil's is, by the terms of the bond, which in turn is made part of the complaint, incorporated into the bond. Thus, its provisions are to be considered in any question of construction of any ambiguous language in the condition of the bond itself. 17 Am. Jur. 2d, Contractor's Bonds, § 4; *Bristol Steel & Iron Works v. Plank, supra;* Corbin on Contracts, § 798, p. 168. However, it is well settled that the contract of a compensated surety, such as USF&G in this case, is to be interpreted liberally in the interest of the promisee and beneficiaries rather than strictly in favor of the surety. Corbin on Contracts, § 800, p. 176. There is no suggestion whatever in the record before us that there is anything in the contract between Cecil's and Fairway which tends to contradict or qualify the clear, direct, unambiguous undertaking to pay laborers and materialmen furnishing labor and materials for use in the completion of the construction for which Fairway and Cecil's contracted. Certainly, there is nothing in the allegations of the complaint which suggests such conflict or qualification. Of course, the contract between Faiway and Cecil's must be consulted to determine whether the work done and materials furnished by RGK were done and furnished for use in the performance of that contract and are,

therefore, within the coverage of the bond, but here USF&G admits this.

USF&G, in its brief, contends: "If the owner is the party who has defaulted on the contract [i.e., the contract between Fairway and Cecil's] then the surety company is not liable since the surety company gives its bond to secure the performance of the general contractor, not that of the owner. * * * [T]he general contractor only agrees with the owner to pay the subcontractors/suppliers that money which it obtains from the owner." It is a sufficient answer to this contention that "it is not so nominated in the bond." The bond plainly states that Cecil's and USF&G will pay claimants "for all labor and material used or reasonably required for use in the performance of the contract." USF&G's contention would transform this from a payment bond into a fidelity bond, making the surety liable only if Cecil's fails properly to apply the money it receives from Fairway. In its petition to this Court for a writ of certiorari, USF&G asserts:

> "If a surety company is going to be liable not only when its principal has defaulted, but also when the other party to the contract [Fairway] has defaulted, then the consequences are obvious. The surety companies in North Carolina will either have to establish premium rates which reflect the fact that they are vouching for the performance by the general contractor *and* the owner on every construction project; *or* surety companies will simply refuse to issue payment bonds on a project, since, as a practical matter, they would not be able to sufficiently investigate the owners as well as the general contractors and would not be able to secure indemnification agreements from owners with whom they do not regularly deal."

This is simply not the case. Here, the surety has not undertaken that Fairway will pay Cecil's and Cecil's will apply what it so receives to the payment of those who supply Cecil's with labor and materials. It has promised unequivocally that Cecil's will pay those suppliers. The surety investigated the financial solvency of the general contractor, its principal, and when satisfied of his solvency, issued its bond saying, "If he does not pay his suppliers and laborers on this construction project, we will." If the surety company does not want to assume this obligation, but merely wants to vouch for his fidelity in applying to labor

and material claims the amount he receives from the owner, then the surety company ought, in simple good faith, to change the condition of its bond so as to make it state in plain English that it is underwriting only the fidelity of its principal in the handling of money paid to him by the owner and ought to strike from its own prepared bond form the undertaking now there stated in plain English that if the contractor does not pay the materialmen, the surety will do so, with no strings attached to the promise. It is the latter undertaking which this bond states and nothing in the pleadings set forth in the record qualifies this undertaking. If the premium charged is not adequate for the risk expressly and plainly assumed in the bond, the remedy is to increase the premium, not to distort the plain terms of the bond after the condition stated therein has been broken.

It is a matter of common knowledge that, while such a bond as that here sued upon is beneficial to the owner of the property through advoidance of the filing of claims of liens thereon, its real purpose is to benefit the owner through enabling the prime contractor to purchase labor and materials on credit. The surety company enters into the bond in return for the premium paid to it and with full knowledge that credit will be extended to the prime contractor by subcontractors, laborers and materialmen in reliance upon the bond. It is inconceivable that USF&G does not have available to it a copy of the contract between Fairway and Cecil's. Here, without any allegation that there is any provision of the contract between Fairway and Cecil's which negates or qualifies the condition of the bond, USF&G, after the plaintiff has extended to Cecil's the contemplated credit, seeks to avoid liability on its own contract, written upon a form prepared or chosen by it, solely because there *might be* something in the prime contract which purports to qualify the liability of Cecil's and its surety to the suppliers of labor and materials. We decline to adopt that test of the sufficiency of the complaint before us.

In *Foundry Co. v. Construction Co.*, 198 N.C. 177, 151 S.E. 93 (1930), this Court, speaking through Justice Adams, in a suit by a subcontractor upon a bond given to secure the prime contractor's performance of a private construction contract, such as that between Fairway and Cecil's, said:

> "The contract and bond must be construed together. *Manufacturing Co. v. Andrews*, 165 N.C. 258. In the former

> the contractor agreed to pay for the materials he purchased, and in the latter he not only agreed to pay all claims of materialmen; he stipulated that 'this bond shall be for the benefit of the materialmen and laborers having a just claim, as well as for J. D. Hood, trustee [the owner].' *By virtue of these provisions the claim of the plaintiff is not subject to the defenses available to the surety against Hood, the promisee and owner of the property.*" (Emphasis added.)

This is in accord with the opinions of courts of other jurisdictions. See: *Aetna Indemnity Co. v. Indianoplis Mortar & Fuel Co.*, 178 Ind. 70, 98 N.E. 706 (1912); *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson*, 124 Iowa 599, 100 N.W. 550 (1904); *Standard Asphalt & Rubber Co. v. Texas Bldg. Co.*, 99 Kan. 567, 162 P. 299 (1917); *Doll v. Crume*, 41 Neb. 655, N.W. 806 (1894); *Pennsylvania Supply Co. v. National Casualty Co.*, 152 Pa. Super. 217, 31 A. 2d 453 (1943).

In *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson, supra*, the Iowa Court said:

> "So far as we can see, the rights and interest of the company were scrupulously guarded, and there is no good ground for holding the surety discharged because of irregularity in the payments [by the owner to the contractor]. Even if the surety should be held released, on this account, as to the owner, it would not follow that it is also released as to the claims of the subcontractors. The bond being given for the benefit of the latter as well as the former, their right of action cannot be affected by an act for which they are in no manner responsible. *Their right is not derived from, nor held under, the owner of the building, but it is an independent right,* of which they are not to be deprived save by their own act or default." (Emphasis added.)

In *Standard Asphalt & Rubber Co. v. Texas Bldg. Co., supra*, the Kansas Court said:

> "Laborers and materialmen have rights under this statutory bond independent of the obligee. The bond is required by the Legislature for the benefit of laborers and those who furnish material for railroad construction, and no agreement between the railway company and the contractor or between him and the guaranty company can affect the rights of laborers and materialmen to recover

upon the bond given for their protection. Modifications of the contract, *or failures to observe some of its provisions,* which might be good defenses as between the guaranty company and the obligee in the bond, will not relieve the guaranty company from liability upon the bond to laborers and materialmen." (Emphasis added.)

In this respect there is no basis for distinction between a statutory bond for public construction and a bond for the payment of subcontractors, laborers and materialmen performing services or supplying materials used by the prime contractor in the performance of a private construction contract once it be determined that the bond in connection with the private construction project was given for the benefit of such claimants as well as for that of the owner. That is clearly established here by the provisions of the bond itself.

Professor Corbin, in his treatise on Contracts, in § 798, at p. 169, says:

"In any case where the third parties [RGK] have an enforceable right as beneficiaries of the bond, the direct promisee [Fairway] in the bond has no power to discharge the surety's duty to them, whether by a release, by an extension of time to the principal contractor, *by breaches of his own duties,* or by agreeing upon changes in the principal contract." (Emphasis added.)

In 17 Am. Jur. 2d, Contractor's Bonds, § 16, it is said:

"The mere fact that laborers and materialmen did not know of the existence of a contractor's bond to the owner, conditioned for their benefit, at the time they furnished the materials or labor, does not prevent them from availing themselves of the protection of the bond. * * * Furthermore, since the rights of laborers and materialmen are independent of the right of the obligee in the bond, it is generally held that *their right to recover against a surety on such a bond cannot be defeated by any act or omission of the obligee named in the bond,* not authorized or participated in by the laborers or materialmen, even though the conduct or default is such as would release the surety from liability to the obligee." (Emphasis added.)

We turn now to *Builders Corp. v. Casualty Co., supra,* upon which USF&G relies. There the bond sued upon was a per-

formance *and* a payment bond. Here the bond is a payment bond only. There the prime contractor did not complete the contract. The surety failed to do so. The contractor's creditors, including the plaintiff materialman, completed the construction and sold the building but, after applying the proceeds to the payment of a prior mortgage, nothing was left for the payment of the claims of the plaintiff and other creditors similarly situated. The contract, for the performance of which the bond was given, was not made part of the complaint. A demurrer to the complaint was sustained by this Court.

The record in that case shows that the bond there sued upon was entitled "Owner's Protective Bond," whereas the bond in the present case is entitled "Labor and Material Payment Bond." The record in that case shows that bond was conditioned upon faithful performance of the contract and payment of persons furnishing labor and materials for use in or about the construction and the saving of the owner harmless from all cost and damage by reason of the contractor's default or failure so to do. That bond further provided, "All persons who have furnished labor or material for use in or about the improvement shall have a direct right of action under the bond, *subject to the owner's priority.*" (Emphasis added.) Speaking through Justice Barnhill, later Chief Justice, this Court there said:

> "To entitle a materialman to recover from the surety *on a performance bond,* he must allege and prove a debt due by the contractor for material furnished by him for use in the performance of his contract with the owner.
>
> "The liability of the surety does not rest solely upon the terms of its bond. It grows out of and is dependent upon the terms of the contract executed by its principal. If there has been no default by the principal then there can be no enforceable debt against the surety.
>
> "The obligation of the bond is to be read in the light *of the contract it is given to secure.* The extent of the engagement entered into by the surety is to be measured by the terms of the principal's agreement. Of necessity, therefore, to determine the surety's liability to third persons on its bond given for their benefit *and to secure the faithful performance of a building contract as it relates to*

them, the contract and the bond must be construed together. * * *

"The plaintiff does not plead the contract between Benfield [the principal contractor] and Harris [the owner] nor does it set forth in its complaint the material terms thereof. It is true the complaint contains the allegation that the defendant executed its bond 'reciting' certain facts in respect to a supposed contract between Benfield and Harris. But this will not suffice. The complaint must make it appear that Benfield, *by virtue of his contract with Harris,* is now indebted to it and the terms of the contract must be pleaded, certainly to the extent necessary to enable the court to determine that, upon the facts alleged, such indebtedness does exist so as to render defendant liable for the payment thereof. These allegations are essential to the cause of action plaintiff seeks to enforce.

"Only a part of the bond itself on which plaintiff relies is by reference made a part of the complaint. The builder's contract is a material part thereof. This contract is not attached either as such or as a part of the performance bond.

* * *

"Furthermore, plaintiff's right to recover is subject to the owner's priority. What is that priority? Is it of such nature as to foreclose plaintiff's action? The Court can answer only upon a consideration of both contracts. Hence it is essential that plaintiff plead both contracts as a part of its cause of action." (Emphasis added throughout.)

In the Builders Corporation case, the record in this Court shows that the complaint attached, and made a part of itself, the bond sued upon and the bond expressly provided that the claim of creditors, such as the plaintiff, would be "subject to the owner's priority." Thus, the complaint on its face showed that the plaintiff's right to recover from the surety was subject to a condition precedent, namely, that all claims of the owner had been paid, leaving of the penal sum of the bond enough to pay the plaintiff in whole or in part. This condition precedent was not alleged in the complaint to have been performed. Therefore, the plaintiff in that case had not alleged a right to recover from the defendant surety and the demurrer to the complaint was properly sustained. Since the complaint in that case, on its

face, showed the owner's rights had priority over those of the plaintiff in pursuing the surety on the bond, and those rights could not be determined without the contract between the owner and the prime contractor, allegation and proof of those rights as established by the prime contract would be necessary to establish the right of the plaintiff to recover on the bond. That is not the situation in the present case. Here any right the owner (Fairway) had under the bond would be fully discharged by payment by USF&G of the claims of laborers and materialmen.

Of course, as the Court said in *Builders Corporation v. Casualty Company, supra,* "The obligation of the bond is to be read in the light of the contract it is given to secure." What contract was the present bond given to secure? It was not given to secure performance of the contract between Cecil's and Fairway but to secure the performance of the contracts between Cecil's and his suppliers of labor and materials so as to enable Cecil's to procure labor and materials on credit. Of course, as the Court there stated, "If there has been no default by the principal there can be no enforceable debt against the surety." Here there was default by the principal of the bond (Cecil's) upon the contract which the bond was given to secure. This is clearly alleged in the complaint and the bond sued upon, and the contract secured thereby, are sufficiently alleged, as to their legal effect, in the complaint.

The complaint fully meets the requirements of Rule 8 in setting forth the plaintiff's claim for relief in "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved showing that the pleader is entitled to relief." It was, therefore, error to dismiss the action against USF&G and the decision of the Court of Appeals is

Affirmed.

Justice EXUM, concurring in result:

I concur in the result reached by the majority. Insofar as the majority opinion intimates any conclusions as to the ultimate rights and liabilities of the parties under the bond, however, I am unwilling to join in the opinion. Such intimations at this stage of the proceedings are, I believe, premature. Since

we have held that plaintiffs have stated a claim upon which relief may be granted despite failure to attach the prime contract to the complaint, we may not yet consider the potential effect of the provisions or specifications of that contract upon the liability of the surety, USF&G, to the materialmen plaintiffs.

This bond was executed by Cecil's as principal and USF&G as surety, with Fairway as named obligee, "for the use and benefit of claimants." The latter language assuredly removes from doubt the right of plaintiffs, as claimants under the bond, to sue the surety: they are, by the above quoted language, made express third party beneficiaries. The majority correctly recognizes this. The language gives them a cause of action *procedurally* independent of any right of the obligee, insofar as the obligee need not be made a party to the suit, to allow recovery by the third party beneficiary. To that extent, I believe the majority is correct in the observation that "[t]he obligation of the principal and the surety to the plaintiff materialmen, upon their bond, is separate and independent from their obligation, if any, thereon to the owner, the named obligee." The language does not, however, of itself deprive the surety in this action of defenses which would be available to it in an action by the obligee on the bond. Therefore the rights of the third party beneficiary plaintiffs to recover are not *necessarily substantively* independent of the rights of the obligee under the bond.

There has been some indication in these proceedings that the owner has defaulted in payments to the contractor which payments may have been intended as a condition precedent to the obligation of the principal, Cecil's, *to the owner* to pay subcontractors and materialmen. We simply cannot make any prediction about the effect of such a breach upon the rights of materialmen to recover from defendant surety until we see the prime contract as well as the documents already in the record.

Whether a default by the obligee, Fairway, under the prime contract, which would serve as a good defense in an action by Fairway against the surety, may also be a good defense in an action by the subcontractor beneficiaries of the bond, depends upon the nature of the surety's obligation under the bond. If the obligation to pay claimants not paid by the general contractor is *unconditional,* then the rights of those claimants is substantively independent of the rights of the obligee-owner, and

an action by the claimants may not be defeated by proof of the obligee's default under the prime contract. On the other hand, where the owner has failed to perform a condition precedent to the liability of the surety, there is a good defense to a suit by claimants.

> "If the contract between the promisee [here Fairway, the named obligee] and the promisor is a bilateral contract, the promise made for the benefit of a third party beneficiary may be unconditional or it may be conditional on performance of the return promise or tender thereof. If unconditional, a breach of duty by the promisee will not affect the right of the beneficiary against the promisor. If conditional and dependent, on the other hand, a failure by the promisee to perform his part may terminate the duty of performance by the promisor. . . . [T]he beneficiary's right is subject to conditions of the contract, whether they be express, implied, or constructive. If the breach of the promisee 'goes to the essence' and amounts to nonfulfillment of a condition precedent, the beneficiary's right is gone." 4 Corbin on Contracts, § 819, p. 277.

A surety bond is a third party beneficiary contract, and should be construed according to the usual rules pertaining to such contracts. *See* cases cited in Annotation, 77 A.L.R. 21, supplemented in 118 A.L.R. 57. The principles relied upon in the above quoted passage from Corbin apply equally to suretyship contracts as to others. A. Stearns, *The Law of Suretyship*, § 7.18, p. 225 (J. Elder Rev. 1951) notes that if the obligee "fails to perform a condition precedent to the principal's liability, the surety will not be required to perform."

The prime contract—not the subcontracts—is referred to in the bond as "The Contract" and is expressly incorporated by reference into the bond. It is, therefore, a part of the entire contract of suretyship between Cecil's, USF&G and Fairway. Many courts have recognized the possibility that the apparently straightforward effect of the condition of a bond may be limited by the provisions of the prime contract, where that contract is made part of the bond. *See, e.g., United States Fidelity & Guaranty Co. v. Housing Authority*, 206 Md. 379, 111 A. 2d 658 (1955) and *Lange v. Board of Education of Cecil County*, 183 Md. 255, 37 A. 2d 317 (1944), where bond, contract and specifications were all examined to determine the existence of

such limitations. The rule is: "The right of laborers and materialmen to recover on a building contractor's bond depends upon the terms of the bond construed in the light of the contract in connection with which it is executed." Annotation, 77 A.L.R. 21, 55 and cases cited therein, supplemented at 118 A.L.R. 57, 62. This rule is not empty verbiage. Courts construing *performance* bonds often express the rule in different terms, but with the same effect: "The right of laborers and materialmen to recover on a building contractor's bond depends upon the terms of the bond construed in the light of the *contract, performance of which is secured by the bond.*" See Annotation, *supra.* In both cases, the contract referred to in the rule of construction is that executed contemporaneously with the bond, i.e., the prime contract.

The majority opinion states that the prime contract "is *not* the *contract, performance of which is secured by the bond* on which plaintiff sues." (Emphasis added.) This statement may not be entirely misleading, since performance of the subcontracts is to some extent apparently guaranteed by the surety. But I believe the majority has prepared fertile grounds for misunderstanding by using in this context the same language, italicized above, which is so often included in the expressions of the general rule of construction by courts construing performance bonds. In any case, whatever the light that may be shed by the subcontracts upon the surety's obligation here, the contract generally held necessary to be construed with the bond is the prime contract.

Certainly the surety may undertake to stand as absolute guarantor of the contractor's payment to materialmen regardless of conditions expressed in the prime contract. Or it may undertake to guarantee simply whatever performance is required of the contractor by the owner in the prime contract conditioned upon the owner's return performance. The language of the condition of the bond appears to impose an unconditional obligation. The ultimate nature of the obligation, however, should not be determined by us without even a glance at the prime contract.

This is for the reason that "[t]he intention of the parties to a contractor's bond is the controlling factor in determining the rights of laborers and materialmen to recover on the bond. . . . [T]his intention is to be determined by the terms of the bond construed in the light of the contract in connection

with which it is executed." 17 Am. Jur. 2d, Contractors' Bonds § 17.

A decision as to the validity of USF&G's contentions that this contract of suretyship is conditioned upon the owner's performance is unnecessary to our holding in this case, which is simply that the plaintiffs' complaint is sufficient to state a claim upon which relief may be granted. The majority seems to have gone further. Assuming the contentions of USF&G regarding Fairway's breach to be true, the majority concludes that such contentions do not, as a matter of law, bar plaintiffs' recovery. I believe this conclusion is premature. Since we do not have before us the entire contract of suretyship, lacking the prime contract incorporated by reference in the bond, we should not draw any conclusions at all as to the validity of USF&G's contentions that the owner's default is a defense in this case. The majority's statement, being unnecessary to our decision, is *obiter dictum* and is not binding upon the trial court upon remand. Although the conclusion of the majority may ultimately be seen to be correct, it goes too far at this time. Our decision should have been limited strictly to whether this complaint was sufficient to state a claim without the attachment of the prime contract. Under our law such attachment is unnecessary. To say more at this time seems unwarranted and unwise.

Chief Justice SHARP concurs in this opinion.

JAMES H. McADAMS, d/b/a McADAMS MASONRY v. UNITED STATES FIDELITY & GUARANTY COMPANY, CECIL'S, INC., AND FAIRWAY PROPERTIES, A LIMITED PARTNERSHIP

No. 112

(Filed 13 June 1977)

ON *certiorari* to the Court of Appeals to review its decision, reported in 31 N.C. App. 750, 230 S.E. 2d 702, reversing the judgment entered by *McLelland, J.*, at the 23 April 1976 Session of ALAMANCE, dismissing the action as to United States Fidelity & Guaranty Company on the ground that the complaint failed to state a claim against that defendant upon which relief could be granted. The Superior Court ordered further that the motion of the said defendant for dismissal as to it be treated as

a motion for judgment on the pleadings and that final judgment for the said defendant be entered from which an immediate right of appeal would lie.

Vernon, Vernon & Wooten, P.A. by John H. Vernon III for James H. McAdams, d/b/a McAdams Masonry.

Brooks, Pierce, McLendon, Humphrey and Leonard by L. P. McLendon, Jr., and W. Daniel McGinn for USF&G.

LAKE, Justice.

In all respects material to this appeal the facts in this case are the same as those in Case No. 111, *RGK, Inc. v. United States Fidelity & Guaranty Company, et al.*, decided this day. The cases were consolidated for argument in this Court and but one brief was filed by each party. The single question presented upon this appeal is the same as that presented in that case and, for the reasons there stated, the judgment of the Court of Appeals reversing the judgment of the Superior Court and remanding the matter for further proceedings is

Affirmed.

GENERAL ELECTRIC COMPANY v. UNITED STATES FIDELITY & GUARANTY COMPANY, CECIL'S, INC., AND FAIRWAY PROPERTIES, A LIMITED PARTNERSHIP

No. 113

(Filed 13 June 1977)

ON *certiorari* to the Court of Appeals to review its decision, reported in 31 N.C. App. 749, 230 S.E. 2d 702, reversing the judgment entered by *McLelland, J.*, at the 23 April 1976 Session of ALAMANCE, dismissing the action as to United States Fidelity & Guaranty Company on the grounds that the complaint failed to state a claim against that defendant upon which relief could be granted. The Superior Court ordered further that the motion of the said defendant for dismissal as to it be treated as a motion for judgment on the pleadings and that final judgment for the said defendant be entered from which an immediate right of appeal would lie.

Vernon, Vernon & Wooten, P.A. by John H. Vernon III for General Electric Company.

Brooks, Pierce, McLendon, Humphrey and Leonard by L. P. McLendon, Jr., and W. Daniel McGinn for USF&G.

LAKE, Justice.

In all respects material to this appeal the facts in this case are the same as those in Case No. 111, *RGK, Inc. v. United States Fidelity & Guaranty Company, et al.*, decided this day. The cases were consolidated for argument in this Court and but one brief was filed by each party. The single question presented upon this appeal is the same as that presented in that case and, for the reasons there stated, the judgment of the Court of Appeals reversing the judgment of the Superior Court and remanding the matter for further proceedings is

Affirmed.

HENDERSON COUNTY AND LINCOLN K. ANDREWS v. FRANK OSTEEN (NOW DECEASED), HARLEY OSTEEN (IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF FRANK OSTEEN), AND ELLIE O. CHEATWOOD, UFALA O. STEPP, HAZEL O. STEVENSON, BLANCHE O. KING, HARLEY OSTEEN, SYLVENE O. SPICKERMAN, GRETA O. ALLEN, JEAN O. HOLDEN, MITCHELL M. OSTEEN, CARL M. OSTEEN, MARTHA SUE O. BROWN, JAMES D. OSTEEN AND THELMA O. TAYLOR AS ALL THE HEIRS AT LAW OF FRANK OSTEEN, DECEASED

No. 61

(Filed 13 June 1977)

1. Execution § 15; Taxation § 44— tax sale — attack on sale by motion in the cause — no bar of statute of limitations

Defendants who properly filed a motion in the cause seeking to set aside a tax sale of property more than four years after the execution sale were not barred by G.S. 1-52(10) providing that the bringing of "an action . . . for the recovery of real property sold for nonpayment of taxes" is barred if not brought within three years, since the present case was not "an action" nor was it for "the recovery of real property," but was instead a motion in the cause for the removal of a cloud on the movant's title; nor were defendants barred by the one year limitation in G.S. 105-393 (now G.S. 105-377), since the motion in the cause was not an "action or proceeding . . . brought to

contest the validity" of a title to real property, and it was not a "motion to reopen or set aside the judgment" pursuant to which the tax sale in question was held, but was instead an attack upon the sale itself.

2. **Execution § 3— tax judgment — execution after death of taxpayer not barred**

Foreclosure of a tax lien by judgment and execution, pursuant to G.S. 105-392 (now G.S. 105-375), is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor.

3. **Taxation § 40— execution upon tax judgment — death of taxpayer — notice required**

When a county has purchased a tax lien at a valid sale thereof and, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in G.S. 105-392 (now G.S. 105-375), the county may not, after the death of the taxpayer, without mailing notice to his last known address by registered or certified mail, as specified in the said statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser, since the provision of G.S. 105-397.1 (now G.S. 105-394) declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the deed, is unconstitutional. Article I, § 19 of the Constitution of North Carolina.

ON *certiorari* to the Court of Appeals to review its decision, reported in 28 N.C. App. 542, 221 S.E. 2d 907, reversing judgment for defendants entered by *Friday, J.*, at the 9 April 1975 Session of HENDERSON, docketed and argued as Case No. 14 at the Fall Term 1976.

The original defendant, Frank Osteen, died 17 July 1970. The defendant Harley Osteen is the administrator of his estate. The remaining defendants are his heirs at law. The plaintiff, Lincoln K. Andrews, is the grantee of the land here in question by a tax deed from Henderson County.

A judgment having been entered in favor of Henderson County against Frank Osteen for ad valorem taxes for the year 1967, assessed against him on account of his ownership of the land in question, and the said land having been sold pursuant to an execution issued upon the said judgment and having been conveyed, pursuant to such sale, to Lincoln K. Andrews, the administrator and heirs of Frank Osteen filed a motion in the cause praying that the sale of the said property by the county to Andrews be set aside. Andrews filed a motion for summary judgment in his favor, contending that the motion by the ad-

ministrator and heirs of Frank Osteen does not state a claim upon which relief can be granted, alleging, among other things, that their motion is barred by the one year statute of limitations and the three year statute of limitations set forth in G.S. 105-177 and G.S. 1-52(10), respectively.

The matter came on to be heard before Judge Friday, without a jury. He found the following facts, to which findings no exception was taken:

"1. That judgment was docketed in favor of Henderson County for nonpayment of real property taxes on October 1, 1969 covering Lots 67 through 75 and one unnumbered lot in Hillside Park Subdivision as recorded in Plat Book 1, page 162, Henderson County Registry, the property of Frank Osteen.

"2. That Frank Osteen died on July 17, 1970 in Henderson County, North Carolina.

"3. That execution on the docketed judgment in favor of Henderson County was issued on the 22nd day of July, 1970, five (5) days after the date of death of Frank Osteen.

"4. That Harley Osteen qualified as Administrator of the Estate of Frank Osteen on the 27th day of July, 1970.

"5. That the property was sold at Sheriff's sale on August 26, 1970 to Lincoln K. Andrews, the last and highest bidder, for the sum of $21.42.

"6. That the sale was confirmed and the property was deeded to Lincoln K. Andrews by deed dated the 15th day of September, 1970 and recorded in Deed Book 478 at page 37, Henderson County Registry.

"7. That at the time the property was sold to Lincoln K. Andrews for $21.42, the property had a value of approximately $12,000.00.

"8. That no notice of the execution sale was given to the Administrator or the heirs at law of Frank Osteen."

Upon these findings Judge Friday, being of the opinion that the decision in *Flynn v. Rumley,* 212 N.C. 25, 192 S.E. 868 (1937) is controlling, entered judgment setting aside and cancelling the said sale of the property, directing the Adminis-

trator of the Estate of Frank Osteen to pay to Lincoln K. Andrews the taxes levied by Henderson County upon the said property for the years 1967 through 1974, plus interest and cost, and ordering Lincoln K. Andrews to execute a quitclaim deed for the said property to the said Administrator.

From this judgment Lincoln K. Andrews appealed to the Court of Appeals assigning as error: (1) The failure of the trial judge to find as a matter of law that the motion in the cause filed by the Administrator and heirs of Frank Osteen failed to state a claim upon which relief could be granted; (2) the denial of the motion by Andrews for summary judgment in his favor; and (3) the signing of the order entered by Judge Friday.

At the hearing before Judge Friday, the Administrator, who is one of the heirs of Frank Osteen, and James Donno Osteen, another of the heirs, testified, each saying that he learned of the sale of the land to Andrews in the latter part of September 1970.

The Court of Appeals reversed and ordered the matter remanded to the Superior Court for the entry of a judgment dismissing with prejudice the motion in the cause filed by the Administrator and heirs of Frank Osteen.

W. Harley Stepp, Jr., for Henderson County.

Prince, Youngblood & Massagee by James E. Creekman for Lincoln K. Andrews.

James C. Coleman for Harley Osteen.

Roberts, Caldwell and Planer, P.A. by Joseph B. Roberts III, Amicus Curiae.

LAKE, Justice.

The procedure for the collection of ad valorem taxes by counties and municipalities is prescribed in the Machinery Act of 1939, as amended from time to time. G.S. Chapter 105, Subchapter II, G.S. 105-271 et seq. Since the tax sale of the Osteen land here involved occurred in 1970, we turn our attention to the statutes then in effect, using the then appropriate section numbers followed in parentheses by the section numbers of the comparable provisions now in effect.

The county tax collector is directed to report to the governing body of the county in April of each year a list of all taxpayers who have not paid ad valorem taxes which become due in the previous calendar year and which are liens on real property. Thereupon, the governing body causes to be published, or posted, a notice of public sale of the said liens, which sale is held on the first Monday in May, or the first Monday of any of the four succeeding months. The advertisement of such sale shows the name of each delinquent taxpayer, a brief description of the land listed for taxes by him and the principal amount of the taxes due thereon. G.S. 105-387 (now G.S. 105-369). Usually, the taxing unit, itself, purchases the tax liens at such sale.

Two methods for the foreclosure of a tax lien so purchased are provided by the statute: Foreclosure by action, G.S. 105-391 (now G.S. 105-374); and an alternate method, now called Foreclosure in rem, G.S. 105-392 (now G.S. 105-375).

The first, which is the only procedure available to private purchasers of tax liens and which may not be brought less than six months after the above mentioned sale of the tax lien, is an action in the Superior Court in the nature of an action to foreclose a mortgage. The listing taxpayer, his or her spouse, the current owner of the property, other taxing units having tax liens, other lienholders of record, and all other persons who would be entitled to be made parties to a court action to foreclose a mortgage on the property must be made parties and served with process. By its judgment, the court orders the sale of the property by a commissioner appointed in the judgment. The property is sold in fee simple, free and clear of all interests, rights, claims and liens, except liens for certain taxes and assessments. The commissioner reports the sale to the court, giving full particulars thereof and, after the expiration of the time allowed for an upset bid, may apply to the court for confirmation of the sale. Upon such confirmation, the commissioner conveys the property by deed to the purchaser. G.S. 105-391 (now G.S. 105-374). This procedure is not involved in the present appeal.

The second procedure, originally designated, "Alternative method of foreclosure," since 1971 designated, "In rem method of foreclosure," is set forth in detail in G.S. 105-392 (now G.S. 105-375). This is the procedure the use of which gave rise to the present appeal. The procedure so prescribed by the

statute in effect in 1970, insofar as pertinent to this appeal, was:

> "(a) * * * [T]he governing body of any taxing unit may order the collecting official to file, not less than six months nor more than two years * * * following the collector's sale of [tax liens] with the Clerk of Superior Court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The Clerk of Superior Court shall enter said certificate in a special book entitled 'Tax Judgment Docket * * * ' and shall index the same therein in the name of the listing taxpayer * * * . Immediately upon said docketing and indexing, said taxes * * * shall constitute a valid judgment against said property * * * which said judgment * * * shall have the same force and effect as a duly rendered judgment of the Superior Court directing sale of said property for the satisfaction of the tax lien * * * .
>
> "The collecting official filing said certificate shall, at least two weeks prior to the docketing of said judgment, send a registered or certified letter or by letter sent by certified mail to the listing taxpayer, at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. However, receipt of said letter by said listing taxpayer, or receipt of actual notice of the proceeding by said taxpayer or any other interested person, shall not be required for the validity or priority of said judgment or for the validity or priority, as hereinafter provided, or the title acquired by the purchaser at the execution sale. It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know, or should know, without special notice thereof, that such property

may be seized and sold for failure to pay such lawful taxes. * * *

"(b) *Motion to Set Aside.*—At any time prior to issue of execution, any person having an interest in said property may appear and move to set aside said judgment on the ground that the tax has been paid or that the tax lien on which said judgment is based is invalid.

"(c) *Issue of Execution.* — At any time after six months and before two years from the indexing of said judgment, execution shall be issued at the request of the governing body of the taxing unit, in the same manner as executions are issued upon other judgments of the Superior Court, and said property shall be sold by the sheriff in the same manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered or certified mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale. The purchaser at said sale shall acquire title to said property in fee simple, free and clear of all claims, rights, interest and liens except the lien of other taxes and assessments not paid from the purchase price and not included in the judgment * * * .

* * *

"(h) *Procedure if Section Declared Unconstitutional.* —If any provisions of this section are declared invalid or unconstitutional by a court of competent jurisdiction, all taxing units which have proceeded under this section shall have one year from the date of the filing of such opinion * * * in which to institute foreclosure actions under § 105-391 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of such property by the taxing unit, would have become due; and such opinion shall not have the effect of invalidating the tax lien or disturbing the priority thereof."

In G.S. 105-393 (now G.S. 105-377) a statute of limitations, relied upon by the purchaser of the property in the present case, is set forth in the following terms:

"Time for contesting validity of tax foreclosure title.— No action or proceeding shall be brought to contest the

validity of any title to real property acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this subchapter * * * nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded * * * ."

Other provisions in the Machinery Act in effect in 1970 and pertinent to this appeal include the following:

G.S. 105-301 (now G.S. 105-302): "(a) Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same. * * * ."

G.S. 105-377 (now G.S. 105-348): "All persons who have or may acquire any interest in any property which may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid such proceedings may be taken against said property as are allowed by law. Such notice shall be conclusively presumed, whether such persons have actual notice or not."

G.S. 105-397.1 (now G.S. 105-394): *"Irregularities Immaterial.*—No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement, shall invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings, nor in any manner invalidate the tax levied on any property or charged against any person. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, shall be deemed to be irregularities within the meaning of this subsection; the failure of the assessors to take or subscribe to an oath or attach an oath to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, or charged against any property or the valuation of any property upon any record; *the failure to make or serve any notice mentioned in this chapter;* the failure or neglect of

the collector to offer any tax lien or real estate for sale at the time mentioned in the advertisement or notice of such sale; failure of the collector to adjourn the sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the order or manner in which tax liens or real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time prescribed by law; any irregularity, informality of omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property, assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the collector at any time by correcting such book, list or record, or may be made definite by using a correct description in any tax foreclosure proceeding authorized by this subchapter, and any such correction shall have the same force and effect as if said description had been correct on the tax list; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this subsection or not; the neglect or omission to tax or assess for taxation any personal property; the overtaxation of persons or property liable to be taxed." (Emphasis added.)

We note that the statute last above quoted was originally a subparagraph in the section entitled, "Sales of Tax Liens on Real Property for Failure to Pay Taxes." G.S. 105-387(j). The Legislature of 1965 took this provision out of that section and, with minor modifications not material to this appeal, made it a separate section in Article 28 (now Article 30) of Chapter 105 of the General Statutes. This would indicate a legislative intent to free this provision from any possible limitation of it to procedures incident to the sale of tax liens so as to extend it to procedures for foreclosure thereof as well.

While not directly pertinent to the decision of this appeal, we note that the 1973 Legislature (Session Laws of 1973), Chapter 681, §§ 1 and 2) amended the procedure governing the

"alternative" or "in rem" method of foreclosing tax liens so as to require that the notice by the tax collector to the listing taxpayer of the collector's intent to docket the judgment upon which execution would thereafter issue be sent in a registered or certified letter "Return Receipt Requested," that such notice be also sent to all lienholders of record who have filed in the office of the collector a request for such notification and that it deleted the former provision stating, "Receipt of the letter by the listing taxpayer, or receipt of actual notice of the proceeding by the taxpayer or other interested persons, shall not be required for the validity or priority of the judgment or for the validity of the title acquired by the purchaser at the execution sale."

We turn now to the task of seeking a pathway through this legislative maze to the answer to the question presented by this appeal.

[1] The movants are not barred from the relief which they now seek by the statutes of limitations pleaded by the purchaser at the tax foreclosure sale. It is expressly provided in G.S. 105-392 (now G.S. 105-375) that the docketed judgment has the same force and effect as a duly rendered judgment of the Superior Court. In *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340 (1938), speaking through Justice Barnhill, later Chief Justice, this Court said:

> "The Court from which the execution issued may, for sufficient cause shown, recall or set aside an execution or a sale made thereunder and prevent further proceedings. This is properly done by a motion in the cause and not by an independent action."

The question here presented was properly brought before the Superior Court in a motion in the cause, not an independent action.

G.S. 1-52(10), relied upon by the purchaser, provides that within three years "an action * * * for the recovery of real property sold for the nonpayment of taxes" is barred. The present case is not "an action," nor is it for "the recovery of real property," but is a motion in the cause for the removal of a cloud on the movant's title. Thus, G.S. 1-52(10) does not apply. *McNair v. Boyd*, 163 N.C. 478, 79 S.E. 966 (1913); *Cauley v. Sutton*, 150 N.C. 327, 64 S.E. 3 (1909); *Beck v. Meroney*, 135 N.C. 532, 47 S.E. 613 (1904).

Likewise, the one year limitation in G.S. 105-393 (now G.S. 105-377), above quoted, has no application. The motion in the cause is not an "action or proceeding * * * *brought* to contest the validity" of a title to real property, and it is not a "motion to reopen or set aside the judgment" pursuant to which the tax sale here in question was held. The movants do not attack the judgment but the sale held under it.

The amended motion in the cause filed in this proceeding by the Administrator and heirs of Frank Osteen states:

> "That pursuant to old NCGS 105-392 (now NSGS 105-375), Elizabeth B. King, Tax Collector of Henderson County mailed to Frank Osteen by registered mail, return receipt requested a notice informing him that a tax judgment for nonpayment of real property taxes for the year 1967 would be docketed if the taxes were not promptly paid. The letter was received by Frank Osteen on September 15, 1969 and judgment was docketed in favor of Henderson County on October 1, 1969 in conformity with the statute."

Thus, it is conceded by the movants that the statutory procedure for the sale of the tax lien and for the docketing of the judgment was followed. Frank Osteen lived ten months after receiving this letter of notification from the tax collector. The evidence is that his health was bad but nothing indicates that he was mentally incompetent to understand the letter so received by him or to take appropriate action to pay the taxes due. The record indicates no effort by him, or on his behalf, during this ten month interval, to exercise his right under G.S. 105-392(b) (now G.S. 105-375(f)) to move to set aside the judgment on the ground that the 1967 taxes had in fact been paid or that the tax lien on which the judgment is based was invalid.

The execution, pursuant to which the land was sold, was issued within the time limits prescribed by the Statute. No further notice of the issuance of the execution than that contained in the registered letter received by Mr. Osteen ten months prior to his death is required by the statute. The execution was actually issued five days after the death of Frank Osteen. Thus, at the time it was issued, his heirs, the movants in the present proceeding, were the owners of the land, legal title descending to them immediately upon his death, subject to the power of the Administrator of his Estate to subject it to the

payment of his debts. Nothing in the record indicates that the governing body of the county, or its tax collector, was then aware of the death of Mr. Osteen.

In his affidavit, filed in support of his motion, the Administrator of the Estate of Frank Osteen says that when he qualified as administrator, the Clerk did not inform him that the judgment for taxes had been docketed or that execution had been issued thereon. The statute imposes no duty upon the Clerk to bring such matters to the attention of an applicant for letters of administration and to require him to do so would impose a well nigh impossible burden upon him. It may well be that the Clerk, or his deputy who handled the granting of the letters of administration five days after the execution was issued, then had no personal knowledge or recollection of the docketing of the judgment ten months earlier or the issuance of the execution five days before the letters of administration were sought. Nothing in the record indicates the contrary, nor is there anything in the record to indicate that the Clerk, if he knew of these matters, had any reason to suppose that the Administrator was unaware of them.

In *Flynn v. Rumley, supra,* this Court, speaking through Justice George Connor, affirmed the lower court's refusal to issue a writ of mandamus directing a sheriff to levy upon and sell land of a judgment debtor under execution issued after the death of such debtor, saying:

> "The execution, having been issued after the death of the judgment debtor, was not warranted by law. A sale of the land made under the execution would be void."

The reason for this rule is thus stated in *Tuck v. Walker,* 106 N.C. 285, 11 S.E. 183 (1890), by Justice Avery:

> "It is well settled that, though there may be unsatisfied judgments constituting a lien upon the land of a debtor, when he dies the judgment creditor is not allowed to sell it under execution, but the administration of the whole estate is placed in the hands of the personal representative, who is required first to apply the personal assets in payment of the debts, and if they prove insufficient, then the statute prescribes how the land may be subjected and sold so as to avoid a needless sacrifice by selling for

cash, or a greater quantity at all than is required to discharge the indebtedness."

In *Atkinson v. Ricks,* 140 N.C. 418, 53 S.E. 230 (1906), the plaintiff brought an action in the justice's court to recover a debt and caused land of the defendant to be attached. He recovered judgment. Pending the defendant's appeal to the Superior Court, the defendant died. The Superior Court rendered judgment against the executor and the plaintiff filed a motion in the cause for the appointment of a commissioner to sell the land which had been so attached for the satisfaction of the judgment. This Court held there was error in granting the p'aintiff's motion, saying the lien of the attachment levied in the lifetime of the debtor could not be enforced in that way and observing:

> "The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding, under proper safeguards, for the benefit of all the creditors, and we must effectuate this intention when it does not conflict with any other special provision of the law in favor of a particular creditor, who has legitimately secured priority."

In *Moore v. Jones,* 226 N.C. 149, 36 S.E. 2d 920 (1946), the administrator of a decedent's estate sought direction as to the order of payment of claims. Speaking through Justice Barnhill, later Chief Justice, this Court said:

> "A judgment creditor may not issue execution for the enforcement of his lien after the death of the judgment debtor. This avenue of relief is closed and he is required to look to the personal representative whose duty it is to administer the whole estate. [Citations omitted.] But this does not mean that when the personal representative finds it necessary to seek a conversion of the land to make assets either he or the Court may disregard the rights of lienors."

In the present case, the Court of Appeals held that the tax lien foreclosure pursuant to G.S. 105-392 (now G.S. 105-375) being, as that statute declares, a proceeding "strictly in rem," whereas the judgment in *Flynn v. Rumley, supra,* was a judgment in personam, that case is not controlling in the present matter, as the trial judge deemed it to be, and, therefore, "given the unique nature of the judgment the death of the taxpayer before execution of the judgment is immaterial."

We do not deem it necessary to go so far as to hold that the rule of *Flynn v. Rumley, supra,* has no application to any judgment in rem. The purpose of the rule is to protect the creditors and the distributees and heirs of the deceased from waste of his assets. For that purpose, the Probate Court takes control of the collection, application and distribution of his properties. When, in this process of administration of the estate, the administrator sells land to make assets with which to pay debts, he first applies the proceeds thereof to the payment of liens upon the land in the order of their priority. *Moore v. Jones, supra.* Land subject to the lien of a judgment in rem for an amount less than its value has the same importance to other creditors and to the heirs of the deceased, against whom the judgment was taken, as does the land subject to the lien of a judgment in personam against him.

In *Guilford County v. Estates Administration, Inc.,* 213 N.C. 763, 197 S.E. 535 (1938), however, there was an action to foreclose a tax lien pursuant to G.S. 105-391 (now G.S. 105-374), the listing taxpayer having died after the tax became due but before the tax lien was sold. The administrator, heirs and judgment creditors of the deceased were made parties defendant to the foreclosure action and contended that, by reason of the death of the taxpayer, the county could not maintain the action to foreclose but must file its claim with the administrator. This Court held that the county could maintain such action, saying, through Justice Winborne, later Chief Justice:

> "The holder [of the tax lien] is entitled to a judgment for the sale of such real estate for the satisfaction of whatever sum there may be due upon such certificate. * * * The county [the purchaser of the tax lien] has the right of foreclosure, and that right is the only right the county has to enforce the lien of the certificate of sale, for the collection of the tax. The county may pursue this course at its election. * * * If the personal estate be insufficient to pay debts of the estate, the administrator, by appropriate proceeding, may resort to the sale of the land, burdened, however, with such items, statutory or otherwise, as exist at the time. But this right does not prevent the holder of the tax sale certificate from foreclosing in civil action in the nature of an action to foreclose a mortgage during the pendency of the administration."

[2] We perceive no basis for a distinction between the right of the county, holding a valid tax lien certificate, to proceed, pending the administration of the deceased taxpayer's estate, to foreclose such lien by an action under G.S. 105-391 (now G.S. 105-374) and its right to proceed to the same result under the alternative procedure provided by G.S. 105-392 (now G.S. 105-375). The effect upon the creditors and heirs of the deceased taxpayer is the same whichever procedure is followed. Therefore, we reach the conclusion reached by the Court of Appeals that foreclosure of a tax lien by judgment and execution, pursuant to G.S. 105-392 (now G.S. 105-375), is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor.

[3] The property here in controversy was sold under the execution 30 days after the Administrator qualified. G.S. 105-392(c) (now G.S. 105-375(i)) provides that the sale under such execution shall be "in the same manner as other property is sold under execution."

Execution sales generally are governed by G.S. 1-339.51 to G.S. 1-339.71. Nothing in the record indicates that these statutory requirements were not complied with, except with reference to the notice of the execution sale. As to that, in ordinary execution sales, G.S. 1-339.51 to G.S. 1-339.54 control. These statutes require that notice of an execution sale shall refer to the execution authorizing it, shall designate the date, hour and place of sale, describe the real property to be sold sufficiently to identify it, and shall state that the sale will be made to the highest bidder for cash. Such notice is required to be posted at the courthouse door for 30 days immediately preceding the sale and, in addition, must be published in a newspaper published in the county (assuming, as is true in Henderson County, that there is a qualified newspaper published therein) once a week for four successive weeks. Nothing in the present record indicates that this posting and publication were not done.

In addition, however, G.S. 1-339.54 requires the sheriff, at least ten days prior to the sale, to serve upon "the judgment debtor" a copy of the notice of sale if he is to be found in the county and, if not, to send a copy of such notice by registered mail to "the judgment debtor" at his last address known to the sheriff. However, G.S. 105-392(c) (now G.S. 105-375(i)) provides that in the tax foreclosure sale, "In lieu of personal serv-

ice of notice on the owner of the property, registered or certified mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale."

The Administrator of Frank Osteen's Estate testified, in support of his motion, that he made diligent search among the papers of the deceased and found no such notice and no such letter was delivered to him by the post office, though he requested it to send to him all undelivered mail addressed to the deceased. It was stipulated by counsel that there was no record of a return receipt showing that such notice had been sent by registered or certified mail to Frank Osteen by the Sheriff of the County. The trial court found that no notice of the sale was given to the Administrator or to the heirs of Frank Osteen. The court made no finding as to whether such notice had been mailed by registered or certified mail to the last known address of Frank Osteen, the listing taxpayer. The evidence would support, but does not compel, a finding that such notice was not so mailed.

As noted above, G.S. 105-397.1 (now G.S. 105-394) provides, "The failure to make or serve any notice mentioned" in the Machinery Act shall be deemed an irregularity which shall not "invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings."

If this statutory provision be given effect, then it would be entirely possible for the owner of a home, farm or business property, who has actually paid the taxes levied thereon, but who is, by virtue of erroneous record-keeping by the tax collector, reported as a delinquent in the payment of such taxes, and to whom the required notices of the docketing of the tax judgment and the sale under execution are not properly mailed, to have his property sold without his knowledge. In that event, G.S. 105-393 (now G.S. 105-377) would seem to preclude him from instituting any action or proceeding to contest the validity of the purchaser's title or to make any motion to reopen or set aside the judgment after one year from the date on which the purchaser recorded his deed. It is a matter of common knowledge that notices of sales of tax liens and notices of sales under execution published in newspapers are frequently not read by taxpayers and others who have no reason to suspect that their properties are included therein.

We are not prepared to hold, and do not here hold, that failure of the taxing authority to notify successors to the legal title of the listing taxpayer to the property, or holders of liens thereon, of its proposed sale of the property for taxes will render the sale thereof, pursuant to G.S. 105-392 (now G.S. 105-375) invalid. We do hold that the giving of the notices of the docketing of the judgment and of the sale under execution, required by G.S. 105-392 (now G.S. 105-375), is indispensable to a valid sale under that statute and that the provision of G.S. 105-397.1 (now G.S. 105-394), to the contrary, is in conflict with Article 1, § 19, of the Constitution of North Carolina. The validity of the remaining provisions of that statute is not presently before us.

When notice of the execution sale is sent by registered or certified mail to the listing taxpayer at his last known address, as is required by G.S. 105-392 (now G.S. 105-375), it is reasonably probable that he, if living and still the owner of the land, or his administrator and heirs, if he be deceased, or his transferee, if he has conveyed the property, will be made aware of the impending sale of the property so that he, or such successor in interest, may take appropriate steps to avoid a sale of it for a grossly inadequate price. Such notice, in conjunction with the posting and publication also required by the statute, would, in our opinion, be sufficient to satisfy the fundamental concept of due process of law and, therefore, to comply with Article 1, § 19, of the Constitution of North Carolina and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. To require the foreclosing county to go further and determine, at its peril, that the listing taxpayer still lives and still owns the land, or if he does not, to give such notice to his administrator, heirs or transferee, would impose an intolerable burden upon the county and would render the use of the procedure established by G.S. 105-392 (now G.S. 105-375) completely impracticable. Where, however, the statutory alternative to foreclosure by court action is prescribed in G.S. 105-391 (now G.S. 105-374) is a sale without any notice except by posting and publication, the statutory alternative offends the fundamental concept of due process of law. See: *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965). Such statutory procedure is easily distinguishable in this respect from a sale under a power contained

in a mortgage or deed of trust, wherein the mortgagor or grantee consents to such sale procedure.

In *Street v. McCabe*, 203 N.C. 80, 164 S.E. 329 (1932), it was alleged that a tax sale was irregular in that the purchaser of the lien was incorrectly named in the certificate issued upon the sale of the lien. Speaking through Justice Adams, this Court said:

> "In selling land for taxes officers should observe the statutory requirements; but all irregularities are not fatal. Under the former law when strict compliance with all salient provisions was demanded it was not easy to make a sale by which title to real estate was conveyed. A large proportion of the taxes was never collected, and a more liberal system of sales became a necessity. Provision was made for certificates of sale by which the holder acquired 'the right of lien' as in case of a mortgage. The relief given him was in the nature of an action to foreclose and the relief given the owner was the right of redemption. Statutes were enacted to cure immaterial irregularities, including any irregularity or informality in the manner or order in which any real estate may be offered for sale and any irregularity in any proceeding or requirement of the law. N. C. Code, 1927, secs. 8020, 8021. These provisions and the changed mode of procedure in the sale of land for taxes lead us to the conclusion that the alleged irregularities as to the advertisement and sale do not entitle the defendants to a judgment invalidating the procedure."

In that case, the irregularity in question was not a total failure to send the listing taxpayer the notice required by the statute. Furthermore, the constitutionality of a statute permitting a sale without such notice was not before the Court.

In *Geer v. Brown*, 126 N.C. 238, 35 S.E. 470 (1900), and in *Sanders v. Earp*, 118 N.C. 275, 24 S.E. 8 (1896), there was a failure by the sheriff to give notice by mail to the taxpayer of the pending sale of land for taxes and this Court, speaking through Justice Montgomery, sustained the validity of the sales on the ground that "such notice, while required in the statute, is declared in the same to be a mere irregularity insofar as the purchaser is concerned." In *Sanders v. Earp, supra*, Justice Montgomery suggested that the remedy of the landowner so deprived of his property might be to sue the sheriff to compel

him to "respond in damages to the value of the land." In neither of these cases did the Court consider the question of the constitutionality of the provision making the requirement of such notice merely a directory provision and the want of notice a mere irregularity not affecting the validity of the deed.

In *Edwards v. Arnold,* 250 N.C. 500, 109 S.E. 2d 205 (959), speaking through Justice Bobbitt, later Chief Justice, this Court said: "Having decided that, upon the evidence presented, the sheriff's deed was void and conveyed no title, we pass, without consideration * * * whether G.S. 105-392 [now G.S. 105-375] in the respect challenged is unconstitutional."

In *Price v. Slagle,* 189 N.C. 757, 128 S.E. 161 (1925), speaking through Justice Varser, this Court held a tax deed invalid for failure of the purchaser of the tax lien to give the notice prescribed by the statute and said:

> "The Legislature has the power to prescribe the details for statutory foreclosure of the taxpayer's equity of redemption in other ways than by judicial process, and may regulate and declare directory, and not vital, the administrative duties therein, which are to be performed by public officers. It has the power to change or abolish these duties, insofar as they are not basic or jurisdictional. *The requirement of notice to the defaulting taxpayer, who is the landowner, may be prescribed and regulated within reasonable limits by the Legislature, but cannot be dispensed with.* Such a requirement is subject to the test of 'due process of law.' " (Emphasis added.)

In the present case, we are presented with this question: When a county which has purchased a tax lien at a valid sale thereof and which, after notice to the listing taxpayer, has docketed a judgment and issued execution in accordance with the procedures prescribed in G.S. 105-392 (now G.S. 105-375), may the county, after the death of the taxpayer, without mailing to his last known address by registered or certified mail, as specified in the said statute, sell his land, at a sale otherwise held in conformity to the statute, and convey a valid title to the purchaser. We hold that the county may not do so for the reason that the provision of G.S. 105-397.1 (now G.S. 105-394) declaring the failure so to mail the prescribed notice to the listing taxpayer a mere irregularity, not affecting the validity of the

deed, is unconstitutional. We do not have before us the validity of any other provision of the statute.

The Superior Court made no finding as to whether the notice of sale required by G.S. 105-392(c) (now G.S. 105-375(i)) was mailed as specified in that statute. Consequently, we find and hold that the judgment of the Court of Appeals remanding this matter to the Superior Court for the entry of a judgment dismissing with prejudice the motion in the cause filed by the Administrator and the heirs of Frank Osteen was error. The matter must be remanded to the Superior Court for a finding by it as to whether the notice of the execution sale required by G.S. 105-392(c) (now G.S. 105-375(i)) was mailed by registered or certified mail by the sheriff addressed to Frank Osteen, at his last known address, at least one week prior to the date fixed for the execution sale. If such notice was so mailed, then a judgment denying the motion in the cause would be proper. If no such notice was mailed, a judgment similar to that entered by Judge Friday, from which the appeal to the Court of Appeals was taken, would be proper.

Reversed and remanded.

STATE OF NORTH CAROLINA v. HAROLD GEORGE FURR

No. 73

(Filed 13 June 1977)

1. **Homicide § 14.2— conviction of murder — necessary proof**

In order to convict the defendant of murder, the State must offer evidence from which it can be reasonably inferred that the deceased died by virtue of a criminal act and that the act was committed by the defendant.

2. **Criminal Law §§ 9, 10— principal — accessory before the fact**

A principal is one who is present at or participates in the crime charged or who procures an *innocent* agent to commit the crime; an accessory before the fact is one who procures, counsels, commands, or encourages the principal to commit it.

3. **Homicide § 21.2— principal in murder — insufficiency of evidence**

The State's evidence was insufficient to convict defendant as a principal of first degree murder of his wife where it tended to show that defendant and his wife were separated and involved in property

disputes; defendant threatened on several occasions to kill his wife; defendant approached four people, two of them on a number of occasions, and asked that they kill or find someone else to kill his wife; defendant's wife was found shot to death in her home; and a few weeks after his wife's death, defendant stated, "Well, you'all know who did it and I know who did it, but nobody else will ever know but me."

4. **Criminal Law § 1— solicitation to commit felony**

Solicitation of another to commit a felonly is a crime in North Carolina, even though the solicitation is of no effect and the crime solicited is never committed.

5. **Criminal Law § 1— solicitation to commit felony**

The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime.

6. **Homicide § 21.1— solicitation to commit murder — solicitation of someone to find another to commit murder**

The crime of solicitation to commit murder is committed where defendant solicits a named person to commit a murder himself or where defendant solicits the named person to find another to perpetrate the murder.

7. **Homicide § 12— solicitation to commit murder — indictment**

An indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object.

8. **Homicide § 21.1— solicitation to commit murder — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendant for solicitation to murder his wife in January 1975 where it tended to show that during that month, shortly after defendant and the solicitee were released from jail where defendant had related his marital problems, the two men met to discuss a lot which the solicitee wanted to buy; defendant stated that "he would make some arrangements about the payment for the lot in another way" and that he wanted the solicitee "to do a job for him"; the solicitee told defendant that he "knew what he was talking about, but that [he] wasn't interested in it"; and defendant then told the solicitee that he had to go to court with his wife in a few weeks and that "he had to have something done before court time or he was going to be in serious trouble."

9. **Homicide § 21.1— solicitation to commit murder — mistaken reference to date**

The State's evidence was sufficient to support defendant's conviction of solicitation to commit murder in February 1975, although the solicitee mistakenly referred to the date of the solicitation as February 1974, where the solicitee testified to events of October 1974

through June 1975 in sequence, and it is inconceivable that the jury was confused by the mistaken reference to 1974.

10. Homicide § 21.1— solicitation to commit murder — insufficiency of evidence

The State's evidence was insufficient to support defendant's conviction of solicitation of a named person in May 1975 to commit murder where it showed that defendant's remarks on that occasion were directed to a second person and that the named person was riding in an automobile with defendant and the second person when they were made.

11. Criminal Law §§ 26.5, 92.3— failure to join charges — collateral estoppel

The trial court properly refused to dismiss charges against defendant for solicitation to commit murder on the ground that the solicitation charges were not joined under G.S. 15A-926 with a murder charge at defendant's first murder trial, which ended in a mistrial, since at the time of defendant's first murder trial no indictments for solicitation had yet been returned against him; nor should the solicitation charges have been dismissed under the doctrine of collateral estoppel, which is a part of the Fifth Amendment guarantee against double jeopardy, since no issue of ultimate fact had been determined by a valid and final judgment which was sought to be relitigated in the solicitation cases.

12. Criminal Law § 1; Homicide § 21.1— solicitation to commit felony— several contacts — separate crimes

While a single solicitation to commit a felony may continue over a period of time and involve several contacts where the solicitee gives no definite refusal to the solicitor's request, a definite refusal on the part of the solicitee plus the lapse of some time may end the transaction so that a new request upon another occasion may constitute a new offense.

13. Criminal Law § 113.1— refusal to allow testimony to be read to jury

Defendant was not prejudiced by the court's refusal of the jury's request that the testimony of a State's witness be read to them.

Justice LAKE dissenting in part.

Chief Justice SHARP and Justice HUSKINS join in the dissenting opinion.

ON defendant's appeal from *Albright, J.*, presiding at the March 22, 1976 Criminal Session of STANLY Superior Court. This case was docketed and argued as Case No. 73, Fall Term 1976.

Rufus L. Edmisten, Attorney General, by James Wallace, Jr., Assistant Attorney General, for the State.

Hopkins, Hudson & Tucker, by Elton S. Hudson, and Tharrington, Smith & Hargrove, by Roger W. Smith, Attorneys for the defendant.

EXUM, Justice.

Defendant was placed on trial for and convicted of murder in the first degree of his wife and twelve counts of solicitation to commit a felony. He was sentenced to death in the murder case and was given three consecutive sentences of 8-10 years each in the solicitation cases. Nine of those cases were consolidated for one judgment by the trial court. Two separate judgments were entered in two others, and in one apparently no judgment was entered upon the verdict.

The state's evidence tends to show that defendant threatened to kill his wife, that he was separated from her and involved in property disputes with her. It also tends to show that defendant approached four people, George Arnold Black, Donald Lee Owens, Raymond Clontz and Donald Eugene Huneycutt, two of them upon a number of occasions, asking that they kill or find someone else to kill his wife or her attorney, Charles Brown, or another acquaintance, Johnny Jhue Laney. His defense to the murder charge was alibi. He denied the solicitation charges.

Defendant presents twelve arguments on appeal. Of most significance is his contention that nonsuit should have been granted in the murder case, since there is no evidence that it was Furr who killed his wife. We agree and hold that nonsuit should have been granted.

Of the assignments of error remaining, those pertaining to the nature of the offense of solicitation are of most significance. Most notably, defendant argues that: (1) in several of the solicitation cases nonsuit should have been granted; (2) proof that defendant solicited a named person to solicit another to commit murder is not proof of any criminal offense in North Carolina; (3) there was a fatal variance between indictments and proof where the indictments alleged that defendant solicited another to kill and murder the victim but the proof is that defendant solicited the named person to find someone else to kill the victim; and (4) several contacts between defendant and a solicitee constitute only one offense.

We find merit in defendant's argument that one of the solicitation charges should have been nonsuited. In the second and third contentions above we find no merit. The last argument

we find unnecessary to address definitively since all the counts of solicitation at issue were consolidated for judgment.

The facts will be discussed in connection with the issues to which they pertain.

To prove that defendant murdered his wife, the state relies entirely upon circumstantial evidence. To withstand the motion for nonsuit, there must be substantial evidence of all material elements of the offense. *State v. Evans,* 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966). The evidence must be considered in the light most favorable to the state, and every reasonable inference must be drawn in the state's favor. *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975), *death sentence vacated,* 96 S.Ct. 3212 (1976); *State v. McKnight,* 279 N.C. 148, 181 S.E. 2d 415 (1971). Defendant's evidence rebutting the inference of guilt may be considered only insofar as it explains or clarifies evidence offered by the state or is not inconsistent with the state's evidence. *State v. Blizzard,* 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Evans, supra; State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169 (1965); *State v. Oldham,* 224 N.C. 415, 30 S.E. 2d 318 (1944).

Applying these guidelines, we find the evidence sufficient to allow the jury to find the following facts:

The defendant and his wife had been married about 21 years and had four children when they separated in 1973. After the separation, Furr moved his real estate office from their home to a nearby location near the square in Locust, North Carolina. His wife, Earlene, continued to live at the house on Willow Drive and Furr moved into Western Hills Mobile Home Park. The couple's relationship was apparently quite volatile and Furr exhibited increasing hostility towards Earlene after the separation.

In April, 1973, Earlene filed a civil action against defendant resulting in a judgment against him in October, 1973. A year later, on his wife's motion, defendant was adjudged to be in contempt and was committed to jail. While in Stanly County jail, Furr met Raymond Clontz and Donald Owens, and related his marital problems to them, especially his concern over the property dispute. He was released from jail on December 6, 1974, upon payment of $13,623.00. After his release, Furr ap-

proached Clontz and Owens, drove them by Earlene's home and explained how to get into the house. He offered Owens $3,000.00 to kill Earlene and offered to give Clontz a lot which the latter wanted to store cars on if Clontz would do the job. Neither man accepted the offer.

In October, 1974, defendant asked "Buck" Baker if he knew a "hit man." At the time Furr was angry because Earlene had disposed of some racing equipment. Furr also approached Donald Eugene Huneycutt on several occasions to ask whether Huneycutt knew a "hit man." In the initial encounters, Furr wanted Johnny Jhue Laney killed because Laney had murdered his own wife, Doris, who was defendant's girl friend. By early 1975, however, Furr's plans extended as well to Earlene and her attorney, Charles Brown. Huneycutt told him killing women and lawyers would create "too much heat," but defendant responded that he could stand the heat and had his mother for an alibi.

Defendant also asked George Arnold Black, Jr., to kill Earlene, and drove him by the house in the fall of 1974. Like the others, Black declined the offer.

Furr was heard to threaten Earlene's life upon several occasions. In February, 1973, Earlene's brother-in-law, David Orrell, went to defendant because Earlene "was literally in terror of her life." Orrell told defendant, "She says that you had threatened to kill her, is that true?" Furr responded that he had, and added, "I can't stand her nagging any more."

In January, 1973, Johnny Jhue Laney called Furr to object to Earlene's telephone calls to Doris Laney accusing Doris of running around with Furr. A month later, Laney called Furr again concerning the same problem. Furr flew into a rage and said "he would kill her, and he would see to it, it wouldn't happen no more . . . that she had caused enough trouble in the community."

In the early part of 1975, during a conversation with Freddie Voncannon, the sister of Ruby Griffin, who was presently defendant's girl friend, Furr suggested Freddie burn Earlene's car.

Just after the 1973 separation, defendant's daughter, Beverly Tucker, overheard her mother begging defendant to come home. Furr responded that "she was ugly and he didn't want

her anymore, and that he hated her and that he would kill her, but he was going to make her suffer first and that he would grind her up like hamburger meat and feed her to the dogs." Once in 1974, when Beverly was driving her mother's car, defendant warned her to be careful driving that car through his trailer park, that he had told Earlene he would kill her if she came there, and he would hate to hit Beverly instead.

Rick Tallent, who had rented a pasture from Earlene, was embroiled in one of the couple's quarrels when he attempted to repair the fence. He heard defendant tell Earlene he would kill her if she came across the fence. Defendant's son, Chuck, also overheard that threat.

On 3 September 1975 defendant was served with papers in the matter of *Frances Earlene H. Furr v. Harold G. Furr*, notifying him to appear on 25 September 1975.

Very little evidence was presented of what actually transpired at the time of Earlene's death on 15 September 1975. Chuck Furr, the last to leave home that morning, testified that when he left at about 8:00 his mother was standing in the doorway. At about 2:15 that afternoon, eleven-year-old Todd came home from school and found his mother lying on his bed, dressed in a pink nightgown and valuable jewelry, with two gunshot wounds, one in the chin and one in the eye. An SBI chemist testified that Earlene's left-hand palm was either on or near a gun when it was discharged. There was no evidence of forcible entry. The front door was unlocked when Todd came home and the garage door closed. Earlene's watch crystal was broken and the hands stopped at 9:45 or 9:56 or sometime between 10:00 and 12:00 according to the testimony of various state's witnesses. The watch calendar said "15."

Several guns were found both in Earlene's home and in defendant's. None of these was connected to the crime. None of the fingerprints lifted from the scene matched defendant's. Defendant testified that he possessed a remote control device to open the garage door. Raymond Clontz said defendant had shown him the device.

One witness, Cecil Almond, said he saw defendant coming out of the trailer park with a lady in the car who "looked like Earlene" at about 9:30 or 9:40 on 15 September 1975. Nevertheless, he testified that he did not actually recognize the lady,

and acknowledged the possibility that it might have been Ruby Griffin.

The trip from defendant's trailer to Earlene's home takes about four minutes and forty seconds.

Defendant's alibi evidence tended to show he was in the company of Ruby Griffin almost constantly from between 9:00 and 9:30 that morning, when they left the trailer park together, until late that night. He presented numerous witnesses who had seen him with Ruby Griffin at various times in his office and at work sites between about 10:00 and noon. His testimony and that of his witnesses tends to establish that he and Ruby drove to Salisbury at about noon, were seen on the road, visited a friend there, and returned at about 5:15 to 5:30, when they learned of Earlene's death.

The defense presented the testimony of a hostile witness, Gary Henry, who had testified at defendant's previous trial that he saw Earlene at her home at about 11:15 on the morning of 15 September 1975 when he went by after a dentist appointment. At this trial, he testified that he was not sure what time that morning he had seen her, but it was either 9:35 to 9:40 or 11:15.

A few weeks after his wife's death, defendant saw Owens and Clontz. On being asked who had killed his wife, Furr said, "Well, you'all know who did it and I know who did it, but nobody else will ever know but me."

Defendant told Johnny Laney that "that ex-bitch of mine got what she deserved and you're next on the list."

Defendant contends this evidence is insufficient to permit a jury to find him guilty of murder. We agree.

[1] In order to convict the defendant of murder the state must offer evidence from which it can be reasonably inferred that the deceased died by virtue of a criminal act and that the act was committed by the defendant. *State v. Jones,* 280 N.C. 60, 184 S.E. 2d 862 (1971); *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908 (1949).

While the evidence clearly establishes the first of these propositions it falls far short of tending to prove the second. The evidence shows that defendant wanted his wife dead; that he actively sought her death; and that he harbored great hos-

tility toward her. This, however, without more is not enough to permit a jury to find that he killed her. *See State v. Jones, supra; State v. Palmer, supra; see also State v. Carter,* 204 N.C. 304, 168 S.E. 204 (1933); *State v. Montague,* 195 N.C. 20, 141 S.E. 285 (1928); *State v. Gragg,* 122 N.C. 1082, 30 S.E. 306 (1898); *State v. Brackville,* 106 N.C. 701, 11 S.E. 284 (1890).

[2] While the evidence might support a reasonable inference that defendant was responsible for his wife's death and that he procured someone to murder her, these facts alone would not make defendant guilty of murder. Our law of homicide still maintains a careful distinction between principals and accessories. A principal is one who is present at and participates in the crime charged or who procures an *innocent* agent to commit the crime. An accessory before the fact is one who procures, counsels, commands, or encourages the principal to commit it. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970).

[3] The only question before us is whether the evidence is sufficient to convict defendant as a principal. We hold that it is not.

The state contends the closest factual situation to this case is found in *State v. Rinaldi,* 264 N.C. 701, 142 S.E. 2d 604 (1965). In *Rinaldi,* defendant's wife died of suffocation between 10:00 a.m. and 5:00 p.m. on 24 December 1963. Defendant and a friend, who testified they had been shopping all morning, were in the apartment when police arrived to find the body. *Rinaldi* is clearly distinguishable not only because defendant's presence at the scene at approximately the time of the killing was established, but also because defendant told a witness at noon on the day of the killing, "It is over, I did it." In the instant case, defendant's remarks after the crime tend to show only that he knew who killed his wife, not that he did so himself.

We have said that where "the State failed to offer substantial evidence that defendant was the one who shot his wife," nonsuit should be granted. *State v. Jones, supra* at 67, 184 S.E. 2d at 866. The evidence here is "sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed . . . . " *State v. Evans,* 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971). Defendant's motion for nonsuit must therefore be sustained.

We next consider defendant's argument that ten of the solicitation charges should have been nonsuited. With respect to the seven indictments alleging solicitation of Donald Eugene Huneycutt to commit murder, defendant's argument is made upon two grounds: first, that the evidence did not establish solicitation to commit a felony and second, that the evidence is at variance with the allegations.

The first contention is directed to the state's alleged failure to prove the substantive crime of solicitation to commit a felony.

[4] Solicitation of another to commit a felony is a crime in North Carolina, even though the solicitation is of no effect and the crime solicited is never committed. *State v. Hampton,* 210 N.C. 283, 186 S.E. 251 (1936); *State v. Keen,* 25 N.C. App. 567, 214 S.E. 2d 242 (1975); 2 Strong's North Carolina Index 2d, Criminal Law § 1 at 479. The offense has been coznizable at common law at least since *Rex v. Higgins,* 2 East 5, 102 Eng. Rep. 269 (1801) and is still an indictable offense under the common law in this state. G.S. 4-1.

[5] The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime. Clark & Marshall, A Treatise on The Law of Crime, § 4.02 at 220 (7th ed. 1967).

[6] Defendant argues that the evidence shows only that defendant requested that Huneycutt find *someone else* to murder each of the three intended victims, and not that Huneycutt *himself* commit the crime. "Under no authority," says defendant, "is that a criminal offense." Accepting for the moment defendant's argument that defendant solicited Huneycutt *only* to find another "hit man," we hold that such a request constitutes the crime of solicitation to commit a felony in North Carolina. In W. LaFave and A. Scott, Criminal Law, § 58 at 419 (1972) it is observed that

> "[i]n the usual solicitation case, it is the solicitor's intention that the criminal result be directly brought about by the person he has solicited; that is, it is his intention that the crime be committed and that the other commit it as a principal in the first degree, as where A asks B to kill C. However, it would seem sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur. Thus it would be criminal for one person to solicit

another to in turn solicit a third party, to solicit another to join a conspiracy, or to solicit another to aid and abet the commission of a crime."

See People v. Bloom, 149 App. Div. 295, 133 N.Y.S. 708 (1912); *King v. Bentley,* [1923] 1 K.B. 403 (1922).

In North Carolina, one who procures another to commit murder is an accessory before the fact to murder. G.S. 14-5. Thus if Huneycutt had acceded to defendant's demands and had found someone else to murder defendant's wife or either of the other victims, and that person had in turn committed the murder Huneycutt would have been indictable for a felony under General Statute 14-5. *See State v. Philyaw,* 291 N.C. 312 (1976). Whether defendant solicited Huneycutt to commit the murder himself or to find another to perpetrate the crime is thus of no consequence; either act is a crime in this state.

Of little more merit is defendant's second argument relating to nonsuit of the Huneycutt solicitation charges. Defendant claims that because the indictments alleged that he "did feloniously, infamously, and with malice, solicit Donald Eugene Huneycutt, to feloniously *kill and murder* [the various victims], this being a crime of soliciting . . . to commit a felony," (emphasis added) but the proof was only that defendant solicited Huneycutt to find someone else to murder the victims, there was a fatal variance between the indictment and the proof.

Defendant's conversations with Huneycutt are obviously designed to accomplish one end: to procure the deaths of Johnny Jhue Laney, Earlene Furr and Charles Brown. There is no intimation whatever in the evidence that defendant would not have been delighted to have Huneycutt himself commit the murders. Defendant had known Huneycutt for many years, and undoubtedly wished to avoid offending him. He obviously meant his requests to cover the broadest ground possible, to leave it open to Huneycutt to give him as much assistance as he might be willing to give. Defendant told Huneycutt how he wanted the job done and said he wanted to take Honeycutt over and show him how easy "you could get right up on" Laney. He offered Huneycutt extra money to get Laney shot between the eyes where Laney had shot his wife, Doris.

[7] Not every variance between the indictment and the proof is a material variance. *See State v. Ballard,* 280 N.C. 479, 186

S.E. 2d 372 (1972); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968); *Wright v. State*, 468 S.W. 2d 422 (Tex. Crim. App. 1971). The gist of this crime is the solicitation itself and not the nature of the crime solicited. *People v. Baskins*, 72 Cal. App. 2d 728, 165 P. 2d 510 (1946); *People v. Humphrey*, 27 Cal. App. 2d 631, 81 P. 2d 588 (1938). Thus, although it remains essential to the validity of the indictment that it advise the defendant of the nature and cause of the accusation sufficiently to allow him to meet it, to prepare for trial and to enable him to plead in bar of further prosecution after judgment, it is not necessary to allege with technical precision the nature of the solicitation. In this regard an indictment for soliciting to commit a felony is analogous to one for conspiracy, in which it is sufficient to allege generally the object of the conspiracy. *See Wong Tai v. United States*, 273 U.S. 77 (1927). Thus an indictment alleging defendant solicited another to murder is sufficient to take a case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object.

[8] Defendant further contends that there was no evidence to support three indictments alleging solicitation of Raymond Clontz to murder Earlene Furr. There is no merit to these contentions in two of the counts. Indictment Number 76-CR-700 alleges that Clontz was solicited in January to murder Furr's wife. The evidence is that during that month, shortly after both men were released from jail where defendant had been quite talkative about his marital problems, Clontz and Furr met to discuss a lot which Clontz wished to purchase. Furr said he wanted $3,000.00 for the lot and Clontz agreed to take it. Then, as Clontz related at trial, Furr told him not to be so hasty, that "he would make some arrangements about the payment for the lot in another way; that he wanted me to do a job for him." Clontz told Furr that he "knew what he was talking about, but that [he] wasn't interested in it . . . . " Defendant then told him he had to go to court with his wife in a few weeks and "that he had to have something done before court time or he was going to be in serious trouble. He said his wife was already getting $250.00 a week from him, and she had possession of the house, and had his property tied up and that he had to have something done." In the context, we find no other rea-

sonable interpretation of defendant's words on this occasion than that he was requesting Clontz to kill his wife.

[9] Indictment Number 76-CR-691 alleged a solicitation in February, 1975. The state concedes that Clontz mistakenly referred to the date of this solicitation as February, 1974. It argues that since Clontz testified he met defendant when he entered the Stanly County jail in October, 1974, and that the conversation in question occurred when Furr came to his garage "a few weeks" after the previous solicitation which occurred in January, 1975, the jury could not have understood the reference to the date to mean February, 1974. This was clearly a slip of the tongue. Since Clontz testified to the events of October, 1974, through June, 1975, in sequence it is inconceivable that any confusion could have resulted. Moreover, on cross-examination, in recounting the February, 1975, occurrence, Clontz reiterated: "It was in February of 1975 that we went by his wife's house and made the detour through the country," which matched his testimony during direct examination except for the date. We note that there is nothing in the record to indicate any judgment having been entered upon this indictment.

[10] In indictment Number 76-CR-690, a solicitation in May, 1975, is alleged. Clontz's testimony is that "sometime later" (after the February incident) he and Owens were stopped by defendant as they took lumber to Locust. Defendant contends all the evidence points to a solicitation directed only to Owens. Although Clontz testified that Furr asked Owens if *"we* had time to ride with him somewhere," it is apparent that Furr's remarks on this occasion were directed solely to Owens, and in fact, constituted a repetition of his earlier February conversation and ride with Clontz. During the May solicitation, Clontz rode in the back seat. He testified that Furr did not speak to him then, and that he did not make any statements to Clontz because he was talking to Owens. We find, therefore, no evidence except that leading to pure speculation that Furr intended Clontz to hear his suggestion to support the charge of solicitation of Raymond Clontz in May, 1975. Consequently we hold that case Number 76-CR-690 must be nonsuited. We note that, since this case was consolidated for judgment with the other Clontz and Huneycutt cases, our ruling has no effect on the sentence defendant will serve.

[11] Defendant's next assignment of error is addressed to the court's failure to dismiss the solicitation charges because they

were not joined under General Statute 15A-926[1] with the murder prosecution at defendant's first murder trial, which terminated in a mistrial. He argues as well that the charges should have been dismissed under the rule of *Ashe v. Swenson*, 397 U.S. 436 (1970), which held the doctrine of collateral estoppel to be applicable against the states as part of the Fifth Amendment guarantee against double jeopardy. Both arguments under this assignment of error are feckless. General Statute 15A-926 simply does not apply in this case. At the time of defendant's first trial for murder on January 12, 1976, no indictments had yet been returned against him for solicitation; the bills of indictment for that offense were not returned until 9 February 1976. They could not, therefore, have been joined with the murder charge. There is nothing whatever in the record to indicate that the state held the solicitation charges in reserve pending the outcome of the murder trial as defendant suggests, nor is the doctrine of collateral estoppel applicable here for a number of reasons. Suffice it to say that no "issue of ultimate fact" had been determined by a valid and final judgment which was sought to be relitigated in the solicitation cases. *Ashe v. Swenson, supra* at 443. *See State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977); *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972). *Cf. State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871, *cert. denied*, 342 U.S. 831 (1951).

Defendant's next contention is that the court erred in denying his motions to compel the state to elect among the several solicitation charges and to dismiss the solicitation charges and in submitting to the jury the issue of defendant's guilt of these charges. Defendant argues that the three Clontz solicitation contacts establish only one offense and that the seven Honeycutt contacts likewise establish only one offense. Neither of the two North Carolina cases dealing with solicitation addresses this issue. *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936); *State v. Keen*, 25 N.C. App. 567, 214 S.E. 2d 242 (1975). In the latter case, as defendant correctly points out, five contacts were made between the same parties but only one count of

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[1] (a) Joinder of Offenses. — Two or more offenses may be joined in one pleading 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. . . .

. . . .

(c) (2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of joinable offense.

solicitation was charged. The distinction between that case and this is that in *Keen* the solicitee never directly refused the defendant's request but "kept him on the string" in order to gather evidence for a conviction.

[12] Defendant analogizes solicitation to conspiracy, and says that only one offense of conspiracy is committed even though there may be multiple discussions and multiple criminal objectives, citing *Braverman v. United States*, 317 U.S. 49 (1942). This Court has already noted the distinction between conspiracy, which involves the concurrence of a second person with defendant, and solicitation, which is an act "completed before the resisting will of another had refused its assent and cooperation." *State v. Hampton, supra.* We recognize that, as in *Keen*, a single solicitation may continue over a period of time and involve several contacts where the solicitee gives no definite refusal to the solicitor's request. But a definite refusal on the part of the solicitee plus the lapse of some time may end the transaction so that a new request upon another occasion may constitute a new offense.

If defendant's contentions were correct, he would be entitled to have only one sentence imposed for the Clontz solicitation contacts, and only one for the Huneycutt contacts. *Cf. Braverman v. United States, supra.* In this case, however, the seven Huneycutt indictments and two of the Clontz indictments were consolidated for judgment and one 8-10 year sentence imposed thereon. (No judgment has apparently been entered in the other Clontz indictment.) Since only one sentence was imposed for all of these, no prejudice to defendant could have resulted from error in submitting each contact as a separate count of solicitation.

Defendant next assigns as error portions of the court's charge to the jury relating to the nature and effect of circumstantial evidence. Since we have held that nonsuit must be granted in the murder case and since all the evidence of solicitation is direct evidence, we find it unnecessary to consider these assignments.

[13] Lastly defendant contends that the court erred in refusing the jury's request that the testimony of Huneycutt be read to them. Defendant argues that such reading would have supported his jury argument that the witness Huneycutt had lied as evidenced by an inconsistency in dates between his testimony and

that of witness Laney. We find nothing in the record to indicate the reason for the jury's request, and it was not repeated. Moreover the court's ruling on the jury's request was not made until after a conference in chambers with counsel and the record indicates that defendant's counsel responded negatively to the court's query whether there was any objection by defendant to the action of the court. Defendant concedes in his brief that ordinarily the decision whether to grant or refuse the jury's request for a restatement of the evidence lies within the discretion of the trial court. *State v. Hatch*, 21 N.C. App. 148, 203 S.E. 2d 334, *cert. denied*, 285 N.C. 375, 205 S.E. 2d 100 (1974); *State v. Crane*, 11 N.C. App. 721, 182 S.E. 2d 225 (1971); 23A C.J.S., Criminal Law, § 1377. We find no error prejudicial to defendant in this instance.

The remaining assignments of error need not be addressed because of our holding that nonsuit must be granted in the murder case.

In cases Number 75-CR-6564 (murder) and Number 76-CR-690 (solicitation) we find error in the failure to allow defendant's motion for nonsuit and those cases are therefore reversed.

In the remaining cases of solicitation we find no error.

Cases No. 75-CR-6564 and 76-CR-690 REVERSED.

NO ERROR in Cases No. 76-CR-691, 76-CR-692, 76-CR-693, 76-CR-694, 76-CR-695, 76-CR-696, 76-CR-697, 76-CR-698, 76-CR-699, 76-CR-700, 76-CR-702.

Justice LAKE dissenting in part.

I dissent from that portion of the decision which holds that the defendant's conviction of murder is reversed and a nonsuit in that case must be granted. In my opinion, the evidence is sufficient to permit reasonable men to find that the defendant, either in person or through a killer procured by him for that purpose, murdered his wife. Consequently, the evidence was sufficient, in my opinion, to carry this case to the jury and to support its verdict of guilty of murder in the first degree. If that be true, the sentence to death must be vacated and a new judgment entered sentencing the defendant to life imprisonment by virtue of the decision of the Supreme

Court of the United States in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

I concur in so much of the decision and majority opinion as relates to the several charges of solicitation to commit the felony of murder.

Chief Justice SHARP and Justice HUSKINS join in this dissenting opinion.

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

BANK v. MOSS

No. 108 PC.

Case below: 32 N.C. App. 499.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977.

BLANTON v. MANESS

No. 112 PC.

Case below: 32 N.C. App. 577.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 13 June 1977.

BUSINESS FUNDS CORP. v. DEVELOPMENT CORP.

No. 90 PC.

Case below: 32 N.C. App. 362.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977. Appeal dismissed ex mero motu 13 June 1977.

CALDWELL v. REALTY CO.

No. 129 PC.

Case below: 32 N.C. App. 676.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977.

DRUMMOND v. DRUMMOND

No. 147 PC.

Case below: 33 N.C. App. 240.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 June 1977.

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

HIGHER ED. ASSISTANCE CORP. v. ANDREWS

No. 142 PC.

Case below: 33 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

IN RE COX

No. 131 PC.

Case below: 32 N.C. App. 765.

Petition by executor for discretionary review under G.S. 7A-31 denied 13 June 1977.

IN RE JOHNSON

No. 126 PC.

Case below: 32 N.C. App. 704.

Petition by caveator for discretionary review under G.S. 7A-31 denied 13 June 1977.

INSURANCE CO. v. INGRAM, COMR. OF INSURANCE

No. 103 PC.

Case below: 32 N.C. App. 552.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

INVESTORS, INC. v. BERRY

No. 117 PC.

Case below: 32 N.C. App. 642.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 13 June 1977.

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

PERRY v. PERRY

No. 134 PC.

Case below: 33 N.C. App. 139.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

PORTS AUTHORITY v. ROOFING CO.

No. 118 PC.

Case below: 32 N.C. App. 400.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 13 June 1977.

PRENTICE v. ROBERTS

No. 102 PC.

Case below: 32 N.C. App. 379.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. ATKINSON

No. 162 PC.

Case below: 33 N.C. App. 247.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977. Appeal dismissed ex mero motu 13 June 1977.

STATE v. BASS

No. 140 PC.

Case below: 33 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 June 1977.

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

STATE v. BLAKNEY

No. 158 PC.

Case below: 32 N.C. App. 399.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 June 1977.

STATE v. BROWN

No. 151 PC.

Case below: 33 N.C. App. 84.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. CHAPMAN

No. 65 PC.

Case below: 32 N.C. App. 398.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. COLE

No. 123 PC.

Case below: 33 N.C. App. 48.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 13 June 1977.

STATE v. CROSBY

No. 122 PC.

Case below: 32 N.C. App. 786.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

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

STATE v. DEESE

No. 23.

Case below: 32 N.C. App. 786.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977. Appeal dismissed ex mero motu 13 June 1977.

STATE v. GAINEY

No. 138 PC.

Case below: 32 N.C. App. 682.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. GREGORY

No. 128 PC.

Case below: 32 N.C. App. 762.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1977.

STATE v. HALES

No. 121 PC.

Case below: 32 N.C. App. 729.

Petition by defendant for discretionary review under G.S. 7A-31 denied 18 May 1977.

STATE v. HARRIS

No. 150 PC.

Case below: 33 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

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

STATE v. HYATT

No. 136 PC.

Case below: 32 N.C. App. 623.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. MILLER

No. 135 PC.

Case below: 32 N.C. App. 770.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 June 1977.

STATE v. MOOREFIELD

No. 137 PC.

Case below: 33 N.C. App. 37.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1977. Appeal dismissed ex mero motu for lack of substantial constitutional question 2 June 1977.

STATE v. MUSUMECI

No. 144 PC.

Case below: 33 N.C. App. 88.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. RIDDLE

No. 124 PC.

Case below: 33 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

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

STATE v. SMITH

No. 119 PC.

Case below: 32 N.C. App. 786.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. WATTS

No. 120 PC.

Case below: 32 N.C. App. 753.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

STATE v. WIKE

No. 125 PC.

Case below: 32 N.C. App. 475.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 June 1977.

STATE v. WILLS

No. 133 PC.

Case below: 32 N.C. App. 787.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 13 June 1977.

TRUST CO. v. BROADCASTING CORP.

No. 130 PC.

Case below: 32 N.C. App. 655.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977.

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

TURNER v. INVESTMENT CO.

No. 113 PC.

Case below: 32 N.C. App. 565.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 June 1977.

UTILITIES COMM. v. EDMISTEN, ATTY. GENERAL

No. 132 PC.

Case below: 32 N.C. App. 787.

Petition by Attorney General for discretionary review under G.S. 7A-31 and notice of appeal allowed 13 June 1977.

UTILITIES COMM. v. SIMPSON

No. 110 PC.

Case below: 32 N.C. App. 543.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 June 1977.

WATERS v. PERSONNEL, INC.

No. 111 PC.

Case below: 32 N.C. App. 548.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 13 June 1977.

WILLIAMS v. INSURANCE REPAIR SPECIALISTS

No. 73 PC.

Case below: 32 N.C. App. 235.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 June 1977.

APPENDIXES

AMENDMENTS TO
RULES OF APPELLATE PROCEDURE

AMENDMENTS TO
STATE BAR RULES

PRESENTATION OF
NEWTON PORTRAIT

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

1. Rule 18, "Taking Appeal; Record on Appeal—Composition and Settlement" is hereby amended:

   (1) by striking the word "and" in line 3 of Subsection (a) and by inserting in line 3 after the word "Insurance" a comma and the words "and the Disciplinary Hearing Commission of The North Carolina State Bar"; and

   (2) by adding two new paragraphs following the first paragraph in Subsection (b) to read as follows:

   "The time and methods for taking appeals from the Disciplinary Hearing Commission of The North Carolina State Bar are: Either party to the proceeding, within 30 days after receipt of a copy of the Order of the Commission, which is to be sent by Registered or Certified Mail, may appeal from the decision of the Commission to the Court of Appeals for alleged errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

   "In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a supersedeas; and any discipline imposed by the Commission shall be stayed pending determination of the appeal."

   (3) by striking the period at the end of the word "agency" in line 10 of Subsection (d) (3) and inserting a comma and the words "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar to settle the record on appeal in appeals from that agency."

   (4) by adding after the word "Commission" in line 2 of the third paragraph of Subsection (d) (3) the words "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of The North Carolina State Bar."

2. Rule 19, "PARTIES TO APPEAL FROM AGENCIES," is hereby amended by adding a new paragraph to read as follows:

"(d) *From the Disciplinary Hearing Commission of The North Carolina State Bar.* The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests."

These amendments to Article IV of the Rules of Appellate Procedure were adopted by the Supreme Court in Conference on June 21, 1977, to become effective immediately upon adoption. The amendments shall be promulgated by publication in the next succeeding Advance Sheets of the Supreme Court and the Court of Appeals.

Exum, J.

For the Court

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

PRACTICAL TRAINING OF LAW STUDENTS

BE IT RESOLVED by the Council of The North Carolina State Bar that Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar entitled paragraph 9 entitled North Carolina Rules Governing Practical Training of Law Students as appears in 282 N.C. 727 be amended by adding a new paragraph to Article II thereof and designated as paragraph f. and Article III B. by changing the concluding period to a semicolon and adding the following words which are italicized.

ARTICLE II — GENERAL DEFINITION:

f. *Second Year Law Student*—a student regularly enrolled and in good standing in a law school in this state who has satisfactorily and substantially completed fifty percent (50%) of the requirements for a first professional degree in law (J.D. or its equivalent).

ARTICLE III — ELIGIBILITY:

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent); *provided a Second Year Law Student as defined in Article II may engage in the activities specified in Article VI, Section C subject to the limitations set forth in said Article VI, except that the supervising attorney must be present at all trials.*

BE IT FURTHER RESOLVED that these amendments be on a trial basis for one year commencing July 1, 1977.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the

Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 28th day of April, 1977.

B. E. James, Secretary-Treasurer

The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar on April 15, 1977, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of May, 1977.

Susie Sharp

Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar adopted on April 15, 1977 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 11th day of May, 1977.

Exum, J.

For the Court

DISCIPLINE AND DISBARMENT OF ATTORNEYS

BE IT RESOLVED by the Council of The North Carolina State Bar that the following amendments to Article IX relative to Discipline and Disbarment of Attorneys were duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on April 15, 1977 and amends Article IX as appears in 288 N.C. 743, 744, 750, 754, 756, 757, 759, 765 and 767, by adding a new definition to Section 3 to be numbered (32); adding a new paragraph to Section 8 (A) to be numbered (6); inserting the italicized portions after the word session in Section 13 (5); inserting the italicized portion to Section 14 (4); rewriting Section 14 (10); adding a sentence at the end of Section 14 (11); substituting the words italicized in Section 14(19); inserting the italicized portion in Section 23 (A); and inserting the italicized portion in Section 25 (3).

§ 3. Definitions

(32) consolidation of cases: a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

§ 8. Chairman of the Hearing Commission—Powers and Duties

(A) (6) in his discretion to consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

§ 13. Preliminary Hearing

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, *and deliberating, but no persons other than members may be present while the Committee is voting.*

§ 14. Formal Hearing

(4) Within seven days *of service* of a complaint *on the defendant,* the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman

for the hearing to commence. The commencement of the hearing shall be *initially* scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant, *unless one or more subsequent complaints have been served on the defendant within ninety days from the date of service of the first or a preceding complaint.*

When one or more subsequent complaints have been served on the defendant within ninety days from the date of service of the first or a preceding complaint, the Chairman of the Disciplinary Hearing Commission may consolidate the cases for hearing, and the hearing shall be initially scheduled not less than sixty nor more than ninety days from the date of service of the last complaint upon the defendant attorney.

§ 14. (10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.

§ 14. (11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. Hearings and other proceedings shall be as expeditious as possible, and all time limits shall be mandatory and nondiscretionary. *No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons beyond the control of a party that would work an extreme hardship in the absence of a continuance.*

§ 14. (19) If the charges of misconduct are established, the Hearing Committee shall then *consider* any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall *accompany* the transcript of the hearing.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, *one of* the following actions shall be taken:

§ 25. Reinstatement

(3) Petitions for reinstatement by disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. *The Chairman shall within seven (7) days appoint a Hearing Committee as provided in section 8 (A) (2), schedule a time and place for the hearing, and notify the Council and the petitioner of the composition of the Hearing Committee and the time and place for the hearing. The petitioner* shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 28th day of April, 1977.

B. E. James, Secretary-Treasurer

The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar on April 15, 1977, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11th day of May, 1977.

Susie Sharp

Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar adopted on April 15, 1977 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 11th day of May, 1977.

Exum, J.

For the Court

Ceremonies

For the Presentation of a Portrait

of

The Honorable

Adrian Jefferson Newton

to

The Supreme Court of North Carolina

11:00 a.m., 4 March 1977

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 Honorable Adrian J. Newton, who served as the Clerk of this Court for 35 years before his retirement on December 1, 1976. For the Court, Mr. Newton, and the members of his family, I express our appreciation to all of you for your presence here this morning at this very meaningful ceremony. I also want to express our regret that Justice Huskins is prevented from being here this morning by his illness.

The presentation will be made by our Marshal-Librarian, the Honorable Raymond M. Taylor, whose selection for this happy assignment was by acclamation. Mr. Taylor's friendship with Mr. Newton began in 1960 when he became law clerk to the late Justice Clifton L. Moore. It continued during the four years he engaged in the active practice of law, and was cemented during the thirteen years he and Mr. Newton worked together in their respective positions with this Court. Because of this personal and professional relationship no more felicitous choice could have been made. The Court now recognizes Mr. Taylor.

PRESENTATION ADDRESS

By

THE HONORABLE RAYMOND M. TAYLOR

MAY IT PLEASE THE COURT:

The greater part of Adrian Jefferson Newton's career has been as a lawyer in the public service. He has done his duty, but that alone is not why we honor him. Indeed, like Robert E. Lee, he has shared in the sentiment that we should do our duty in all things; we "cannot do more," we "should never wish to do less."[1]

What has distinguished his career from the careers of so many others is that Adrian Jefferson Newton has performed his duty in an exemplary manner. He has worked honestly, honorably, and unselfishly. In so doing, he has reflected high credit upon himself and his profession. He especially has endeared himself to the 124 present and former Research Assistants of this Court[2] on whose behalf it is my memorable pleasure today to present to this Court an oil portrait of Mr. Newton.

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[1] Lee's regard for duty has been expressed as follows: "Duty, then, is the sublimest word in our language. Do your duty in all things . . . . You cannot do more; you should never wish to do less." T. PAGE, ROBERT E. LEE: MAN AND SOLDIER 35 (1911, 1923).

[2] The list is as follows: Hamlin Wade, Edgar Reel Bain, Andrew Holmes McDaniel, Archibald Edgar Lynch, Jr., William Clarence Brewer, Jr., James Bethel Richmond, Gerald Corbett Parker, William Earl Britt, Dan Elijah Perry, George Wilson Saintsing, Daniel Watson Fouts, Thomas Stephen Bennett, David Edward Reid, Jr., Rossie Garnet Gardner, Renard Roy Mitchell, Jr., Charles Hutchins Sedberry, Leslie Gray Frye, Theodore Reaves Reynolds, Jacob Winston Todd, Jimmy Lewis Love, James Gooden Exum, Jr., Louis B. Meyer, Robert Alden Jones, Kennieth Sawyer Etheridge, Jr., Raymond Mason Taylor, Elbert Richard Jones, Jr., William Lee Powell, Jr., Carl Wainwright Loftin, Emil Failing Kratt, Clifton Leonard Moore, Jr., Hugh Glenn Pettyjohn, Harry McCarley Giles, Jr., Eugene Simpson Tanner, Jr., Charles Royal Tedder, Reginald Stanley Hamel, Thomas LaFontine Odom, William Isler Wooten, Jr., Andrew Albert Vanore, Jr., Delford Payne Richey, Samuel Houston Dorsett, Jr., Wade Marvin Smith, Louis Phillip Hornthal, Jr., James Monroe Long, James Harold Tharrington, Edward Lewis Murrelle, Wilson Burton Partin, Jr., Ralph Alexander White, Jr., Charles Ewing Clement, Joe Neal Cagle, William Claude Myers, Norman Bryant Kellum, Jr., Willis Padgett Whichard, Vernon Haskins Rochelle, Robert Eugene Smith, Reuben Leslie Moore, Jr., Henry Stancil Manning, Jr., Walter Wray Baker, Jr., Frederick Eugene Hafer, Joseph William Moss, Thomas Jefferson Bolch, Fred Stephen Glass, Thomas Alfred Gardner, Edward Tollett Cook, Jefferson Deems Johnson, III, John Frederick Riley, Roger William Smith, William Frank Moser, John Ward Purrington, James Robert Slate, Thomas Willis Haywood Alexander, Pender Roberts McElroy, John Breckenridge Regan, III, Robert Livingston Thompson, Broxie Jay Nelson, George Verner Hanna, III, William Preston Few, Robert Fuller Fleming, Michael Kent Curtis, John Lewis Shaw, James Gunter Billings, Ernest LeRoy Evans, Richard Bruce Conely, Kenneth Byron McCoy, John Randolph Riley, Hunter Spencer Barrow, Robert Warren Sumner, Mark Ellis Galloway, Joseph Hackney, Franklin Edward Freeman, Jr., Haywood Forney Rankin, Richard Rankin Reamer, James Calvin Fuller, Jr., Claude Ernest Simons, Jr., John Morris Rich, Thomas Sims Erwin, Bruce William Vanderbloemen, Thomas Rich Crawford, Clarence Hatcher Pope, Jr., Brenton Douglas Adams, William Lunsford Long, III, Coy Estres Brewer, Jr., Edward Fitzgerald Parnell, III, William Hunter Gammon, Robert Dumais Kornegay, Jr., Marvin Allen Bethune, Sidney Lawrence Cottingham, Oliver Max Gardner, III, Gary Lambeth Murphy, Robert Michael Wells, Edward Johnston Harper, II, Jackie Don Drum, Jonathan Virett Maxwell, Edward Garrett Walker, Bruce Hartmann Connors, Donald Jackson McFadyen, Michael Deams West, Jane Rankin Thompson, Edgar Thomas Watson, Peter Joseph Sarda, Edward Bardin Simmons, Craig Johnson Tillery, Michael Corbett Stovall, Jr., Christy Eve Reid, and Caroline Nicholson Bruckel.

To understand any person to the fullest degree it is essential to know whence he has come. Adrian Jefferson Newton is a product of one of the most remarkable families in the history of North Carolina. A consistent characteristic of his forebears has been service and achievement founded upon strong Christian conviction and indomitable moral courage.

His great grandfather, John Garland Mills of Virginia, married Martha Williams Haymes. He was a minister of the Gospel and a prosperous farmer. Not only did he take an orphan boy into his family to rear, but he distributed to the poor such of his crop as was not needeed by his own family.[3]

To John Garland Mills and his wife, Martha, was born on July 9, 1831, a son. The son was named John Haymes Mills for his grandfather, and he grew into a physical and intellectual giant, being six feet two inches in height,[4] an excellent debater, and the head of his class throughout his academic career at Wake Forest College, from which he graduated in 1854.[5] Another member of that class was William T. Faircloth,[6] who was later Chief Justice of this Court,[7] and whose portrait now hangs in this chamber.

This John Haymes Mills married Elizabeth Ann Arrington Nicholson Alston Williams, an accomplished musician, so accomplished that she played the piano at the inauguration of President William Henry Harrison in 1841.[8] Beyond that, John Haymes Mills was the owner and editor of the *Biblical Recorder*.[9] He founded the Masonic Orphanage at Oxford in 1873,[10] and he founded the Baptist Orphanage at Thomasville in 1885.[11] The story of that institution, known as the Mills Home, is told in an inspiring book written by Dr. Bernard Washington Spil-

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[3] B. SPILMAN, THE MILLS HOME: A HISTORY OF THE BAPTIST ORPHANAGE MOVEMENT IN NORTH CAROLINA 6 (1932).

[4] *Id.* at 7.

[5] *Id.* at 8-9.

[6] *Id.* at 9.

[7] *See generally* Clark, *History of the Supreme Court of North Carolina*, 177 N.C. 615, 627-628 (1919).

[8] Interview with Adrian Jefferson Newton, in Raleigh, North Carolina (March 4, 1977). Her uncle, Archibald Hunter Arrington, was a Representative from North Carolina in the Twenty-seventh and Twenty-eighth Congresses (March 4, 1841-March 3, 1845), and possibly was acquainted with President Harrison. *See* STAFF OF THE JOINT COMM. ON PRINTING, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, S. Doc. No. 92-8, 92d Cong., 1st Sess. 526 (1971). Her brother, Archibald Hunter Arrington Williams later served in Congress. *Id.* at 1925. A biographical sketch of Mrs. Mills appears in C. Howell, "With the Alumni," *Charity and Children*, Dec. 4, 1947, at 3, col. 5.

[9] B. SPILMAN, *supra* note 3, at 9-10.

[10] *See generally* B. SPILMAN, *supra* note 3, at 13-20.

[11] *Id.* at 49-54.

man,[12] who there described John Haymes Mills as both "a man of deep and abiding piety"[13] and "a genius, original, vigorous, highly cultured."[14]

A daughter of John Haymes Mills and Elizabeth Williams was named Martha. She was a person of talent and accomplishment. Many of her hymns were published, and her poems, "Little Lottie's Speech" and "Life of a Dew-Drop" were widely circulated in the 1887 *North Carolina Speaker*.[15]

A contemporary of Martha Mills was a Baptist minister named Jefferson Davis Newton. He was a native of Sampson County and was the tenth child in a family of thirteen, of which three were ministers. He was educated at Wake Forest College where John Haymes Mills had led his class a generation before. He farmed as well as preached. He worked as a newspaper correspondent. He served a stint as editor of *Charity and Children*, and he was the first pastor of the Mills Home Church.[16]

Perhaps it was inevitable that the talented Martha Mills and the dedicated Jefferson Davis Newton should become acquainted. That acquaintance led to their marriage, and their fifth and last child was born on a farm in Davidson County near Thomasville, and near the Mills Home, on September 30, 1901. He was named Adrian Jefferson Newton, and we honor him here today.

Growing up as a son of Jefferson Davis Newton and Martha Mills Newton must have been a unique experience for a child of that day, because both parents were well educated and no families in the state were more respected.

Young Adrian Jefferson Newton obtained most of his early formal education in the schools of Davidson County. He graduated from Thomasville High School in 1919 when completion of ten grades was required for a diploma, and then again in 1920, when an additional grade had been added and he decided he wanted to go to school for an eleventh year.

Immediately after high school he went into the public service, serving from June 1, 1920, through August of that year

[12] B. SPILMAN, *supra* note 3.
[13] *Id.* at 154.
[14] *Id.* at 156.
[15] THE NORTH CAROLINA SPEAKER was compiled by Eugene G. Harrell and John B. Neathery, and its title page states that it was "For Every Grade of Pupils in North Carolina Schools." It was published in 1887 by Alfred Williams & Co., Raleigh, North Carolina. "Little Lottie's Speech" is on pages 87-88 and "Life of a Dew-Drop" is on pages 148-150.
[16] *See generally Biblical Recorder*, Feb. 11, 1948, at 9, col. 2.

as City Clerk of Thomasville and Clerk of Thomasville's Recorder's Court.

In the fall of 1920 he entered Wake Forest College, where his father and grandfather had been educated. After two years in college it was necessary for Adrian Newton to earn some money before continuing his education. Again, he went back into the public service, this time working from December 11, 1922, through August 30, 1924, as Assistant Clerk of the Superior Court of Davidson County.

When fall came, however, he returned to Wake Forest where he received his Bachelor of Laws degree on June 5, 1925. He passed the State Bar examination in August of that year,[17] returned to Wake Forest for additional courses, and then back to Davidson County in January, 1926, to begin the practice of law in Lexington.

But what about those years in college? Assuredly, they were years of activity and achievement. In athletics, he was Captain of the Wake Forest College tennis team, and he became President of the North Carolina Intercollegiate Tennis Association.

In academic affairs, he was a Commencement Marshal, President of the Euzelian Literary Society, and Business manager of *Old Gold and Black.* He became a member of the Order of the Golden Bough and Pi Gamma Sigma fraternity.[18]

That Adrian Newton was General Director of the Baptist Young People's Union as a student at Wake Forest was natural. When he was a lad of thirteen while his father briefly held a pastorate near the Mitchell River in Surry County he was baptised by total immersion. Apart from its religious significance, that occasion was memorable to Adrian Newton because the ceremony was performed, to use his words, "by two old Baptist preachers on a *cold* November day."

When some nearby church, a few years ago, advertised for a church pianist, the newspaper advertisement stated that the successful applicant must be a "Saved Baptist." Seeing that advertisement, Mr. Newton said he would qualify but for the fact that he did not play the piano. Surely, he is among the ranks of those to whom it means much to possess the basic Christian faith as taught in the Baptist Church.

[17] 190 N.C. vii (1925).

[18] Pi Gamma Sigma subsequently became the Delta Omega chapter of Kappa Sigma national fraternity, and he consequently became a member of Kappa Sigma.

Not long after beginning the practice of law in 1926 he also acquired an interest in a young school teacher who had just graduated from college and was teaching the first grade in Lexington. She was a native of Mount Airy, and her name was Lois Long Spaugh. Apparently because she had manifested some of the characteristics of a sometimes talkative kind of bird, her family had nicknamed her "Polly," a name that ever since has stuck.

As things turned out, Adrian and "Polly" were married on August 10, 1927. She is a lady of strong conviction, warm charm, and keen intellect. To be around her always is a joy, and surely we honor her also by this occasion today.

Politics held a fascination for Adrian Newton, and in 1928, a landslide victory year for the Republicans, Adrian Jefferson Newton, a Democrat, was elected Judge of the Davidson County Court. He took office on the first Monday of December, 1928, at the age of 27, was reelected twice, and served until the first Monday of December, 1934.

In the civic and community affairs of Davidson County he was Councilor and District Deputy of the Junior Order of United American Mechanics, President of the Kiwanis Club in 1932, Chapter Chairman of the American National Red Cross, and a member of the Masonic Lodge and, of course, the Baptist Church.

His political interests led to his participation in the 1936 political campaign as county manager of Clyde R. Hoey's successful campaign for Governor. That, in turn, led to Adrian Newton's appointment effective January 18, 1937, to the position of the first General Counsel of the newly-created North Carolina Unemployment Compensation Commission. That, of course, brought about his move from Lexington to Raleigh, where he since has resided.

The challenge of his work at the Unemployment Compensation Commission is indicated by the fact that the new commission had been created by legislation and there was little judicial precedent to help explain what that new law meant or to whom it applied.

Lawsuit after lawsuit arose, and Adrian Newton followed them through, one by one. The law was new, the questions

were new, and the precedents were new, each of them forged in part by the keen legal skill of Adrian Newton.[19]

His repeated activity as an advocate in the Supreme Court no doubt impressed the Justices with his manner and ability, for October 15, 1941, he became Clerk of the Supreme Court by virtue of the Court's election.[20] That is the position he held until December 1, 1976,[21] after a total of more than 35 years as Clerk of the Supreme Court and 49 years of outstanding public service.

In his history of the Supreme Court of North Carolina in 1889, Dr. Kemp Plummer Battle, then President of the University at Chapel Hill, said:

> The Clerks of the Supreme Court hold a most responsible office. Questions of great complexity are frequently referred to them. The duties require an excellent memory and business head, good knowledge of the law, great accuracy, perfect integrity, untiring patience, and unfailing courtesy.[22]

In Adrian Jefferson Newton the Supreme Court of North Carolina found such a man in 1941. The record bears it out.

During his 35 years as Clerk of the Supreme Court, Adrian Jefferson Newton became possibly the best known court official in the state.

Most lawyers are at home in their own county courthouses, but it always has been with some anxiety and not a little uncertainty that even the most seasoned practitioners have approached the highest court of their state. It has been in such times that the Bar has found in Adrian Newton a knowledgeable, hospitable, courteous, efficient, and understanding friend, confidant, and appellate procedure expert.

Many are the lawyers who because of him have proceeded with confidence when without his help they would have been laboring under a cloud of anxious uncertainty. Indeed, many are the times that his telephone has rung with inquiries from lawyers throughout the state, and never has he turned one away without help.

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[19] For general biographical information and a review of his work at the Unemployment Compensation Commission *see The News and Observer,* Oct. 16, 1941, at 1, col. 4, and 2, col. 3.

[20] [Fall 1941] N. C. SUP. CT. MINUTE DOCKET 174.

[21] [Fall 1976] N. C. SUP. CT. MINUTE DOCKET 232-235. These pages also contain the remarks of the Chief Justice in connection with Mr. Newton's retirement.

[22] Battle, *An Address on the History of the Supreme Court* (Feb. 4, 1889), as published in 1 N. C. 835, 860 (Ann. ed. 1937).

His record of outstanding service made it logical that those seeking the most competent person to serve as Clerk of the World Court in Tokyo[23] in 1945 would tender that post to North Carolina's Supreme Court Clerk. They did, but he declined, choosing rather to continue notable service in his native state.

Being one who enjoys pleasant companionship and feels a deep sense of civic and religious responsibility, Adrian Newton has not cloistered himself among the personages of the law. Rather, he has participated notably in the athletic, academic, religious, civic, and community service spheres wherever he has been.

In Raleigh he has been president of the Raleigh High School Boosters Club, President of the Torch Club, President of the Raleigh Baptist Council, a member of the Board of Directors of the Young Men's Christian Association of both Raleigh and North Carolina State University, and a member of the Board of Directors of the Wake County Chapter of the American National Red Cross.

He is a former Chairman of the Student Loan Committee of the Raleigh Kiwanis Club and a former President of the Raleigh Kiwanis Scholarship Foundation. He also is a member of the Mayflower Society.[24]

He has been a Deacon of Hayes Barton Baptist Church in Raleigh since November 13, 1938. He was Chairman of the Board of Deacons twice, in 1942 and in 1956, and on November 15, 1970, he was elected a Life Deacon.

Professionally, he is a member of the North Carolina State Bar, the North Carolina Bar Association, the Wake County Bar Association, and the Bar of the Supreme Court of the United States. He is a former Vice President of the Twelfth Judicial District Bar Association, having been then a member of the Davidson County Bar.

Adrian Newton also is a member of Omicron Delta Kappa honorary fraternity and Phi Delta Phi international legal fraternity.

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[23] Formally known as the International Military Tribunal for the Far East.

[24] He is a descendant of Richard Warren, who was a passenger on the "Mayflower" on the voyage that terminated at Plymouth, New England, in December, 1620. *See* Application for Membership, North Carolina Society of Mayflower Descendants, General No. 15,704, State No. 341, copy of which is on file in the North Carolina Supreme Court Library.

Among the singular honors and distinctions that have come to Adrian Newton are his listing in the "North Carolina Biography" volume of *North Carolina: The Old North State and the New*[25] and *North Carolina Lives: The Tar Heel Who's Who,*[26] his designation as "Tar Heel of the Week" by *The News and Observer* on June 6, 1954,[27] and his inclusion in *Who's Who in the South and Southwest*[28] and *Who's Who in Government.*[29]

Wake Forest University replaced his Bachelor of Laws degree with a Juris Doctor degree on April 17, 1970.

Beyond all the things that we have spoken of is his family and the importance that his family has had for him, the important place that it has had in his life. Perhaps you will recall the words of Justice Walter Parker Stacy, later Chief Justice, when he wrote:

> It matters not on what plane of life one labors, nor how large or small the number of his acquaintances, the man who toils and yet knows that in the circle of his influence there is at least one life in which there is sunshine where but for him there would have been shadow; that there is at least one home in which there is cheer where but for him there would have been gloom; that there is at least one heart in which there is hope where but for him there would have been dispair, that man carries with him as he goes one of the richest treasures on this earth.[30]

By virtue of the contribution of "Miss Polly" and the other members of his family, I cannot imagine that his household ever could have been one that was gloomy, or without hope, or without genuine joy. And yet, as we look at the plane upon which Adrian Jefferson Newton has walked, we know that truly he has carried, in the form of his family, "one of the richest treasures on this earth."[31]

He and Mrs. Newton have five children: Lois Spaugh Newton, now Mrs. William Hooper Wilson of Raleigh; Sarah Martha Newton, now Mrs. Richard Llewellyn Sommers of Lexington; Adrian Jefferson Newton, Jr. of Raleigh; Thomas Long

[25] 3 A. HENDERSON, NORTH CAROLINA: THE OLD NORTH STATE AND THE NEW 100 (1941).

[26] W. POWELL, NORTH CAROLINA LIVES: THE TAR HEEL WHO'S WHO 910 (1962).

[27] O'Keef, "Tar Heel of the Week," *The News and Observer*, June 6, 1954, § 4, at 3, col. 1.

[28] WHO'S WHO IN THE SOUTH AND SOUTHWEST 527 (14th ed. 1975).

[29] WHO'S WHO IN GOVERNMENT 450 (2d ed. 1975).

[30] *State v. Wingler*, 184 N.C. 747, 751, 115 S.E. 59, 61 (1922).

[31] *Id.*

Newton of Monroe, Georgia; and Henry Williams Newton, a fine young man, a fine lawyer, whose passing we still mourn.[32]

Mr. and Mrs. Adrian Jefferson Newton have sixteen grandchildren,[33] and, if it please the Court, their names will not be recited at this time.

They have a host of friends, many of whom share this occasion with us.

Thus, we are gathered to honor a good man, a dedicated man, an unselfish man, a competent man, an honest man, a congenial man, a courteous man, a man who has been a friend to all who have turned to him for help. We are gathered to honor one whose public service has been exemplary.

Many of us who served as Research Assistants to this Court from 1956 through 1976 determined that it would be appropriate for an oil painting of Mr. Newton to be presented to the Court. We sought the counsel of an eminent artist, Everett Raymond Kinstler,[34] who did the magnificent portraits of Chief Justices Winborne[35] and Parker.[36] He agreed to serve as the consultant for this project and he recommended as the artist a very talented and outstanding young painter, Thomas W. Orlando,[37] a member of the faculty of the Pratt-Phoenix School of Art and Design in New York, with studios in both New York and his home, Sheffield, Massachusetts.

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[32] He was admitted to the North Carolina State Bar in 1966, practiced law in Raleigh, and died December 13, 1972. *See "Licensed Attorneys,"* 268 N.C. x, xii (1966).

[33] They are as follows: (1) Children of Mr. and Mrs. William Hooper Wilson: William Hooper Wilson, Jr., and Adrian Newton Wilson; (2) Children of Dr. and Mrs. Richard Llewellyn Sommers: Sarah LuClare Sommers, Richard Newton Sommers, and Jefferson Maurice Sommers; (3) Children of Adrian Jefferson Newton, Jr. (now married to Barbara Virginia Hardee Newton) and Barbara Hunter Sneed Newton: Jean Hunter Newton, Adrian Jefferson Newton, III, Elizabeth Arrington Newton, Timothy Starke Newton, and John Haymes Newton; (4) Children of Thomas Long Newton and Mary Frances Connell Newton: Thomas Long Newton, Jr., Graham Connell Newton, Taylor Spaugh Newton, Mary Amanda Newton, and Evan Christian Newton; and (5) Daughter of Henry Williams Newton and Lillian Arrington Johnston Newton (now Mrs. William Brantley Cox): Jane Guignard Cox.

[34] *See generally* WHO'S WHO IN AMERICA 1727 (39th ed. 1976); Andersen, "Arts," *People* (weekly magazine), June 14, 1976, at 31; and E. KINSTLER, PAINTING PORTRAITS (1971).

[35] *See* Denny, *Presentation of the Portrait of the Late Chief Justice John Wallace Winborne*, 277 N.C. 745 (1970).

[36] *See* Branch, *Presentation of the Portrait of the Late Chief Justice Robert Hunt Parker*, 282 N.C. 739, N.C. Reporter, 193-194 S.E. 2d (front insert at 5) (1972).

[37] Thomas W. Orlando received his B.A. in Art from the City College of New York, received various scholarships and fellowships, and did further study at the National Academy of Art and Design, the Art Students League, the Brooklyn Museum, and Henry Hensche's Cape School of Art. He teaches drawing, painting, and portraiture, and he has received numerous awards for both portraiture and traditional landscape and easel painting.

Thomas Orlando came to Raleigh and Adrian Newton sat for him for two days[38] as he sketched, photographed, and studied. The portrait subsequently was painted, and we are particularly pleased that the artist, Thomas W. Orlando, and his charming wife, Judy, have come today for its presentation and are seated with Mr. and Mrs. Newton and their family.

On behalf of the 124 Research Assistants[39] who commissioned this painting,[40] it is a high honor, a distinct privilege, and a genuine pleasure for me at this time to present it to the Supreme Court of North Carolina and to request that it be unveiled by the Research Assistants to the two newest members of the Court, those Research Assistants being Christy Eve Reid[41] and Caroline Nicholson Bruckel.[42]

[38] October 30-31, 1976.

[39] Each member of the Supreme Court of North Carolina has had a Research Assistant, also known as a "law clerk," since 1956. During the succeeding twenty years 140 lawyers have filled those positions. The portrait of Adrian Jefferson Newton was commissioned by 124 of the 139 still living. Those who commissioned the portrait are listed in note 2 *supra*.

[40] The portrait is on a canvas approximately 28 inches in width and 36 inches in height. It shows Mr. Newton standing in typical posture holding the first volume of Supreme Court records and briefs to be bound after he took office in 1941. Writing of the painting, Everett Raymond Kinstler said, "It pleased me greatly to see it . . . . [I]t is a splendid work, one that will enhance the walls [of the Court]." Letter from Everett Raymond Kinstler to Raymond M. Taylor (March 1, 1977), on file in the North Carolina Supreme Court Library. The portrait is framed in a wood frame, gilded in genuine gold leaf. Outside dimensions of the frame are approximately 33¼ inches by 41¼ inches. The inscription on the engraved plate at the bottom of the frame is, "ADRIAN JEFFERSON NEWTON, CLERK OF THE SUPREME COURT, 1941-1976."

[41] Research Assistant to Associate Justice J. William Copeland.

[42] Research Assistant to Associate Justice James G. Exum, Jr., who served 1960-1961 as Research Assistant to Associate Justice Emery B. Denny, later Chief Justice.

REMARKS OF CHIEF JUSTICE SUSIE SHARP IN ACCEPTING THE PORTRAIT OF THE HONORABLE ADRIAN JEFFERSON NEWTON

We thank Mr. Taylor for the discerning and fitting tribute which he has paid to Mr. Newton, whose years as Clerk of this Court not only endeared him to the Justices with whom he worked, but to laymen and lawyers alike who had business with his office. All have relied upon his unique knowledge of the Court's customs, traditions, and procedure. Both the young lawyer, unskilled in appellate procedure, and the experienced practitioner confounded by a special situation, have sought his counsel, and always they found him sympathetic, courteous, and ready to help. He set a high standard of efficiency and gracious public service.

We are most grateful to our former law clerks whose thoughtfulness and generosity have given us this life-like portrait of our friend and associate of many years. And we are especially pleased that this inspiration came to our law clerks at a time when the painting could be done from life and the subject himself could see the real evidence—proof beyond a reasonable doubt—of the high esteem and affection which so many have for him.

The Marshal will see that the portrait is hung in an appropriate place in the Clerk's office, and a record of these proceedings will be included in the minutes of the Court and printed in the *North Carolina Reports.*

We are delighted to have with us the artist and his wife, Mr. and Mrs. Thomas Orlando.

In order that the members of the Court and the others present may have the opportunity to greet Mr. Newton, his family, and Mr. and Mrs. Orlando, they will form a receiving line as directed by the Marshal. When the receiving line has been formed, the Court will rise and the Justices will leave the bench for the purpose of greeting the members of the receiving line. When the members of the Court have retired from the courtroom, others are invited to proceed down the receiving line as directed by the Marshal. Please remain seated until the Marshal gives you other instructions.

[The receiving line then was formed and those in it received the Justices and others for approximately one hour.]

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index, e.g., Appeal and Error § 1, correspond with titles and section numbers in the N. C. Index 3d (Abandonment of Property—Homicide) and N. C. Index 2d (Hospitals—Witnesses).

TOPICS COVERED IN THIS INDEX

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BILLS AND NOTES
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DAMAGES
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WILLS

ANIMALS

§ 4. Payment of Damages Inflicted by Dogs Out of Dog License Tax

Defendant board of county commissioners was strictly liable under provisions of G.S. 67-13 for personal injuries inflicted upon plaintiff by a dog. *Heath v. Board of Commissioners*, 369.

In an action to recover from defendant board of county commissioners for injuries inflicted by a dog, the county acquired a cause of action against third-party defendant dog owner from the moment his dog injured plaintiff, and that cause of action survived the repeal of G.S. 67-13. *Ibid.*

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

Upon appeal to the Supreme Court from the Court of Appeals review is limited to questions first presented in the Court of Appeals. *Sales Co. v. Board of Transportation*, 437.

§ 6. Right to Appeal

Order rendering summary judgment for plaintiff for the unpaid balance of a note and retaining defendant's claim for a set-off or credit affected a substantial right of defendant and was appealable. *Investments v. Housing, Inc.*, 93.

§ 16.1. Limitations on Powers of Trial Court After Appeal

Plaintiffs' post-trial motion for voluntary dismissal without prejudice and the subsequent appearance of the parties for the hearing of this motion did not constitute an abandonment of plaintiffs' prior appeal which revested jurisdiction in the trial judge for the purpose of hearing and ruling on the motion. *Bowen v. Motor Co.*, 633.

§ 62.2. Granting of Partial New Trial

Partial new trial on the issue of damages should not be awarded in an action for breach of contract where the jury's verdict provides no basis for ascertaining which of several theories supported its award of damages and where the measure of damages might vary according to the breach proven. *Weyerhaeuser Co. v. Supply Co.*, 557.

AUTOMOBILES

§ 60. Skidding

Plaintiff passenger's evidence was insufficient to support an inference that defendant driver was negligent when his automobile skidded on water and overturned. *Farmer v. Chaney*, 451.

§ 63.3. Striking Children on Private Property

Evidence of negligence was sufficient for the jury in an action to recover for injuries sustained by minor plaintiff when he was struck by a motorcycle operated by a 14 year old on private property. *Williams v. Trust Co.*, 416.

AUTOMOBILES — Continued

§ 108.1. Circumstances Where Family Purpose Doctrine Applies

The family purpose doctrine is applicable to accidents involving the operation of a motorcycle upon private property. *Williams v. Trust Co.*, 416.

§ 113.1. Sufficiency of Evidence of Manslaughter

In a prosecution in superior court for involuntary manslaughter arising from an automobile accident, the State could not properly rely on defendant's driving while under the influence when defendant had earlier been acquitted of this offense in district court, but defendant's failure to raise the double jeopardy defense at trial amounted to a waiver of that defense. *S. v. McKenzie*, 170.

Evidence was sufficient for the jury in a prosecution for manslaughter arising out of an automobile accident. *Ibid.*

In a prosecution for involuntary manslaughter evidence was sufficient to support a finding that defendant drove into an intersection without stopping, that at the time he approached and entered it he was driving at a greater speed than was reasonable and prudent under the conditions then existing, and that such behavior constituted culpable negligence proximately causing death. *S. v. Gainey*, 627.

BILLS AND NOTES

§ 20. Presumptions and Burden of Proof

Superior court erred in rendering summary judgment for plaintiff for alleged unpaid balance due upon a note while retaining for hearing defendant's claim it is entitled to a set-off or credit in approximately the same amount. *Investments v. Housing, Inc.*, 93.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Defendant in a first degree murder case was not entitled to pretrial disclosure of how the State intended to prove the victim's ownership of guns sold by defendant. *S. v. Dollar*, 344.

Trial court properly allowed into evidence photographs which had not been supplied to defendant pursuant to a discovery order. *Ibid.*

CONSPIRACY

§ 6. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury on issues of defendants' guilt of first degree murder and conspiracy to commit an assault with a firearm. *S. v. Tilley*, 132.

CONSTITUTIONAL LAW

§ 12.1. Regulation of Trades and Professions

Statute providing for a 10% discount on mobile home insurance premiums for proper mobile home tie-down was a valid exercise of the legislature's police power. *Insurance Co. v. Ingram*, 244.

CONSTITUTIONAL LAW — Continued

§ 20. Equal Protection Generally

There was no constitutional impediment to the State's recovery of the actual cost of defendant's care in a mental health facility before and after his acquittal of murder by reason of insanity. *Hospital v. Davis*, 147.

§ 26.1. Full Faith and Credit: Foreign Judgment Obtained Without Jurisdiction

N. C. courts are not required to give full faith and credit to the determination by a Hawaii court that defendant was the father of plaintiff's child or to order of the court purporting to fix the amount of child support since the determination and order were adjudications in personam and the Hawaii court did not have in personam jurisdiction over defendant. *Brondum v. Cox*, 192.

§ 31. Affording the Accused the Basic Essentials for Defense

While photographs used in a pretrial photographic identification should have been made available to the defense, failure to do so did not deny defendants the right to effective cross-examination. *S. v. Legette*, 44.

Trial court in a rape case did not err in denial of indigent defendant's motion that the State furnish him a private investigator and expert in serology to aid defense counsel in the preparation for cross-examination of the State's expert chemist who testified as to blood grouping tests. *S. v. Gray*, 270.

§ 32. Right to Fair and Public Trial

Amnesia concerning the events of a crime does not per se render a defendant incapable of standing trial or of receiving a fair trial. *S. v. Willard*, 567.

§ 46. Removal or Withdrawal of Appointed Counsel

Trial court did not err in denial of defendant's motion to dismiss his court appointed attorney on grounds the attorney had urged defendant to plead guilty to first degree murder, had "misled" defendant, his wife and mother, hadn't come to see defendant regularly, and had served as an assistant district attorney. *S. v. Gray*, 270.

Defendant's assertion that he wished to employ his own counsel, made on the day of trial without the name of an attorney who might be privately employed to represent him and with no claim that he had funds to employ counsel, was not ground for dismissal of his court appointed counsel. *Ibid.*

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel by the trial court's denial of his motion for continuance so that a second attorney appointed by the court to assist previously appointed counsel could prepare for trial. *S. v. Beeson*, 602.

Denial of defendant's motion for continuance violated defendant's constitutional right to counsel of his choice and to effective assistance of counsel where defendant's retained counsel was engaged in a trial in a federal court and trial court required a junior associate of retained counsel who knew nothing about the case to represent defendant at trial. *S. v. McFadden*, 609.

CONSTITUTIONAL LAW — Continued

§ 49. Waiver of Right to Counsel

Defendant's earlier request for counsel did not make inadmissible a confession made at a subsequent conversation with investigating officers, initiated by defendant himself, at which he was again fully informed of his constitutional rights and at which he expressly waived the right to have counsel present. *S. v. Dollar*, 344.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Trial court did not err in sustaining State's challenges for cause to prospective jurors because of their death penalty views. *S. v. Squire*, 494.

§ 78. Cruel and Unusual Punishment

The punishment provisions for armed robbery set forth in G.S. 14-87 are constitutionally valid. *S. v. Legette*, 44.

§ 80. Death and Life Imprisonment Sentences

Where the State successfully challenged jurors who were unalterably opposed to the death penalty, the decision of the U. S. Supreme Court during trial declaring the death penalty unconstitutional as imposed under the laws of N. C. did not transform the sustaining of the State's challenges to prospective jurors into a valid basis for granting defendants a new trial. *S. v. Madden*, 114.

Sentence of life imprisonment for armed robbery is not cruel and unusual punishment. *S. v. Jenkins*, 179.

Life imprisonment is substituted for sentence of death imposed for first degree murder. *S. v. Stewart*, 219; *S. v. Biggs*, 294; *S. v. Dollar*, 344; *S. v. Williams*, 391; *S. v. Squire*, 494; *S. v. Hopper*, 580; *S. v. May*, 644.

§ 83. Equal Protection as Applied to Punishment

A defendant sentenced to life imprisonment for armed robbery was not denied equal protection because of wide discretion allowed the judge by the robbery statute. *S. v. Jenkins*, 179.

CONTRACTS

§ 19. Novation and Substitution

The record did not support corporate defendant's contention that it was released from liability on a note to plaintiff by a novation which substituted its shareholder as principal debtor. *Investments v. Housing, Inc.*, 93.

§ 21.1. Breach Generally

A jury finding that defendant had breached the contract sued on did not preclude the jury from finding that plaintiff had also breached the contract. *Weyerhaeuser Co. v. Supply Co.*, 557.

§ 27. Sufficiency of Evidence

Summary judgment was improper in an action on a contract where there was conflicting evidence on crucial issues. *Whitten v. AMC/Jeep, Inc.*, 84.

CONTRACTS — Continued

§ 29.2. Calculation of Compensatory Damages

Trial court erred in permitting the jury to consider possible lost profits as an element of damages in a breach of contract action. *Weyerhaeuser Co. v. Supply Co.*, 557.

§ 29.5. Interest

Plaintiff lessor was entitled to recover the legal rate of interest from the date on which each rental payment became due until such amounts were paid. *Equipment Co. v. Smith*, 592.

CORPORATIONS

§ 25. Contracts and Notes

Evidence was sufficient to show that corporate defendant adopted a contract made on its behalf by the president and general manager prior to incorporation. *Whitten v. AMC/Jeep, Inc.*, 84.

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General

Solicitation of another to commit a felony is a crime in N. C. *S. v. Furr*, 711.

A definite refusal to commit a felony on the part of the solicitee plus a lapse of some time may end the transaction so that a new request upon another occasion may constitute a new offense. *Ibid.*

§ 5. Mental Capacity; Insanity

The M'Naghten Rule for legal insanity is constitutional. *S. v. Willard*, 567.

§ 15.1. Pretrial Publicity as Ground for Change of Venue

Trial court in a first degree murder prosecution properly denied defendant's motion for change of venue on account of pretrial publicity. *S. v. Dollar*, 344.

§ 23. Plea of Guilty

District attorney's cross-examination of defendant about prior inconsistent statements made in the presence of the district attorney, the sheriff and defendant's former counsel did not violate the statute prohibiting evidence of plea negotiations. *S. v. Jenkins*, 179.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Solicitation to commit murder charges were not required to be dismissed under the doctrine of collateral estoppel because defendant's first murder trial ended in a mistrial. *S. v. Furr*, 711.

In a prosecution in superior court for involuntary manslaughter arising from an automobile accident, the State could not properly rely on defendant's driving while under the influence when defendant had earlier been acquitted of this offense in district court, but defendant's failure to raise the double jeopardy defense at trial amounted to a waiver of that defense. *S. v. McKenzie*, 170.

CRIMINAL LAW — Continued

§ 29. Mental Capacity to Stand Trial

Defendant was not prejudiced by a sheriff's testimony that it was his "personal feeling" that defendant's attitude and manner of speech changed because prisoners from Central Prison who were placed in jail with defendant had talked with him. *S. v. Willard*, 567.

Although the psychiatrist who most recently examined defendant testified that defendant was mentally incompetent to stand trial, other evidence supported the trial court's determination that defendant was mentally competent to stand trial. *Ibid.*

Amnesia concerning the events of a crime does not per se render a defendant incapable of standing trial or of receiving a fair trial. *Ibid.*

§ 29.1. Procedure for Raising and Determining Issue of Capacity to Stand Trial

Trial court did not err in denial of defendant's pretrial motion for a mental examination to determine his capacity to stand trial without conducting a formal inquiry into his mental capacity. *S. v. Gray*, 270.

Trial court erred in proceeding with trial without conducting further hearings to determine defendant's mental competency to proceed, but defendant waived his right to such a hearing by failing to make a request therefor. *S. v. Dollar*, 344.

§ 29.2. Commitment of Defendant

Trial court did not err in transferring defendant who was under examination to determine his mental capacity to plead and stand trial from Dorothea Dix Hospital to the hospital at Central Prison upon learning that defendant's brother planned to break into Dorothea Dix and release defendant. *S. v. Dollar*, 344.

§ 34.4. Admissibility of Evidence of Defendant's Guilt of Other Offenses

Evidence that defendant assaulted another with a shotgun less than a month before the murder was properly admitted for the limited purpose of showing defendant's possession of a shotgun shortly before the murder. *S. v. Stanfield*, 357.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Intent, Etc.

Trial court in a murder case properly allowed evidence concerning defendant's participation in a prior armed robbery and murder where such evidence tended to show motive and intent. *S. v. Williams*, 391.

In a prosecution for murder committed during a robbery, trial court did not err in allowing evidence of defendant's participation in an armed robbery five days earlier. *S. v. May*, 644.

§ 35. Evidence that Offense was Committed by Another

Trial court properly excluded evidence tending to show that other persons may have had a motive to rob the victim. *S. v. Jenkins*, 179.

Where defense counsel on cross-examination brought out evidence tending to show someone else had been suspected of the crime charged, the State was entitled to introduce evidence that the earlier suspects could not have committed the offense. *S. v. Stanfield*, 357.

CRIMINAL LAW — Continued

§ 46.1. Competency and Sufficiency of Evidence of Flight

A highway patrolman's testimony that defendant shot him when he stopped defendant for speeding after commission of the crimes for which defendant was being tried was competent to show flight, and defendant's offer to stipulate to the fact of flight did not render such testimony inadmissible. *S. v. Jones*, 513.

§ 55.1. Blood Tests

Results of blood grouping and absorption inhibition tests performed on fluids taken from a rape victim, a male friend of the victim, and defendant were admissible in this rape prosecution. *S. v. Gray*, 270.

§ 57. Evidence in Regard to Firearms

An expert on gun residue tests properly testified that defendant "probably" fired a gun within a short time prior to the administration of the test to him. *S. v. Tilley*, 132.

Trial court in a prosecution for armed robbery properly allowed a police officer to testify concerning a pistol which defendant threw down at the time of his arrest. *S. v. Jones*, 255.

§ 62. Lie Detector Tests

Defendant's rights to confrontation, counsel, due process and equal protection were not violated by denial of his pretrial motion to have a polygraph examination. *S. v. Gray*, 270.

§ 63.1. Competency of Evidence of Sanity of Defendant

Trial court did not err in refusing to permit a psychiatrist to testify as to his findings that defendant suffered from simple schizophrenia and alcohol pathological intoxication at the time of the crime. *S. v. Willard*, 567.

§ 66. Evidence of Identity by Sight

Trial court properly refused to permit defendant to testify for the purpose of discrediting a robbery victim's identification of him that he knew other black males living in the town where the crime occurred who were about his size and had goatees. *S. v. Jenkins*, 179.

§ 66.1. Competency of Witness; Opportunity for Observation

A rape victim's identification of defendant was not rendered inadmissible by the victim's physical condition and the darkness of the scene of the crime. *S. v. Herndon*, 424.

§ 66.7. Identification from Photographs

While photographs used in a pretrial photographic identification should have been made available to the defense, failure to do so did not deny defendants the right to effective cross-examination. *S. v. Legette*, 44.

§ 66.9. Suggestiveness of Photographic Procedure

Pretrial identification procedure was not so impermissibly suggestive so as to give rise to a substantial likelihood of irreparable misidentification. *S. v. Legette*, 44.

CRIMINAL LAW — Continued

Pretrial photographic procedures were not unnecessarily suggestive because defendant's hairdo was different from others in the photographs. *S. v. Gray*, 270.

§ 66.10. Confrontation at Police Station

An in-court identification of defendants by robbery victims was not tainted by an unintentional confrontation of defendants by one of the victims in the sheriff's office or by viewing of photographs in the sheriff's office. *S. v. Thomas*, 527.

§ 66.12. Confrontation in Courtroom

Rape victim's in-court identification of defendant was not tainted by her identification of him at a preliminary hearing. *S. v. Gray*, 270.

§ 69. Telephone Conversations

Defendant was not prejudiced by exclusion of a telephone conversation where it merely established a reason for defendant's appearance near the home of deceased on the afternoon of the murder, his presence there was later established by other testimony, and the telephone conversation was in no way exculpatory. *S. v. Stewart*, 219.

§ 72. Evidence as to Age

Lay witnesses who had adequate opportunity to observe defendant may state their opinion regarding the age of defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the State. *State v. Gray*, 270.

§ 73.4. Hearsay Testimony; Statements as Part of Res Gestae

Requests by coconspirators that the witness drive one of them home, made immediately after a murder resulting from the conspiracy, were admissible as part of the res gestae. *S. v. Tilley*, 132.

§ 74.2. Confession by, or Implicating, Codefendant

Trial court erred in allowing into evidence a statement made to officers by a nontestifying defendant implicating another defendant, but such error was harmless. *S. v. Squire*, 494.

§ 75.1. Confessions; Effect of Fact that Defendant is in Custody or Under Arrest

The manner in which defendant was secured while being transported from Florida to N. C. was a fact so remote in time and place from defendant's confession that its admission would have carried little weight as a circumstance affecting the credibility of the confession. *S. v. Jenkins*, 179.

§ 75.4. Confessions Obtained Prior to Appointment of Counsel

Trial court erred in admitting an incriminating statement made by defendant where the evidence was insufficient to show a waiver of the right to counsel. *S. v. Siler*, 543.

§ 75.7. When Warnings are Required; "Custodial Interrogation"

Trial court in a first degree murder case did not err in denying defendant's motion to suppress noncustodial statements made by him to law enforcement officers without benefit of the Miranda warnings. *S. v. Biggs*, 328; *S. v. Dollar*, 344.

CRIMINAL LAW — Continued

§ 75.8. Warning of Constitutional Rights Before Resumption of Interrogation

Defendant's earlier request for counsel did not make inadmissible a confession made at a subsequent conversation with investigating officers, initiated by defendant himself, at which he was again fully informed of his constitutional rights and at which he expressly waived the right to have counsel present. *S. v. Dollar*, 344.

§ 75.9. Spontaneous Statements

Trial court properly allowed into evidence incriminating statement made spontaneously by defendant. *S. v. Siler*, 543.

§ 75.11. Waiver of Constitutional Rights

The trial court properly found that defendant waived his right to an attorney prior to making in-custody statements although the evidence as to such waiver was conflicting. *S. v. Jenkins*, 179.

§ 75.12. Use of Confession Obtained in Violation of Defendant's Constitutional Rights

Though it was error to allow an officer to testify concerning defendant's statement made during an improper custodial interrogation, such error was cured by the court's instruction. *S. v. Siler*, 543.

§ 76. Determination of Admissibility of Confession; Presumptions

Defendant's second confession was properly admitted into evidence notwithstanding the inadmissibility of his first confession since no threats or promises were used to extract the first confession. *S. v. Siler*, 543.

§ 76.1. Voir Dire Hearing; Role of Judge and Jury

Trial court did not err in failing to instruct the jury as to the law relating to the voluntariness of defendant's confession. *S. v. Jenkins*, 179.

§ 76.5. Voir Dire Hearing; Sufficiency of Findings

It was not error for the trial court to admit testimony as to a statement made by one defendant to an interrogating officer without making the specific finding that defendant had waived his right to counsel. *S. v. Squire*, 494.

§ 76.7. Voir Dire Hearing; Evidence Sufficient to Support Findings, Generally

Evidence on voir dire supported findings by the trial court that defendant was not coerced into making in-custody statements, was fully advised of his constitutional rights, and that any statements he made were made at a time when his physical and mental faculties were unimpaired. *S. v. Jackson*, 203.

§ 76.8. Voir Dire Hearing; Evidence Sufficient to Support Findings With Respect to Waiver of Constitutional Rights

The evidence supported the trial court's determination that defendant's in-custody statement was voluntarily given after a proper waiver of his constitutional rights, although defendant testified his waiver was coerced by an assault upon him by an officer. *S. v. Herndon*, 424.

CRIMINAL LAW — Continued

§ 77.1. Admissions and Declarations of Defendants

Testimony of the "effect" of a conversation between the witness and defendants several days after a murder concerning disposition of the murder weapon was competent as an admission by defendants. *S. v. Stanfield*, 357.

A conversation some two weeks after a murder was competent as an admission against defendants who participated in the conversation and as an admission by silence against nonparticipating defendants who were present. *S. v. Tilley*, 132.

§ 79. Acts and Declarations of Codefendants and Coconspirators; Acts Prior to or During Crime

Acts of one defendant and a coconspirator in furtherance of a conspiracy were admissible against both defendants although one defendant was absent during such acts. *S. v. Tilley*, 132.

Testimony that a witness observed defendant's coconspirator carrying a pistol during the day of the murder was admissible although such act occurred before the conspiracy to murder was entered. *Ibid.*

§ 79.1. Acts Subsequent to Crime

A witness's testimony that she threw an accomplice's pistol away was properly admitted although the act occurred after termination of the conspiracy. *S. v. Tilley*, 132.

§ 80.1. Authentication of Records and Other Writings

A "Certified Certificate of Birth" signed by a deputy registrar which was no more than the registrar's assertion of what she found on the recorded birth certificate was double hearsay and inadmissible. *S. v. Gray*, 270.

§ 84. Evidence Obtained by Unlawful Means

Variance between a rape victim's description of the coat worn by her assailant in an affidavit for a warrant and a coat actually seized from defendant did not render the coat inadmissible where the description in the warrant was sufficiently precise to preclude any doubt that the coat seized was the one authorized to be taken. *S. v. Gray*, 270.

§ 86.5. Impeachment of Defendant; Particular Questions as to Specific Acts

Trial court properly allowed defendant to be cross-examined concerning his commission of prior armed robbery. *S. v. Williams*, 391.

§ 88.3. Cross-examination as to Collateral Matters

Trial court did not infringe on the right of defendant to cross-examine a State's witness by refusing to require the witness to answer specifically an immaterial question. *S. v. Stanfield*, 357.

§ 89. Credibility of Witness; Corroboration

Trial court in a robbery and murder case properly allowed corroborative testimony of a witness. *S. v. Madden*, 114.

§ 89.3. Prior Statements of Witness

Trial court did not err in allowing into evidence for corroborating purposes pretrial statements made by a State's witness. *S. v. Hopper*, 580.

CRIMINAL LAW — Continued

§ 89.8. Promise or Hope of Payment, Leniency or Other Reward

An accomplice may testify that he received neither promises nor threats for his testimony even though his credibility has not yet been impugned. *S. v. Stanfield*, 357.

§ 91.4. Continuance on Ground of Absence of Counsel or to Obtain New Counsel

Denial of defendant's motion for continuance violated defendant's constitutional right to counsel of his choice and to effective assistance of counsel where defendant's retained counsel was engaged in a trial in a federal court and trial court required a junior associate of retained counsel who knew nothing about the case to represent defendant at trial. *S. v. McFadden*, 609.

Defendant was not denied the effective assistance of counsel by the trial court's denial of his motion for continuance so that a second attorney appointed by the court to assist previously appointed counsel could prepare for trial. *S. v. Beeson*, 602.

§ 92.1. Consolidation Held Proper; Same Offense

Consolidation of felony-murder cases of three defendants was proper. *S. v. Squire*, 494.

Trial court properly denied one defendant's motion for a separate trial. *S. v. Madden*, 114.

Trial court did not err in denying defendants' motions for a continuance and separate trials because of publicity surrounding the separate trial of a coconspirator one week earlier. *S. v. Tilley*, 132.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

The court properly refused to dismiss charges against defendant for solicitation to commit murder on the ground the solicitation charges were not joined with murder charges at defendant's first murder trial which ended in a mistrial. *S. v. Furr*, 711.

§ 99.2. Conduct of Court and Expression of Opinion on Evidence During Trial

Trial court's remark during cross-examination of a State's witness that "I think it is obvious what the facts are," when considered with other actions by the court during the trial, constituted an expression of opinion on the evidence. *S. v. Staley*, 160.

§ 101.2. Exposure of Juror to Evidence Not Formally Introduced

Trial court did not err in allowing a juror to continue to serve after the juror stated that defendant's age might have affected her opinion concerning the death penalty had she known it during jury selection. *S. v. May*, 644.

§ 101.4. Conduct During Jury Deliberations

Defendant was not prejudiced where the trial court allowed the reporter to read to the jury a portion of a witness's testimony on direct examination but did not allow the reporter to read the witness's testimony on cross-examination. *S. v. Thomas*, 527.

CRIMINAL LAW — Continued

§ 102.5. Conduct of District Attorney in Cross-examining Defendant and Other Witnesses

Defendant is not entitled to a new trial because of questions propounded by the district attorney to defendant and his mother on cross-examination. *S. v. Herndon*, 424.

§ 102.6. Argument of District Attorney to Jury

District attorney's argument that the murder victim would still be alive if his rights "had been observed to the extent that we are now undertaking to observe these defendants' rights" was within permissible bounds. *S. v. Tilley*, 132.

§ 102.8. Comment on Failure to Testify

The prosecutor's argument that defendant did not show where he was between certain hours when the crime was committed because he was where a State's witness said he was did not constitute a comment on defendant's failure to testify. *S. v. Stanfield*, 357.

District attorney's remarks directed at the failure of defendants to contradict the State's case did not constitute a comment on the failure of defendants to testify. *S. v. Tilley*, 132.

Defendant was not prejudiced by the district attorney's allegedly improper argument to the jury concerning defendant's failure to present witnesses to contradict the State's evidence. *S. v. Hopper*, 580.

§ 102.12. Counsel's Comment on Punishment

Trial court in an armed robbery and murder prosecution erred in sustaining the State's objection to defense counsel's reading to the jury of the armed robbery statute, including the punishment provision, but such error was harmless. *S. v. Dollar*, 344.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

In a prosecution for murder committed during a robbery where the State offered evidence of defendant's commission of another robbery, trial court did not err in failing to require the jury to be satisfied beyond a reasonable doubt that defendant committed the other robbery. *S. v. May*, 644.

§ 113.1. Recapitulation of Evidence

Defendant was not prejudiced by the court's refusal of the jury's request that the testimony of a State's witness be read to them. *S. v. Furr*, 711.

Trial court did not err in instructing the jury that defendant "has produced evidence tending to show" when defendant had presented no evidence on direct examination. *S. v. Warren*, 235.

§ 114. No Expression of Opinion by Court in Other Instructions

In a retrial of defendant for murder in which the State was precluded from retrying defendant for first degree murder because of his conviction at his first trial of second degree murder, the trial court did not express an opinion as to the reason the State proceeded on the charge of second degree murder by instructing that the district attorney had announced

CRIMINAL LAW — Continued

that the State would not seek a verdict of guilty of first degree murder but would seek a verdict of guilty of second degree murder. *S. v. Cousin*, 461.

§ 116. Charge on Failure of Defendant to Testify

The trial court did not err in failing to instruct the jury regarding defendant's failure to testify absent a special request for such an instruction. *S. v. Warren*, 235.

§ 117.3. Charge on Credibility of State's Witnesses

Where the trial court instructed the jury to scrutinize closely the testimony of defendant and his relatives, it was not incumbent upon the trial judge, without request, to give a like instruction as to any possible interested witness who testified for the State. *S. v. Eakins*, 445.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Trial court did not coerce a verdict where, after giving requested additional instructions at 5:00 p.m., the court stated that it would call the jury back at 5:30. *S. v. Cousin*, 461.

Where the trial court had promised two jurors that court would not be held over the weekend, the court coerced a verdict when it called the jury back into court on Friday night and threatened to keep them through the weekend unless they reached a verdict. *S. v. Jones*, 513.

Trial court's additional instructions given upon the jury's failure to reach a verdict did not amount to coercion. *S. v. Thomas*, 527.

§ 130. New Trial for Misconduct of or Affecting Jury

Defendant was not entitled to a mistrial on the ground that jurors already selected and others of the panel awaiting interrogation were influenced by the statement of one prospective juror that he had formed an opinion that defendant was guilty. *S. v. Dollar*, 344.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

Trial court in an armed robbery case did not err in refusing to set aside the verdict of guilty on the ground the jury had disregarded the court's instructions on intoxication and unconsciousness. *S. v. Jenkins*, 179.

§ 138.1. Severity of Sentence; More Lenient Sentence to Codefendant

Defendant who was sentenced to two terms of life imprisonment upon conviction of aggravated kidnapping and armed robbery was not entitled to have her sentence modified on the ground that all other participants in the crimes received lighter sentences. *S. v. Barrow*, 227.

§ 141. Sentence for Repeated Offenses

The Habitual Felons Act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon but requires that the proceeding be ancillary to a pending prosecution for the substantive felony. *S. v. Allen*, 431.

§ 169.6. Exclusion of Evidence; Refusal to Allow Answer in Record

Judge's refusal to have an answer placed in the record will not be held error where both the question and the answer are immaterial. *S. v. Stanfield*, 357.

DAMAGES

§ 3.5. Compensatory Damages for Loss of Earnings or Profits

Trial court erred in permitting the jury to consider possible lost profits as an element of damages in a breach of contract action. *Weyerhaeuser Co. v. Supply Co.*, 557.

DEATH

§ 4. Time Within Which Wrongful Death Actions Must be Instituted

The 10 year statute of limitations in G.S. 1-15(b) did not apply to a wrongful death action based on an alleged defect in a crane where there was no latent injury. *Pinkston v. Baldwin, Lima, Hamilton Co.*, 260.

Wrongful death action instituted approximately one year after a crane collapsed and killed plaintiff's intestate was not barred by the three year statute of limitations or the two year limitation period applicable to wrongful death actions. *Ibid.*

DIVORCE AND ALIMONY

§ 26.1. Child Support; Full Faith and Credit

N. C. courts are not required to give full faith and credit to the determination by a Hawaii court that defendant was the father of plaintiff's child or to an order of the court purporting to fix the amount of child support since the determination and order were adjudications in personam and the Hawaii court did not have in personam jurisdiction over defendant. *Brondum v. Cox*, 192.

EVIDENCE

§ 11.6. Transactions or Communications With Decedent Relating to Mental Capacity

Trial court in a caveat proceeding properly permitted the propounder to testify to certain transactions and communications with deceased relating to the execution of the purported will where the testimony was offered mostly for the purpose of showing the basis for the propounder's opinion that deceased had mental capacity to execute a will. *In re Will of Ricks*, 28.

Testimony by propounder's wife that deceased told the witness that she wanted to leave her home to the propounder because the propounder's father had built it for him while he was in service was not inadmissible as hearsay but was admissible to show the basis upon which the witness expressed an opinion that deceased possessed the requisite testamentary capacity. *Ibid.*

EXECUTION

§ 3. Issuance of Execution

Foreclosure of a tax lien by judgment and execution pursuant to G.S. 105-392 [now G.S. 105-375] is an exception to the general rule that land may not be sold under an execution issued after the death of the judgment debtor. *Henderson County v. Osteen*, 692.

EXECUTION — Continued

§ 15. Attack on Sale

Defendants who properly filed a motion in the cause seeking to set aside a tax sale of property more than four years after the execution sale were not barred by the three year limitation of G.S. 1-52(10) or by the one year limitation of G.S. 105-393. *Henderson County v. Osteen*, 692.

EXECUTORS AND ADMINISTRATORS

§ 37. Costs, Commissions and Attorney's Fees

In a proceeding to determine whether a testator's nominee is disqualified to serve as executor, the nominee is a party to the will within the meaning of the statute permitting the court to award costs and attorneys' fees in a proceeding to fix the rights of a party to the will. *In re Moore*, 58.

Trial court should not award costs and attorneys' fees to a nominated executor whose claim for appointment is rejected unless the claim was reasonable, made in good faith and prima facie in the interest of the estate. *Ibid.*

Trial court has no discretion to tax costs against an estate when a nominated executor was disqualified to act as a matter of law. *Ibid.*

Where the holding that testator's nominee was legally disqualified to serve as executor became the law of the case, the nominee was not entitled to recover costs and attorney's fees in pressing his claim for appointment as executor. *Ibid.*

The court should determine the amount to be awarded as an attorney's fee without reference to the value of the estate. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 7.2. Construction of Highways; Liability of Contractor for Property Damage

Blasting is an inherently dangerous or extrahazardous activity, and persons using explosives are strictly liable for damages proximately caused by an explosion. *Sales Co. v. Board of Transportation*, 437.

Allegation and proof of negligence by the Board of Transportation in its action against third party defendant for indemnification for any amount recovered from defendant Board by plaintiff for the taking of property by blasting damage was unnecessary since the contract between the Board and the contractor specifically provided that the contractor would be responsible for all damages resulting from the use of explosives. *Ibid.*

HOMICIDE

§ 4. Murder in the First Degree

There is no merit in defendant's contention that at the time of his trial the crime of first degree murder did not exist because the U. S. Supreme Court had declared G.S. 14-17 unconstitutional. *S. v. Warren*, 235.

§ 4.2. Murder in the First Degree in Commission of Felony

In a prosecution for murder committed during the perpetration of a bank robbery, trial court did not err in failing to submit to the jury the guilt of two of the defendants of armed robbery. *S. v. Squire*, 494.

HOMICIDE — Continued

§ 12. Indictment, Generally

An indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find another to commit murder. *S. v. Furr*, 711.

§ 14.2. Burden of Proof on State

The felony murder rule does not unconstitutionally relieve the State of the burden of proving beyond a reasonable doubt every element of the crime of first degree murder. *S. v. Womble*, 455.

§ 19.1. Evidence of Character or Reputation on Question of Self-Defense

Trial court in a homicide case properly excluded testimony that two victims were operating an illegal liquor business and possibly a house of prostitution. *S. v. Stewart*, 219.

Trial court in a murder case properly excluded a witness's testimony concerning the deceased's prior criminal record. *S. v. May*, 644.

§ 20. Demonstrative Evidence

Trial court in a homicide prosecution did not err in admitting a knife seized from defendant although bloodstains on the knife could not be definitely identified as human blood, and the State's pathologist testified that none of the deceased's wounds appeared to be stab wounds. *S. v. Warren*, 235.

§ 20.1. Photographs

Photographs of the victim's body at the crime scene were properly admitted in a first degree murder case. *S. v. Madden*, 114.

§ 21.1. Sufficiency of Evidence to Overrule Nonsuit

State's evidence was sufficient for the jury in a prosecution of defendant for solicitation to murder his wife committed in January 1975 and February 1975 but was insufficient for the jury on a charge of solicitation in May 1975. *S. v. Furr*, 711.

A definite refusal to commit a felony on the part of the solicitee plus a lapse of some time may end the transaction so that a new request upon another occasion may constitute a new offense. *Ibid.*

§ 21.2. Sufficiency of Evidence that Death Resulted from Injuries Inflicted by Defendant

State's evidence was insufficient to convict defendant as a principal in the first degree murder of his wife where it tended to show defendant had threatened to kill his wife on several occasions and had tried to hire others to kill his wife. *S. v. Furr*, 711.

§ 21.5. Sufficiency of Evidence of First Degree Murder

State's evidence was sufficient for the jury on issues of defendants' guilt of first degree murder and conspiracy to commit an assault with a firearm. *S. v. Tilley*, 132.

State's evidence of premeditation and deliberation was sufficient to carry two charges against defendant for first degree murder to the jury. *S. v. Stewart*, 219.

HOMICIDE — Continued

State's evidence was sufficient for the jury in a prosecution for first degree murder. *S. v. Warren*, 235.

Evidence of premeditation and deliberation was sufficient for the jury in a first degree murder case. *S. v. Biggs*, 328.

Evidence that defendant served as a lookout was sufficient for the jury in a first degree murder case. *S. v. Womble*, 455.

Evidence in a murder case was sufficient for the jury notwithstanding the State's introduction of defendant's exculpatory statement which tended to show self-defense. *S. v. May*, 644.

§ 21.6. Homicide in Perpetration of Felony

A homicide which occurred during a robbery escape occurred in the perpetration of the robbery and was first degree murder. *S. v. Squire*, 494.

§ 24.1. Presumptions Arising from Use of Deadly Weapon

Trial court's instruction on the presumption of malice did not violate defendant's privilege against self-incrimination. *S. v. Biggs*, 328.

§ 25. Instruction on First Degree Murder Generally

Trial court in a first degree murder prosecution erred in submitting to the jury the offense of "first-degree murder where a deadly weapon is used." *S. v. Lee*, 617.

§ 30. Submission of Lesser Degrees of the Crime Generally

In a prosecution for murder committed during the perpetration of an armed robbery where all the evidence was that each victim was struck on the head with a weapon of such nature and used with such force as to make it a deadly weapon, the trial court was not required to submit to the jury as a possible verdict defendant's guilt of common law robbery. *S. v. Dollar*, 344.

Trial court in a first degree murder case did not err in failing to charge on the lesser offense of manslaughter. *S. v. Stewart*, 219.

§ 30.1. Submission of Second Degree Murder when Homicide in Perpetration of Felony

Trial court did not err in failing to instruct on lesser offense of second degree murder when all the evidence pointed to a felony-murder. *S. v. Warren*, 235.

§ 31.1. Punishment for First Degree Murder

Sentence of life imprisonment is substituted for the death penalty in a first degree murder case. *S. v. Stewart*, 219; *S. v. Biggs*, 328; *S. v. Stanfield*, 357; *S. v. Dollar*, 344; *S. v. Williams*, 391; *S. v. Squire*, 494; *S. v. Hopper*, 580; *S. v. May*, 644.

When the U. S. Supreme Court held that the mandatory death penalty provided by G.S. 14-17 could not be constitutionally imposed for first degree murder, the alternative provision for life imprisonment set forth in Sec. 7 of Chap. 1201 of the 1973 Sess. Laws was triggered. *S. v. Warren*, 235.

INDEMNITY

§ 3. Actions

Since enactment of G.S. 1A-1, Rule 14, it is no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim. *Heath v. Board of Commissioners,* 369.

INSANE PERSONS

§ 5. Claims Against the Estate

The State could collect for the cost of defendant's care in a mental health facility before and after his acquittal of murder by reason of insanity. *Hospital v. Davis,* 147.

INSURANCE

§ 79.1. Automobile Liability Insurance Rates

The Commissioner of Insurance was without authority in a hearing on a proposed rate change to fix a rate reducing the then existing rate. *Comr. of Insurance v. Automobile Rate Office,* 1.

In a hearing on a proposed rate change for automobile liability insurance rates, the Commissioner of Insurance erred in using a different trending period than that used by the Rate Office and in taking into consideration past excess profits derived from rates previously approved and implemented. *Ibid.*

Findings by the Commissioner which resulted in a 5% supplementary reduction in the rate level for property damage insurance were unsupported by the substantial and material evidence. *Ibid.*

§ 116. Fire Insurance Rates

No public hearing is required for the statutory deemer provision to be operative, but a public hearing is a prerequisite to valid action by the Commissioner of Insurance to avoid automatic operation of the deemer provision. *Comr. of Insurance v. Rating Bureau,* 70.

Disapproval of a proposed rate revision of automobile physical damage insurance by the Commissioner of Insurance 59 days after it was filed was invalid because no public hearing had been held, and proposed rates were deemed approved 60 days after the filing. *Ibid.*

Deemer provision operates only as a temporary approval pending valid action by the Commissioner. *Ibid.*

While the Commissioner may disapprove a fire insurance rate filing on the ground it was not supported by material and substantial evidence, he must make findings of fact supported by evidence which specifically point out the absence of, or deficiencies in, the evidence produced in support of the filing. *Ibid.*

Automobile physical damage insurance rate filing was not defective because of omission of data on trend adjustment for claim frequency, because certain portions of the filing relied on countrywide data rather than N. C. data exclusively, because portions of the filing relied solely on data taken from selected N. C. companies rather than from all companies operating in this State, or becauss loss and premium data for the prior year was not included with the filing. *Ibid.*

INSURANCE — Continued

Finding by the Commissioner that the Fire Bureau failed to produce sufficient evidence that 5% is a fair and reasonable profit for automobile physical damage insurance was unsupported by the evidence. *Ibid.*

The Commissioner of Insurance was directed by statute to implement not less than a 10% discount on mobile home insurance premiums for proper mobile home tie-down and he was not required to support his findings with substantial evidence. *Insurance Co. v. Ingram,* 244.

The Commissioner of Insurance properly determined that a 10% decrease in mobile home insurance for proper mobile home tie-down should not apply only to that portion of the premiums applicable to wind loss perils. *Ibid.*

Action of the Fire Insurance Rating Bureau in placing proposed premium rates into effect pursuant to the deemer provision more than 60 days after submission of the rate filing was lawful although the Comr. of Insurance had set the filing for hearing. *Comr. of Insurance v. Rating Bureau,* 471.

Disapproval of a rate filing after the proposed rate was placed in effect pursuant to the deemer provision does not require a refund of rates previously collected. *Ibid.*

"Page 14" figures taken from fire insurance companies' reports to the Comr. of Insurance were competent evidence of the experience of the fire insurance business. *Ibid.*

Homeowners insurance constitutes fire insurance within the meaning of the fire insurance rate statutes. *Ibid.*

Conclusion of the Comr. of Insurance that a homeowners insurance rate filing was improper and that the proposed rates were unwarranted and unreasonable was not supported by evidence in the record. *Ibid.*

The Comr. of Insurance is not required to accept countrywide experience as indicative of losses and expenses to be anticipated in connection with N. C. business. *Ibid.*

The Court of Appeals erred in continuing in effect proposed homeowners insurance rates in the exercise of the inherent power of the court, but such rates remained in effect under the deemer provision. *Ibid.*

INTEREST

§ 2. Time and Computation

Plaintiff lessor was entitled to recover the legal rate of interest from the date on which each rental payment became due until such amounts were paid. *Equipment Co. v. Smith,* 592.

JUDGES

§ 7. Misconduct in Office

A district court judge is censured by the Supreme Court for improper conduct in precluding the district attorney from participating in the disposition of cases, transacting the court's business in secrecy, and entering and changing judgments under circumstances suggesting bad faith. *In re Stuhl,* 379.

JURY

§ 5. Personal Disqualifications

Trial court erred in refusing to grant defendant's challenges for cause to a juror who was married to a police officer and who knew the officer who was the State's chief investigating officer. *S. v. Lee*, 617.

§ 6. Examination

Defendant's right to examine prospective jurors was not unreasonably restricted. *S. v. Hopper*, 580.

§ 7. Challenges

Where the State successfully challenged jurors who were unalterably opposed to the death penalty, the decision of the U. S. Supreme Court during trial declaring the death penalty unconstitutional as imposed under the laws of N. C. did not transform the sustaining of the State's challenges to prospective jurors into a valid basis for granting defendants a new trial. *S. v. Madden*, 114.

Trial court did not err in sustaining State's challenges for cause to prospective jurors because of their death penalty views. *S. v. Squire*, 494.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

Evidence was sufficient to show that defendant was a willing participant in the crime charged. *S. v. Barrow*, 227.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

The 10 year statute of limitations in G.S. 1-15(b) did not apply to a wrongful death action based on an alleged defect in a crane where there was no latent injury. *Pinkston v. Baldwin, Lima, Hamilton Co.*, 260.

Wrongful death action instituted approximately one year after a crane collapsed and killed plaintiff's intestate was not barred by the three year statute of limitations or to the two year limitation period applicable to wrongful death actions. *Ibid.*

MASTER AND SERVANT

§ 55. Injuries Compensable under Workmen's Compensation

An assault upon a shoe store employee when she went to her car in a mall parking lot after leaving work was an accident within the purview of the Workmen's Compensation Act. *Gallimore v. Marilyn's Shoes*, 399.

§ 56. Causal Relation Between Employment and Injury

The death of a shoe store employee when she was abducted in a mall parking lot after leaving work and was thereafter robbed and shot to death did not arise out of her employment. *Gallimore v. Marilyn's Shoes*, 399.

§ 57. Intoxication of Employee

Evidence in a workmen's compensation case was sufficient to support findings by the Industrial Commission that plaintiff's injury was not occasioned by the intoxication of plaintiff. *Inscoe v. Industries, Inc.*, 210.

MASTER AND SERVANT — Continued

§ 63. Injuries on the Highway

Evidence was sufficient to support the conclusion of the Industrial Commission that the automobile accident in question arose out of and in the course of plaintiff's employment. *Inscoe v. Industries, Inc.*, 210.

MORTGAGES AND DEEDS OF TRUST

§ 9. Release of Part of Land From Mortgage Lien

Defendant was not released from liability on its note to plaintiff because of plaintiff's release of a portion of the secured property from the lien of the deed of trust upon its sale to a municipal housing authority after an agreement between defendant's two stockholders that one stockholder would complete a housing project on the secured property without cost to defendant. *Investments v. Housing, Inc.*, 93.

§ 32. Deficiency and Personal Liability

A genuine issue of material fact was presented as to the amount, if any, which should be credited upon a note by reason of the purchase of the secured property by the holder of the deed of trust at a foreclosure sale conducted pursuant to the power of sale in the deed of trust. *Investments v. Housing, Inc.*, 93.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offense Relating to Narcotics

By enacting the N. C. Controlled Substances Act the legislature established parallel systems of drug regulation—one system to control those who sell and deliver in the streets and the other to regulate those permitted by law to conduct authorized transactions with controlled substances. *S. v. Best*, 294.

§ 4. Sufficiency of Evidence and Nonsuit

A fatal variance existed between the allegations and proof where defendant doctor was charged with selling and delivering a controlled substance but the evidence disclosed a violation, if at all, of the statute prohibiting the writing of prescriptions for a controlled substance outside the normal course of professional practice. *S. v. Best*, 294.

NEGLIGENCE

§ 5. Dangerous Substances

Blasting is an inherently dangerous or extrahazardous activity, and persons using explosives are strictly liable for damages proximately caused by an explosion. *Sales Co. v. Board of Transportation*, 437.

Allegation and proof of negligence by the Board of Transportation in its action against third party defendant for indemnification for any amount recovered from defendant Board by plaintiff for the taking of property by blasting damage was unnecessary since the contract between the Board and the contractor specifically provided that the contractor would be responsible for all damages resulting from the use of explosives. *Ibid.*

PHYSICIANS AND SURGEONS

§ 1. Licensing and Regulation Generally

By enacting the N. C. Controlled Substances Act the Legislature established parallel systems of drug regulation—one system to control those who sell and deliver in the streets and the other to regulate those permitted by law to conduct authorized transactions with controlled substances. *S. v. Best*, 294.

A fatal variance existed between the allegations and proof where defendant doctor was charged with selling and delivering a controlled substance but the evidence disclosed a violation, if at all, of the statute prohibiting the writing of prescriptions for a controlled substance outside the normal course of professional practice. *Ibid.*

PRINCIPAL AND SURETY

§ 10. Private Construction Bonds

A highway contractor's payment bond covered rental payment for equipment. *Equipment Co. v. Smith*, 592.

Surety on a highway subcontractor's payment bond which covered labor and materials could be held liable for repairs to leased machinery and for abnormal tire wear. *Ibid.*

Plaintiff subcontractor's complaint was sufficient to state a claim for relief against the surety on the prime contractor's payment bond without the attachment of the prime contract to the complaint. *RGK, Inc. v. Guaranty Co.*, 668.

An assertion that the owner defaulted in payments to the prime contractor of a private construction project does not bar the right of a subcontractor which furnished labor and materials for the project to recover from the surety upon a bond securing payment by the prime contractor of materialmen and laborers. *Ibid.*

RAPE

§ 3. Indictment

Indictment for rape charging the prosecutrix had her resistance overcome or her submission procured "by the use of a deadly weapon and by the infliction of serious bodily injury" correctly charged the offense of first degree rape, and defendant was not prejudiced by the inclusion of the "serious bodily injury" allegation where that theory was not submitted to the jury. *S. v. Gray*, 270.

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence in a rape case was sufficient to permit the inference that the victim's submission was procured through the use of a gun defendant carried and was sufficient to overcome defendant's motion for nonsuit of the charge of first degree rape. *S. v. Gray*, 270.

Evidence was sufficient for the jury in a prosecution for first degree rape of a hospital employee. *S. v. Siler*, 543.

§ 7. Verdict and Judgment

Life sentence is substituted for sentence of death imposed for first degree rape. *S. v. Gray*, 270.

ROBBERY

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to show that defendant was a willing participant in the crime charged. *S. v. Barrow*, 227.

Evidence was sufficient for the jury in a prosecution for armed robbery. *S. v. Thomas*, 527.

Evidence was sufficient for the jury in a prosecution for armed robbery of a hospital employee. *S. v. Siler*, 543.

§ 5. Instructions and Submissions of Lesser Degrees of the Crime

In a prosecution for murder committed during the perpetration of an armed robbery where all the evidence was that each victim was struck on the head with a weapon of such nature and used with such force as to make it a deadly weapon, the trial court was not required to submit to the jury as a possible verdict defendant's guilt of common law robbery. *S. v. Dollar*, 344.

§ 6. Verdict and Sentence

The punishment provisions for armed robbery set forth in G.S. 14-87 are constitutionally valid. *S. v. Legette*, 44.

Sentence of life imprisonment for armed robbery is not cruel and unusual punishment. *S. v. Jenkins*, 179.

A defendant sentenced to life imprisonment for armed robbery was not denied equal protection because of wide discretion allowed the judge by the robbery statute. *Ibid.*

Trial court in an armed robbery and murder prosecution erred in sustaining the State's objection to defense counsel's reading to the jury of the armed robbery statute, including the punishment provision, but such error was harmless. *S. v. Dollar*, 344.

RULES OF CIVIL PROCEDURE

§ 14. Third-Party Practice

Even where circumstances require separate trials after a Rule 14 impleader, the better practice is to try the principal action first. *Sales Co. v. Board of Transportation*, 437.

Since enactment of G.S. 1A-1, Rule 14, it is no longer true that an indemnitee cannot sue the party ultimately liable to him until after the indemnitee has paid the claim. *Heath v. Board of Commissioners*, 369.

§ 15. Amended Pleadings

Though plaintiff's complaint did not specifically allege that corporate defendant adopted a contract made on its behalf by the individual defendant, evidence presented at the summary judgment hearing supported this theory, and the complaint should be treated as amended to conform to the evidence. *Whitten v. AMC/Jeep, Inc.*, 84.

SAFECRACKING

Each method of opening a safe must be by means of "explosives, drills or tools" in order to fall within the prohibition of the safecracking statute. *S. v. Thomas*, 251.

SAFECRACKING — Continued

Evidence was insufficient to show that defendant "picked the combination" of a safe within the meaning of the safecracking statute where it tended to show defendant merely opened the doors to an essentially unlocked safe by turning the combination dial a half turn to zero. *Ibid.*

SCHOOLS

§ 13. Principals and Teachers

Evidence that a career teacher neglected his duty to maintain good order and discipline by permitting two students to settle a dispute by fighting was insubstantial in view of the entire record. *Thompson v. Board of Education*, 406.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers had probable cause to make a warrantless search of defendant's vehicle. *S. v. Legette*, 44.

A pistol which was in plain view in defendant's vehicle was properly seized without a warrant. *Ibid.*

TAXATION

§ 2. Uniform Rule and Discrimination

To require defendant, who was committed to a State mental health facility through the criminal justice system, to pay for the cost of his care did not subject defendant to an unequal tax to support the general welfare. *Hospital v. Davis*, 147.

§ 40. Foreclosure of Tax Certificate

When a county has purchased a tax lien at a valid sale and, after notice to the listing taxpayer, has docketed a judgment and issued execution, the county may not, after the death of the taxpayer and without mailing notice to his last known address by registered or certified mail, sell his land and convey a valid title to the purchaser. *Henderson County v. Osteen*, 692.

§ 44. Validity of and Attack on Sale, and Confirmation

Defendants who properly filed a motion in the cause seeking to set aside a tax sale of property more than four years after the execution sale were not barred by the three year limitation of G.S. 1-52(10) or by the one year limitation of G.S. 105-393. *Henderson County v. Osteen*, 692.

UNFAIR COMPETITION

The debt collection activities of a department store chain do not come within the purview of the statute prohibiting unfair or deceptive practices in the conduct of any trade or commerce. *Edmisten v. Penney Co.*, 311.

WILLS

§ 22. Mental Capacity

Trial court in a caveat proceeding properly permitted the propounder to testify to certain transactions and communications with deceased relating to the execution of the purported will where the testimony was offered mostly for the purpose of showing the basis for the propounder's opinion that deceased had mental capacity to execute a will. *In re Will of Ricks*, 28.

Testimony by propounder's wife that deceased told the witness that she wanted to leave her home to the propounder because the propounder's father had built it for him while he was in service was not inadmissible as hearsay but was admissible to show the basis upon which the witness expressed an opinion that deceased possessed the requisite testamentary capacity. *Ibid.*

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